



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

CULTURE AND EDUCATION

Implementing the UNESCO Convention of 2005 in the European Union

STUDY

This document was requested by the European Parliament's Committee on Culture and Education.

AUTHOR

Germann Avocats (Geneva) and multidisciplinary research team ¹

RESPONSIBLE ADMINISTRATOR

Mr Goncalo MACEDO
Policy Department B: Structural and Cohesion Policies
European Parliament
B-1047 Brussels
E-mail: poldep-cohesion@europarl.europa.eu

EDITORIAL ASSISTANT

Ms Lyna PÄRT

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-cohesion@europarl.europa.eu

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¹ See section "Research Team" at www.diversitystudy.eu.



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**STUDY
Full Version**

Abstract

This study provides a summary of the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. Focusing on fields in which the EU is expected to provide leadership or coordination, it is intended to provide ideas and long-term guidance on implementing the Convention. For that purpose, it analyses the obligations set out by this treaty. It assesses various practices in implementing the UNESCO Convention from a legal and practical viewpoint, and identifies challenges and measures to help achieve the objectives of this instrument.



Drawing: Elena Sofia

Grassroots interpretation, creation and implementation

John Lennon sang "Imagine there's no countries / It isn't hard to do / Nothing to kill or die for / And no religion too / Imagine all the people / Living life in peace..."

Now imagine that diversity is more realistic and feasible than "no countries" and "no religion".

Imagine grassroots communities whose members gather together to read and discuss the text of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. They will first try to understand its meaning - "grassroots interpretation". They might replace words such as "culture" and "cultural" with "religion" and "religious", or "politics" and "political" with "nation" and "national". Adopting these revisions they might elaborate a new agreement on the diversity of religious, political and national expressions. Accordingly, they would further develop the protection and promotion of the diversity of cultural expressions towards a new Convention on human diversity - "grassroots creation". Finally, they would implement what they created, discussed and interpreted - "grassroots implementation."

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GENERAL INFORMATION

Specification of the Tender

This study is the result of the European Parliament's expressed wish to be informed about the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, in particular in fields where the European Union would be expected to provide leadership or coordination.

Scope of the Study

Stakeholders and geographical scope

In compliance with the specifications of the tender, this Study covers the relevant questions related to the implementation of the UNESCO Convention primarily from the perspective of the European Union and the Member States. Since this implementation process requires civil society's participation, we addressed the involvement of non-state actors without limiting our focus to the situation in Europe.

In areas applicable to the EU's external relations, we consider the situation of the so-called "Global South" and more specifically those regions and countries with which the EU maintains concrete development cooperation and trade and cultural relationships.

Since the UNESCO Convention is an international treaty, this Study addresses domestic practices, challenges and expectations in several countries and regions outside of Europe.

Chronological scope

For the purpose of the empirical research in this Study, "national law" implementing the UNESCO Convention includes national legislation, regulations, administrative practise and case law promulgated both before or after the entry into force of the UNESCO Convention in the countries surveyed. We use 1 January 2010 as a reference date in our questionnaires.

Scope of policies and measures

This Study refers to the scope of application defined in Article 3 the UNESCO Convention: "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions." We construed this scope of application in conformity with the rules of interpretation of the Vienna Convention on the Law of Treaties.

RESEARCH TEAM

The Geneva based law firm **Germann Avocats** and its multidisciplinary research team completed the study for the European Parliament's Committee on Culture and Education (tender procedure IP/B/CULT/IC/2009-057). The overall objective of this study is to provide a summary of the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, in particular in fields where the European Community would be expected to provide leadership or coordination.

Dr Christophe Germann takes overall responsibility for the delivery of this Study to the European Parliament.

Christophe Germann is an attorney at law admitted to the bar of Geneva and authorized to practise in Switzerland and in the European Union. He holds a Ph.D. from the University of Berne Law School addressing cultural diversity and international trade laws and policies ("Diversité culturelle et libre-échange à la lumière du cinéma"). In 2009-10, Christophe Germann worked as a visiting research affiliate at the Lauterpacht Centre for International Law at the University of Cambridge (www.lcil.cam.ac.uk/) and at the Genocide Studies Program at the Whitney and Betty MacMillan Center for International and Area Studies at Yale University (www.yale.edu/gsp/). This research will result in a habilitation thesis on cultural genocide in international law. In 2006 to 2008, he was a post doctoral researcher at the Research Institute for Comparative Law at the University of Paris I – Panthéon Sorbonne / Centre National de Recherche Scientifique CNRS (www.umrdc.fr; grant awarded by the scientific council of the City of Paris) and at the European University Institute of Florence/Fiesole (www.eui.eu; "Max Weber" fellowship awarded by the European Commission). He previously worked as associate of the international law firm of Baker & McKenzie in San Francisco and Geneva where he contributed to the implementation of the firm's WTO Practice Group. He also acted as deputy director of a research project on WTO law and special and differential treatment in the World Trade Institute of the University of Berne (www.wti.org).

Professor Caroline Pauwels of the Vrije Universiteit Brussel and **Dr Jan Loisen**, post-doctoral researcher on the project "Cultural Diversity and Subsidiarity" at the Flemish Centre for Foreign Policy (Vlaams Steunpunt Vlaams Buitenlands Beleid), contribute to the survey work, questionnaire design and analysis of the implementation of the UNESCO Convention in European trade policy and protocols on cultural cooperation (EC external relations)

Caroline Pauwels is a fulltime professor at the Vrije Universiteit Brussel – Free University of Brussels where she teaches communication sciences, media policy, European media policy and media economics. She is also the Director of the Research centre IBBT-SMIT. She holds a Ph.D. in communication sciences ("Culture and economics: the fields of tension of the Community audiovisual policy. A study on the limits and opportunities for a qualitative cultural and communications policy in an economically integrated Europe. A critical analysis and prospective evaluation of the European audiovisual policy"; 1995).

Jan Loisen works as a post-doctoral researcher on the project "Cultural Diversity and Subsidiarity" for the Flemish Centre for Foreign Policy, a research centre performing policy supporting research for the Department International Flanders of the Flemish Government. He earned a Ph.D. in communication sciences from the Vrije Universiteit Brussel, Faculty of Arts & Philosophy ("The audiovisual dossier on the agenda of the World Trade Organization.

An institutional and political economic study on the tenor, form and margins of the WTO intervention in audiovisual policy"; 2009).

Dr Teresa Hoefert de Turegano, a practitioner and researcher from Berlin with solid professional experience at Eurimages, the European Audiovisual Observatory, Medienboard Berlin-Brandenburg combined with academic experience on culture, film, international politics and developing countries and North-South relations, provides a case study based on the ACP Film Fund. This case study informs on and critically discusses international funding mechanisms for cultural policies, with a special focus on external relations and development questions.

Teresa Hoefert de Turegano is of counsel of Germann Avocats. She works as a film funding advisor for the Medienboard Berlin-Brandenburg, Berlin, Germany. She holds a Ph.D. from the Graduate Institute of International Studies of the University of Geneva in history and international politics ("The Logic of Historical Knowledge in Images of Africa: A Case Study of Affiliation in Burkina Faso Cinema"; 1997). She is also a Visiting Lecturer at Université Robert Schuman, Strasbourg (2005-2008) and at the Institut d'Etudes Politiques (Master en Politique et gestion de la culture) of the Universität Zürich, Film department - Seminar für Filmwissenschaft (2004 - 2005).

Professor Annick Schramme and **Sigrid Van der Auwera** of the University of Antwerp contribute to the analysis of the implementation of the UNESCO Convention in the area of internal policies of the European Union with as special focus on linguistic diversity.

Annick Schramme is a professor at the University of Antwerp. She is academic coordinator of the master programme on Cultural Management (Faculty of Applied Economics) and of the master programme on creative and cultural industries of the UA Management School. She specializes in cultural policy and international cultural policy. She also acts as advisor to the Alderman for Culture and Tourism of the city of Antwerp and as a member of the Commission for the implementation of the Cultural Treaty between Flanders and the Netherlands and the Strategic advisory group for Culture, Youth, Sport and Media of the Flemish government.

Sigrid Van der Auwera is a Ph.D. candidate at the University of Antwerp. She researches on the protection of cultural heritage in conflict areas.

Dr Christophe Germann and **Dr Delia Ferri** take primary control of the legal contributions to the study on a cross cutting basis (EC's external relations and internal policies, including "new ideas" on civil society, intellectual property and competition and cultural genocide).

Delia Ferri is an attorney at law working as of counsel of Germann Avocats. She is *Cultore della materia* (Non-tenured position of Lecturer) in Comparative Constitutional Law at the University of Verona Law School. She participates to several research projects in the field of European and Comparative Law. She earned a Ph.D. in Italian and European Constitutional Law at the University of Verona, Law School, with focus on cultural law and policies: "La costituzione culturale dello spazio giuridico europeo" ("The cultural constitution of Europe"). This doctoral thesis was awarded the Italian prize "Premio Ettore Gallo 2008". A refined version of this thesis was published in 2009. She also holds a degree in law magna cum laude with a thesis in Constitutional law on Freedom of Arts. The thesis was awarded "Premio Dugoni 2003". In 2008, she was visiting research fellow at European University Institute (Department of Law). In 2009 she worked as EU law researcher for the European Foundation Centre (Brussels).

High level experts from academia discuss Germann's and Ferri's legal contributions on new ideas related to the implementation of the UNESCO Convention:

Professor Ben Kiernan (Yale University, www.yale.edu/gsp) regarding cultural genocide prevention.

Professor Fiona Macmillan (Birkbeck University of London School of Law; www.bbk.ac.uk/law/) regarding the implications of intellectual property and competition;

Professor Jan Aart Scholte (University of Warwick; <http://www2.warwick.ac.uk/fac/soc/pais/>) regarding civil society involvement.

Jonathan Henriques of Germann Avocats oversees and manages as project director the process of surveys and interviews. The researchers **Andrzej Jakubowski**, **Sonja Lipus** and **Lauren Milden** assist him in this task. Jonathan Henriques also contributes with an analysis on non-state tribunals and on monitoring mechanisms for treaty implementation.

Jonathan Henriques holds degrees in Law (Juris Doctor, Public International Law focus) and Anthropology (BS). He has experience working with rural communities in East Africa on various development projects; and, he has worked with civil society groups in Northern Iraq on a project on constitutionalism in Iraqi Kurdistan. He was recently a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge, where he was researching the interrelation of community empowerment, post-conflict accountability, and institutional reform in the context of rule of law promotion in post-conflict settings. He is presently completing a PhD in Law and Democracy.

Andrzej Jakubowski is a Ph.D. candidate in law at the European University Institute, Florence, and a member of the International Council of Museums (ICOM). He is writing a doctoral dissertation on topic of State succession to cultural heritage, mainly focused on the post-Cold War developments. He holds degrees in law (MA) and art history (MA) from the Warsaw University, and a diploma from the Fredric G. Levin College of Law, University of Florida. He gained professional experiences at different Polish governmental cultural heritage agencies as well as in the National Gallery of Modern Art, Rome, and the Peggy Guggenheim Collection, Venice. He also contributed to a study for the European Commission on state aid for the European audiovisual industry (2006-2007).

Sonja Lipus contributes with a analysis on a pooling mechanism for intellectual property rights of cultural expressions resulting from public funding and on the The U- 40-Capacity Building Program "Cultural Diversity 2030".

Dr Lucia Bellucci and **Roberto Soprano** contribute with a case study on the WTO disputes of the United States versus China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363) and Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362).

Lucia Bellucci is a Senior Lecturer at the Università degli Studi di Milano, Law School. She holds a Ph.D. in Law from the Université Paris 1-Panthéon Sorbonne and a Ph.D. in Sociology of Law from the Università degli Studi di Milano. In addition, she holds a postgraduate degree in Economics and Management of Cultural Industries from the Università Bocconi-SDA, and an undergraduate degree in law from the Università di

Bologna. Her fields of research are Media Law in Context (European, international and comparative with a focus on Film Law), and Law and Anthropology. She has published in both fields and presented papers at many international conferences and workshops. She teaches European Media Law in Context, Film Production Law in the EU, and International and European Media Regulation.

Roberto Soprano is a Ph.D candidate at the University of Salerno. He holds a Master of International Law and Economics from the World Trade Institute in Berne, B.A and LL.M from the University of Milan and has been visiting fellow at the Lauterpacht Centre for International Law at the University of Cambridge. He has experience working with the World Bank (PREM), the European Commission (DG Trade), the European Central Bank and the Italian Embassy in Saudi Arabia. His publications and research interests focus on international economic law and European law.

Associate Professor Tania Voon of the Melbourne Law School, University of Melbourne, contributes with an analysis of the legal relationship between the UNESCO Convention and WTO law.

Tania Voon is a former Legal Officer of the WTO Appellate Body Secretariat and a graduate of Cambridge University (PhD in Law), Harvard Law School (LLM), and the University of Melbourne (LLB, BSc, Grad Dip Intl L). She has previously practised law with Mallesons Stephen Jaques and the Australian Government Solicitor, and she has taught law in Australia, Canada and the United States (most recently at Georgetown Law). She has published widely in the areas of public international law, preferential trade agreements, WTO dispute settlement, WTO trade remedies, trade-related aspects of intellectual property rights (TRIPS), and trade in services. She is the author of *Cultural Products and the World Trade Organization* (Cambridge: Cambridge University Press, 2007), a member of the Editorial Boards of the *Journal of International Economic Law* and the *Indian Journal of International Economic Law*, and a member of the Indicative List of Governmental and Non-Governmental Panelists for resolving WTO disputes.

Christine Larssen contributes with a summary on the Århus convention.

Christine Larssen is writing a Ph.D. on the 1998 Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters at the Centre de Droit International of the Université libre de Bruxelles. She is currently (until September 2010) a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University. She studied law at the Université libre de Bruxelles, where she obtained, in 1999, the diploma of Licenciée en droit (magna cum laude, Prix Ganshof van der Meersch). She has been specialising in environmental law (regional, national, European and international) since 1995, when she started to work for Milieu Ltd., an environmental law consultancy. As from 1999 she became an associate lawyer of Milieu Ltd., designing and carrying out projects to prepare EU candidate countries for accession, undertaking legal research into environmental acquis, and participating in the Progress Monitoring of the new member states with regard to their implementation of EU environmental law.

LIST OF ABBREVIATIONS

ACP	Africa, the Caribbean and Pacific Region
ANDEAN	Andean Community
AVMS	Audiovisual Media Services (directive)
CAC	Cultural Affairs Committee
CARIFORUM	Caribbean Forum
CCP	Cultural Cooperation Protocol
CNC	Centre National de la Cinematographie (France)
CT	Cultural Treatment Principle
DG	Directorate-General
EAC	Education and Culture
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EES	European Employment Strategy
EP	European Parliament
EPA	Economic Partnership Agreement
ESS	European Statistical System
ETF	European Training Foundation
EU	European Union
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions
FEPACI	Fédération Panafricaine des Cinéastes
FESPACO	Festival Panafricain du Cinéma et de la Télévision de Ouagadougou
FP7	Seventh Framework Programme
FRA	Fundamental Rights Agency

FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIS	Inter-Service Group
INFSO	Information Society
IPR	Intellectual Property Rights
KORUS	Korea-US Free Trade Agreement
MEDA	Partner States of the EU in the Mediterranean
MFC	Most Favoured Culture
MFN	Most Favoured Nation
NCCEDA	National Council for Cooperation on Ethnic and Demographic Affairs
NCEDI	National Council of Ethnic and Demographic Issues
NIP/RIP	National/Regional Indicative Programme
NT	National Treatment Principle
OCT	Overseas Countries and Territories
ODA	Official Development Assistance
OHIM	Office for the Harmonisation of the Internal Market
OMC	Open Method of Coordination
PALOP	Portuguese-speaking African Countries
PCC	Protocol on Cultural Cooperation
RELEX	DG External Relations
SWOT	Strengths, Weaknesses, Opportunities, and Threats
TEC	Treaty Establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TFI	Tribunal of First Instance
TRIPS	Trade-Related Aspects of Intellectual Property Rights

UNCTAD United Nations Conference on Trade and Development

UNESCO United Nations Educational, Scientific and Cultural

WIPO World Intellectual Property Organization

WTO World Trade Organization

EXECUTIVE SUMMARY

Coal and Steel Call for Culture

Does culture matter for Europe? - Jean Monnet, one of the architects of the European integration, stated that if he had to start his work all over again he would start with culture: "*Si c'était à recommencer, je commencerais par la culture.*"²

This Study provides a summary of the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. It focuses on fields in which the European Union is expected to provide leadership or coordination. It shall give assistance and long-term guidance to the European Union on implementing the UNESCO Convention. For this purpose, it carries out a detailed analysis of the obligations set out by this treaty. It assesses various practices in implementing the UNESCO Convention from a legal and practical viewpoint, and identifies challenges and measures to help achieve the objectives of this instrument.

The implementation of the UNESCO Convention requires new action by the European Union, the Member States and civil society. Overcoming fragmentation and striving for coherence must be the leitmotifs in this undertaking. If public and private actors are ambitious, the tasks are complex and the stakes are high. However, if they take a minimalist approach, they will fail to meet the challenges. This latter approach presents a worst-case scenario that would clear the way for the diktat of trade concerns at the expense of human rights, fundamental freedoms, and access to the wealth of diversity of cultural expressions. Moreover, a middle path between ambition and minimalism will only cement the *status quo*: the diversity of cultural expressions will be a luxury for a few rich and democratic welfare states, remaining out of reach for the rest of the world.

The UNESCO Convention provides a new instrument with the potential to render the European integration substantially wealthier, more profound and sustainable. In the European Union's external relations, genuine protection and promotion of the diversity of cultural expressions can contribute to improving "world integration" in order to secure peace and social welfare as existential complements to mere economic globalisation. Sixty years after the Schuman declaration, coal and steel now call for culture more than ever in Europe and around the world.

² Jean Monnet quoted in Denis de Rougemont tel qu'en lui-même, in Cadmos 33/1986, p. 22.

Overview of the Study

Short and long versions of the Study, surveys and stakeholders' dialogue

There are two versions of this Study: a shorter version of 80 pages translated into French, German, and Spanish, and a longer English version that contains a more detailed analysis of the topics in the form of study papers. Both versions, as well as the responses to our survey, can be downloaded from the website that is dedicated to this Study and contains further relevant documentation, at www.diversitystudy.eu

This website also provides a section where stakeholders can comment on the Study and exchange their opinions. Representatives of concerned civil society organisations can still participate in our survey until 1 December 2010 by replying to the on-line questionnaire under the section "Civil Society Survey".

The long version of this study will be published as a book in 2011.

The text of the UNESCO Convention, its operational guidelines and other useful information can be consulted at www.unesco.org/culture/en/diversity/convention.

Our Study is divided into five Parts. In our survey of implementation practices of the UNESCO Convention summarised in Part One, we examined traditional and innovative approaches to how cultural diversity can be preserved and promoted in all types of countries irrespective of their level of development. The survey encompasses: (1) developed countries with strong cultural industries such as EU Member States and Canada; (2) economically emerging countries with organised cultural industries such as China or Brazil; and, (3) developing and least developed countries with very little economic means to protect and promote the diversity of cultural expressions such as Senegal.

The UNESCO Convention is drafted in a programmatic way. As a consequence, the Parties to the Convention have a wide margin of manoeuvre in implementing this instrument. Taking this reality as a starting point, we develop and discuss new ideas aimed at improving the quality of this treaty via its implementation process (Part Two).

The surveys and desk-based research inform our evaluation of how the EU has applied the Convention in foreign relations and its internal policies (Parts Three and Four). We assess whether the UNESCO Convention had an impact on more recent policy, and provide scenarios of its repercussions in the foreseeable future in order to submit recommendations for further action (Part Five).

Part One: Survey based on questionnaires and interviews

Part One provides a summary of the information and opinions that we gathered through questionnaires and interviews from various private and public stakeholders within and outside the European Union. We provide a short analysis of these data, which grant insight into the current state of implementation and inform expected further action.

The first questionnaire allowed us to gather legal data; the second questionnaire analysed implementation practices from the perspective of representatives of civil society; and, the third questionnaire examined implementation from the angle of regional organisations. Additionally, we conducted oral interviews with representatives of several regional and international organisations.

The completed questionnaires are publicly available via the website dedicated to the Study, www.diversitystudy.eu

Part Two: New ideas for the implementation of the UNESCO Convention:

Part Two explores a selection of new ideas to implement the UNESCO Convention, which apply to the EU's external relations and internal policies.

First, article 8 of the UNESCO Convention provides that "a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding;" and, that "Parties may take all appropriate measures to protect and preserve cultural expressions" in such situations. This provision, in combination with article 17, can be construed as addressing so-called "cultural genocide" as the most extreme negation of the diversity of cultural expressions. The initial drafts of the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 contained provisions addressing attacks on certain cultural expressions with the purpose of destroying national, ethnical, racial or religious groups as such. We propose to further examine this interpretation from the perspective of possible new approaches based on the UNESCO Convention for the early prevention of genocide and mass-atrocities. In particular, we shall recommend further exploration of the relationship between the diversity of cultural, religious, political and national expressions. We shall outline a proposal for new tools for the EU's external relations with countries plagued by humanitarian issues and violations of minorities' rights and human rights.

We submit that this proposal should be discussed in the framework of the Transatlantic Legislators' Dialogue (TLD), which aims to strengthen and enhance the level of political discourse between European and American legislators. Early prevention of genocide and mass atrocities is a very important policy concern shared by lawmakers from both sides of the Atlantic. This topic will allow European Parliamentarians to reveal the full value of the UNESCO Convention to their colleagues in the United States. In the best case scenario, such a dialogue could provoke in the United States and other like minded countries a welcome change of attitude toward this instrument, i.e., from rejection to adherence.

Second, policies aimed at protecting and promoting cultural diversity require adequate resources. In this context, we shall analyse the role of intellectual property rights and competition law in contributing to levelling the playing field between providers of cultural expressions from the North and the South. For the purpose of improving access to cultural expressions from diversified origins, we shall introduce the principles of "Cultural Treatment" and "Most Favoured Culture". We examine the issues related to the international intellectual property system vis-à-vis the protection and promotion of the diversity of cultural expressions and offer proposals for redress. In this context, we also highlight the positive contributions from existing competition law and a new legal framework based on cultural non-discrimination principles. These legal regimes can provide improved balance between the various legitimate interests at stake. Policy makers could adopt similar approaches within the EU in order to meet the requirements of articles 6 and 7 of the UNESCO Convention and promote better circulation of cultural goods and services among the Member States. This discussion calls for the elaboration of new legal avenues to implement the principles of equitable access, openness and balance, pursuant to articles 2.7 and 2.8, whilst complying with universally recognised human rights instruments as required by article 5.

Developing and least developed economies have been pressing developed countries to collaborate on adjustments of patent protection at the WTO in order to protect and promote public health. We submit that cultural stakeholders should require similar initiatives for copyright and related intellectual property rights in order to protect and promote the diversity of cultural expressions. EU taxpayers pay for damage to the diversity of cultural expressions. This includes the adverse effects of oligopolies that abuse their market power by arguably practicing cultural discrimination through their policies.

Third, civil society must play an instrumental role in the implementation of the UNESCO Convention in order to ensure the effectiveness of this instrument. We shall focus our attention on the way this role can materialise. Ideally, non-governmental organisations (NGOs) representing civil society with respect to implementation of the Convention should undertake political action with the same determination and effectiveness as activist groups that voiced environmental non-trade concerns in the WTO. These players were able to substantially influence the elaboration and implementation of international trade laws and policies promoting non-trade concerns related to the protection of the environment and sustainable development. Similar actors must emerge in the near future to further develop and implement laws and policies aimed at protecting and promoting cultural diversity on the national, regional and international stages. In order to achieve these objectives, independence from public and private power is crucial. In authoritarian regimes, NGOs must be protected from the diktat of the state. In democratic regimes, NGOs must contend with the economic strength of corporate interests that have a dominant position in the market. In both cases, we assess legal and policy mechanisms to enable representatives of civil society to articulate and advocate the public interest whilst preserving their independence. At the same time, NGOs must be transparent and accountable in terms of their membership structure, representativeness, internal decision making processes, governance, and funding.

The participatory system of the Århus Convention of 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters can serve as a model for the implementation of article 11 of the UNESCO Convention at the EU level.

These three issues deserve particular attention for policy makers and representatives of civil society who seek to take action in the implementation process of the UNESCO Convention, with the ambition to overcome its weaknesses and exploit its opportunities.

**Stakeholders' Dialogue on new ideas:
Cultural genocide prevention, copyright and competition, civil society involvement**

Our analysis of each of the three topics is informed by the fact-finding work, addressed in Part One of our study, and by desk-based research. We submitted this analysis to high-level discussants from academia who offered a critical assessment in order to stimulate a broader debate among stakeholders. We recorded these discussants' contributions on video and posted them on www.diversitystudy.eu under the section "Stakeholders' Dialogue". Each of these contributions provides a starting point for an on-line debate on the respective topics via a blog. We expect that stakeholders will read our study, listen to the discussants' comments, and then express and exchange their own opinions on our blog.

Part Three: The implementation of the UNESCO Convention in the EU's external relations

Part Three covers the EU's external relations. It addresses the implementation of the UNESCO Convention in relation to human rights policies and international trade at the multilateral, regional and bilateral levels.

This Part explores the role of the EU in recent litigation at the (WTO) on the GATS and TRIPS Agreements between the United States and China. We observe that the EU supported the United States against China in these dispute settlement procedures concerning cultural industries. Both procedures were driven by the oligopoly of Hollywood film majors and related interests. In one of these trials China invoked the UNESCO Convention in its defence. To our knowledge European cultural stakeholders were not consulted prior to the European Commission's decision to support the American position. Following a discussion of these cases, we conclude that the European Commission should establish procedures that ensure timely information and adequate participation by civil society in decision making processes regarding disputes at the WTO that involve matters falling under the scope of the UNESCO Convention. Such an informed participation shall contribute to a more effective implementation of the UNESCO Convention.

We further question the absence of formal discussions of the UNESCO Convention within the WTO thus far. We analyse this situation and propose strategies for the EU to start a dialogue between the UNESCO and the WTO on the protection and promotion of the diversity of cultural expression in relation to international trade regulation.

We also critically examine cultural cooperation mechanisms and explore the relationship between cultural diversity concerns and regional and bilateral trade agreements. The first concrete implementation of the UNESCO Convention in EU external relations, within the framework of the European Agenda for Culture, was the negotiation of two Protocols on Cultural Cooperation. In 2008, the European Commission concluded a first protocol with CARIFORUM; and, in 2009, she negotiated a second protocol with South Korea. On one hand these protocols are early indicators of how the guidelines and objectives in the Agenda for Culture can be fulfilled. On the other hand, these negotiations reveal several issues that need further analysis, especially considering that different aspects of the European Commission's approach met fierce criticism.

We submit that the EU, the Member States, and like minded countries should conclude a plurilateral framework of reference agreement when the EU enters into regional or bilateral trade agreements. This plurilateral agreement would contain the essential contents on cultural cooperation applicable to all third countries. Such an instrument could, for example, condition TRIPS Plus standards on copyright protection to the implementation of corresponding competition law safeguards. The EU could then complete this basic arrangement with specific contents applicable on a case by case basis within a clearly defined scope.

International public funding mechanisms are crucial for cultural production in countries in the Global South. On the basis of a case study on the Film Fund for the African, Caribbean and Pacific Group of States (ACP), we take lessons for future development cooperation in the framework of the UNESCO Convention.

Part Four: The implementation of the UNESCO Convention in EU's internal policies

Part Four assesses the situation of France and South Korea in terms of market shares for films as emblematic of a core issue affecting the markets of most cultural industries today. In all EU Member States, and in most countries of the world, a high concentration of marketing power conditions the audience to demand mainstream forms and contents that are for the most part culturally homogeneous. The average person has little choice but to consume the cultural expressions and underlying ideology, which market dominating players are able to impose via heavy advertisement. The more marketing power providers of cultural expressions possess, the higher their market penetration. The Hollywood oligopoly's marketing power on one side, and the EU Member States' funding via selective state aid on the other, largely "duopolizes" Europe's various cultural sectors today. The rights of artists and the audiences who refuse either of these powers must be safeguarded. Responsible policy makers should elaborate new rules for a level playing field for creators of cultural expressions currently excluded from the prevailing system. We consider the States' selective aid mechanism, its "expertocracy," and its inflating business of various intermediaries as a threat to freedom of expression in Europe. We identify a remedy to this risk in the intellectual property system combined with competition law and cultural non-discrimination principles, as outlined in Part Two.

We further outline strategies for institutional design aimed at implementing the UNESCO Convention in the European Union. We recommend stocktaking of existing competences and potential synergies based on new collaborations between established institutions. In addition, we suggest considering the Intergovernmental Panel on Climate Change (IPCC) as a source of inspiration for the creation of a new facility to produce and exchange knowledge on measures and policies aimed at protecting and promoting the diversity of cultural expressions. Finally, we propose to further explore the question on the impact of the UNESCO Convention on policies aimed at protecting and promoting linguistic diversity.

Part Five: Conclusions and recommendations

Part Five states conclusions and recommendations to materialise the significant potential of the UNESCO Convention within Europe and on the global stage. We stress, in particular, the role of civil society as a driving force for the implementation of this treaty.

Key Features of the Convention: the Principle of Sovereignty and its Limitations

The mechanism underlying the UNESCO Convention can be labelled as a "limited free pass" empowering its parties to adopt and implement laws and policies aimed at protecting and promoting the diversity of cultural expressions in their territories (articles 5 and 6). The UNESCO Convention sets forth the principle of sovereignty in article 2.2. Under this provision States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures to achieve the objectives of the Convention. This right is subject to the respect for human rights and fundamental freedoms, pursuant to article 2.1. This provision recalls that "cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed". The principles of equitable access, openness and balance, pursuant to articles 2.7 and 2.8, further restrict the powers of the Parties in matters of cultural policies.

The principle of sovereignty is highly problematic when it applies to authoritarian regimes. In most cases, such regimes tend to use and abuse the power vested in sovereignty, and ignore its limitations requiring compliance with human rights and fundamental freedoms.

The European Union faces the challenge to address this reality when promoting the objectives of the UNESCO Convention in her external relations.

One can argue that the principle of international solidarity and cooperation, as articulated in article 2.4, prescribes that States overcome a narrow and introverted understanding of the concept of sovereignty. International solidarity and cooperation should be aimed at enabling countries, especially developing and least developed economies, to create and strengthen their means of cultural expressions and cultural industries that are either nascent or established. This must occur at the local, national and international levels. In our opinion, the same interpretation should also apply to the principles of equitable access, and openness and balance (articles 2.7 and 2.8). These principles stress that “equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding”. The Convention acknowledges that States should seek to appropriately promote openness to other cultures of the world, when they adopt measures to support the diversity of cultural expressions. Consequently, it is not in the interest of the European Union to reduce international solidarity and cooperation to forms of mere charity.

The protection and promotion of a sustainable diversity of cultural expressions in the so-called “Global South,” to the benefit of the whole world, requires the elaboration and implementation of new legal mechanisms aimed at levelling the playing field. Policy instruments based on direct payments present the risk of empowering donors to influence cultural contents, and of rendering recipients vulnerable to dependence and clientelism. This particularly applies to so-called “selective state aid” funding schemes, which we address in more detail in Part Four below.

Effective legal safeguards with a long-term vision are necessary to ensure that genuine diversity of cultural expressions benefits more than a small number of wealthy and democratic states that are indifferent to, or patronise, the rest of the world.

Articles 205 to 207 of the TFEU, in combination with article 21, require that the Union's action on the international stage is guided by the principles that have inspired its own creation (i.e., development and enlargement); and, by those principles which it seeks to advance in the world, such as: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. As a consequence, the EU's common commercial policy and emerging economic constitution also should contribute to a fairer world order for the cultural sector.³

Overview on the Strengths, Weaknesses, Opportunities and Threats

The results presented in this Study are based on a variety of tools: data collection, interviews, case studies and desk based research. They offer the opportunity to consider the potential of the implementation of the UNESCO Convention. To this effect, we used a SWOT analysis (Strengths - Weaknesses - Opportunities - Threats) of the UNESCO Convention and its implementation in the European Union as a strategy tool. The following is a summary of this analysis:

Strengths

³ See on the emerging European economic constitution Christian Joerges, *La Constitution européenne en processus et en procès*, *Revue Internationale de Droit Économique* 2006, p. 245 to 284: <http://www.cairn.info/revue-internationale-de-droit-economique-2006-3-page-245.htm>.

The UNESCO Convention provides considerable space for civil society's participation. In certain jurisdictions, representatives of civil society were instrumental in shaping the contents of the Convention during the elaboration and negotiation phases. The adopted treaty presents the same potential to empower civil society to act as a driving force for its implementation (article 11).

As a consequence, the implementation of the UNESCO Convention requires a strong commitment by civil society to motivate and legitimate action by public stakeholders.

Weaknesses

The principle of sovereignty underlying the Convention, in combination with vague provisions and a very weak dispute settlement system, do not measure up to the challenges facing a large majority of States, particularly those in developing and least developed economies and authoritarian regimes.

Therefore, public and private stakeholders must articulate and enforce at the international level clear and precise limits to the principle of sovereignty based on human rights and fundamental freedoms and the principles of equitable access, openness and balance.

Opportunities

The Convention contains parlance that is inspirational and invites public and private stakeholders to be creative in legal and policy terms. Together with developments in the field of environmental law, and pressured by trade regulation, stimulating dynamics between idealism and realism can transpire from such creativity. This will be highly beneficial for the implementation of this treaty. Furthermore, this Convention can become a building block for an international legal instrument to protect and promote "human diversity" as a tool for early prevention of genocide and mass atrocities. This tool can be used in EU's external relations.

In the EU's internal relations, the Convention has the potential to reinforce more sustainable integration efforts. This instrument can substantially contribute to strengthening cohesion. It can provide a good governance tool for the maximisation of the wealth, and settlement of tensions, resulting from the diversity of cultural, political, ethnical, religious and national expressions in Europe and around the world.

Therefore, stakeholders must give special attention to the effective implementation of articles 7 and 8 of the UNESCO Convention, which address access to the diversity of cultural expressions and its most radical negation. Success in this undertaking can earn the Convention the rank of a major international treaty.

Threats

The Parties to the Convention need to be aware of the negative effects of the current international system of intellectual property rights on the diversity of cultural expressions, particularly in markets that are dominated by big corporations exercising collective power as oligopolies.

If the parties neglect to adequately use relevant competition law, and fail to redress systematic cultural discrimination perpetrated by corporate power, the current imbalance of exchanges of cultural goods and services will not be improved. In this case, the access obligations in article 7 will remain purely programmatic.

Pursuant to article 6, parties must elaborate and implement legal checks and balances to avoid measures granting decision-making powers to the state that are beyond judicial reach and violate freedom of expression. We consider selective state aid mechanisms as a risk for covert censorship and inhibiting cultural entrepreneurship.

Failure in implementing the Convention in a way that takes full advantage of its potential for good governance can have negative spill-over effects on sustainable European integration efforts, especially in times of economic and political crisis.

Without active participation of civil society and policy makers who drive the further implementation of the Convention, this instrument is at risk of becoming a mere "langue de bois" discourse for rich and democratic welfare states; and, eventually becoming a "dead letter" for all parties.

Therefore, promoters of the cultural diversity cause must oppose a narrow interpretation of the scope of the UNESCO Convention. They must mobilise private and public actors within the cultural sector and beyond in order to contribute to an effective implementation of this instrument. Last, but not least, they must use best efforts to further develop the law and policies thus far created on the national and regional levels.

Three Generations of Law and Policy Discourses on Cultural Diversity

We observe three generations of discourses on policies and rules of law that are relevant to the scope of the UNESCO Convention. Pursuant to article 3, this instrument "shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions." This scope must be construed in combination with articles 1 and 2, which define the objectives and guiding principles of this treaty.

Historically, the first generation of discourse was based on a predominantly ethnocentric understanding that focused on the protection and promotion of the concept of "cultural identity". With the spectacular reinforcement of the multilateral trading system in the last decade of the 20th century, cultural stakeholders in various jurisdictions became aware of their need to join forces in order to meet new challenges. The agreements of the World Trade Organisation (WTO) entered into force in 1995. During the negotiations that led to these treaties, the cultural stakeholders failed to impose a "cultural exception." This exception would have carved out cultural regulation from the scope of the regulation on the progressive liberalisation of trade in goods and services, and on trade related aspects of intellectual property rights (GATT, GATS and TRIPS).

The success in terms of predictability and enforceability of WTO law essentially resulted in a radical change of the dispute settlement mechanism that applied to the General Agreement on Tariffs and Trade (GATT) from 1948 to 1994. This new reality arguably contributed to a shift of strategy among cultural stakeholders, ushering in a second generation of discourses revolving around the concept of "cultural diversity". Cultural stakeholders reacted to the imminent threat by elaborating new law. This process started with soft law in the form of a declaration on cultural diversity adopted in 2000 under the auspices of the Council of Europe. This was followed by a similar declaration at the UNESCO in 2001, and by more binding law through the Convention of 2005. Although a variety of discourses on cultural diversity started much earlier, new multilateral trade regulation gave them the momentum to be translated into increasingly well-articulated norms of law.

At present, we perceive an emerging third generation of legal and policy related ideas and initiatives. This impending era presents the opportunity to welcome new allies for the cultural cause who are concerned about the protection of human rights, fundamental freedoms, minorities' rights, and the prevention of genocide and mass atrocities. The Convention as it stands today aims to put forward contributions that materialise human rights and fundamental freedoms, both as a result of the diversity of cultural expressions and as a limitation to the principle of sovereignty.

Implementation as “Pursuit of Policy Developments”

The European Commission considers that “the implementation of the UNESCO Convention within the EU is not a strict legislative activity as such but rather the pursuit of policy developments, both in internal and external policies, which might take the form of legislative action in specific instances.” (EU Commission's reply to question 4 of the Regional Organisations Survey, available at www.diversitystudy.eu). This understanding presents the opportunity for new creative thinking in political and legal terms beyond a mere static and formalistic approach. The UNESCO Convention has the great potential to mobilise and stimulate law and policy makers in search of innovative solutions to address their constituencies' core societal concerns pertaining to questions of identity and diversity. The Convention covers these questions from the cultural angle. However, the considerable value of this instrument resides in its potential to offer inspiration and guidance for a future legal framework that can maximise the wealth and settle the tensions resulting from the diversity of cultural, political, ethnical, religious and national expressions in Europe and around the world.

In the European Agenda for Culture, the European Commission calls for “mainstreaming culture in all relevant policies” on the basis of the Treaty's cultural clause (point 4.4): “With regard to the external dimension, particular attention is paid to multi-intercultural and inter-religious dialogue, promoting understanding between the EU and international partners and reaching out increasingly to a broader audience in partner countries. In this context, education and particularly human rights education play a significant role.”

The relationships between Tibet and China, or Israel and Palestine, exemplify the urgency to further examine such an avenue in depth. The protection and promotion of the diversity of cultural expressions, in compliance with human rights and fundamental freedoms, deliver a road map to the elaboration of novel international law aimed at protecting and promoting human diversity and the early prevention of genocide and mass atrocities. However, before dreaming of new buildings, the existing house must be reinforced in its foundations.

The European Commission recognises that a new strategic framework for culture in the EU's external relations is emerging, following the adoption of the European Agenda for Culture. In this framework, culture is perceived as a strategic factor of political, social and economic development, and not exclusively in terms of isolated cultural events or showcasing (EU Commission's reply to question 4.1 of the Regional Organisations Survey). The Copenhagen criteria on the dialogue between the European Union, the Western Balkan, and Turkey illustrate how this new approach can be applied to concrete tasks. The Commission also clearly articulates the expectation that the UNESCO Convention will shape “a new role for culture and cultural diversity in global governance, being recognised as the cultural pillar at global level, thus mirroring the achievements made by environmental issues and treaties in the area of climate change and biodiversity.” (European Commission's reply to question 11.2 of the Regional Organisations Survey)

We share this vision and outline various options in this Study that can contribute to transforming these aspirations into a reality in domestic and cross border relations. Over recent decades, dynamic developments in environmental law have resulted in the creation of various instruments on the national, regional and international levels, such as the 1992 Biodiversity Convention. These legal developments, combined with more recent challenges to non-trade concerns such as public health resulting from WTO law, eventually caused the genesis of a new discourse on cultural diversity. From a law and policy perspective, the main threat to this discourse is an eventual regression into an introverted understanding of cultural identity as mere protection of cultural identities. Considering this worst-case scenario, serious advocates of cultural diversity should not miss the unique opportunities that a creative interpretation of the UNESCO Convention promises to deliver.

INTRODUCTION

Christophe Germann

Mainstreaming Cultural Diversity in the European Union

Article 167 paragraph 4 TFEU (ex Article 151 TEC) obliges the Union to take cultural aspects into account in its action under other provisions of the Treaties, particularly in order to respect and to promote the diversity of its cultures. Since the entry into force of the Lisbon Treaty this obligation is reinforced by Article 22 of the Charter of Fundamental Rights of the European Union. Pursuant to this provision, the Union shall respect cultural, religious and linguistic diversity.

“Mainstreaming culture,” according to point 4.4 of the European Agenda for Culture, means “integrating culture in all relevant policies” pursuant to art. 167 para. 4 TFEU (“Intégration de la culture dans toutes les politiques pertinentes” or “Einbeziehung der Kultur in andere betroffene Politikbereiche”). A note of 2007 on the implementation of this clause observes that the European Union failed to meet this obligation so far:

“While, of course, there is a necessity for a balance to be struck between competing policy ambitions and Treaty objectives, the cultural sector is often disadvantaged in the negotiating process because it does not carry sufficient political clout. (...)”

This note recalls in particular that when the predecessor of article 151 TEC (Article 128 of the Maastricht Treaty) was adopted, a number of policy researchers and analysts as well as senior Commission officials expected that the requirement in paragraph 4 could be treated in much the same way as environmental issues had been. Prospective European legislation and policies are automatically scrutinised for their potential environmental impacts. This expectation, however, did not materialize although paragraph 4 is an obligation and not a mere option. The briefing paper critically comments:

“This is a failure on two counts. First a failure to ensure co-ordination across Commission Directorates. No matter how dedicated staff may be, inevitably they focus on their own agendas; they rarely think laterally. This is a common problem in large organisations structured in hierarchical departments, but the ‘silo’ mentality that results impedes horizontal connections being made. Secondly, it represents a failure of resolve. Notwithstanding the rhetoric at European level about the importance of culture and the strong evidence that the field of culture, and especially the creative industries, are making a significant contribution to the Lisbon agenda on growth and employment (...), culture remains relatively low in the hierarchy of Commission concerns. As a consequence, it is generally not regarded seriously at Commission staff level outside DG Education and Culture. Moreover, Member States governments are sensitive to preserve culture as their exclusive policy domain and often quick to invoke subsidiarity as a brake on EU action.”⁴

There are no indications that this situation significantly changed in the meantime, except for certain specific instances such as the so-called territorialization clauses in the cinema sector.⁵ This reality obviously weakens the implementation process of the UNESCO

⁴ European Parliament, Briefing paper on the implementation of article 151.4 of the EC Treaty, Note, IP/B/CULT/FWC/2006_169, 18/06/2007, items 1 to 4, 9 and 10, with further references (footnotes omitted).

⁵ See Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of state aid schemes for films and audio-visual productions for the European Commission (Directorate-General Information Society and Media): www.germann-avocats.com/documentation/index.htm One can argue, however, that this example illustrates mainstreaming of competition rather than of culture.

Convention in the EU's external relations and internal policies. In order to address this systemic problem in a consequential manner, we submit that the European Parliament's Committee on Culture and Education together with the European Commission Directorate-General for Education and Culture should take the lead to initiate a compelling and sustainable dynamic of dialogue and interaction between the relevant public and private players aimed at implementing the UNESCO Convention. For this purpose, they must assess concrete issues that need to be solved by appropriate action according to three main criteria: First, these issues must present a high degree of relevance for the implementation of the UNESCO Convention. Second, the resolution of these issues must receive political priority in the EU. Third, these issues must present a strong cross-cutting impact in the decision making process in other concerned policies.

Policy Action to Implement the UNESCO Convention

We submit four main areas where the European Parliament should set up a research agenda in order to take adequate policy action in mainstreaming cultural diversity. These fields are as follows:

Copyright, Competition, Taxation and “Selective” State Aid

In this Study, we adopt a critical approach towards the intellectual property system. In order to meet the objectives of the UNESCO, we recommend applying this approach to markets dominated by private oligopolies. Intellectual property rights can grant cultural actors an indispensable independence from the states, their bureaucracies and experts. This finding is equally applicable to liberal and authoritarian regimes as well as to wealthy and developing economies. We therefore do not advocate in this Study a complete abolition of intellectual property protection as proposed by certain scholars and cultural activists.⁶ Instead of this radical solution, we recommend that stakeholders should work towards achieving a new equilibrium based on better interactions between competition law and intellectual property rights combined with human rights instruments, primarily protecting freedom of expression, that articulate cultural non-discrimination principles in order to materialize the rights of access set forth in article 7 of the UNESCO Convention. The ultimate goal of this undertaking is to outline new solutions for a framework that provides a level playing field for all suppliers of cultural goods and services. Such a level playing field is the basis of genuine artistic freedom for creators and freedom of choice for consumers of cultural goods and services. Since these goods and services have a cultural specificity that distinguishes them from all other goods and services, such freedom of choice is crucial for the well functioning of democracies founded on freedom of expression, as protected by article 10 of the European Convention on Human Rights and article 11 of the Charter of Fundamental Rights of the EU. Pursuant to these provisions, everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers.

The combined effects of the Hollywood oligopoly's marketing power on one side and states' control via “selective” aid on the other side are largely conditioning and negatively affecting Europe's various cultural sectors. The rights of artists and of the audiences who refuse either diktat must be safeguarded. Responsible policy makers should elaborate new rules for a level playing field for those creators of cultural expressions currently excluded from access to the public. We consider the states' selective aid mechanism, its “expertocracy,” and its inflating business of intermediaries of all kind as a threat to this freedom in Europe.

⁶ See for example Joost Smiers and Marieke van Schijndel, *Imagine there is no copyright and no cultural conglomerates too... Better for artists, diversity and the economy*, Institute of Network Cultures, Amsterdam 2009: www.networkcultures.org/uploads/tod/TOD4_nocopyright.pdf

We identify a remedy to this risk in the intellectual property system as amended and combined with competition law and cultural non-discrimination principles. We will outline this remedy in more detail below.

We are aware that the beneficiaries of the status quo are very powerful. They include the big Hollywood majors that control the film, music and book markets, and their local clientele around the world, as well as the current recipients of selective state aid. Those who are left behind in the status quo encompass European artists who reject the rule of state appointed experts, artists from the Global South, and each Member State with respect to the freedom of movement and market access of its cultural goods and services in other Member States. These latter actors who are excluded from the benefits of the current system constitute a major constituency that the European Parliament should take into account in order to promote genuine diversity of cultural expressions.

There is a need of re-balancing intellectual property rights in order to take better account of the protection and promotion of the diversity of cultural expressions in the interests of creators and the public. Concretely, policy makers must re-design copyright and related intellectual property rights in a way that these rights become more workable for individual creators and small and medium sized enterprises. This means that policy makers must elaborate legal safeguards against cultural discrimination resulting from abuse of dominant market positions that are induced by excessive levels of intellectual property protection. In this context we recall that the EU and the Member States grant considerable state aid to produce cultural contents and establish broadband networks.⁷ Without competitive marketing these subsidized contents will not find access to the public through these networks. Instead, big corporations will capture the benefits of the networks while the small and medium sized content providers remain silenced. Moreover, marketing for cultural goods and services from diverse origins does not achieve a critical mass of support to compete with private players that economically dominate the relevant markets and impose culturally uniform contents. We therefore recommend three measures to level the playing field and induce economically powerful private players to contribute to the promotion of the diversity of cultural expressions. These measures are related to copyright, competition and taxation.

The Example of Film as Emblematic of the Whole Cultural Sector

An impact assessment report of 2009 on the MEDIA Mundus programme outlines the issues related to the poor circulation of films of European and of non-Hollywood origins in Europe and abroad. This report mentions that Europe has a particularly active cinema industry:

“In 2006, Europe produced 883 films, in second place behind India (1,016 films) and in front of the United States (485 films). In 2006, Europe was the third largest cinema market in the world (926 million cinema tickets sold) and the second in terms of box office takings, just behind India (3,997 million tickets sold), and the United States (1,448 million tickets). (...) Despite this, the European industry struggles with the major problem of poor circulation of European films on international markets and of foreign films (other than those produced by Hollywood studios) on European markets. European films, in contrast to those produced by Hollywood studios, are not readily exported. This is evidenced by the low market share of European films on foreign markets (...). These figures represent some important markets; however, the average market share of European films in third countries is estimated to amount to 4%.⁸”

⁷ See for example the press release “State aid: Commission adopts Guidelines for broadband networks”, IP/09/1332 of 17 September 2009: “Investments in broadband networks also form a crucial part of the European Economic Recovery Plan (see IP/08/1771), for which the Commission has provided €1.02 billion through the European Agricultural Fund for Rural Development (EAFRD) for developing broadband internet in rural areas (see IP/09/142 and MEMO/09/35).”

⁸ Commission Staff Working document accompanying document to the Proposal for a decision of the European

The report lists several causes of this problem. However, we observe that most of these causes do not prevent Hollywood majors from deeply penetrating all national markets of the EU Member States. This applies equally to US and Latin American films that the Hollywood majors distribute – for example, the Spanish spoken film “Y tu mamá también” by Mexican writer and director Alfonso Cuarón, which enjoyed competitive marketing worldwide, did not encounter any difficulty in accessing the public. We assess that the main reason of low market penetration of European films and films from third cultural origins is a lack of competitive marketing. There is no incentive for theatrical exhibitors in Europe to screen films that do not enjoy the same advertisement induced visibility as Hollywood films. The same logics apply *mutatis mutandis* to the music and book sectors.

The Commission's impact assessment report suggested three scenarios to solve the issue, all of which require state aid. Two of these scenarios provided a budget of Euro 267,5 million in subsidies over three years whereas the budget for the third scenario amounted to only Euro 13.5 million.⁹ In consideration of the economic crisis, the EU eventually adopted the latter scenario. The budget of the MEDIA Mundus programme for the initial period of 2011 to 2013 now amounts to a mere Euro 15 million.¹⁰

The impact assessment report also points to the risk of dependency on public financing: there might be a risk of increasing the dependence of the audiovisual industry on public funding. However, the report minimizes this threat: “the aim of the instruments to be developed is to provide a leverage effect and to create a favourable socio-economic environment for European companies to improve their competitiveness and therefore to enhance their financial sustainability. The actions to be implemented would to a large extent consist of incentives for companies to seek for ‘private’ funding abroad, mainly upstream and downstream of the production stage.”¹¹ We do not share this assessment and consider it as not realistic in terms of sustainability. Trouble shooting starts with the awareness of the full dimension of the issues at stake.

Even if we consider that Euro 5 Million per year (or Euro 89 Million if one of the other scenarios was adopted) qualifies as “seed” money that shall attract additional private investments, we conclude that this amount is absurdly low if compared to an average investment in marketing (stars, prints and advertisement) of USD 60 million per Hollywood film. Indeed, around 160 of the prospective Hollywood blockbusters that are released per year each enjoy such a publicity budget. From a macro economic perspective, this state aid qualifies as mere charity for a few European SMEs in view of the relevant figures. Most likely this state aid will just evaporate like a drop of water on a burning stone. Moreover, even if the MEDIA Mundus budget may be increased in the future once the current economic crisis is solved, we submit that it is not the tax payers who shall pay for the damages resulting from the predatory marketing of economically dominating providers of cultural goods and services. As a complement, and eventually as an alternative, to scarce state aid we recommend a different road map to implement the UNESCO Convention. A new design of copyright legislation is key to this novel approach. The EU is currently contemplating an overhaul of certain elements of the copyright system in order to adapt it to the digital age. We suggest taking this opportunity by mainstreaming cultural diversity in the context of this reform.

A Commission's Reflection document on creative content in the European digital single Market of 2009 claims that copyright is the basis for creativity:

Parliament and of the Council establishing an audiovisual cooperation programme with third countries MEDIA Mundus, Impact Assessment Report, SEC(2008) 3098 final, Brussels, 9 January 2009, with further references (footnotes omitted): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:3098:FIN:EN:PDF>.

⁹ Point 5.1 of the Impact Assessment Report, op. cit.

¹⁰ Point 5.1.3 of the Impact Assessment Report, op. cit.: “In order to take current economic crisis into account , scenario 3 is based on a smaller budget than that of scenarios 1 and 2. Such an option aims at ensuring continuity following the preparatory action and at paving the way for a larger programme under the new financial perspectives.” See also MEDIA Mundus website with further links at: http://ec.europa.eu/information_society/media/overview/media_mundus/index_en.htm.

¹¹ Point 5.7 of the Impact Assessment Report, op. cit.

“It is one of the cornerstones of Europe's cultural heritage, and of a culturally diverse and economically vibrant creative content sector. In Europe, the cultural and creative sectors (from published content such as books, newspapers and magazines via musical works and sound recordings, to films, video on demand and video games) generates a turnover of more than € 650 billion annually, contributes to 2.6% of the EU's GDP and employs more than 3% of the EU work force. European Policymakers therefore have the responsibility to protect copyright, including in an evolving economic and technological environment. (...) Digital technologies bring a number of changes to the way creative content is created, exploited and distributed. New content is being created by traditional players such as authors, producers, publishers; but user-created content is playing a new and important role, alongside professionally produced content. The co-existence of these two types of content needs a framework designed to guarantee both freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity.”¹²

We share the latter objectives and therefore submit the new solutions as follows to apply both in the hard copy world and in the digital environment:

1) The terms of copyright protection shall be subject to variable geometry: the higher the marketing investments the shorter the copyright duration of protection. In a first stage, copyright terms shall be reduced down to the minimum of 50 years according to Article 12 of the TRIPS Agreement when the protected works enjoy high investments in their advertisement.¹³ In a second stage, the EU shall propose an amendment of this provision at the WTO aimed at further reducing the terms of protection for copyrighted works enjoying predatory marketing, for example to one year after the first public release of the work. The duration of copyright protection provided by the copyright duration directive shall continue to apply to works that enjoy none or little marketing investments.¹⁴

We recommend that the EU induces the UNESCO and the WIPO to act as a joint forum for this initiative. Such collaboration between these international organizations shall initiate a dialogue on the relationship between cultural diversity and intellectual property.

In order to reinforce disincentives to excessive marketing and prevent circumvention via other forms of intellectual property protection, such as trademarks and trade names, we recommend that EU Member States introduce a progressive tax on marketing to be levied from the distributors and related investors in marketing. Eventually, we also recommend pooling intellectual property rights that were financed by public funds. Such bundling of

¹² DG INFSO and DG MARKT, Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document, 22 October 2009 (footnotes omitted): http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf.

¹³ Article 12 of the TRIPS Agreement on the terms of protection for copyright states: “Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.”

¹⁴ Article 1 of the Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights states: “The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.” Further provisions apply to define the start of the terms of protection. One can expect endorsement of this initiative in the United States where a significant segment of civil society opposed when this country followed the example of the EU in extending the duration of copyright duration from 50 to 70 years; See Amicus Curiae brief submitted to the US Supreme Court in the case 537 U.S. 186 by 53 law professors who teach and research intellectual property law at American universities in support of the petitioners Eric Eldred et al. against attorney general John D. Ashcroft: <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/ip-lawprofs.pdf> The petitioners challenged in this case the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act (CTEA).

rights shall create catalogues that shall serve as collaterals for private funding of new projects.

Furthermore, as a flanking measure, legislators shall elaborate and adopt compulsory law on contracts between artists and producers that contain appropriate safeguards against circumvention of the desirable new legal framework. Collecting societies shall perform certain new tasks related to the implementation of variable duration of copyright protection, in particular on monitoring the various applicable terms in the context of commercial mass exploitation of rights and rights clearance operations.

Regional and national coalitions for cultural diversity, as well as other like minded NGOs, should mobilize around the task of advocating variable geometry for duration of copyright protection to protect and promote the diversity of cultural goods and services. They should also require a progressive tax on marketing for cultural goods and services, and induce public players to adopt the further initiatives as follows:

2) Law makers and courts should further develop current competition case law in order to meet the specificities of the cultural sector. Desirable new case law and legislation should apply the essential facilities doctrine to marketing power. Refusal to grant access to such an essential facility shall be considered as an abuse of dominant market position – that is, whenever this refusal qualifies as cultural discrimination by violating the novel principles of cultural treatment and most favoured culture (we further discuss these principles below). The cultural discrimination test shall complement the other criteria that are necessary to affirm an essential facility. Moreover, severe violation of cultural non-discrimination principles should be sanctioned in a manner analogous to the WTO cases Ecuador-Banana and Antigua-Gambling: suspension of protection of intellectual property belonging to the infringer on the territory where the infringement took place. Law and policy makers should elaborate and adopt a corresponding legal framework.

For the purpose of assessing a dominant position in the market, the relevant market for cultural goods and services should be defined on the basis of investments in marketing.

Representatives of civil society can play a pro-active role in transforming the “shall endeavour” access rules set forth in article 7 of the UNESCO Convention from mere aspirations into obligations. For this purpose, the establishment of non-state tribunals may generate public awareness and induce law and policy makers to take corresponding initiative.

The cultural sector will remain dependent upon state aid for some time. However, we submit that so-called “selective” state aid is detrimental to the interests of the cultural sector and of society at large. As a consequence, we encourage private and public stakeholders to challenge this modality of distributing public money in all relevant fora on the local, national and regional levels.

3) We recommend abolishing all forms of selective state aid and replacing it with automatic state aid in order to establish a clear separation between culture and state, which is similar by analogy to the principle of secularism. The selective state aid modality of granting public finance for the production and distribution of cultural goods and services is based on the arbitrary taste of state appointed experts. It indirectly grants power over cultural expressions to the state, which cannot be subject to substantive judicial review. We therefore consider that selective state aid presents the risk of covert censorship in violation of artistic freedom, freedom of expression and opinion. Moreover, it often tends to promote clientelism and can even cause corruption. As a consequence, it damages cultural entrepreneurship, hinders new entrants and favours conformism over creativity, innovation and openness. In addition to these arguments, the EU and her Member States should also ban selective state aid because it is a bad model and practice for authoritarian states to adopt. We conclude that good governance in the cultural sector requires alternative

mechanisms of state intervention. In addition to classical tools of automatic state aid, we recommend that policy makers redesign copyright and related intellectual property law in ways that allow individual artists as well as small and medium sized cultural entrepreneurs to take full advantage of this system.

Since the prevailing “expertocracy” has considerable power in the current system, and a strong “bread and butter” interest in maintaining the status quo, policy makers must ensure that appropriate safeguards allow other voices to be heard in the debate on the abolition of selective state aid.

Plurilateral Agreement on Cultural Cooperation and Development

Parties to the UNESCO Convention need to duly consider cultural non-trade concerns in relation to new multilateral, regional and bilateral trade agreements. They must overcome the current fragmentation of law, and codify fundamental requirements in the form of a plurilateral treaty containing precise, predictable and enforceable rights and obligations. Such a desirable instrument shall provide legally binding minimum standards of protection and promotion of the diversity of cultural expressions. The EU should take the lead in this undertaking and implement it in her external relations.

For this purpose, the EU should elaborate, negotiate and adopt a plurilateral agreement on cultural development and cooperation based on the UNESCO Convention. Such a cultural framework agreement shall complement bilateral trade agreements in a coherent way. It shall articulate and codify in further detail and in a binding manner the principles of equitable access, openness and balance; and, in particular, it shall reinforce the rights of access pursuant to article 7 of the UNESCO Convention. We recommend that the EU induces the UNESCO and the WTO to act as a joint forum for this undertaking. As a side effect, such a joint venture between these international organizations will initiate a dialogue on the relationship between cultural diversity and international trade.

Education and Grassroots Initiatives to Implement and Further Develop the Convention

The Council of Europe recognizes in its White Paper on Intercultural Dialogue that European societies are concerned with a growing cultural diversification because of migration, asylum seekers and globalisation. This cultural diversification further results from the revolution in telecommunications and the media, internet, development of transport and tourism.

For the Council of Europe, the promotion of intercultural dialogue needs to take place at three different levels: within European societies, between different cultures across national borders and between Europe and the rest of the world. The awareness of these different levels should enable a coherent policy of promoting intercultural dialogue in order to learn how to live peacefully and constructively in a multicultural world.

The Council of Europe considers that every level of governance – from local to regional to national to international – is drawn into the democratic management of cultural diversity.¹⁵ The UNESCO Convention can provide very precious guidance for this task. For this purpose, educational and greater public awareness programmes across generations, pursuant to article 10 of the UNESCO Convention, represent contributions of crucial importance.

A large scale and sustainable implementation of the UNESCO Convention requires that beyond a few experts, law and policy makers, a large segment of civil society must understand this treaty. For this purpose, we recommend that the European Parliament

¹⁵ Patricia Wiater, *Intercultural Dialogue in the Framework of European Human Rights Protection*, Strasbourg 2010, p. 101, quoting Council of Europe, *White Paper on Intercultural Dialogue – Living together as equals in dignity*, Strasbourg 2008, p. 9f.

sponsors the elaboration of a school teaching kit on the meaning of the UNESCO Convention to be used all over the EU for children between eight and twelve years old. Such a teaching kit could be disseminated via the internet at low costs. The children would share a first common learning experience all over Europe by getting familiar with the fundamental value of unity in cultural diversity, which underlies the European integration.

In parallel, the European Parliament could also sponsor an initiative to translate and transpose the UNESCO Convention into a more holistic instrument protecting and promoting "human diversity" as a contribution to early prevention of genocide and mass atrocities. This initiative would encourage members of local communities to gather, read and discuss together the text of the UNESCO Convention. They will first try to understand its meaning - "grassroots interpretation". They would then replace words such as "culture" and "cultural" with "religion" and "religious", or "politics" and "political" with "nation" and "national". In the process of adopting these revisions, they would elaborate a new agreement on the diversity of religious, political and national expressions. Accordingly, they would further develop the protection and promotion of the diversity of cultural expressions towards a new Convention on human diversity - "grassroots creation". Finally, they would implement what they created, discussed and interpreted on the local level - "grassroots implementation."

Such a process should contribute to reinforcing civil society resistance against mobilization by conflict entrepreneurs.¹⁶ This grassroots initiative could substantially deepen the reception of the UNESCO Convention, and allow interaction between local communities and formal policy makers for the purposes of implementing and further developing the Convention. Local communities from various parts of the EU could connect with each other via the internet around this initiative. This would materialize the potential of the UNESCO Convention to promote intercultural dialogue, integration and cohesion. It could represent a bottom-up addendum to the United Nations' Millennium Development Goals, which for the time being do not provide any specific objectives related to protection and promotion of cultural diversity, not to mention human diversity.¹⁷

Both initiatives on education and grassroots implementation of the UNESCO Convention could bring European teachers and local community organizers together. As they share their experiences they may inspire other regions of the world to follow.

Involving Civil Society in the Implementation of the Convention

The implementation of the UNESCO Convention needs the empowerment of civil society. Civil society is called to play an instrumental role; that is, if the UNESCO Convention shall become a reality beyond pontificating rhetoric in policy making and transform aspiration into obligation in law making.

In order to reinforce the involvement of civil society in the implementation of the UNESCO Convention, we submit that the European Parliament should cause the Århus Convention to be translated and transposed into the cultural sphere on the international level. On the level of the EU, the Århus Regulation shall undergo the same process. National coalitions for cultural diversity and other concerned civil society organizations and individual activists

¹⁶ The "Aktion Sühnezeichen Friedensdienste" or "Action Reconciliation Service for Peace" (ARSP) can serve as inspiration for a grassroots initiative aimed at combining dialogue with concrete action. The ARSP is a German peace and volunteer service organization founded in the aftermath of World War II to confront the legacy of the Nazi regime. At its onset, the mission of ARSP was to volunteer in countries affected by World War II and to work with the peoples who suffered during the Nazi regime. The founders of ARSP called upon young Germans to work for peace through social services in these countries as a sign of atonement. The mission has evolved. It now includes learning from Germany's history, taking a stand against racism and hatred today, and creating a positive future for everyone; see www.asf-ev.de/en/.

¹⁷ Compare the UN Millennium Development Goal 7 that aims at ensuring environmental sustainability. Its first target seeks to integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources. Its second target consists in reducing biodiversity loss, and achieving, by 2010, a significant reduction in the rate of loss; see www.un.org/millenniumgoals/envIRON.shtml.

shall participate in this undertaking and promote it in their respective jurisdictions. Accordingly, the objective of involving civil society in the implementation of the UNESCO Convention requires a new legal framework to give voice to non-state actors.

EXAMPLE OF GOOD PRACTICE

“Cultural Diversity – More than a Slogan”

Civil society’s pro-active involvement in the implementation of the UNESCO Convention on the Diversity of Cultural Expressions in Switzerland

In Switzerland, the National Coalition for Cultural Diversity and the Swiss UNESCO Commission published in October 2009 the report “La diversité culturelle – plus qu’un slogan” containing proposals for the implementation of the UNESCO Convention.¹⁸ These recommendations are based on stock-taking and analyses of the current situation of cultural diversity in Switzerland, which resulted from the work of eight experts’ groups addressing the areas of international cooperation, theatre and dance, cinema, education, music, literature, visual arts and conservation of cultural heritage, and media. This stakeholders’ report is a very valuable tool for the implementation of the UNESCO Convention in Switzerland.

Assessing the status quo and articulating expectations

Switzerland became a party to the UNESCO Convention in October 2006. Ratification of the treaty was the culmination of intense work by the Swiss Coalition for Cultural Diversity and the Swiss Commission for UNESCO, which actively supported this process.

The Swiss Coalition for Cultural Diversity demonstrated by pro-active involvement that it plays the fundamental role from civil society recognized by Article 11 of the UNESCO Convention. Established in 2005, this Coalition federates around sixty organizations covering all the cultural domains in all regions of Switzerland.¹⁹ It thus provides, along with the Swiss Commission for UNESCO, significant resources in knowledge, experience and skills. It mobilized these assets for a large scale action launched under the label “Cultural Diversity – More than a Slogan”. This project aimed at taking stock of the issues and expectations related to the implementation of the UNESCO Convention from the perspective of stakeholders from varied cultural areas. Based on this inventory, the final report provided a catalogue of recommendations to bring to the attention of the general population and decision-makers.

Cultural practitioners and representatives of civil society who are primarily concerned with the implementation of the UNESCO Convention authored this report, which shall constitute a road map for future action.

Organization and scope

A steering committee, in collaboration with a project manager, selected the cultural areas to be scrutinized, and defined the objectives and their implementation. The covered fields included visual and photographic arts, film, music, theatre, literature, media as well as education and cooperation within the cultural sector.

In summer 2008 the steering committee decided on the overall conception, and appointed heads of areas who were in charge of animating groups of 4 to 6 experts. In spring 2009 all

¹⁸ See report and related documentation at: www.diversiteculturelle.ch/visio.php?en,0,0.

¹⁹ Information provided by Marco Polli, Member of the board of the Swiss Coalition for Cultural Diversity.

experts' groups gathered in order to define and coordinate their tasks and to communicate their working plan. Each field was processed pursuant to the structure as follows:

- a) Inventory of status quo of cultural diversity
- b) Trends and developments
- c) Threats and opportunities regarding cultural diversity
- d) Proposals and recommendations
- e) List of relevant contacts (private and public actors)

Results and costs of operation

In June 2009, the heads of areas delivered the reports of their experts' groups to the Rapporteur general who drafted an introduction and a summary of the factual findings, analyses and recommendations. The final report was publicly released on 16 October 2009 and is available in French, German and English at www.coalitionsuisse.ch/fs_fr.htm.

The Swiss Coalition for Cultural Diversity shall use this report in its interactions with other relevant players as a monitoring tool for the implementation of the UNESCO Convention in Switzerland, and as an instrument to assess compliance. Around 50 persons worked on this report, with the cost of € 115'000 Euros that was paid by the Swiss federal government and the Swiss cantons (60%), private donors (20%) and the Swiss Coalition's own resources (20%).

Initiatives by the French and German Coalitions for Cultural Diversity

The German Coalition for Cultural Diversity recently released a report containing analyses and recommendations for the implementation of the UNESCO Convention from the German perspective, available at:

www.unesco.de

The French Coalition for Cultural Diversity contributed to a report on the elaboration of a new cultural strategy for the EU's external relations, available at:

www.coalitionfrancaise.org

The meaning of "Equitable Access" to Cultural Expressions

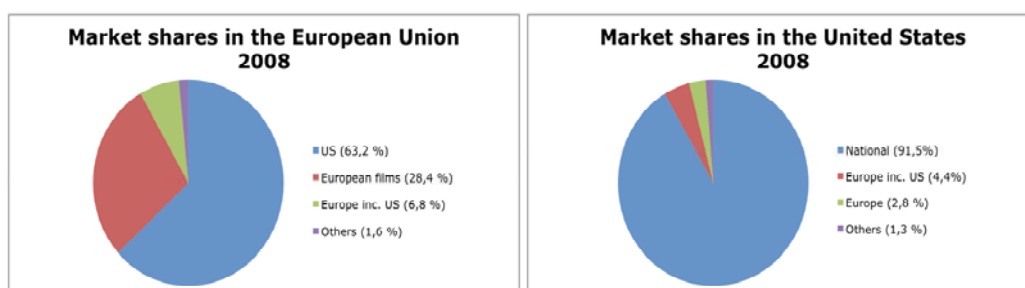
In the 2010 Green Paper "Unlocking the potential of cultural and creative industries", the European Commission asks which tools should be foreseen or reinforced at the level of the European Union in order to promote cooperation, exchanges and trade between the European cultural and creative industries and third countries.²⁰ In this context, the Commission recalls that the EU's perspective on international cultural exchanges and trade is framed by the UNESCO Convention. Under this Convention, the EU is committed to fostering more balanced cultural exchanges, and to strengthening international cooperation and solidarity in the spirit of partnerships. The EU promotes these exchanges with a view,

²⁰ COM(2010) 183, point 4.3.

in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions. These objectives are in keeping with some of the guiding principles of the Convention, particularly the principles of equitable access, openness and balance, pursuant to articles 2.7 and 2.8.

In the Section on intellectual property and competition in Part Two below, we outline new ideas for EU Member States, as well as small and medium-sized enterprises, to overcome the market domination of big enterprises when they abuse their marketing strength and impose uniform cultural expressions on the public. In a subsequent section of Part Two below, we will critically assess the power of States to control the contents of cultural expressions via selective state aid schemes. We will argue that cultural stakeholders should find a new balance between the “duopoly” of global private players and local public powers in the EU, which are currently conditioning the markets of cultural industries at the expense of providers of cultural expressions from the Global South, local new entrants and otherwise marginalised artists, and society in general.

If we take the film sector as an example, and market shares as an indicator of the diversity of cultural expressions in the European Union, we observe that the public consumed a very small percentage of films from non-European origins in 2008:²¹



In comparison, domestic films in the US reached a market share of 91.5 percent, whereas films from Europe and the rest of the world attracted only 2.8 percent and 1.3 percent, respectively, of all American moviegoers (4.4 percent for films produced in Europe with incoming investment from the US).²² In light of these figures, one can argue that the European taxpayers finance the remnants of diversity of cultural expressions in the US film sector. In the US the game is largely left to an oligopoly of private players. Arguably, the situation in terms of diversity of the supply of cultural goods and services is poor. We label this situation as “cultural quasi uniformity”.²³

In the European Union, most of the market shares go to films marketed by the Hollywood majors, whereas relevant cultural policies preserve only less than a third of the shares for European films on average. Obviously, this situation is far from satisfactory in light of the principles of equitable access, openness and balance. This situation raises very serious concerns regarding freedom of expression and opinion. In the absence of comparable

²¹ All figures quoted from the European Audiovisual Observatory, Focus 2009, World Film Market Trends, at: www.obs.coe.int/online_publication/reports/focus2009.pdf.en.

²² All figures quoted from the European Audiovisual Observatory, Focus 2009, World Film Market Trends, at: www.obs.coe.int/online_publication/reports/focus2009.pdf.en (figures from previous years are quoted from Focus in the respective editions).

²³ Canada's market shares pattern looks similar to the one in the United States. The Hollywood film majors consider this country as a “domestic” market for distribution purposes.

statistics for books and music, we can only suspect that a similar situation applies for all types of cultural expressions that heavily rely on copyright and related rights.

Trade related intellectual property protection without adequate safeguards in competition law induces predatory marketing. This type of marketing conditions the consumers to read, watch, and listen to largely uniform cultural expressions. Only rich countries can partially escape this diktat by spending their tax-payers' money to protect and promote their local cultural expressions. We therefore advocate a radical change of paradigm at the multilateral level of the WTO and the regional and bilateral levels in the European Union's cultural development and cooperation efforts. This issue is not only about trade and markets. It reaches the core values of the UNESCO Convention as articulated in articles 5 to 7.

The meaning of the principles of equitable access, openness, balance, solidarity, cooperation and sustainable development, and their mutual relationships, will need further research and elaboration. At this stage, we can only approximately sketch their scope and significance by considering them as legal safeguards against the worst case situations as follows:

- Cultural imperialism or colonialism (diktat of the politically and economically strongest);
- Cultural piracy (by analogy to biopiracy);
- Cultural protectionism and relativism (versus cultural diversity and universality of human rights and fundamental freedoms);
- Cultural genocide (destruction of a human group as such by destroying its cultural expressions).

These situations, which are radically inconsistent with the objectives of the UNESCO Convention, require more precise and legally operational definitions.

The protection and promotion of a sustainable diversity of cultural expressions in the so-called "Global South" to the benefit of the whole world, requires the elaboration and implementation of new legal mechanisms aimed at levelling the playing field in terms of access, openness and balance of cultural exchanges. Policy instruments based on direct payments present the risk of empowering the donors to influence cultural contents, and of rendering recipients vulnerable to dependence and clientelism. This applies in particular to so-called "selective" aid funding schemes. Effective legal safeguards are necessary to insure that genuine diversity of cultural expressions benefits more than a small number of wealthy and democratic states that are indifferent to, or patronize, the rest of the world.

Obstacles to the Free Movement of Cultural Goods and Services in the Internal Market

The European Commission's Green Paper on Cultural and Creative Industries recalls that a diverse range of entrepreneurs, and the free movement of their services, is a prerequisite for a culturally diverse offer to consumers. This is possible only if fair access to the market is guaranteed pursuant to art. 7 of the UNESCO Convention. Creating and maintaining a level playing field that ensures the absence of unjustified barriers to entry will require combined efforts in different policy fields, especially competition policy. The European Commission acknowledges that, even in sectors where major international companies play a leading role, small and micro-enterprises play a crucial role in creativity and innovation: "They are typically the risk takers and early adopters and play decisive roles when it comes

to scouting for new talents, developing new trends and designing new aesthetics.” The Commission asks in this context how to create more spaces and better support for experimentation, innovation and entrepreneurship in the cultural and creative industries. Furthermore, which tools should be foreseen or reinforced at EU level to promote cooperation, exchanges and trade between the EU cultural and creative industries and third countries?²⁴

Cultural and democratic interests require from the creators in each country to share the market in a way that allows the public to have access to cultural expressions from diverse national and foreign origins. Two questions articulate the main challenge: Who shall share the market and how shall this sharing happen?

When states seek to implement the principles of access to cultural expressions pursuant to article 7 of the UNESCO Convention, they face the risk of upsetting the delicate equilibrium between local and foreign small and medium sized content providers. For example, in the cinema sector of both France and South Korea approximately 45% of market shares went to local works and 45% to the Hollywood oligopoly in 2008, whereas a small 10% remained for works from third cultural origins. Shall Korean film makers make space to increase the share of European ones in South Korea; and shall French film makers do the same for Asian ones in their country? If the cultural industries in these countries must share their home market, local cultural expressions will suffer. Moreover, over time, the Hollywood majors’ market dominating position will be reinforced when providers of local cultural expressions are weakened. This can have disastrous consequences since local cultural industries are essential for overall cultural diversity. Policy makers must therefore target the Hollywood majors’ market shares and induce them to adapt their business model towards contributing to the policy objectives at stake. In particular, local cultural contents shall not give way in their home markets when the EU and her Member States finance cultural goods and services in developing and least developed countries and promote their access to the European public. Our proposals regarding intellectual property rights and competition law discussed in Part Two of this Study shall insure consistency between the principles of equitable access, balance and openness pursuant to the UNESCO Convention on one side, and the National Treatment and Most Favoured Nation principles under WTO on the other side.

Market Share as Cultural Diversity Indicators: Comparing France and South Korea

In all EU Member States, most independent artists as well as small and medium-sized entrepreneurs providing cultural goods and services are caught between a rock and a hard place – *entre le marteau et l’enclume* – between the private power of strong oligopolies and the public power resulting from state aid.

On the national level, France is at the top of public aid based on direct payments (as opposed to tax incentive schemes) via an efficient, sector specific tax system, the so-called “taxe parafiscale”. France levies a percentage of the revenues generated by the whole audiovisual sector, and distributes it mostly to local film producers. A small part of this aid is granted to film projects from transitional economies and developing countries via the Fonds Sud development programme. Other parts are spent on foreign films made according to international co-production agreements with France. In recent years, France increasingly replaced centralised automatic funding modalities with decentralised selective aid.

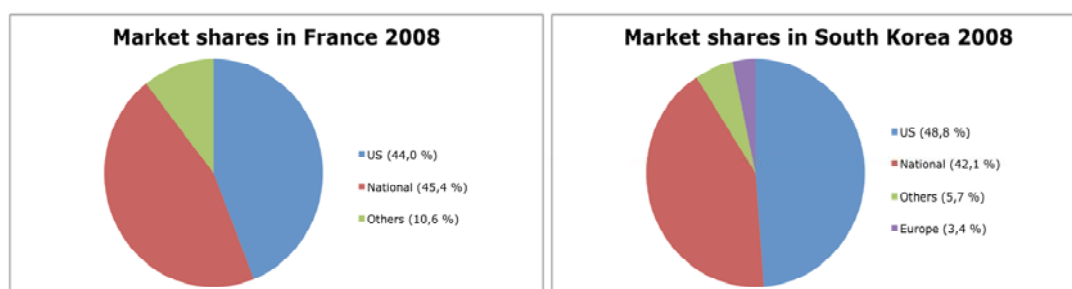
²⁴ European Commission, Green Paper, Unlocking the potential of cultural and creative industries, COM(2010) 183, points 2, 3 and 4.3.

In 2008, the French taxes levied from 44 percent of the market share obtained by Hollywood films in the Hexagon were redistributed among French producers in order to preserve local film production. In turn, this production achieved approximately 45.4 percent of the share in their own national market. During that year films from third countries, mainly European ones, obtained 10.6 percent of the market share.

If the state protects local cultural expressions by quantitative restrictions to trade (i.e., quotas or equivalent measures), it reduces the supply of cultural goods and services from foreign origins, and as a consequence the overall diversity of cultural offerings.

In comparison to France, the screening time quotas in South Korea for theatrical release in 2008 led to a market share of 42.1 percent for local content (45.2 percent in 2002); 48.8 percent for content from the oligopoly of the Hollywood majors (48.9 percent in 2002); and, 9.1 percent for content from third cultural origins (0.8 percent in 2002), including 3.4 percent from Europe.

We note that the market share structures in France and South Korea look almost identical: most of the shares are divided between local films and films from the Hollywood oligopoly, whereas only a relatively small percentage goes to films from third cultural origins. We label this situation as “cultural quasi duality”.²⁵



Source: Focus 2009

Independent Creators of Cultural Goods and Services Are Between a Rock and Hard Place

The European Commission defends the principle of reciprocity as a contribution to cooperation, balanced exchanges, better circulation of audiovisual works, and access to markets that are difficult to penetrate.²⁶ This opinion was challenged by certain European stakeholders in the context of provisions on co-production arrangements for the film sector contained in Protocols on Cultural Cooperation, which we discuss in further detail in Part Three below. The interest groups argued that the positive features of co-production arrangements would primarily benefit the other party. Accordingly, they advocated limitations to cooperation and exchange. Among other arguments, these stakeholders contended in the specific case of South Korea that the market was already “saturated” with national and Hollywood films. They argued that in reality co-production provisions would not result in cooperation and exchange, but rather one-way traffic from South Korea to the EU.²⁷

²⁵ A recent bilateral free trade agreement between the United States and South Korea explains the change in the structure of market shares between 2002 and 2008.

²⁶ European Commission, Op. Cit., 2009b, p. 2.

²⁷ Interview with Cécile Despringre, Executive Director of SAA (Society of Audiovisual Authors).

We question these stakeholders' claim in terms of its consistency with article 7 of the UNESCO Convention. Rather than "one-way-traffic," we submit that almost "no traffic" characterises the prevailing situation in most cases. Moreover, it is technically not an issue of "market saturation," but of a "market barrier" that arguably results from cultural discrimination. We critically assess that films from third countries are caught between a rock and a hard place in France and South Korea in a strikingly similar way - that is, between the Hollywood majors' marketing hammer, on one side, and South Korean quota regulation and the French subsidies, respectively, on the other. The situation of third countries in this context is emblematic of a core issue affecting the market of most cultural industries today. This status quo is also detrimental to the free circulation of European films within the European Union. In the EU and Member States, this constellation of private and public powers hinders the public from accessing films from local authors who do not belong to the clientele of the national selective aid regimes. They also hinder access to films from authors of other Member States, and the rest of the world, who are not supported by the Hollywood oligopoly.

Policy makers could easily amend quota regulation, as applied in South Korea, in a manner that would provide a better market access to works from third cultural origins. In contrast, state intervention based on selective aid schemes constitutes a substantially more complex problem that mere amendments of applicable rules can hardly solve. Therefore, we submit that selective aid granting procedures should be reduced to a minimum. Existing and novel forms of automatic aid should replace this patronising form of state aid. At the same time, States must reinforce the artists' and public's protection against abuses of private power dominating the market of cultural industries. This can be achieved by means of intellectual property and competition law, as well as new cultural non-discrimination principles ("Cultural Treatment" and "Most Favoured Culture") as discussed below.

The states' contribution should focus on creating an environment that enables the public to access cultural expressions from a great variety of cultural origins, as required by article 7 of the UNESCO Convention. Artists should decide what to create and communicate to the public, rather than state appointed experts. The public should ultimately decide what it wants to see, read, hear, feel and think, and not upper management of entertainment giants.

"Marketing Tax" for equitable access

Copyright and related intellectual property rights protect, on average, 40 percent of creative activities and 60 percent of marketing if we consider the figures of the Hollywood majors' annual outputs. Disproportionately high standards of intellectual property protection are incentives to disburse excessive expenditures in advertisement for cultural goods and services. They are the primary means for market domination and, therefore, detrimental to the creation, production and dissemination of films, books and music that do not enjoy comparable investments in attracting the public's attention. In this regard, excessive copyright, trademark and trade name protection generally contribute to marginalising and excluding films, books and music that are culturally different from the economically dominant ones. Accordingly, policy makers must structure and compose the complex legal dynamics between intellectual property and competition in novel modes to implement access pursuant to article 7 of the UNESCO Convention.

For Europe, we suggest that Member States introduce a progressive marketing tax on "blockbusters", "hits" and "bestsellers".²⁸ Such a measure, pursuant to article 6, would complement a new balance in intellectual property protection and help level the playing field between providers of cultural goods

²⁸ For an overview on the existing tax treatment in the audiovisual sector, see Hasan Bermek, *The Impact of EC Law on the Taxation of the European Audiovisual Industry*, IRIS plus, Legal Observations of the European Audiovisual Observatory, Issue 2007-12.

and services from diversified origins. The members of the Hollywood oligopoly presumably invest over Euro 10 billion per year in advertisement. The proceeds from such a tax to be levied from distributors on their investments in marketing could initially amount to 2 billion Euro per year. This tax revenue could be redistributed to advertisement efforts for cultural expressions of providers who are independent of market dominating corporations in the EU. This revenue could also serve to feed the International Fund for Cultural Diversity that was established by the UNESCO Convention.

Institutional Design for the Implementation of the UNESCO Convention

The implementation of the UNESCO Convention requires organisational measures. There are various institutions in the European Union dealing with matters that are relevant for this task. As a first step, the EU and the Member States should coordinate stocktaking of existing competences and facilities and evaluate potential synergies. The European Institute on Gender Equality could serve as a model for a new agency to coordinate the implementation of the UNESCO Convention. The potential of institutional synergies should be assessed at the European Training Foundation (ETF) and the Fundamental Rights Agency (FRA). These two agencies are primarily involved in tasks relevant for the EU's external relations. However, since the EU and her Member States can benefit from the experience of foreign regions and countries for the implementation of the Convention, these agencies could contribute to enhancing a true dialogue among stakeholders within and outside Europe.

Another source of inspiration for institutional design is the Intergovernmental Panel on Climate Change (IPCC). This panel can serve as a reference for the elaboration of a facility to produce and exchange knowledge on measures and policies aimed at protecting and promoting the diversity of cultural expressions. The IPCC assesses the state of knowledge on the various aspects of climate change, including scientific, environmental, and socioeconomic impacts and response strategies. The IPCC does not undertake independent research, but compiles key research published world wide and attempts to produce a consensus. The IPC provides governments with scientific, technical, and socioeconomic information relevant to evaluating risks, and developing a response to global climate change. It regularly publishes reports drafted and reviewed by experts from different countries. Governments, international organisations, and non-governmental organisations appoint these experts. The IPCC is recognised as an authoritative scientific and technical voice on climate change, and its assessments have had a profound influence on the negotiators of the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.²⁹

For the purpose of implementing the UNESCO Convention, a similar body could set up working groups with specific tasks, such as further research on the following topics:

- Indicators to measure the diversity of cultural expressions;
- Impact of the diversity of cultural goods and services on cultural expressions that are not trade related;
- Determination of cultural expressions that are not compliant with human rights;
- Role of intellectual property and competition rules to implement a better access to diversified cultural expressions pursuant to art. 7;
- Contribution of the UNESCO Convention to protect and promote linguistic diversity.

²⁹ Mark Maslin, *Global Warming, A Very Short Introduction*, Oxford 2009, p. 23 – 40.

The experts' reports could serve as support for the elaboration of operational guidelines that would adapt and further develop the operational guidelines under the UNESCO Convention at the European level. The European Parliament's Committee on Culture and Education could establish a structured dialogue on such regional guidelines with its counterparts in the Member States' national and municipal parliaments, in line with the principle of subsidiarity. The considerable shortcoming of the operational guidelines that the Parties adopted thus far at the UNESCO is that they essentially paraphrase the respective provisions of the UNESCO Convention. Regional operational guidelines elaborated and concluded at the EU level could provide a clearer, more concrete and binding interpretation of the rights and obligations at stake. Eventually, they could serve as a basis for the elaboration of regional guidelines in other parts of the world and improve the current UNESCO operational guidelines.

Pursuant to a more ambitious vision, each Member State's government could appoint a national from another Member State as a "Visiting Cultural Diversity Minister". This new position would contribute to reinforcing exchanges between MS' on cultural diversity policies, thereby making these policies more open and dynamic. These ministers would essentially contribute to the implementation of the UNESCO Convention and of article 167 on the Member State level. They could meet on a regular basis in an EU visiting cultural diversity ministers' conference and inform civil society, their national executive and legislative branches, the European Parliament, and the Commission on the progress of actions aimed at protecting and promoting the diversity of cultural expressions in Europe. Member States could also envisage the position of a cultural diversity ombudsman and a cultural diversity advocate as an institutional complement to desirable non-state tribunals run by civil society representatives.

From "Flou Artistique" to a Road map for Good Governance

At the present stage, the UNESCO Convention is not sufficiently operational from a purely legal perspective. That is, at least not in a manner that is comparable to the effect the WTO agreements have had over the last fifteen years in generating a great deal of case law and peer reviewed country assessments clarifying trade rules.³⁰ A respondent to a WTO dispute who does not comply with a report must endure incisive trade sanctions. The deterrent effect of this mechanism is considerable and provides a strong incentive for Members of the WTO to respect its agreements. The UNESCO Convention does not provide any comparable strength - a stark reality that impacts the current process of implementation of the UNESCO Convention.

The core issue for the further implementation of the UNESCO Convention on the diversity of cultural expressions resides in its current lack of "justiciability". WTO law imposes effective dispute settlement procedures and an arsenal of constraining trade sanctions to ensure compliance with its obligations. In contrast, the UNESCO Convention does not require any meaningful discipline from the States to protect and promote cultural diversity beyond aspirational "shall endeavour" obligations, which the parties can construe and implement in practice as mere discretionary rights to act. The core issue with the UNESCO instrument is the lack of "lock-in mechanisms" that would effectively commit the countries to protect and promote the diversity of cultural expressions. Article 5.1 provides that the Parties "reaffirm their sovereign right to formulate and implement their cultural policies and to adopt

³⁰ Under the old GATT, panel reports (judgements) needed the unanimous approval by all parties, including the losing one, in order to be enforced. Accordingly, the number of adopted reports remained small. Since 1995, such reports need the unanimity of the parties, including the approval by the winning one, in order to avoid adoption and enforcement. As a consequence of this new regime and of the considerable extension of the coverage of multilateral trade law, case law increased substantially in terms of quantity and quality.

measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.” This means that no party can realistically oblige another to exercise its rights and comply with its “shall endeavour” obligations to protect and promote cultural diversity on its territory, if such other State is not willing to do so for one reason or another. Therefore, this agreement is in practice hardly subject to enforcement.

Most of the substantive terms and concepts of the UNESCO Convention are subject to interpretation, notably the definition of “cultural diversity,” in relation to the “diversity of cultural expressions” and the meaning of “cultural expressions”. In the absence of jurisprudence, we expect that these terms and concepts will remain vague and unclear. Indeed, since this treaty lacks an effective dispute settlement mechanism that could generate case law interpreting the Convention, its contents remain ambiguous, legally inoperable, and therefore practically non-binding. The reporting obligations (article 9 let. A), and the operational guidelines (article 22 para. 4 let. c and 23 para. 6 let. B) may resolve some of these shortcomings. However, they will remain as ineffective palliatives so long as the reporting does not trigger stringent peer review, and the guidelines are phrased in a diplomatic rather than a legal style.

In this Study, we outline strategies for civil society to overcome the legal shortcomings of the UNESCO Convention. These strategies include the use of non-state tribunals to test the novel cultural non-discrimination principles of “Cultural Treatment” and “Most Favoured Culture,” as well as regular state courts that are competent to hear cases on human rights, intellectual property and competition.

The Scope of the Convention is Open, but Certainly Not Narrow

There are major challenges that stakeholders must face when contributing to the implementation of the Convention; particularly with respect to its scope of application, which is far from clear and leaves room for diverging interpretations.

We have not found consensus among stakeholders and commentators on the interpretation of the scope of the Convention. The UNESCO Commentary of 2007 proposes a narrow scope: “The Convention on the Protection and Promotion of the Diversity of Cultural Expressions does not cover all the aspects of cultural diversity addressed in the UNESCO Universal Declaration on Cultural Diversity. It deals with specific thematic fields of the Declaration, such as those set out in Articles 8 to 11 (...).”³¹ Several other commentators share this opinion. We disagree with this narrow construction on the basis of an interpretation that is consistent with the Vienna Convention on the Law of Treaties. We argue that this narrow construction derives in part from the conflation of the terms “cultural expressions” and “cultural activities, goods and services”. The Convention defines these terms separately without indication that they share the same meaning (articles 4.3 and 4.4).

As a general rule of interpretation, article 31 para. 1 of the Vienna Convention provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context, and in light of its object and purpose. Only one of nine objectives listed in article 1 of the UNESCO Convention mentions “cultural activities, goods and services”. Four objectives refer to “cultural expressions”, while four other objectives refer to other terms for which this instruments does not provide a legal definition (i.e., “culture”, “cultural exchanges” and “cultural interaction”). Pursuant to

³¹ Document CLT/CEI/DCE/2007/PI/32, p. 4.

article 31 para. 2 of the Vienna Convention, for the purpose of the interpretation of a treaty the context shall comprise the text of the treaty including its preamble and annexe. As a supplementary means of interpretation, article 32 sets forth that the preparatory work of the treaty and the circumstances of its conclusion can serve to confirm the meaning derived from the interpretation, pursuant to article 31. Moreover, article 18 of the UNESCO Convention, which is of central interest to many parties, establishes an "International Fund for Cultural Diversity". The preamble of the UNESCO Convention refers eight times to "cultural expressions" and seven times to "cultural diversity," whereas it only once mentions "cultural activities, goods and services".

The interpretation of a broader scope of the Convention appears to reflect findings from the negotiation history of the Convention, and stakeholders' perception as reported in our surveys. Therefore, in this Study, we reject the interpretation of a narrow scope as advocated by the authors of the 2007 UNESCO Commentary and among certain scholars. Instead, we adopt the interpretation of a broader scope while leaving open the discussion regarding its parameters, which case law can eventually clarify.

We believe that this approach supports the European Commission's view that the implementation of the UNESCO Convention within the EU is not a strict legislative activity as such, but rather the pursuit of policy developments. The UNESCO Convention can serve as a good governance tool to promote human rights and fundamental freedoms, particularly through intercultural dialogue. Such dialogue needs an instrument that protects and promotes the diversity of cultural expressions beyond trade aspects of cultural goods and services. A narrow scope of the Convention presents the risk that this treaty will be reduced to a loudspeaker for sterile cultural monologues of rich democracies.

In sum, a literal interpretation of the text of the UNESCO Convention in accordance with the rules of the Vienna Convention on the Law of Treaties hardly supports a narrow interpretation. The UNESCO Commentary remains itself unclear since it does not provide an exhaustive list of the fields the Convention is supposedly dealing with. In our opinion, there is a misunderstanding of the definition of "cultural expressions" when this term is reduced to meaning only "cultural activities, goods and services" as defined by article 4.4. The Convention provides separate definitions of both terms and does not indicate that they are synonymous. Furthermore, we construe the *travaux préparatoires* of the Convention as expressing the Parties' will to agree on a broader coverage. Therefore, we submit that the scope of the Convention cannot be limited to the protection and promotion of "cultural activities, goods and services" or to "trade related" cultural expressions.³²

The Lack of "Justiciability" and the Role of Civil Society

The UNESCO Convention contains many rights and almost no significant obligations. One must remain aware that the Parties are free not to exercise these rights. A Party can either violate an obligation contained in a trade agreement by exercising a given right granted by the UNESCO Convention, or comply with a trade treaty by not exercising its right under the UNESCO Convention. Obviously, if there are effective sanctions provided by a trade agreement to avert a violation of a Party's obligations, then the state that is party to both treaties will likely choose not to exercise its rights under the UNESCO Convention in case of a conflict of laws. Furthermore, when there is such a conflict, there is no incentive to negotiate a trade-off between culture and trade concerns in line with the objectives of the UNESCO Convention. This is particularly relevant when severe trade sanctions, such as

³² In comparison, the relation between "intellectual property rights" and "trade related intellectual property rights" pursuant to the TRIPS Agreement is similarly ambiguous. At least in practice, the criterion of "trade related" does not reduce the scope of the TRIPS Agreement.

those provided under the WTO dispute settlement mechanism, face vague state liability under the treaty of 2005.

According to Article 26 of the Vienna Convention on the Law of Treaties, every treaty in force is binding upon the parties to it (*pacta sunt servanda*) and must be performed by them in good faith. Article 20.1 of the UNESCO Convention repeats and clarifies this good faith obligation. It requires its parties to foster mutual supportiveness between this Convention and the other treaties to which they are parties. Additionally, parties must take into account the relevant provisions of this instrument either when interpreting and applying the other treaties to which they are parties, or when entering into other international obligations. This provision further expressly states that the parties shall not subordinate the UNESCO Convention to any other treaty. On its face this provision appears to favour cultural concerns. However, there is room for scepticism if one critically explores the meaning of this article by taking the current realities of the relevant trade regulations into consideration. Even where a margin of manoeuvre exists when interpreting existing undertakings or negotiating new ones, the advocates of cultural diversity concerns will confront the reality that in practice they are armed with soft law to oppose trade rules that not only have a precise meaning but are equipped with substantially more deterrent sanctions.

The UNESCO Convention is full of provisions containing vague terms and concepts that can be interpreted in many different ways, or that are even conflicting with each other. Moreover, it does not have a dispute settlement system with an efficient sanction mechanism, which could produce concrete interpretations of its terms and concepts in order to make its rules more predictable and transparent. The parties, therefore, do not have an incentive to clarify and develop law through litigation. Treaties dealing with intellectual property protection illustrate this point. For several decades, there was no significant international case law pertaining to the treaties administered by the WIPO, such as the Berne Convention and the Paris Convention. This situation changed dramatically when these treaties were partially incorporated into the TRIPS Agreement. Since the TRIPS Agreement entered into force in 1995 and thus became enforceable through the WTO dispute settlement system under an agreement called "Dispute Settlement Understanding" (DSU), it has generated a number of cases which have provided a better understanding and, consequently, a more binding interpretation of the rules at stake. The UNESCO Convention, therefore, will face trade regulations that are most often clearer and more effective. It is very likely that WTO law will prevail over the rules of the UNESCO Convention; and, that the "good faith" requirement according to article 20 para. 1 will in practice most likely be of little help for cultural concerns.

In contrast to the initial GATT of 1948 and to WTO law since 1995 one may not expect that the UNESCO law on the diversity of cultural expressions will substantially develop in a binding way in the near future; that is, unless civil society becomes a driving force. If civil society does not take appropriate initiative, and instead remains passive, we expect that this instrument will largely remain a dead letter that does not generate case law and is irrelevant to stakeholders' realities.

While the WTO considers itself as a Member-driven organization, the reality is that Members are generally driven by their own private sector import and export interests. For example, when the Hollywood oligopoly does not obtain the market shares in China that it expects without piracy, it lobbies the US administration through its trade organization, the Motion Picture Association of America (MPAA), to initiate a WTO litigation against China. The purpose of these lobbying efforts is to enforce the clear and detailed rules of the GATS and the TRIPS Agreement with the support of the EU. In contrast, presently neither

domestic nor foreign non-state interests can induce a government to act in a similarly effective manner in order to implement the UNESCO Convention on a concrete issue beyond mere political statements. The rules of the UNESCO Convention will not put governments under the same compliance pressure as WTO's regulations. Furthermore, if the UNESCO Convention enters into conflict with WTO law, the latter will generally prevail over the former. Therefore, in terms of implementation and enforcement, there is presently not a level playing field between trade and non-trade concerns in the area of cultural industries. Accordingly, civil society is called to play an instrumental role on the political floor to induce public actors to overcome the legal weaknesses of the UNESCO Convention.

KEY FINDINGS

The European Commission considers that "the implementation of the UNESCO Convention within the EU is not a strict legislative activity as such but rather the pursuit of policy developments, both in internal and external policies, which might take the form of legislative action in specific instances." This understanding presents the opportunity for new creative thinking in political and legal terms, beyond a mere static and formalistic approach.

The UNESCO Convention has the great potential to mobilize and stimulate law and policy makers in search of innovative solutions to address some of their constituencies' core societal concerns pertaining to questions of identities and diversity. The considerable value of this instrument, is its potential to offer inspiration and guidance for a future framework for the maximisation of the wealth and the settlement of tensions resulting from the diversity of cultural, political, religious and national expressions.

The Convention has the potential to reinforce more sustainable integration efforts on the regional level. This instrument can substantially contribute to strengthening internal cohesion within countries, in particular regarding the management of migration flows.

The principle of sovereignty underlying the UNESCO Convention is highly problematic when it applies to authoritarian regimes. The European Union faces the challenge to address this reality when promoting the objectives of the UNESCO Convention in her external relations.

The protection and promotion of a sustainable diversity of cultural expressions in the so-called "Global South" benefits the entire international community, but requires the elaboration and implementation of new legal mechanisms aimed at levelling the playing field in terms of access, openness and balance of cultural exchanges.

Effective legal safeguards are necessary to insure that the benefits of genuine diversity of cultural expressions are enjoyed by more than a small number of wealthy and democratic states that are indifferent to, or patronize, the rest of the world.

The Convention has no dispute settlement system with an efficient sanction mechanism that will produce concrete interpretations of its terms and concepts and make its rules more predictable and transparent. The parties, therefore, have no incentive to clarify and develop law through litigation.

Compared to the precise, predictable and enforceable rules of the WTO, the law of the UNESCO Convention is hardly competitive. Its rules are vague, subject to conflicting interpretations, and thereby lack the incentive for the States to clarify and test them through jurisprudence.

At the present stage, the Convention is not sufficiently operational from the legal perspective, at least in a way that would be comparable to the effect of the WTO agreements that generated a great deal of case law and peer reviewed country assessments clarifying trade rules over the last fifteen years.

In contrast to WTO law, one may not expect that the UNESCO law on the diversity of cultural expressions will substantially develop in a binding way in the near future unless civil society becomes a driving force. If civil society does not take appropriate initiative and instead remains passive, we expect that this instrument will likewise remain, to a large extent, a “dead letter” removed from the stakeholders’ realities.

Ideally, non-governmental organizations (NGOs) representing civil society for the purpose of implementing the Convention should gain influence on the implementation of the UNESCO Convention with the same dynamism and effectiveness as activist movements that voiced environmental non-trade concerns in the WTO and related fora in recent years.

1. FACT-FINDING ANALYSIS

Study Paper 1A: Fact-finding analysis on the implementation of the UNESCO Convention

Andrzej Jakubowski and Jonathan Henriques

1.1. Introduction

The fact-finding operation allowed us to gather valuable, substantive data from stakeholders across diverse geographical areas. The resource constraints of this Study prevented an exhaustive analysis of the implementation practices of the UNESCO Convention. Therefore, the results of our fact-finding operations are utilised as illustrations to inform and compliment the Study's analysis. In the future, more comprehensive empirical studies are required to produce conclusive data regarding implementation practices across multiple dimensions.

The process of gathering data with regard to the implementation of the UNESCO Convention was conducted via three sets of questionnaires.³³ The first questionnaire collected legal data from UNESCO National Commissions of EU Member States and law firms of non-EU countries. The second questionnaire explored implementation practices from the perspective of representatives of civil society, in particular National Coalitions for Cultural Diversity. The third questionnaire investigated the situation from the angle of regional organisations.³⁴ To supplement our primary fact-finding operations described above, we distributed a set of questionnaires to two additional groupings of civil society organisations: 1) in countries that have ratified the 2005 UNESCO Convention, but were not included in the first data set; and, 2) in countries that have not yet signed and/or ratified the Convention. The table below outlines the entities we contacted in our primary fact-finding operations, their response rates, and the respondents to the questionnaires.

³³ The fact-finding operations covered the following national jurisdictions: Azerbaijan, Brazil, Bulgaria, Canada, China, Croatia, Denmark, Egypt, France, Germany, Hungary, Ireland, Italy, Portugal, Senegal, Spain, Switzerland, Tunisia, and the United Kingdom. This choice was made on the basis of geographical, political, and cultural criteria. All of the completed questionnaires and other data components of the study are publicly available via the study's website, www.diversitystudy.eu.

³⁴ The following regional organisations were invited to participate in the survey: African Union, Association of Caribbean States, Association of Southeast Asian States, Commonwealth Foundation, Council of Europe, European Commission, International Organisation of the Francophonie, League of Arab States, and Organization of American States.

	Participating (Respondents)	Countries	No response / declined participation	Response rate
Civil Society	Canada, Croatia, Denmark, France, Germany, Italy, Senegal, Spain, Switzerland, UK	10	Bulgaria, Brazil, China, Ireland, Hungary, Portugal, Tunisia	59%
Regional Organisations	Assoc. of Caribbean States, Commonwealth Foundation, European Commission ³⁵	3	ASEAN, AU, COE, IOF League of Arab States, OAS	33%
National UNESCO Commissions	Bulgaria, Denmark, France, Germany, Hungary, Ireland, Spain	7	Croatia, Egypt, Portugal, Spain, UK, Tunisia	54%
Law firms and consultancy firms	Azerbaijan, Brazil, Canada, China, Senegal, Switzerland,	6		(100%)

1.2. Implementation Practices in a Selection of Jurisdictions

1.2.1. Legal Questionnaires

A major trend with regard to the implementation of the UNESCO Convention relates to the development of existing cultural policies rather than new legislative efforts. Additionally, the provisions of the Convention are often classified as applicable (self-executing) in the domestic legal systems analyzed. It also appears that there are no separate legal frameworks for the participation of civil society exclusively for the purposes of the UNESCO Convention. The actual role of civil society in protecting and promoting the diversity of cultural expressions is reconstructed from State cultural legislation and policies. Similarly, compliance with the Convention's guiding principles is assessed on the basis of broader domestic frameworks for the protection and promotion of cultural manifestations.

The National UNESCO Commissions in particular fully recognized and confirmed the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. For example, the French Commission highlighted the advanced dialogue between State authorities and civil society. However, the responses reveal that specific mechanisms within a procedural framework are needed to provide for the active support of civil society in regulating implementation practices. It also seems that States generally fail with respect to establishing institutional measures for dialogue between trade and cultural agencies, notwithstanding the existence of different forums for internal inter-ministerial collaboration. Furthermore, a general lack of adequate coordination was considered together with the insufficiency of funds as two major problems related to the implementation of the UNESCO Convention. Conversely, the activities of States to promote its objectives on the international and regional levels were positively assessed. In addition, there was an absence in respondents' replies of a clear awareness or publicity of best practices in their countries.

Little detail was offered among respondents regarding specific methodologies and explanations of their country's compliance with particular articles of the Convention (e.g., articles corresponding with the principles of openness and balance, international solidarity and cooperation, and equitable access). Brazil and Canada offer public funding for projects

³⁵ The European Commission responded on behalf of the European Community.

related to various cultural and artistic expressions conducted on a national and international level.

Reported best practices include: cross-border cultural cooperation agreements; State subsidies for projects involving diversity of cultural expressions; programmes addressed to a variety of multi-cultural audiences; promotion of mobility of art/museum collections; and, active participation in international and/or regional projects, e.g. European Year of Intercultural Dialogue.

Major obstacles to implementation were commonly associated with inadequate resources and funding. China, in particular highlighting concerns regarding harmonising tensions between national cultural protection and social and economic development. Several respondents shared misgivings regarding insufficient support for developing countries.

1.2.2. Regional Organisation Questionnaires

In the group of regional organizations analyzed, the EC/EU is the sole entity who ratified and implemented the UNESCO Convention. Other organizations have no competence in the sphere of cultural policy, or as a non-governmental entity they are not authorized to promote any legally binding instruments amongst their members. Nevertheless, respondents confirmed the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. According to the European Commission, the EC/EU fully implemented the objectives of the UNESCO Convention via policy developments in its internal policies and external relations. One particular example given was the so-called 'Protocol on Cultural Cooperation' (PCC). Moreover, the European Commission stated that within the framework of the European Agenda for Culture (2007), the EC/EU facilitates a dialogue between trade and cultural agencies; and provides for a reinforced structured dialogue with civil society.

Major problems identified by regional organizations refer to the failure of international co-ordination and promotion of the Convention, which is often erroneously perceived as potentially dangerous for cultures of smaller and/or developing countries. The best practices related to EC/EU activity in the sphere of cultural diversity were as follows: structured mechanisms of inter-ministerial consultations at Parties' internal level, and structured dialogue with civil society.

1.2.3. Civil Society Questionnaires

Civil society organizations critically assessed the contribution of their countries to the promotion of the objectives of the UNESCO Convention. Civil society members of some states, such as Switzerland, the United Kingdom and Italy, perceived their governments as uninterested and/or dilatory in developing international and regional cooperation in this matter. Conversely, France and Germany were considered among the most active State actors in the cultural diversity field. Importantly, the public authorities of these States explicitly encourage and support the active participation of civil society in implementing the UNESCO Convention.

Major problems reported by respondents refer to the following groups of issues: inefficiency of domestic public administration in terms of coordination and governance; institutional and financial obstacles; lack of concrete goals and strategies developed at the political level; indolence of the Intergovernmental Committee (IGC) in formulating the operational and legal guidelines; and insufficiency of financial resources paid to the International Fund for Cultural Diversity. Additionally, some respondents called for the reinforcement of the position of the IGC, and the extension of competences of civil society organizations on the

international level. Regarding EU external relations, some respondents argued that the practice of including PCC's in trade negotiations challenges the objectives of the UNESCO Convention.

The best practices reported include: integration of the Convention's principles into overseas development programmes; promotion of the values of multicultural society on national, regional and local levels; international cultural exchange programmes; and state policies to develop different sectors of culture.

1.3. Expectations from the Stakeholders

1.3.1. Legal Questionnaires

The best-case scenarios with regard to National UNESCO Commissions expectations primarily refer to the effective implementation of the UNESCO Convention worldwide. Respondents stated that this would lead to a new system of governance in the sphere of cultural expressions, which would be based on multisectoral cooperation. The elaboration of new international strategies with respect to cultural challenges of globalization was also generally anticipated. For example, Bulgaria expects the expansion of the international market for cultural industries.

The worst prognoses commonly shared among the respondents are as follows: inaction on behalf of policy makers; failure of international and sectoral cooperation; financial obstacles arising from the global financial crisis; and insufficient contributions to the International Fund.

The most likely scenarios reported as to the further implementation were a mixture of respondents' best and worst prognoses. Accordingly, the respondents predicted that the major goals of the Convention will be only partially achieved, and that several important provisions of the Convention would continue to be more declarative than operative.

There was relative consistency regarding respondents' forecast for implementation. Prominent factors of a 'best-case scenario' in their respective countries included: sufficient, meaningful support for developing countries; widespread ratification in diverse geographical areas; and increased international funding. China specifically highlighted, as a desirable outcome, the ability to use the Convention as a justification for restricting the importation of 'harmful cultural goods and services'; and providing safeguards for cultural security, thus strengthening cultural sovereignty.

1.3.2. Regional Questionnaires

There was a striking divergence in the assessment from the participating regional organizations, particularly between the European Commission and the Commonwealth Foundation. The Commission identified strengths of the Convention as follows: setting forth clear objectives; coherence in scope; and definitional clarity regarding the 'diversity of cultural expressions' vis-à-vis cultural goods and services. However, the Commonwealth Foundation stated that the Convention is not sufficiently articulated as a development instrument and maintains scant clarity and understanding among stakeholders. Both entities viewed the Convention in positive terms as an important instrument providing an elevated space for culture in international policymaking processes. However, the Commonwealth Foundation voiced concern that the Convention, to its detriment, is not adequately connected with relevant social movements; and, considering this predicament,

the Convention may inadvertently manifest as a repressive tool that promotes majority cultures at the expense of national cultural diversity.

1.3.3. Civil Society Questionnaires

The best-case scenarios regarding civil society's expectations were consistently related to the involvement of civil society in national integration issues, and bolstering its influence within national policymaking in cultural fields. There was also a shared perception among respondents that the UNESCO Convention can provide a framework for increased cooperation between EU member states' respective national cultural industries, and strengthen extant cultural institutions (national and international). These developments may likely have the positive affect of increased diversity of cultural expressions in production, distribution and access of cultural products. The worst prognoses shared among civil society members related primarily to three scenarios: inaction on behalf of policy makers; a correlated lack of incorporation of the Convention's provisions in national cultural policies; and, the exclusion of civil society from the negotiation of policies related to implementation practices of the Convention.

The strengths of the Convention are generally viewed with regard to its foundational qualities. That is, it provides a legal basis for the protection of cultural identities and a significant and symbolic impetus for an emerging normative framework for proactive cultural policies. One dimension of this burgeoning normative push was related to forging new avenues for cultural exchanges between the developed and developing world vis-à-vis the cultural impact of trade policies. On a transnational level these developments can create new spaces for cultural expressions.

Two significant weaknesses were identified by representatives as follows: the weakness of the Convention with respect to the lack of consequences for non-implementation; and, that due to the lack of obligations implementation is at the mercy of political will on the national level and short-sighted political time horizons. Moreover, this latter point is exacerbated by inadequate space in policymaking processes for civil society's input.

1.4. Notable Trends

Respondents identified two general methods of implementation of the UNESCO Convention. The first one consists of the revision and development of existing State cultural policies. The second one requires the enactment of implementing legislation. It is however difficult to assess from the responses which method leads to better conformity with the guiding principles of the Convention. Notably, jurisdictions providing the most advanced devices for the protection of cultural diversity, such as Canada, France and Germany, represent both methodological models. It appears that the outcome of the implementing processes needs to be examined with reference to all of the states cultural legislation and policy approaches. While the majority of respondents emphasised civil society's fundamental role, little detail was provided as to existing procedural frameworks that ensure civil society's participation. Moreover, inadequate coordination at the national level was widely reported as a significant problem. The systems adopted in France and Canada are noteworthy exceptions with uniquely successful coordination models.

The insufficiency of resources, caused in part by low contributions to the International Fund, and general consequences of the recent global economic crisis were also a common concern. Other common findings were related to important differences between developed and developing countries' perception of the Convention. Accordingly, developed countries, in particular the EU members, raised arguments in favour of global cultural policy-making.

Conversely, developing countries and non-European regional organizations shared misgivings about the role of the Convention as a repressive tool promoting majority cultures at the expense of national cultural diversity.

There was however a number of good practices reported, which primarily refer to public state aid for programmes involving: cultural diversity, international cultural cooperation and/or exchange agreements, mobility of artists and collections, and structured dialogue with civil society.

Monitoring and Evaluating Implementation: the OECD Anti-Bribery Treaty³⁶

Review mechanisms are important features of international agreements as they have high potential to raise public awareness, promote dialogue among stakeholders and prompt governmental action through critical evaluation of implementation practices and public pressure. Civil society has an integral role in this process; and, with the proper orchestration of monitoring tools and enforcement strategies non-state actors can be a powerful, mobilising force for meaningful implementation and coordination on national, regional and international levels. The OECD is but one example of an effective review mechanism. With an eye toward developing a robust review mechanism for the UNESCO Convention, further inspiration for effective compliance and monitoring can be drawn from mechanisms in other treaty bodies.

Considering the variety of review mechanisms integrated within international legal instruments, some have demonstrated marked superiority with respect to their performance in efficiency and effectiveness. The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions ('Anti-Bribery Convention') stands as a prominent example of such an instrument with vigorous monitoring. Considered as one of the most dynamic review processes, it sets forth an elaborate monitoring framework within a two-phase process.³⁷

The OECD Working Group on Bribery plays a central role in this process. The Working Group meets five times per year, and is comprised of representatives of all signatory states. In Phase 1 the Working Group evaluates national implementing legislation against the standards and guidelines of the Convention, with an issuance of recommendations as necessary. In Phase 2 the Working Group assesses the adequacy of in-country resources and structural capacity to operationalise the Convention's mandates. Prior to the two main phases of monitoring, there is a forum conducted at least four times per year, which allows countries to report on progress on implementation, respond to any critiques issued by the Working Group, or pose case-specific queries thereto. The overall review methodology is exercised through a variety of tools including questionnaires, in-country visits, peer reviews, and plenary discussions.³⁸

³⁶ Jonathan Henriques authored this section.

³⁷ For more detailed analysis of this mechanism as well as those employed by other international and regional treaty bodies, see the Transparency International Report "Attachment to TI Report on Follow-Up Process for UN Convention Against Corruption" (28 July 2006).

³⁸ See Marie Chene and Gillian Dell, Transparency International Expert Answer: Comparative Assessment of Anti-corruption Conventions' Review Mechanisms (15 April 2008).

These tools are considered as notable strengths of the review mechanism, as well as substantive reporting on recommendations and related follow-up procedures. Additionally, a noteworthy strength is the provisions for participation of Civil Society in both Phases of the review process.

Monitoring Implementation Practices of the UNESCO Convention

Implementation of cultural policies aligned with the standards outlined in the UNESCO Convention can be costly, thereby often constrained by a lack of resources particularly on a national level. Indeed, the lack of obligations in the Convention can weaken civil society groups' ability to mobilise national policymakers to take action.

However, this need not dissuade concerted effort from civil society to adopt monitoring tools that have been successful in other contexts, such as those used to monitor implementation of the Anti-Bribery statute. For example, the UNESCO Convention requires that States Parties shall complete reports every four years regarding "measures taken to protect and promote the diversity of cultural expressions" at the national and international level."³⁹ While some have expressed reservations regarding the effectiveness of this reporting requirement, civil society groups can utilise existing networks and resources to transform this provision into a powerful monitoring tool.

³⁹ UNESCO Convention, Article 9 (a)

2. NEW IDEAS FOR THE IMPLEMENTATION OF THE UNESCO CONVENTION

STUDY PAPER 2A: Early prevention of genocide and mass violence

Christophe Germann

KEY FINDINGS

- “Cultural genocide” as contemplated in the draft versions of the UN Genocide Convention of 1948 is the most extreme negation of the diversity of cultural expressions.
- A society who cares for biological and cultural diversity will care for “human diversity”. The desirable policy objective of “human diversity” aims at protecting and promoting the diversity of cultural, religious, political and national expressions.
- The UNESCO Convention on the protection and promotion of the diversity of cultural expressions could inspire the further development of international law on human diversity as a tool for early prevention of genocide and mass atrocities.
- The degree of acceptance of the diversity of cultural expressions can function as an indicator and early warning system for risks of tensions that could lead to genocide and mass atrocities in a given society.
- Article 8 of the UNESCO Convention presents a particular interest since it provides that Parties may take all appropriate measures to protect and preserve cultural expressions in special situations where cultural expressions on their territories are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.
- This avenue could contribute to broadening the constituency of cultural diversity proponents beyond the traditional stakeholders in the cultural sector by including new public and private players engaged in human rights and minorities' rights advocacy. In turn, this novel approach could elevate the significance of protecting and promoting the diversity of cultural expressions. In the best case scenario, it could also attract support from civil societies and states that have thus far refused to adhere to the UNESCO Convention, in particular the United States and Israel.

2.1. Biological, Cultural and Human Diversity

In Eichmann in Jerusalem, A Report on the Banality of Evil, Hannah Arendt defines genocide as "an attack upon human diversity as such, that is, upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning." The UN General Assembly's Resolution 96 (I) of 1946 states that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."

With the end of the cold war, the UN Genocide Convention of 1948 found effective enforcement regarding its provisions dealing with the punishment of the "crime of crimes". However, this instrument of international criminal law contains almost no rules on prevention, not to mention "early" prevention. In December 2008, Madeleine Albright and William Cohen delivered the Genocide Prevention Task Force's report "Preventing Genocide" to the US Administration.⁴⁰ This document analyses past failures and makes recommendations for the future to prevent mass atrocities and acts aimed at annihilating human groups as such. To our knowledge, this report has not yet had significant repercussions in Europe. The government of Hungary announced in June 2009 its intention to establish a Centre for the International Prevention of Genocide and Mass Atrocities in Budapest.⁴¹ By launching this initiative this Member State seeks to contribute to the international promotion of human rights and fundamental freedoms, emphasising the prevention of genocide and mass atrocities with a view to spread a culture of prevention. However, except for this recent initiative that is still in its infancy, early prevention does not appear to be a priority in Europe.

The Albright/Cohen report mainly discusses the United States' contributions to the prevention of genocide and mass atrocities. Furthermore, it does not address early prevention in much detail. In this respect, the greatest challenge is finding solutions that protect civil society from being used as an instrument to perpetuate such crimes. An inventory of the existing relevant legal framework, which ranges from traditional protection of minorities via international criminal law to the newest developments of the "responsibility to protect" ("R2P"), reveals that early prevention lacks corresponding legal instrumentation.⁴² Indeed, the law in force is incomplete and fragmented. States and civil society need foremost a convincing set of incentives to protect and promote the diversity of human groups. We submit that human diversity requires a new "contrat social" that immunises civil society from mobilisation by perpetrators of mass atrocities. For this purpose, the protection and promotion of the diversity of cultural expressions can play an instrumental role in exploring new legal avenues to secure human diversity through its cultural, religious, political and national expressions.

The prevention of mass atrocities, in particular genocide, is essentially about protecting "human diversity" according to the term used by Hannah Arendt. Human groups are both

⁴⁰ See Report of the Genocide Prevention Task Force chaired by Madeleine K. Albright and William S. Cohen, "Preventing Genocide: A Blueprint for U.S. Policymakers" at: www.usip.org/genocide_taskforce/index.html For a critical analysis of this report by various genocide scholars, see Genocide Studies and Prevention, Volume 4, Number 2, Summer 2009. In Canada, in the context of the project "La volonté d'intervenir" co-chaired by Roméo Dallaire and Frank Chalk, the Institut montréalais d'études sur le génocide et les droits de la personne published the report, Leadership et action pour la prévention des atrocités de masse, in 2009: www.operationspaix.net/IMG/pdf/DALLAIRE_Romeo_Mobiliser_la_volonte_d_intervenir_2009-09-22.pdf.

⁴¹ See Istvan Lakatos / Enzo Maria Le Fevr, Feasibility study for the establishment of the Budapest Centre for the International Prevention of Genocide and Mass Atrocities, June 2009, at: www.mfa.gov.hu/kum/en/bal/foreign_policy/protection_human_rights/bp_nepirtas_megelozesi_kozpont/.

⁴² See UN Secretary-General, Report on Implementing the responsibility to protect, 12 January 2009 (A/63/677), at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf?OpenElement>.

“living beings” and “cultural beings” whose existences rely on biological and cultural welfare.

Since 1992 there has been a convention on biological diversity, and since 2005 there has been a convention on the diversity of cultural expressions. These two treaties arguably reflect a shift of paradigm from idealizing purity, uniformity and supremacy toward valuing diversity and equality as existential conditions for the evolution of life and culture on this planet. One can argue that these conventions need completion by a third international legal instrument that specifically addresses the protection and promotion of “human diversity”. The desirable policy objective of “human diversity” includes the protection and promotion of the diversity of cultural, religious, political and national expressions. The UNESCO Convention of 2005 provides a highly valuable road map for the further and more comprehensive development of law aimed at protecting and promoting human diversity.

Policy makers started to seriously consider environmental concerns in their agenda approximately forty years ago. In the initial stages, environmental law was soft and suffered weakness from lack of prioritisation compared to other concerns, namely economic interests. It took several decades of determined political activism, nurtured by scientific research, before environmental concerns acquired the significance and relative legal strength they enjoy today.⁴³ In 1992 at Rio Earth Summit, one hundred fifty government leaders signed the Convention on Biological Diversity, which aims to promote sustainable development. This treaty acknowledges that preserving the diversity of plants, animals and micro-organisms and their ecosystems responds to human beings’ need for food security, medicines, fresh air, water and shelter in order to secure a clean and healthy living environment. On the international level, diversity in culture followed diversity in nature on the policy makers’ agenda.

The first article of the Universal Declaration on Cultural Diversity adopted by the UNESCO on 2 November 2001 considers that “as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.” In fall 2005, the impressive number of countries approved the UNESCO Convention, which carries remarkable potential. It provides that “cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.” It furthermore sets forth that “the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.” Article 7 requires that the Parties shall endeavour to create in their territory an environment that encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions whilst “paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples”.

The UNESCO Convention could therefore also provide new and more clearly articulated support to cultural rights of ethnic minorities as protected by Article 27 of the International Covenant on Civil and Political Rights, or by Article 15 of the International Covenant on Economic, Social and Cultural Rights.⁴⁴

⁴³ For an overview on the scientific contributions, the rise of the environmental social movement and the media regarding global warming, see Mark Maslin, *Global Warming, A Very Short Introduction*, Oxford 2009, p. 23 – 40.

⁴⁴ Article 27 of the International Covenant on Civil and Political Rights provides that in “those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” Cultural rights of minorities are also protected by instruments of

2.2. Cultural Genocide as the Most Extreme Negation of Cultural Diversity

The Polish lawyer Raphael Lemkin, who coined the term “genocide” and who was instrumental in the adoption and implementation of this treaty, advocated the inclusion of acts against cultural expressions aimed at wiping out a human group as a genocidal technique: “It takes centuries and sometimes thousands of years to create a (...) culture, but genocide can destroy a culture instantly, like fire can destroy a building in an hour.”⁴⁵

The first two drafts of the Genocide Convention contained provisions on cultural genocide. However, they did not find their way into the final version of this instrument. The opponents to inclusion of “cultural genocide” into the treaty of 1948 invoked that it would dilute the gravity of the crime of genocide and could favour separatist movements seeking national disintegration.⁴⁶

The legal definition of the crime of genocide under existing law of the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

“Cultural genocide” according to the 1947 draft by the UN Secretariat:

Article 1

Definitions

I. [Protected groups] The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.

II. [Acts qualified as Genocide] In this Convention, the word ‘genocide’ means a criminal act directed against any one of the aforesaid groups of human, with the purpose of destroying it in whole or in part, or of preventing its preservation or development.

Such acts consists of:

(...)

international humanitarian law applicable to armed conflicts. Pursuant to article 15 of the International Covenant on Economic, Social and Cultural Rights, the Parties recognize the right of everyone to take part in cultural life.

⁴⁵ The importance of the Convention, p. 1, reel 2, Lemkin Papers, New York Public Library. In Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposal for Redress, Washington 1944, p. 84, Lemkin listed “cultural genocide” as a technique of genocide. Lemkin’s unpublished book project “The History of Genocide” contains a draft chapter entitled “Impact on the culture”, see Tanya Elder, What you see before your eyes: documenting Raphael Lemkin’s life by exploring his archival Papers, 1900-1959 (pp. 469-499), in: Dominik J. Schaller / Juergen Zimmerer (eds.), Raphael Lemkin: the ‘founder of the United Nation’s Genocide Convention’ as a historian of mass violence, Journal of Genocide Research, Volume 7, Number 4, December 2005, p. 489: www.inogs.com/JGRFullText/Elder.pdf.

⁴⁶ See William A. Schabas, Genocide in International Law, The Crimes of Crime, Cambridge 2009, p. 207-221, for a summary of the negotiating history.

3. Destroying the specific characteristics of the group by:

(...) (c) Prohibition of the use of the national language even in private intercourse; or

(d) Systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

(e) Systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

“Cultural genocide” according to the 1948 draft by the UN Ad Hoc Committee:

Article III

[‘Cultural’ genocide]

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

We observe that these draft provisions refer to protected human groups’ “cultural expressions” as defined in article 4.3 of the 2005 UNESCO Convention, that are “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” Article 4.2 defines “cultural content” as “the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.”

The Parties decided to exclude acts of “cultural genocide” from the final text of the Genocide Convention that they adopted in 1948. Article II of this instrument mentions only two forms of the crime of genocide that do not cause the death of human beings: Causing serious bodily or mental harm to members of the group (lit. b), and forcibly transferring children of one protected group to another group (lit. e).⁴⁷ Case law considered, for example, rape as causing serious bodily or mental harm if this act is committed with special intent (“dolus specialis”) to destroy, in whole or in part, a national, ethnic, racial or religious group as such.

In 2009, the Swiss Parliament voted on the question of “cultural genocide” upon a motion by one of its Members, Mrs. Josiane Aubert.⁴⁸ This lawmaker requested new legislation that would reinforce, by way of criminal law, the protection of cultural expressions against their destruction aimed at wiping out a human group as such. The contemplated legislation

⁴⁷ Compare Kurt Mundorff, *Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, in *Harvard International Law Journal* / Vol. 50, p. 61 ff.

⁴⁸ See Conseil National, *Motion Aubert Josiane. Prévention des génocides. Combattre les génocides culturels (08.3789)*, in BO 2009 N 1351, at: www.parlament.ch/ab/frameset/d/n/4811/306271/d_n_4811_306271_306485.htm.

seeks to strengthen the legal meaning of culture in relation to the protection of human groups that, at least symbolically, appears to lag behind the significance of nature as protected by environmental law. This reinforcement of protection should constitute an important step towards a desirable new international convention on human diversity. It could complement as "civil law" the existing criminal law on genocide and mass atrocities. Protecting and promoting human diversity as the most effective way to prevent genocide and mass atrocities would essentially rely on both the protection and promotion of biological and cultural diversity. The Swiss parliament rejected the proposal in September 2009. However, this first attempt calls for further efforts in order to raise awareness for, and make use of, the full potential of culture to preserve life. The EU can take up this challenge in its efforts to promote dialogue and collaboration with other countries and regional organizations aimed at securing peace, human security and sustainable development.

The UNESCO Convention arguably has the potential to reinforce more profound integration efforts on the regional level. This instrument can substantially contribute to strengthening internal cohesion within countries, in particular regarding the management of migration flows. It can provide a good governance tool for the maximization of the wealth and the settlement of tensions resulting from the diversity of cultural, political, religious and national expressions. In particular, it can provide new practical guidance to policy makers to implement more sustainable inter-cultural dialogue from the legal perspective.⁴⁹

This avenue would also contribute to broadening the constituency of cultural diversity proponents beyond the traditional stakeholders in the cultural sphere by including new public and private players engaged in human rights and minorities' rights advocacy. In turn, this novel approach could elevate the meaning of diversity of cultural expressions. In the best-case scenario, it could also attract support from civil society and States that have thus far refused to adhere to the UNESCO Convention, in particular the United States and Israel. In this manner, a legally open-minded interpretation of articles 8 and 17 of the Convention may become a very meaningful tool for the EU's external relations.

We submit that this proposal should also be discussed in the framework of the Transatlantic Legislators' Dialogue (TLD), which aims to strengthen and enhance the level of political discourse between European and American legislators. The TLD constitutes the formal response of the European Parliament and the US Congress to the commitment in the New Transatlantic Agenda (NTA) of 1995 to enhanced parliamentary ties between the European Union and the United States.⁵⁰

Early prevention of genocide and mass atrocities is a very important policy concern shared by lawmakers from both sides of the Atlantic. This topic will allow European Parliamentarians to reveal to their colleagues in the United States the full value of the UNESCO Convention. In the best case scenario, such a dialogue could provoke in the United States a welcome change of attitude towards this instrument; that is, from rejection to adherence.

⁴⁹ Compare Council of Europe, White Paper on Intercultural Dialogue - "Living Together As Equals in Dignity", Strasbourg 2008, at: www.coe.int/t/dg4/intercultural/Source/White%20Paper_final_revised_en.pdf See also Patricia Wiater, Intercultural Dialogue in the Framework of European Human Rights Protection, Strasbourg 2010.

⁵⁰ In practical terms, the TLD includes the bi-annual meetings of the European Parliament and the US Congress delegations and a series of teleconferences, organised on specific topics of mutual concern, with a view to fostering an ongoing and uninterrupted dialogue. The European Parliament and the US Congress have established a Steering Committee to co-ordinate TLD activities. The Steering Committees also maintains contact with the members of the Senior Level Group (SLG), which is composed of high-ranking officials from the European Commission, the EU Presidency and the US Administration. See: www.europarl.europa.eu/intcoop/tld/default_en.htm.

In our survey, the Commonwealth Foundation critically observes that “UNESCO has not given sufficiently priority of the promotion of the Convention. Little connection has been made to other issues of global social justice, and so the Convention has not won popular support and found itself the focus of advocacy for civil society beyond the cultural sector. The critique of the Convention as a potentially repressive tool – as a promoter of national majority cultures to the detriment of cultural diversity within national borders – has not adequately been addressed.” (Reply 9 to the Regional Organizations Survey at www.diversitystudy.eu).

2.3. Hypotheses on Cultural Genocide under Desirable International Law

Can the prevention of cultural genocide under desirable law strengthen the prevention of physical and biological genocide as addressed by existing law? Systematic attacks on cultural expressions can contribute to removing inhibition from perpetrators to physically and biologically destroy the targeted victims. For example, the Nazi regime started to burn books in public places, and eventually killed people in concentration camps. This pattern of behaviour provides a solid argument against the critique that cultural genocide would dilute the significance of the crime of physical and biological genocide. While negotiating the Genocide Convention, Canada, France, the United States and the United Kingdom held that this crime was not on par with physical genocide and should be dealt with separately; and, that too wide a definition of genocide would render the Convention meaningless. Combining the objective of early prevention with a strict application of the requirement of a special intent (“destruction of protected groups as such”) should rebut the argument of dilution.

If one accepts that the prevention of cultural genocide can contribute to the prevention of physical and biological destruction of human groups both in situations of circumvention and disinhibition, one should consider whether the protection and promotion of cultural diversity could contribute to reinforcing the prevention of cultural genocide. The link is obvious: cultural genocide is the most extreme negation of cultural diversity. Accordingly, we submit that early prevention of genocide and mass atrocities requires a legal round trip from cultural diversity to cultural genocide.

We submit the following three hypotheses to stimulate the discussion on the elaboration of new means of early prevention of genocide and mass atrocities in international law:

- 1) A country that cares for biological and cultural diversity will tend to protect and promote the diversity of human groups. The members of such a civil society will tend to be less vulnerable to calls from leaders who seek to mobilize masses of people as an instrument for the perpetration of genocide and mass atrocities.**
- 2) Acts of “cultural genocide” as defined in the draft Genocide Convention of 1948 constitute a technique to remove inhibition to physically or biologically destroy the members of the targeted group.**
- 3) The prevention of physical and biological genocide can be more effective by preventing cultural genocide. In turn, reinforcing the protection and promotion of cultural diversity in international law can prevent cultural genocide.**

The examination of these hypotheses should deliver new legal arguments in favour of including cultural genocide into positive international law. If one or more of these hypotheses are verified, culture really matters for early prevention. In this case, cultural diversity should be considered as essential for humanity as

biological diversity, and consequently cultural genocide as a crime as serious as physical and biological genocide.

However, these assumptions raise several questions. First of all, would it be enough to destroy the cultural identity of a protected human group in order to destroy the group as such? Related to this question, one should examine how other forms of identities, that is non cultural ones, contribute to cultural diversity; and, vice versa, how cultural identities shape other forms of identities, such as religious, political and national ones. Furthermore, to what extent is the principle of sovereignty appropriate to reach the objectives at stake? Answers to these questions require further research with a special focus on the provisions on human rights, fundamental freedoms and in the principles of equitable access, openness and balance contained in the UNESCO Convention.

From a more practical perspective, one can observe that attacks on “cultural expressions” of a human group can reinforce such group’s cohesion around a common cultural identity shared by its members. Thus, a complete obliteration of a group’s cultural identity may require considerable resources with a significant risk of eventual failure, and achieve the opposite goal of reinforcing such identity as a result of oppression. Such uncertainty in the outcome may deter potential genocidaires from engaging in cultural genocide. Nevertheless, acts of cultural genocide certainly remain as a technique to remove inhibition to physically or biologically destroy the members of the targeted group.

Article 8 of the 2005 UNESCO Convention arguably offers new guidance for a codification aimed at preventing cultural genocide under desirable international law. This provision sets forth that Parties may take, under certain conditions, all appropriate measures to protect and preserve cultural expressions in special situations where cultural expressions on their territories are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding. Furthermore, pursuant to article 17, the Parties shall cooperate in providing assistance to each other, and particularly to developing countries in situations referred to under Article 8.⁵¹ These two provisions may become a very meaningful tool for the EU’s external relations. We propose to further investigate this avenue from the perspective of possible new approaches for an early prevention of genocide and mass-atrocities. Such efforts shall result in outlining new tools to deal with countries plagued by humanitarian issues and violations of minorities’ rights and human rights.

The problem of article 8 in this context lies with the exclusive prerogative granted to the Parties to act; and, more precisely, to the Party affected by a “special situation” where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguard. This approach is consistent with the principle of sovereignty, but it fails to provide a satisfactory solution when the Party in question perpetrates the acts that lead to a special situation as contemplated by Article 8. In this case, civil society may play a “fundamental role”, as acknowledged by the Parties in Article 11, in order to insure that the Parties assume their right, pursuant to article 8.2, to “take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.”

⁵¹ Art. 8 refers to art. 5 and 6. For an interpretation of the relation between these three provisions, see Ivan Bernier, *Les expressions culturelles menacées dans la Convention sur la diversité des expressions culturelles de l’Unesco*, April 2009: www.diversite-culturelle.gc.ca/fileadmin/documents/pdf/Expressions_culturelles_menacees.pdf The UNESCO Operational Guidelines on the Measures to Promote and Protect Cultural Expressions, as approved by the Conference of Parties at its second session (June 2009), focus on the role of the Parties and neglect to put art. 8 in connection to art. 11, see: www.unesco.org/culture/culturaldiversity/articles_7_8_17_en.pdf.

2.4. Promoting Cultural Diversity to Protect Human Diversity

Pursuant to Article 4 of the 2005 UNESCO Convention, the term “cultural expressions” means expressions that result from the creativity of individuals, groups and societies, and that have cultural content. The notion of “cultural content” itself refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities. This definition of cultural expressions is useful to better conceptualize the various human groups protected under existing law in the Genocide Convention. We could understand the concept of “human diversity” from the legal perspective as the “diversity of human expressions”. Under this approach, “human expressions” would include cultural, religious, political and national expressions. As a consequence, we could adapt the definition of “cultural expressions”, pursuant to article 4 of the UNESCO Convention, in order to define “religious expressions”, “political expressions” and “national expressions” accordingly.

In this context, we can build upon the legal distinction between “discovery” and “invention” developed in patent law.⁵² By analogy, one could consider identities and differences between human groups based on physical and biological similarities and distinctions, respectively, as “nature-made” (e.g., “racial” or “ethnic” groups as contemplated by article II of the Genocide Convention). In contrast, the distinctive features of human groups that rely on man-made identities would include “national” or “religious” groups as protected by the existing law, and other forms of groups such as social, economic or political groups that are currently excluded from the scope of the Genocide Convention.

The perception and interpretation of man-made identities and differences all rely on “cultural expressions” as defined in the 2005 UNESCO Convention, except for biological and physical ones, such as the colour of the skin. These “cultural expressions”, however, are also relevant as a discourse to integrate or exclude human groups based on nature-made identities and differences.

This definitional approach can contribute to apprehending the complex reality of differentiating human groups for the purpose of elaborating new rules of conduct. This would allow for bridging differences among these groups while keeping their diversity as a source of cultural and natural wealth, i.e. human diversity as the most precious resource.

Many expressions protected under the 2005 UNESCO Convention are both cultural and religious expressions. Furthermore, religious expressions are often intertwined with political and nationalistic discourses.⁵³ In consideration of this reality, we propose to translate and transpose the 2005 UNESCO Convention into a new international agreement on the diversity of religious, political and national expressions. For this purpose, members of the civil society in each country could come together to interpret and discuss the existing instrument on cultural diversity. On the basis of their understanding of this treaty they could then develop a new treaty at a grassroots level on religious, political and national diversity as a further building block for the protection and promotion of human diversity.

This initiative could ultimately contribute to an early prevention of those forms of genocide and mass atrocities that originate from an ideology professing supremacy of certain cultural, religious, political and national expressions over others. The supremacist discourse rejects equality and propagates uniformity and segregation against diversity and

⁵² In a nutshell, patent law traditionally grants intellectual property protection for inventions. A “discovery” is non patentable since it is nature-made whereas an “invention” is patentable because it is man-made.

⁵³ The minaret provides an example of such an expression, see Christophe Germann, *La diversité humaine à l'appel du minaret*, in *Le Courrier*, 8 December 2009: www.lecourrier.ch/index.php?name=NewsPaper&file=article&sid=444414.

“métissage” of the various types of expressions. In the worst case, this discourse causes “ethnic cleansing”, mass atrocities and genocide.

We submit a blueprint for grassroots interpretation, creation and implementation of the UNESCO Convention that would grant ownership of this treaty to the people. We suggest that such a process could result in a highly effective, cost efficient, and sustainable achievement of the objectives of the UNESCO Convention. The European Parliament could launch and sponsor such a neighbourhood initiative in the European Union. It would essentially require the dissemination of the text of the Convention along with a teaching kit among schools and local communities. The people would be encouraged to read, discuss and further develop the treaty with the objective of translating it into a new desirable convention on human diversity.

RECOMMENDATIONS

- The European Union should further explore and exploit the full potential of the UNESCO Convention to contribute to the early prevention of genocide and mass atrocities.
- European parliamentarians should discuss with their colleagues from other parliaments within and outside the European Union ways to further develop and implement the Convention as a tool of early prevention of genocide and mass atrocities and of post-conflict sustainable justice. In particular, they should focus the attention of US lawmakers on the value of this treaty in the framework of the Transatlantic Legislators' Dialogue.
- An appropriate interpretation of article 8, 11 and 17 could broaden the constituency of civil society supporting the UNESCO Convention beyond stakeholders in the cultural sector to human rights activists and minorities' advocates world-wide. The European Parliament could play an instrumental role in facilitating efforts to reach this goal.
- The European Union should establish an independent observatory on (a) cultural expressions that violate human rights and fundamental freedoms, (b) censorship and (c) special situations contemplated under article 8. This observatory should inform the Parties of the UNESCO Convention, in particular authoritarian regimes, of the limits of the principle of sovereignty.
- The European Union and the Members States should encourage grassroots interpretation and implementation of the UNESCO Convention. They should encourage civil society to translate and transpose the UNESCO Convention into a new desirable treaty on “human diversity” relying on the diversity of cultural, religious, political and national expressions that could be applied in conflict areas.
- The European Union should elaborate a school teaching kit, disseminate it via the internet, and encourage teachers to interpret and discuss the UNESCO Convention with young students.

STUDY PAPER 2B: Intellectual property and competition

Christophe Germann

KEY FINDINGS

- Article 7 in combination with article 6 is a fundamental norm of the UNESCO Convention that should guide the elaboration of governance tools for the well functioning of modern democratic societies. Accordingly, this provision deserves special attention from law and policy makers when they implement the UNESCO Convention in their respective jurisdictions.
- Parties shall contribute to the empowerment of individuals and groups to create cultural expressions, and to have access to the diversity of these expressions. Furthermore, article 7 of the UNESCO Convention recalls that the Parties should consider artists and others involved in the creative process as key contributors to the diversity of cultural expressions.
- There is little research available on the interactions between international trade rules and state intervention aimed at protecting and promoting the diversity of cultural expressions on one side, and intellectual property and competition laws on the other.
- For the time being, the discussion on culture and trade mainly focuses on GATT and GATS, the WTO agreements on trade in goods and services. However, WTO members must also comply with the minimum standards of intellectual property protection as provided in the third pillar of the WTO, the TRIPS agreement.
- The TRIPS Agreement in combination with article 7 of the UNESCO Convention offers a specific approach to deal with the relationship between trade and non-trade concerns, which should be explored in the context of protecting and promoting the diversity of cultural expressions from the legal angle.
- Intellectual property protection has not only positive effects on cultural diversity, but can also be a threat.
- High standards of intellectual property protection are incentives to proceed to excessive marketing expenditures for cultural goods and services. They are the primary means for market domination and, therefore, detrimental to the creation, production and dissemination of films, books and music that do not enjoy comparable investments to accede to the public.
- Too much copyright, trademark and trade name protection generally contributes to

driving films, books and music from cultural origins that are different from the economically dominant ones out of competition. Accordingly, policy makers must structure and compose the complex legal dynamics between intellectual property and competition in novel modes that favour the protection and promotion of the diversity of cultural expressions and act against systematic cultural discrimination.

- States seem to have a better understanding of the relationship between intellectual property and biological diversity than between intellectual property and cultural diversity; although, most of them declared that both forms of diversity are equally important.
- Competition authorities have faced the difficulty of defining and implementing concerns related to cultural diversity in assessing merger and acquisitions. The main problem arguably resides in the lack of clear criteria for cultural diversity as well as in the traditional definition of the relevant market for cultural industries. This should be replaced by the objective criterion of marketing investments.
- In light of the market structure and mechanisms currently prevailing in the film, music and book sectors, most of the providers of cultural goods and services that are denied access to competitive marketing and distribution cannot reach audiences independently of the potential public appeal of their cultural contents.
- In order to secure a level playing field among cultural content providers from a variety of cultural origins, legislators and judges should apply competition law based on the “essential facilities” doctrine to marketing power in cultural industries.
- The application of the “essential facilities” doctrine to marketing power in cultural industries can contribute to the objectives of the UNESCO Convention without unduly relying on taxpayers’ money. It would therefore also constitute an affordable way for economically weaker countries to protect and promote the diversity of cultural expressions.
- The intellectual property system should serve as a source of revenue for artists to preserve their independence vis-à-vis illegitimate state control. At the same time, the European Union should ensure that copyright, trademarks and related intellectual property rights do not serve as a tool for big corporations to cannibalise small and medium-sized cultural entrepreneurs.
- Uniform duration of protection of copyright is not appropriate to achieve the goals of the UNESCO Convention. A reform of the copyright duration directive shall implement variable geometry: the higher the marketing investments, the shorter the duration of protection.
- New principles of law prohibiting systematic cultural discrimination shall act against abuses of dominant positions in the cultural sector, and contribute to equitable access, openness and balance as required by the UNESCO Convention. These “meta-rules”, which we label “Cultural Treatment” and “Most Favoured Culture” principles, would mirror the WTO principles of National Treatment and Most Favoured Nation.

2.1. Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Many artists, law and policy makers, civil society activists and scholars who are concerned about the protection and promotion of cultural expressions have a blind eye to the international intellectual property system. They only see the benefits of this system for the cultural sector while ignoring its negative sides. Today, there is a widespread taboo in the cultural sector against critically analysing and discussing the aspects of this system that are inconsistent with the very purposes and objectives of the UNESCO Convention; particularly, in relation to the "shall endeavour" obligations set forth by article 7. Pursuant to this provision, the Parties shall endeavour to create in their territory an environment that encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions, as well as to diverse cultural expressions from within their territory and from other countries of the world. The Parties shall also endeavour to "recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions." In other words, Parties shall contribute to empowering individuals and social groups to create cultural expressions, and to have access to the diversity of these expressions. Very importantly, the Parties should consider artists and others involved in the creative process as key contributors to the diversity of cultural expressions.

We submit that article 7 is a fundamental norm of the UNESCO Convention that must guide the elaboration of governance tools for the well functioning of modern democratic societies. Accordingly, this provision deserves greatest attention from law and policy makers when they implement this instrument in their respective jurisdictions.

In this section, we describe the issues related to the international intellectual property system in relation to the protection and promotion of the diversity of cultural expressions, and we make proposals for redress. In this context, we shall also highlight the positive contributions of competition law in combination with desirable new cultural non-discrimination principles for a better balance between the various legitimate interests at stake.

Most provisions of WTO law that affect national cultural policies are precise and enforceable. In political claims from many non-governmental stakeholders, and in policy statements by a majority of public actors, much focus is given to the rules of GATT and GATS addressing progressive liberalization in the field of trade in goods and services. In contrast, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not seem to attract the critical attention for the cause of cultural diversity that it deserves.⁵⁴ In comparison, there is a wide consensus to consider excessive patent protection as potentially detrimental to public health policies in developing and least developed countries. In the area of cultural industries, however, the dogma still prevails that the stronger copyright and trademark protection is, the better for culture and cultural diversity in general and for the diversity of cultural expressions in particular.

The TRIPS agreement harmonizes to a large extent national intellectual property law among the WTO Members. As an important side-effect, it reinforces oligopolies that dominate the market of cultural goods and services without providing commensurate checks and balances due to the lack of effective competition law in many jurisdictions. In other words, the TRIPS agreement imposes relatively high standards of intellectual property protection on the basis of the principles of National Treatment (NT) and Most Favoured Nation treatment (MFN), without any multilateral requirement to legislate on

⁵⁴ For the texts of the WTO agreements see www.wto.org.

competition aimed at counterbalancing excessive owners' rights.⁵⁵ Since the costs of implementing intellectual property are already high for economically weak countries, these economies generally cannot afford the additional significant costs of competition law as well.

2.2. Cultural diversity and intellectual property rights

There is little research available on the interactions between international trade rules and state intervention aimed at protecting and promoting the diversity of cultural expressions on one side, and intellectual property and competition laws on the other. For the time being, the discussion on culture and trade mainly focuses on GATT and GATS, the WTO agreements on trade in goods and services. However, WTO members must also comply with the minimum standards of intellectual property protection as provided in the third pillar of WTO, the TRIPS agreement. This instrument offers a specific approach to deal with the relationship between trade and non-trade concerns, which should be explored in the context of protecting and promoting cultural diversity from a legal angle. In this context, one must stress that intellectual property protection has not only positive effects on the diversity of cultural expressions, but can also be a threat.

The widespread perception of the value of intellectual property protection among artists focuses on economic rights: copyright is an essential source of revenue. While this understanding is correct on the micro level, it neglects the fact that on the macro level copyright is the main instrument to secure investments for the marketing (advertisement) of cultural goods and services distributed by big entertainment corporations. Artists whose works do not enjoy competitive marketing are thus silenced in the prevailing system.

The most commercially successful contemporary authors typically enjoy the highest investments in the marketing (advertisement and distribution) of their works. In turn, copyright and related intellectual property rights are instrumental to secure these investments, which drive out of competition authors whose works do not enjoy comparable ones. Geiger observes that copyright has evolved more and more into an investment protection mechanism:

“It must be noted that copyright has gradually become an industrial right and the investment has become the reason of protection. The copyright, which was originally intended to promote the interests of the public, presents itself increasingly as a protection of the interests of some few private entities. The bond between the author and society has loosened, and copyright has come to be seen by the public as a weapon in the hands of large corporations. The social dimension of the law is progressively disappearing in favour of a strictly individualistic, even egoistic conception. This means that the balance between the different interests within the system is threatening to tip in favour of the investors. It could even be argued that the continental term 'author's rights' is no longer appropriate, since it suggests that the system of protection benefits above all the author. In reality, only a small number of authors (the commercially most successful) benefits from copyright protection.”⁵⁶

⁵⁵ For an introduction to the NT and MFN principles see World Trade Organization, *Understanding the WTO*, Geneva 2008, p. 12 and 13, at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

⁵⁶ Christophe Geiger, “Constitutionalizing” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property Rights in the European Union, in: *IIC International Review of Intellectual Property and Competition Law*, Volume 37, No. 4/2006, p. 379 and 381 (footnotes and further references omitted).

Researchers and civil society activists gave much attention in recent years to the negative effect of exclusive rights, which preclude using elements of pre-existing works for inspiration and new creation. However, there is almost no discussion of the fact that copyright and related intellectual property rights can provide collaterals to secure advantageous financing for exorbitant marketing investments that, in turn, copyright again protects.

States seem to have a better understanding of the relationship between intellectual property and biological diversity than between intellectual property and cultural diversity; although, they declared that both forms of diversity are equally important. According to the first article of the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, "as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature." Article 16.5 of the Convention on biological diversity of 5 June 1992 provides that the parties shall cooperate in relation to patents and other intellectual property rights in order to ensure "that such rights are supportive of and do not run counter to its objectives" while complying with national and international laws. In comparison, the preamble of the 2005 UNESCO Convention merely acknowledges the importance of intellectual property rights in sustaining those involved in cultural creativity. WTO member states gained valuable experience in the process of finding a balance between TRIPS based patent protection and health concerns, particularly around access to essential drugs for the poorer population in developing countries. From the perspective of developing countries, high standards of protection and enforcement of intellectual property rights can be detrimental to public health and nutrition policies (food security). In the Declaration on TRIPS and Public Health of 2001, WTO members recognised the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics. Ministers of WTO Member States stressed that it is important to implement and interpret TRIPS in a way that supports public health, by promoting access to existing medicines and research and development of new medicines.⁵⁷ The WTO Member States' efforts to address these issues led to a decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, and to an amendment to the TRIPS Agreement based on a subsequent decision of 6 December 2005 which is still in the process of being accepted.⁵⁸

⁵⁷ Compare recent developments in the WTO, in particular the communication by Bolivia of 26 February 2010 in the WTO Council for Trade-Related Aspects of Intellectual Property Rights (IP/C/W/545) that refers to the right to protect and develop the cultural manifestations in order to limit excessive patent protection: "(...) Another important development is the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Article 11.1 of the Declaration recognizes the right of indigenous peoples 'to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature'. Article 11.2 of the Declaration requires states to 'provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'." See also the update on the ongoing discussions on TRIPS and biodiversity at the WTO: www.wto.org/english/news_e/news10_e/trip_12mar10_e.htm.

⁵⁸ The decision of 2003 is a so-called "waiver" that allows countries to bypass a WTO rule under certain circumstances. In this case, it waived the countries' obligations under Article 31(f) of the TRIPS Agreement according to which production under compulsory licensing must be predominantly for the domestic market. This effectively limited the ability of countries that cannot make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented. See documents and regular updates on TRIPS, patents, and pharmaceuticals and public health at: www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm#declaration.

Copyright and related intellectual property rights, including trade marks and trade names, have a double-edged impact on the diversity of cultural expressions. Arguably, one should learn from the process on TRIPS and public health and critically explore this impact. This is especially advisable in order to take into account the interests of economically weaker countries. Articles 7 and 8 of the TRIPS Agreement, as well as its preamble, could serve as a starting point for this approach. Article 7 articulates the objectives of the TRIPS Agreement. It provides that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology. These contributions must be to the mutual advantage of producers and users of technological knowledge, in a manner conducive to social and economic welfare, and to a balancing of rights and obligations. Arguably the same applies, by analogy, to works protected under copyright. Article 8 enables WTO members, in formulating or amending their laws and regulations, to adopt measures necessary to protect public health and nutrition; and, to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the TRIPS Agreement. Furthermore, this provision empowers the WTO members to take appropriate measures in order to prevent the abuse of intellectual property rights by rights holders, or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology.

2.3. Copyright as an Instrument for Systematic Cultural Discrimination

From the angle of the public interest, the main reason to apply the non-discrimination principles of National Treatment (NT) and Most-Favoured-Nation (MFN) to intellectual property law, and to reinforce a substantive and procedural harmonisation of intellectual property protection, is to facilitate the cross border transfer and dissemination of technology, knowledge and trade-related culture. From the perspective of developing countries, but also of Member States vis-à-vis other Member States in the EU, one may argue that inappropriately high standards of protection of intellectual property rights generally hinder this goal for cultural goods and services from diversified origins. It is difficult for these countries to assess precisely the costs and benefits of implementing intellectual property according to TRIPS in the medium and long-term for the cultural sector. This economic assessment is even more difficult if one takes into consideration the bilateral pressures on developing and least developed countries facing an increase of the standards of intellectual property protection. The bilateral approach can substantially reduce the flexibilities granted under TRIPS, and further disturb the equilibrium between the various interests at stake, by imposing higher standards of intellectual property protection (so-called "TRIPS Plus standards"). The Commission on Intellectual Property Rights that was set up by the British government to look at how intellectual property rights might work better for developing countries summarised its findings on copyright protection as follows:

"There are examples of developing countries which have benefited from copyright protection. The Indian software and film industry are good examples. But other examples are hard to identify. Many developing countries have had copyright protection for a long time but it has not proved sufficient to stimulate the growth of copyright-protected industries. Because most developing countries, particularly smaller ones, are overwhelmingly importers of copyrighted materials and the main beneficiaries are therefore foreign rights

holders, the operation of the copyright system as a whole may impose more costs than benefits for them. (...)”⁵⁹

High levels of intellectual property protection substantially reinforce positions that are already dominant in the market. For example, strong copyright and other relevant intellectual property rights allow and induce the Hollywood oligopoly to invest up to 60% into the advertisement of their films. As we will see in more detail in the sections below, these marketing investments drive films from other cultural origins out of the market independently of their intrinsic quality and audience appeal. The same situation applies *mutatis mutandis* for music, books and other cultural expressions.

When intellectual property rights are used for forms of predatory competition leading to cultural uniformity they arguably no longer fulfil their fundamental public interest purpose. In our context, “predatory competition” means competition that is not primarily based on the quality and price of the goods and services at stake, but mainly on the strength of their advertisement and on the control over distribution that excludes competition and thus a real choice for consumers. We contend that this is analogous to the question of the appropriate level of patent protection and public health, particularly in relation to the access to so-called “essential medicine” for poorer segments of the population. If excessive levels of intellectual property protection lead to situations where many people in the world have no access to essential medicines and to the diversity of cultural expressions, there is a responsibility for policy makers in Europe and elsewhere to correct the applicable patent and copyright regimes.

Developing and least developed economies started some years ago to press developed countries to negotiate at the WTO the reform of the initial TRIPS rules on patents, particularly where they negatively affect public health. We submit that the same initiative must be taken in the field of copyright when it has a negative impact on the diversity of cultural expressions.⁶⁰ Big marketing power resulting from high levels of copyright protection enables the majors’ oligopoly to dominate the market of cultural goods and services. We submit that this oligopoly abuses its collective market domination if it practices “cultural discrimination”; and, that these practices violate the desirable new principles of “Cultural Treatment” and “Most Favoured Culture” by systematically precluding creators who do not belong to the economically dominating culture from access to the public.

In 1996, the American civil rights activist Jesse Jackson met representatives of the Hollywood majors at their trade organization MPAA in Encino, California, to complain that black artists were unduly underrepresented in the Oscar winners’ list so far. This prize provides high marketing value both for the individual winner and for the films concerned. Jackson’s protest brought media attention to what he called “institutionalized racism” within the motion picture industry. The protest stemmed from the lack of minority nominations for awards that year. Of 166 nominees, only one was non-White. Jackson denounced “cultural bias” and “cultural lockout” and announced: “We’re really trying to raise consciousness... At a certain point you have to organize and fight back.”⁶¹

⁵⁹ Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002, Executive Summary, p. 20: www.iprcommission.org The idea of the Commission on Intellectual Property Rights originated in the UK Government’s White Paper on International Development “Eliminating World Poverty: Making Globalisation Work for the Poor” published in December 2000 (paragraphs 142-149). The aim was to look at the ways that intellectual property rules need to develop in the future in order to take greater account of the interests of developing countries and poor people.

⁶⁰ Pursuant to this understanding, preferential treatment for developing countries based on Article 16 of the UNESCO Convention should not be motivated by charitable reasons, but understood as a contribution in exchange of fighting piracy and materializing the rationale of the TRIPS Agreement in compliance with human rights and fundamental freedoms.

⁶¹ See Jet, Jesse Jackson leads protest of Academy Awards ceremony, 8 April 1996: http://findarticles.com/p/articles/mi_m1355/is_n21_v89/ai_18170343/.

In Europe, art. 10 ECHR protects freedom of expression. Art. 14 prohibits discrimination and provides that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Horizontal application (“Drittwirkung”) requires that this fundamental freedom also apply in the relationship between private parties.⁶²

Under the current situation, EU taxpayers are required to finance state aid as an expensive remedy for the damages to the diversity of cultural expressions resulting from systematic cultural discrimination. For this reason, the EU should enter into an alliance with developing and least developed economies so that her common commercial policy and emerging economic constitution will contribute to a fairer world order in the cultural sector.⁶³ This claim relies on art. 205 through 207 TFEU combined with art. 21 TFEU, and requires that the Union's action on the international stage shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

2.4. Cultural Diversity and Competition Law

International trade regulations represent a challenge and threat to regional and national laws and policies that are aimed at promoting local cultural identities and the diversity of cultural expressions. Public aid for local cultural expressions is commonly considered as a distortion of international competition and trade. By economically favouring local providers of cultural goods and services via tariffs, quotas and subsidies, state intervention grants them a competitive advantage vis-à-vis foreign providers in the national market; and, in the case of export subsidies, a trade related advantage in international markets. However, the rules of the WTO and of many regional and bilateral trade agreements do not cover distortion of international trade and competition caused by private corporations dominating the market. This limited coverage of trade regulations is very relevant for cultural industries because, while these rules challenge trade distorting state intervention, they leave unsanctioned the often equally or even more harmful abuses of a dominant market position held individually or collectively by private corporations. The issue is not so much the insufficiencies of the world trading system, but rather the lack of awareness of states to address distortion of competition and trade via national anti-trust legislation.

The removal of state erected obstacles to trade promotes cultural diversity if these obstacles hinder the free exchange of cultural goods and services. The issue with the current generation of WTO rules resides in considering cultural policies as a mere distortion of trade if such policies favour local cultural content and content providers over foreign ones. However, state intervention via regulations is usually a response to market failure, understood here as the incapacity of the market forces (supply and demand) to achieve a

⁶² The horizontal effect applied to article 14 remains indirect and relies on the Contracting Parties' positive duties to protect the rights under the ECHR against both state and individual violations. Under EU law, in contrast, those protected by the principle of non-discrimination on grounds of gender for example include all physical and legal persons, while the addressees are both state authorities and individuals; see Samatha Besson, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, *Human Rights Law Review* 8:4(2008), 660, with further references.

⁶³ For the concept of European economic constitution, see Christian Joerges, *La Constitution européenne en processus et en procès*, *Revue Internationale de Droit Économique* 2006, p. 245 to 284: <http://www.cairn.info/revue-internationale-de-droit-economique-2006-3-page-245.htm> See also Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law, The Trouble with Private Informational Power*, Vaajalkoski 2009.

given policy goal, such as to protect and promote the diversity of cultural expressions. This is the case, for example, when creators and producers of artistic expressions suffer from abuses of dominant market positions causing cultural discrimination. In such a situation, providers of cultural expressions usually need the assistance of the state in order to remain economically viable. Classical tools of state intervention in the cultural sector are subsidies (direct payments) and quantitative restrictions such as quotas that are commonly used for films, books and music. This means that the local providers of cultural expressions are favoured vis-à-vis their foreign competitors who do not enjoy similar assistance from the state. This type of discrimination between local and foreign creators and producers of cultural goods and services may violate the WTO principle of National Treatment.⁶⁴

Measures of cultural policy based on subsidies are in most cases out of reach for developing and least developed countries for obvious economic reasons; that is, at least insofar as such state aid is capable of reaching a critical mass to influence market shares. This reality requires the exploration and development of new solutions.

The WTO rules that are currently in force only address trade distortion by state intervention. As mentioned, they do not cover distortion of trade and competition caused by private entities since competition law is not part of these rules. From the cultural perspective, the systemic shortcoming of this legal situation is obvious if one considers that private entities dominating a given market may strangle the creation, production and distribution of local cultural expressions. In particular, the state may need to intervene against abuses of dominant positions held by private players. The typical instrument for this purpose is competition law that, at the moment, largely remains under the regulatory competence of states. In other words, states remain competent regarding the elaboration and implementation of competition law, as they stay sovereign concerning cultural policy measures according to articles 5 to 7 of the Convention.

2.5. “Freedom of Communication” of the Economically Strongest

The film industry provides a good example of the issues at stake, which apply to a large extent also to the music and book sectors. In many countries, the film sector is divided into two blocs of interests. An oligopoly of highly concentrated corporations, the Hollywood majors, constitutes one bloc. The members of this oligopoly operate worldwide without direct state intervention and easily export their products by investing heavily in the commercialisation of films. The other bloc is deeply fragmented into small and medium-sized, locally operating undertakings. They are dependent on public aid, export little, and have small means at their disposal to invest in the promotion of their cultural activities, goods and services. We observe a similar bloc division in the music sector in many jurisdictions, whereas for the book sector in non-Anglophone territories local players tend to dominate the market in similar constellations.

We assess an imbalance that does not rest on the intrinsic quality of the works or on their potential to attract the public, but on the control exercised on the marketing front by the businesses that dominate the market. These businesses impose certain cultural contents and forms on the public; and, arguably, all the while discriminate against contents and

⁶⁴ In practical terms, state aid for cultural goods and services that are not “trade relevant”, e.g. subsidies for opera houses, or state aid that is not significant will hardly trigger pressure from the WTO (so-called “benign neglect”). However, such situations can change over time and may lead to some forms of pressure by trading partners.

forms of other cultural origins, particularly those from economically disadvantaged countries and regions. This is not consistent with the goals articulated in article 7 of the UNESCO Convention.

For some time already, research revealed that the state of the diversity of cultural expressions in the film sector is very unsatisfactory. This situation is mainly due to the absence of the cross-border circulation of films that are not produced or distributed by the major companies or their niche affiliates. This is reflected in the market shares in each EU Member State: the market is shared between films from the Hollywood oligopoly and local origin, whereas films from other Member States and third countries usually get the crumbs. This scenario is exemplified in France:

“On the French exhibition market, which is seen as the most open to diversity within the European Union, only 541 films from Asia, Africa and Latin America had a première showing between 1992 and 2003, as opposed to 1,967 from North America, 1,746 French films and 1,201 from Europe. Only 20 Indian films were shown in France during this period, 4 Thai films, 31 Korean films, 23 Mexican films (this represents a tiny proportion of the national production from these countries during this period). This under-showing is even more noticeable when one considers the number of screenings (i.e. number of times the film was shown in cinemas) as a reference criterion. Asian cinema represented 7.26 % of the number of films released during that period, but only 2.05 % of the number of screenings. This discrepancy affects also Latin-American productions (share in the number of screenings lower by 1.39 points than films released). Conversely, domestic films and American films represent a share in screenings higher than their share in the number of films (by nearly 20 points in the case of American films).”⁶⁵

Economies in transition, developing countries and least developed economies endure the most precarious situation since they generally do not have the resources to publicly finance domestic film production in a meaningful way. Moreover, these countries experience a heavy pressure from the United States in the process of negotiating bilateral agreements or adhering to the WTO and liberalize their markets of cultural goods and services. Bernier and Ruiz Fabri summarised the imbalance of cultural exchanges on the international level as follows:

“In the case of developing countries characterized by an internal market with limited resources, they usually find themselves dependent on their consumption of cultural products imported from a few developed or developing countries. (...) However, the imbalance of the international film trade for developing countries is barely offset by more balanced regional exchanges. Thus several countries with mid-sized production industries profit from a peripheral traditional market defined by geographic proximity or by a common cultural and linguistic identity. This geographic scheme is evident in Asia where the exporter countries like India, Japan and Hong Kong can control more than a third of their neighbours’ markets. For example, Indian films represent 35% of feature-length films screened in Bangladesh, while Hong Kong produces 38% of the films shown in Pakistan. The situation is not very different in the exchanges between the developed nations themselves, wherein the clear domination of one or two countries on the domestic market generally occurs to the detriment not only of national

⁶⁵ Media MUNDUS Impact Assessment, op. cit., p. 16.

production but also to other foreign producers. In the case of television, like film, the possibility of European audiences discovering a variety of European and global productions is considerably limited by the weak showcasing of films and television programmes other than those that are American or national (...). The same is equally true in Australia and in Canada (...). Inversely, we could also mention a marked imbalance in the consumption of audiovisual products in the United States in that barely 3 to 5% of the consumption in question goes to foreign productions, all foreign nationalities combined".⁶⁶

Almeida and Alleman recall that this imbalance not only concerns film, but also books and music:

"In the music industry, four of the major companies dominate the global market: Sony (Japan) and BMG (Germany) recently merged, Universal (France), EMI (United Kingdom) and Time Warner (USA). These four companies control 80% of the music market. The bulk of the global book and printed materials trade (25.6 billion dollars in 1998) is made up by 13 countries: the United States, Great Britain, Germany, France, Spain, Belgium, the Netherlands, Canada, Singapore, Hong-Kong, China, Mexico and Colombia. The United states and the Western European Countries control up to 67% of this sector".⁶⁷

It follows from these figures that there is a serious issue of access to cultural expressions in the sense of article 7 of the UNESCO Convention.

We suspect that the market shares quoted above result from cultural discrimination systematically practised by players who economically dominate the market. This alleged discrimination causes cultural mimicry in regard to residual markets. If creators want their works commercialised in a competitive manner, and thus gain access to the public, they must submit to the artistic and cultural norms dictated by the majors. Thus, creators, producers and consumers of diverse cultural origins do not enjoy the access rights provided for under article 7 of the UNESCO Convention.

In this context, we must keep in mind that measures of cultural policy based on subsidies are in most cases out of reach for developing and least developed countries for obvious economic reasons; that is, at least insofar as such state aid is capable of reaching a critical mass to influence market shares.

2.6. Market Share as Cultural Diversity Indicators

2.6.1. Categories of Countries

Market shares can serve as an indicator of the strength of domestic cultural expressions and the degree of diversity of cultural expressions in a given country. If we take the film industry as an example, we find four main types of market shares:

⁶⁶ Ivan Bernier / Hélène Ruiz Fabri, *Faisabilité, Évaluation de la faisabilité juridique d'un instrument international sur la diversité culturelle*, Laval / Paris 2002, p. 25 (working translation by the authors of this Study), at: www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/106145_faisabilite.pdf.

⁶⁷ *Les industries culturelles des pays du Sud : enjeux du projet de convention internationale sur la diversité culturelle*, Rapport pour le compte de l'Agence Intergouvernementale de la Francophonie et du Haut Conseil de la Francophonie, August 2004, p. 23, with further references.

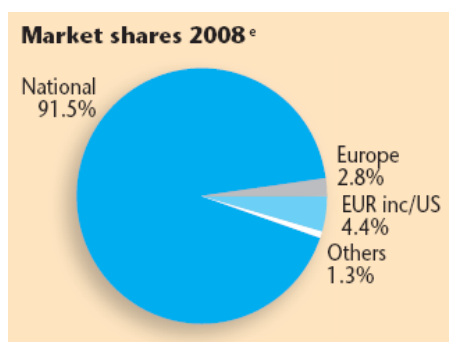
- 1) Market shares resulting from an absence of state intervention, because the local film industry dominates the domestic market (e.g., United States or India);
- 2) Market shares resulting from an absence of state intervention, because a foreign film industry dominates the domestic market and the state cannot afford consequential cultural policies (most developing and least developed countries);
- 3) Market shares resulting from state intervention mainly based on quotas (e.g., South Korea);
- 4) Market shares resulting from state intervention mainly based on subsidies and supported by quotas (e.g., the European Union).

Market shares commonly reflect the audience's demand. However, the film industry is heavily supply driven and the demand mainly conditioned by advertisement, since films are typically "prototype" goods and services. The same applies to the music and book sectors. We observe that there are no statistical data on marketing investments in the various territories that would explicate the linkage between market shares and the cultural origins of the films. We submit that policy makers should implement statistical devices to provide such information to the benefit of consumers.

2.6.2. "Cultural Quasi Uniformity" (Local Culture is Very Dominant)

Most of the non-US films in the North American market (US and Canada) come from UK and among these British films most include US investments (61.1 percent).⁶⁸ These US investments in UK films and European cultural policy measures (subsidies and TV quotas) achieve market shares of 7.2 percent for films of non-US origin in America.⁶⁹

Graph 1: Market shares in the United States



Source: Focus 2009

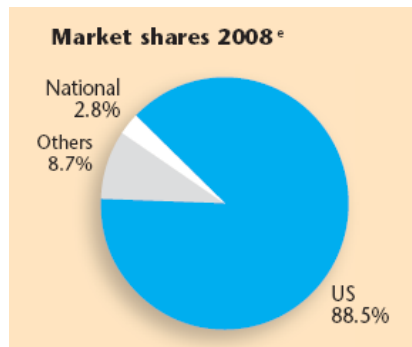
2.6.3. "Cultural Quasi Uniformity" (One Foreign Culture is Very Dominant)

Canada's market shares pattern looks similar to the one in the United States. The Hollywood majors consider this country as a "domestic" market for distribution purposes. Cultural policy measures in Canada and other countries, in particular from the EU, achieve market shares of 11.5 percent for films of non-US origin in Canada.

⁶⁸ All figures quoted from the European Audiovisual Observatory, Focus 2009, World Film Market Trends, at: www.obs.coe.int/online_publication/reports/focus2009.pdf (figures from previous years are quoted from Focus in the respective editions).

⁶⁹ See Focus 2009, op. cit., p. 19.

Graph 2: Market shares in Canada



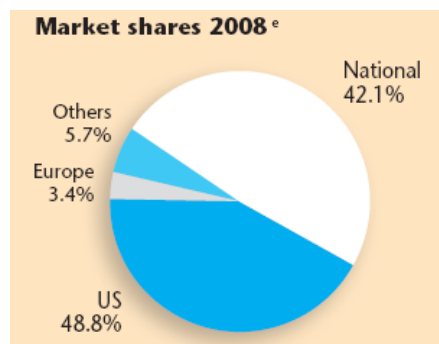
Source: Focus 2009

Focus 2009 does not provide comparable statistics for developing and least developed countries. In the absence of a strong local film industry such as in Nigeria, we assume that the market shares pattern resembles the ones in the United States and Canada, except that the foreign dominant market players may be regional (e.g., presumably, a high percentage of market shares for Egyptian films in most Arabic countries).

2.6.4. "Cultural Quasi Duality" (Local Culture and One Foreign Culture Share Most of the Market)

South Korean quota regulation leads to substantial market shares for local films, whereas films from the Hollywood majors take most of the rest of the markets shares. Films from third cultural origins have little access to this market.

Graph 3: Market shares in South Korea



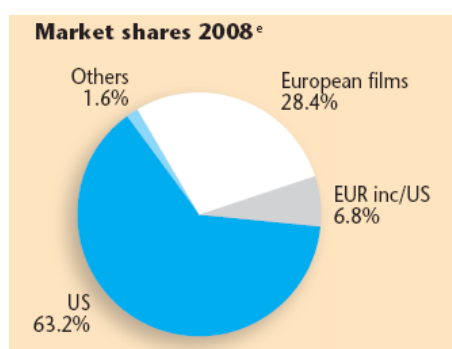
Source: Focus 2009

South Korea liberalized in recent years the quota regulation as a result of bilateral trade pressure from the United States.

2.6.5. Relative Cultural Diversity (Several Cultures Have Significant Market Shares)

The European Union provides an illustration of the fourth pattern. Most of the EU members substantially subsidise their own local film industry and enjoy additional revenues from television quota regulation. We observe that films of non-EU and non-US origins obtained only 1.6 percent of the market shares in average.⁷⁰

Graph 4: Market shares in the European Union



Source: Focus 2009

We also note that there are no statistical data on marketing investments in the various territories that would inform of the linkage between market shares and the cultural origins of the films.

2.7. Causal Link between Marketing Investments and Market Shares

2.7.1. "The Cost of Pushing Pills"

The example of the pharmaceutical industry shall allow us to discuss the shortcomings in terms of the appropriate standards of patent protection, and translate this debate into the field of copyright protection for cultural industries. From the perspective of welfare for society, the main rationale of intellectual property law is to provide an incentive for innovation and creation by granting a competitive advantage in the form of exclusive rights.

The pharmaceutical industries' main argument when advocating high standards of patent protection is to claim that these standards are in the public interest since they are necessary to secure investments for research and development. However, using data from two market research companies, Marc-André Gagnon and Joel Lexchin found that drug companies in the United States spent USD 57.5 billion on promotional activities (advertisement) in 2004 compared with USD 31.5 billion on research and development.⁷¹ In

⁷⁰ In 2002, European films outside their own national markets obtained 6.3 percent of the market shares in the European Union in average. Focus does not provide this figure for 2008.

⁷¹ The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States, The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States. PLoS Med 5(1), 2008: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050001.

other words, these pharmaceutical manufacturers invested almost twice as much in marketing and advertising medications than in research and development. These figures are obviously relevant in the context of the debate on a balanced level of patent protection for medicine.

By analogy, one should critically analyse the ratio between costs of creation and production on one side and the costs of marketing on the other, in the debate over an appropriate level of copyright protection for cultural expressions.⁷² One of the main rationales underlying the grant of intellectual property rights is to provide incentives for creative achievements. Therefore, authors and investors advocate high standards of copyright protection. Too much protection, however, is detrimental to the interest of authors who are not backed by strong distributors, in addition to the interest of the users and society at large. This is particularly true with respect to the huge accumulation of capital fuelling the production and distribution of the Hollywood majors' films. These investments, which are protected by intellectual property laws, are channelled to marketing rather than creative efforts. Ultimately, they drive most of the Hollywood oligopoly's competitors out of the market.

2.7.2. The Cost of Pushing Films, Books and Music

In all EU Member States, and in most countries outside Europe, film distribution is largely dominated by the oligopoly of Hollywood majors and their affiliates.⁷³ In this context, "film distribution" means the facility to invest in competitive marketing (stars and advertising), and to bring motion pictures to theatres with the appropriate number of copies (prints) to ensure maximum simultaneous exposure to the audience. Over the last decade, the Hollywood majors distributed an average of around 160 to 200 films per year.

The huge investments that these corporations make in the marketing of the films they produce and distribute generate market dominance. This dominance prevents films from cultural origins without competitive marketing investments from having access to audiences. Given this reality, one may question the efficiency and effectiveness of many public funding schemes in which rich states intervene in the market through subsidies to promote local cultural identities and cultural diversity. One can invest huge sums to make a motion picture; however, without competitive promotion from investments in advertisement there is little chance of accessing the public. This business reality arguably leads to a considerable waste of taxpayers' money. The same logic applies to the music and book industries. From this perspective, state aid in the form of direct payments is hardly the most cost efficient and effective measure to comply with article 7 of the UNESCO Convention.

In order to manage the high entrepreneurial risk related to the production and distribution of cultural goods and services, the film, book and music industries rely on substantial marketing means, and the financial ability to set off flops against "blockbusters" (film), "bestsellers" (books) and "hits" (music). The US film industry best illustrates these realities.⁷⁴

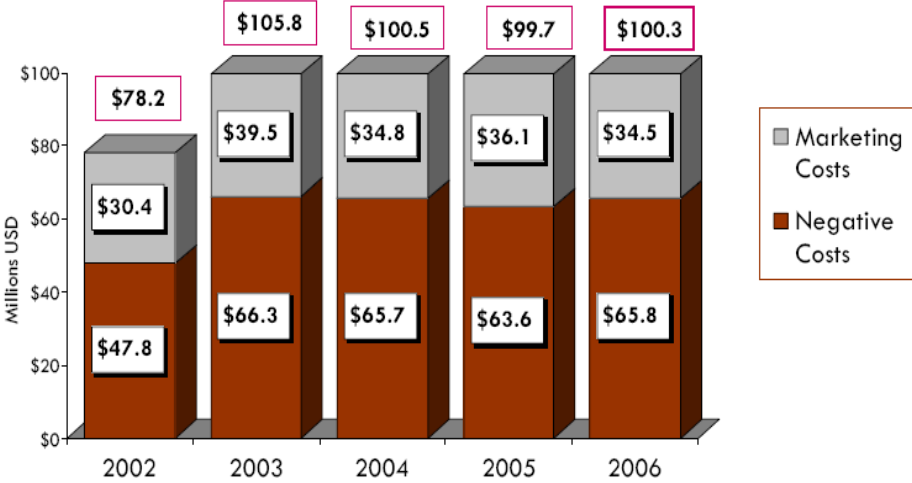
According to the statistical data provided by the MPAA, in 2006 the majors invested an average of USD 65.8 million per film in so-called "negative costs" (which includes

⁷² Since "copyright" and "droit d'auteur" do not differ substantially regarding the economic rights, we use here the term "copyright" as a synonym of "droit d'auteur".

⁷³ See information on membership and market statistics of the Hollywood majors' oligopoly at: www.mpa.org.

⁷⁴ Compare the findings in the Swiss "Blockbuster" case with further references, Commission de la concurrence, Droit et politique de la concurrence DPC 2000/4, Pratique administrative, Secrétariat de la Commission de la concurrence, Enquête préalable, p. 571ff., at: www.weko.admin.ch/dokumentation/00157/index.html?lang=fr#sprungmarke1_66

production costs, studio overhead and capitalised interest), and USD 34.5 millions in marketing costs (which includes “prints” and “advertisement”). Each year, these multinational corporations release over 160 films with an average cost structure as follows: Figure 1 MPAA member company average theatrical costs:



The MPAA no longer publishes updated statistics on marketing expenses on its website. However, one can make the reasonable assumption that these expenses hardly decreased since 2006.

On average, the Hollywood studios spend approximately twice as much on production and marketing costs as their subsidiaries and affiliates, which produce “niche” films, including artistically more ambitious works made by the so-called “studio classics” and “speciality” divisions.⁷⁵

Year	MPAA member company			MPAA subsidiary/affiliate*		
	USD 000's			USD 000's		
	Print	Advertising	Total P&A	Print	Advertising	Total P&A
2006	\$3.82	\$30.71	\$34.53	\$2.09	\$15.74	\$17.83
2005	\$3.83	\$32.36	\$36.19	\$1.85	\$13.31	\$15.16
2004	\$3.75	\$30.61	\$34.36	\$1.29	\$10.13	\$11.42
2003	\$4.21	\$34.84	\$39.05	\$1.87	\$12.80	\$14.67
2002	\$3.31	\$27.31	\$30.62	\$1.42	\$9.76	\$11.18
1996	\$2.63	\$17.21	\$19.84	NA	NA	\$0.00
1986	\$1.24	\$5.44	\$6.68	NA	NA	\$0.00

Notes: All data adjusted to exclude MGM.

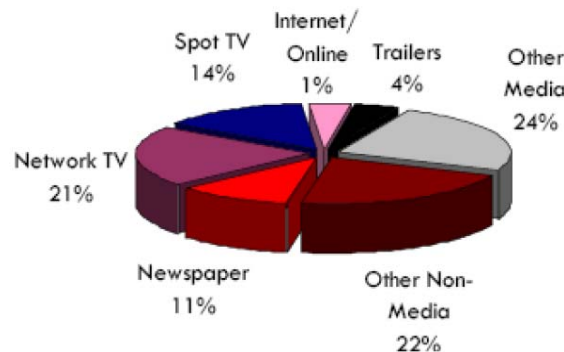
Source: MPA

⁷⁵ In 2006, the Hollywood Majors' subsidiaries and affiliates included studio 'classics' and specialty divisions such as Fox, Searchlight, Miramax, New Line, Sony Pictures Classics.

In contrast to the presentation of costs in the figures above, it makes more sense from an economic rationale to account for the costs of “stars” as marketing expenses; and, accordingly subtract them from the productions costs. If the average salary for stars (around USD 20 million) is accounted for under marketing expenses, each film produced and distributed yearly by the Hollywood studios costs approximately USD 40 million (USD 20 million for subsidiaries and affiliates) to make (production or “negative” costs, including overhead and capitalised interests), and USD 60 million (USD 30 million for subsidiaries and affiliates) to sell (marketing costs, including prints, advertisement and stars). Advertising, including investments in stars, is the main tool to lure the audience into theatres, and to cause consumption in the subsequent commercial exploitation cascade ranging from DVD sales to television broadcast. The same logic applies to the music and book industries.

According to the available statistical data, a small percentage of competitively advertised films are very successful at the box office, whereas the others either just recoup their costs or incur losses. If a producer who is independent from the Hollywood studios’ oligopoly wants to be competitive on the market, she must invest comparable sums for marketing. This highly risky investment, however, would not be reasonable if the producer and the distributor could not in case of a flop compensate losses with successful box office returns generated by other films in their catalogue. In other words, in order to compete on a level playing field, a cultural content provider needs to have access to an “essential facility” encompassing competitive marketing means, and an accounting scheme for mixed calculations that permits compensating losses with profits on a sustainable level.

The Hollywood studios spend their marketing money as follows:



The corresponding figures of the Hollywood studios’ affiliates and subsidiaries look similar.⁷⁶ These figures illustrate the spill-over effects of motion pictures on other media and eventually other contents including newspapers, magazines, television and radio.

Marketing expenditures bring visibility for a particular film in other cultural expressions; and, those contents not only gain revenues, they can use the exposure to increase their own visibility. This dynamic can impose largely uniform aesthetics and messages to the consumers and citizens, and can destroy alternative forms and contents. For example, in Switzerland publicly subsidized newspapers regularly publish lengthy film reviews in their

⁷⁶ Other media includes: cable tv, radio, magazines and billboards. Other non-media includes: production/creative services, exhibitor services, promotion and publicity, and market research. All data adjusted to exclude MGM. Source: www.mpa.org (consulted in 2007; documents on file with the authors).

cultural section on Hollywood blockbusters. This arguably qualifies as covert advertisement at the expense of tax payers and content providers from other cultural origins. Such a practice induced by majors' marketing power results in state aid for newspapers having a cannibalising effect on subsidies for films.⁷⁷

Case study: The power of marketing for “prototype” industries

The meaning of competitive marketing investments can be illustrated by the example of two films that were launched on 2 February 2006 in the German speaking market of Switzerland. They achieved approximately the same box office results after nine weeks of theatrical release, each attracting 113,000 moviegoers. The Swiss film “Vitus” starring Bruno Ganz (“Himmel über Berlin”, “Pane e Tulipiani”, etc.) was directed by the Berlin International Film Festival lifetime achievement award-winning director Fredi M. Murer (author of “Alpine Fire” - “Höhenfeuer”). An independent Swiss company distributed it with 24 copies and a marketing budget of less than 150,000 Euros.⁷⁸ At the same time, and in the same territory, the film “Walk the Line”, a biography of country singer Johnny Cash directed by James Mangold and starring Joaquin Phoenix (“Gladiator”) was marketed by the local subsidiary of a Hollywood major. Reese Witherspoon won the Oscar for the best actress. This film presumably enjoyed a substantially higher investment in local advertising, and more screening venues and time.⁷⁹

Bruno Ganz arguably has a higher marketing value than Joaquin Phoenix and Reese Witherspoon in Switzerland. However, Johnny Cash’s international notoriety may have compensated for this advantage. Therefore, the number of prints and the investment in advertising constitutes the primary measurable difference in terms of competitiveness in the commercial distribution circuit. This difference did not influence the box office results in the German speaking market of Switzerland, where film director Fredi M. Murer is well-known and triggered reasonable media coverage. However, this difference arguably penalised Vitus vis-à-vis Walk the Line in markets outside Switzerland where Vitus no longer had a “home field advantage” and competitive advertising. In this context, it must be recalled that visibility acquired during a successful theatrical release usually conditions the subsequent commercial exploitation chain such as DVD sales and rental, dissemination via television, and ancillary revenues (e.g., from book adaptation, music, video games, etc.).

In this example, both films had the same box office success in Switzerland. One can conclude that the intrinsic quality, including unbiased audience appeal, of a given cultural good or service is not as relevant as marketing power, that is from the perspective of the consumers at least during the period of initial release. This is a characteristic feature for goods and services of so-called “prototype” industries. Without state aid, the audience would not have had access to Vitus. This is evidence that there is a demand for films from diversified cultural origins that the Hollywood oligopoly supply is not able or not willing to meet. The access obligations set forth in article 7 of the UNESCO Convention are not fulfilled as long as the audience remains constrained to consume cultural activities, goods and services that are imposed by large corporations collectively dominating the market and driving the demand via their marketing power.

⁷⁷ See Sandra Vinciguerra, “Hollywood pratique une discrimination culturelle à l’échelle planétaire”, in: Le Courrier, Geneva, 13 October 2003, at:

http://www.germann-avocats.com/docs/Le_courrier_13_10_05_full_page.pdf

⁷⁸ For more information on “Vitus” see the Internet Movie Database: www.imdb.com/title/tt0478829/.

⁷⁹ For “Walk the Line” see the Internet Movie Database: www.imdb.com/title/tt0358273/.

These findings are meaningful in view of the fact that cultural goods and services, understood as mass cultural expressions, may heavily influence public opinion. Freedom of speech is in danger where such public opinion is based on films, books and music from one single, largely uniform, cultural source. In other words, there is insufficient freedom of expression, information and communication in the sense of articles 2.1 and 5.1 if there is insufficient diversity of cultural expressions. As a consequence states must intervene against marketing power that restricts the creators' freedom of expression and communication, as well as the consumers' freedom of information and opinion. State intervention aimed at protecting and promoting the diversity of cultural expressions should therefore prevent public and private players from abusing a dominant market position that restricts access to these expressions based on cultural discrimination. Intellectual property and competition laws are most relevant for this task.

We argue that the TRIPS Agreement provides the necessary flexibility to protect and promote cultural identities, and as a desirable consequence thereof, the diversity of cultural expressions. An appropriate level of intellectual property protection can contribute to a balance between the public and private interests at stake.

2.8. Marketing Rule and Proposals for Redress

For the time being, in most countries of the world, a high concentration of marketing power conditions the audience to demand mainstream aesthetics and contents that are for the most part culturally homogeneous. The average public has little choice but to consume the sights and sounds, smiles and cries, stories and underlying ideology that market dominating players are able to impose on them via heavy advertisement. Film exhibitors around the world will rent films from distributors that are likely to fill their theatres. Since success is not predictable, they will rely on available data of marketing investments performed by the distributors when making their programmes. Eventually, the audience will see the films that these exhibitors will show in their theatres. The same supply driven business pattern applies for the whole commercial exploitation cascade of audiovisual content ranging from television to DVD releases. The more marketing power content providers have, the higher their market penetration. Again, the same logic applies to books and music as well as to other cultural goods and services.

The European Commission articulated in a communication of 1999 the values underlying the objectives aimed at protecting and promoting cultural diversity in the audiovisual sector as follows:

"The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. This is not simply because they influence to a large degree which facts about and which images of the world we encounter, but also because they provide concepts and categories – political, social, ethnic, geographical, psychological and so on – which we use to render these facts and images intelligible. They therefore help to determine not only what we see of the world but also how we see it.

The audiovisual industry is therefore not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a

cultural industry par excellence. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities. This is true above all with regard to children.”⁸⁰

“*On agit sur la réalité en agissant sur sa représentation.*” - “*You act on reality by acting on its representation.*”⁸¹ The United States lost the Vietnam War in reality. In its representation on screen, however, they seem to have won it. How many Vietnam War films could audiences in the United States and abroad watch over the last decades that were authored by Vietnamese and not produced by the Hollywood majors or their affiliates? To what extent did this one-sided “freedom of expression” prepare the public opinion for new wars in Afghanistan and Iraq? In 2010, the Oscar for the best film - a major marketing hammer - went to a film on the Iraq war, *The Hurt Locker*. How many films will we see on the wars in Iraq and Afghanistan that are made by Iraqis or Afghans over the coming years?⁸²

POOLING OF PUBLICLY FINANCED INTELLECTUAL PROPERTY RIGHTS

The film business is economically and legally complex since it constitutes a so-called “prototype industry” and it involves many creative and entrepreneurial contributors at each of the different stages of the value chain (pre-production development, production, post-production, distribution and asset valorization). Production and marketing require significant investments at high risks.⁸³ Statistics show that the opportunities of a film to attract the public’s attention and scoring market shares raise parallel to the investments in its marketing, including advertisement and stars. However, since consumers’ tastes are not predictable, competition is fierce and, accordingly, profit generating success is rare. The most common result is that they break even or incur losses. As opposed to small and medium sized entrepreneurs, big corporations are able to set off the many flops against the seldom hits and thereby create valuable catalogues of intellectual property rights with the latter. These assets grant a competitive advantage over time as they allow capitalization under better conditions and provide leverage in other markets of cultural goods and services, particularly music and books.⁸⁴

⁸⁰ Principles and guidelines for the Community's audiovisual policy in the digital age, COM(1999) 657 final.

⁸¹ Michel Foucault, *Les mots et les choses, Une archéologie des sciences humaines*, Paris 1966, p. 93.

⁸² Compare Tim Arango, *Iraqis Gather to Watch Hollywood's Take on a War That Has Enveloped Their Lives*, *New York Times*, 19 March 2010: “The Iraqis gathered at the Friday movie club of the Iraqi Writers Union, a literary society for Baghdad’s intelligentsia, were no easier an audience. Bassam Abbas, a lawyer, stepped outside to smoke. A butcher shop in one scene had the wrong Arabic word on its sign, he said, it was the word that Jordanians use, not Iraqis. (The film was shot in Jordan.) “At least they could have made use of an adviser to teach them such things,” Mr. Abbas, 57, said. “And the accent is not an Iraqi accent.” He said the accent resembled an Egyptian one, perhaps not surprising since Egypt is the center of the Arab world’s entertainment industry. He said one scene, early in the film, in which an Iraqi man gets past a cordon and drives near a soldier as he approaches an I.E.D., was inaccurate because the Iraqi man did not die. “He would definitely have been shot,” he said. “I wonder how this movie got an Oscar?” he asked. “It’s unrealistic, even though I’m not a movie critic.” (...) Gone are restrictions on artistic expression, but there is very little money to pay for film production in Iraq. Mr. Manei said he would like to make a documentary drama about an Iraqi police officer who by day works as a bomb-disposal expert and by night is a musician. But for now nearly all films in Iraq are foreign. Even as the men quibbled with many of the details of “*The Hurt Locker*,” they seemed to realize it would be an important part of the historical memory of their war. “In the future, when we talk to our children and grandchildren about what happened here, this is one thing we will show them,” Mr. Hassan said.”

⁸³ See Sonja Lipus, *Die Fragmentierung geistigen Eigentums an kulturellen Gütern und Dienstleistungen – Ein Hindernis für die erfolgreiche Vermarktung europäischer Kulturgüter*, *Sic! Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht*, 11/2009, p. 834 ff.: www.sic-online.ch/2009/documents/834.pdf.

⁸⁴ Compare Harold L. Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis*, Cambridge 2007.

In Europe, most film producers would not survive without state aid granted on the national and regional levels, including quasi public, but formally private financing from television based on quota regulation and service public obligations.⁸⁵ Certain creative activities related to the production of state aided films (screenwriting, directing, acting etc.) generate copyright that the producers need to bundle in order to exploit films commercially. We can observe a considerable fragmentation of intellectual property rights that small and medium sized production companies own in Europe on this basis. This fragmentation does not allow the use of these assets as collateral to finance new projects at more advantageous financing costs since the rights do not reach the critical mass necessary for this purpose.

EU Commission staff observed that European audiovisual works suffer from a lack of private financing. In particular, seeking additional non-domestic or non-European financing is rarely vital once the public financing from the country of origin has been awarded. This prevents the development of effective export strategies. However, this also impacts negatively on the economic viability of the company and its capacity to attract private investment domestically.⁸⁶

In the Green Paper on cultural and creative industries, the Commission identifies access to funding as an obstacle constraining the growth of small to medium size businesses within the cultural and creative industries. This barrier to growth is attributed in part to the challenges in developing sustainable business plans that integrate and reinforce the valuation of immaterial assets unique to these industries. The Commission calls for new mechanisms that link private investment to these industries in a manner that increases awareness of their inherent economic value and accordingly improves European producers' access to funding.

In order to address these issues, we propose to pool the publicly financed intellectual property rights. Regulation should make such "Intellectual Property Pooling" compulsory for all state aided films that break even according to transparent accounting principles.

As analyzed above, the uneven playing field in the film industry results from an imbalance of marketing power favouring US majors' productions over those originating from other origins. In order to respond to this disparity, for the purpose of increasing the diversity of cultural expressions, European producers need a more solid financial basis. This objective requires new incentives for private funding of production and distribution of their films that will enhance competitiveness.

The status quo in the European subsidized film sector largely ignores the potential of capitalizing intellectual property as collateral to finance new projects. For the time being, a plethora of undercapitalized small and medium sized film production companies are satisfied to own small pieces of intellectual property without taking advantage of pooling these assets. Such pooling could cross-subsidize marketing costs of films that have an audience appeal. IP pools can achieve a critical mass for the purpose of providing securities

⁸⁵ Local content quota regulation requires the broadcaster to buy the relevant intellectual property rights to broadcast films that meet this obligation. Quota regulation economically translates into licence fees and/or investments based on co-production agreements between television companies and independent film companies. Although these sources of financing do not legally qualify as state aid in most jurisdictions, economically they certainly do, in particular when consumers and/or tax payers are obliged to finance the public service provided by television even without using it.

⁸⁶ Commission Staff Working document accompanying document to the Proposal for a decision of the European Parliament and of the Council establishing an audiovisual cooperation programme with third countries MEDIA Mundus, Impact Assessment Report, op. cit., p. 17.

for private financing of the production and distribution of new projects. It is a waste of tax payers' money to allow publicly financed intellectual property rights to lie fallow. Accordingly, policy makers at the level of the EU and her Member States should elaborate a new mechanism to valorise these fragmented rights for the public good. Collecting societies can inspire the institutional design required for this objective.

2.9. Variable Geometry for the Duration for Copyright Protection

We contend that obstacles to the access to affordable medicine and access to cultural expressions pursuant to article 7 of the UNESCO Convention have in common excessive levels of intellectual property protection. As a consequence, we argue that the implementation of the "shall endeavour" obligations contained in this provision should be based on a new balance of the relevant interests at stake in compliance with the rationales underlying the grant of copyright, trademark and related intellectual property rights. However, in the cultural sector, and in contrast to public health, the objective is not about promoting "generics" as cheaper imitations, but inducing dominant market players to invest in the diversity of cultural expressions instead of diverting huge marketing resources in uniform cultural contents. Moreover, we suspect that investing in diversity could be more profitable than imposing uniformity.

As a concrete response to the systemic issue at stake, we perceive a momentum to mainstreaming culture in a compulsory way by challenging the duration of copyright terms. Germany pioneered extending the terms of protection from 50 years, pursuant to the Berne Convention, to 70 years, which now constitutes a so-called "TRIPS Plus" standard of protection. The rationale of this extension refers to the fact that the World Wars frustrated several generations of authors from the benefits of the economic rights in their works. In 1993, the copyright duration directive extended the German term of protection to all Member States. As a consequence, the United States followed the trend in spite of considerable resistance from civil society. Today, obviously, the rationale underlying this extension is no longer relevant for post-war generations of authors in Europe and the United States – the war has been over for quite some time! We therefore propose to elaborate a new paradigm based on a variable geometry regarding the terms of copyright protection: the higher the marketing investments the shorter the terms of protection.

A more radical version of this proposal would aim at reducing the duration of copyright protection below the terms of the TRIPS Agreement for works that enjoy predatory investments in their advertisement.

Variable geometry shall provide strong disincentives for exorbitant investments in marketing that damage the diversity of cultural expressions; and, provide commensurate incentives for reasonable investments in marketing. Tax measures to be adopted on the level of the Member States shall complement the system and, in particular, prevent circumvention via trademark protection or similar means. We envisage that this new legal mechanism shall eventually condition undertakings that dominate the market to promote cultural contents from a diversity of origins. It shall avoid concentration of excessive marketing resources on a relatively small number of culturally homogeneous goods and services.

2.9.1. Cultural Non-Discrimination to Access Competitive Marketing as "Essential Facility"

The Meaning of Marketing for Competition Law Applicable to Cultural Industries

Article 167 of the Lisbon Treaty (ex Article 151 TEC) must be workable for administrative and judicial procedures on cartels, abuses of dominant position, mergers and acquisitions. In order to delineate an appropriate way to define the relevant market of cultural industries, we shall explore the framework of the film industry as an emblematic cultural sector. First, the

relevant competitors must be defined. For the cinematographic sector, which drives large parts of the cultural industries, there are chronologically separate sub-markets in the exploitation cascade (theatrical market, various types of television and video markets). If a film is successful in the theatres, it will likely be broadcasted in prime-time on television and become a video bestseller. Theatrical exploitation, as the primary market, includes three sub-markets characterized by the supply and demand relationships as follows:

First, film producers (supply) and distributors (demand); second, distributors investing in print and advertising (supply), exhibitors investing in the screening facilities and local advertising (demand); and, third, eventually exhibitors (supply) and the cinema audience (demand).

The most significant theatrical sub-market is the one between the distributors (supply) and exhibitors (demand), since it largely conditions what will be available for the public to consume in theatres, on television and for home sale and rental (this can also include parallel markets such as books and music which often spin-off from the success of a movie).

The territorial market between distributors and exhibitors is international, since in theory a local exhibitor can rent a film for screening in his theatre from distributors around the world who usually operate through local subsidiaries or independent contractors (local distributors or "sales agents"). We will therefore focus on the second theatrical sub-market, between distributors (supply) and exhibitors (demand), to explore the definition of the product or service relevant market.

According to our proposal, the definition of the product and service market needs to take into account the economic specificity of cultural industries. The common approach under competition law is to assess the substitutable character between goods or services from the perspective of the demand. This approach facilitates a determination of whether such goods or services are in a competitive relationship with each other. According to EU case law, the relevant product or service market encompasses all products or services that the consumer considers as substitutable or interchangeable with each other based on (1) their physical characteristics, (2) their price, and (3) the use to which they are dedicated.⁸⁷ These criteria make little sense when applied to mass cultural goods and service. For example, films, books and music often show little price differentiation; their physical characteristics are difficult or even practically impossible to define without an arbitrary recourse to aesthetic and content related considerations; and their intended use is commonly entertainment, perhaps combined with personal enlightenment.

From the perspective of the theatrical exhibitors, the rental price of a film is generally based on a percentage of the box office results. Aesthetic and content related aspects are largely irrelevant as long as the use of the film for screening purposes attracts as many moviegoers as possible into their theatres (profit maximisation).⁸⁸ Therefore, the most relevant criterion for substitutability from the perspective of the exhibitors' demand is the audience appeal of a given film. This appeal is largely unpredictable prior to the launching of the film in the market if one relies on a subjective criterion such as the characteristics (aesthetic and content) of the film, which is typically a "prototype". Competitive investments in the marketing of a film will provide more comfort to the exhibitors, and therefore condition their choices.⁸⁹ We therefore

⁸⁷ For a summary of the case law, see Advocates General's opinion of 28 May 1998 in the case Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, Case C-7/97, ECR 1998 I-07791.

⁸⁸ See "Blockbuster" decision, op. cit.

⁸⁹ Arthur De Vany Arthur. 2004, *Hollywood Economics. How extreme uncertainty shapes the film industry*, London / New York 2004, p. 122, describes the "blockbuster strategy" as follows: "The blockbuster strategy is based on the theory that motion picture audiences choose movies according to how heavily they are advertised, what stars are in them, and their revenues at the box office tournament. The blockbuster strategy

suggest that competition authorities replace the criteria of physical characteristics, price and intended use with a more objective measurement – that is, the amount of investment in print and advertising when they assess the substitutability of films. One should adopt the same market definition for music and books, as music hits and book bestsellers are also largely conditioned by huge investments in advertising and distribution.

Authoritarian regimes and democracies, in times of war, equate cultural policies with propaganda and censorship. This applies in particular to the film industry and more generally to printed and audiovisual media. The so-called “blockbuster strategy” originates from military jargon.⁹⁰ For democracies in times of peace, there are defensive weapons against this form of extremely aggressive and destructive cultural imperialism that do not rely on tax payers' money, and can therefore be applied both in rich and poor countries willing to implement cultural diversity.

In our assessment, national agencies and courts have failed so far to use competition law to protect and promote the diversity of cultural expressions, because they were unable to define adequately the relevant product and service market (i.e., the goods and services and their suppliers competing with each other). Furthermore, competition authorities have faced the difficulty of defining and implementing cultural diversity whilst assessing merger and acquisitions. Arguably, the main problem resides in the lack of clear criteria for the diversity of cultural expressions as well as in the traditional definition of relevant markets. We recommend using marketing investments made by competitors within cultural industries as the main criterion to assess anti-trust relevant situations and transactions (cartels, mergers and acquisitions, abuses of dominant position). These investments in advertisement cause market power that can harm the diversity of cultural expressions under certain circumstances. In addition, competition authorities should develop a clear picture on how this investment relates to the cultural origin of films, books and music by players dominating the market of cultural industries. This approach requires the elaboration of predictable and transparent rules to measure marketing investments, and to define the cultural origin of the goods and services at stake.

is primarily a marketing strategy that suggests the movie-going audience can be ‘herded’ to the cinema. Where this theory is true, then the choices of just a few movie-goers early in a film’s run would determine the choices of those to follow. This suggests that the early choosers are leaders or people on whom later choosers base their choices. They choose to follow these ‘leaders’ because they believe they are more informed than they are or because they neglect their own preferences in order to mimic the leaders. Audiences who behave this way are said to be engaged in a non-informative information cascade. It is non-informative because their choices are not based on the opinions of the leaders, only their revealed actions, and the followers do not reveal their true preferences when they choose only what the leaders chose.”

⁹⁰ Compare David Puttnam, *The Undeclared War: Struggle for Control of the World's Film Industry*, London 1997, who also uses, as a former Hollywood film industry insider and British parliamentarian, war terminology to describe the Hollywood diktat worldwide. In particular, he recalls the collaboration between the Hollywood majors and the US government to impose post war American dominance on screen, p. 213f.: “The American administration saw movies as a crucial weapon in the battle to re-educate the peoples of Germany, Italy and elsewhere in the virtues of democracy in general and American democracy in particular, a propaganda offensive which, in the words of one American senator, was simply ‘a world-wide Marshall plan in the field of ideas’. A Hollywood producer put it even more plainly: ‘Donald Duck as World Diplomat!’ (...) In Germany and Italy especially, the ideological case made by the government for encouraging the distribution of Hollywood movie effectively allowed the American industry to re-establish its dominance. In Italy, Admiral Stone, the chairman of the Film Commission which oversaw the development of the industry, unambiguously stated that the country no longer needed a film industry and that it should not be allowed to create one. (...) In Germany, the American film companies had found that their earning were blocked by foreign exchange restriction and could not be changed into dollars. (...) In 1948, the Truman administration came to the rescue, creating the Informational Media Guaranty Program (IMG) under which the government paid dollars for soft foreign currencies earned by American media firms, providing that the material presented a favourable picture of American life. In effect, the United States Information Agency directly subsidized American distributors in countries such as Germany, Poland and Yugoslavia so long as the local currencies remained blocked. As a result, Germany remained saturated with Hollywood product throughout the 1950s and well into the 1960s. By 1957, the German market, which only twelve years earlier had been completely closed to the American industry, would be its third largest export market after Canada and the United Kingdom.”

Case study: Sony–BMG merger

The decision by the European Commission on the merger between Sony and BMG in the music sector is emblematic of the administration's and judiciary's failure to duly define the relevant market and competitive relationships. In this case, the Commission subdivided the relevant market for recorded music (including A&R and the promotion, sales and marketing of recorded music) into distinct product markets based on genre (such as international pop, local pop, classical music) or compilations.⁹¹ The Commission left open the question of whether these genres or categories constituted separate markets, "as the concentration would not lead to a creation or strengthening of a dominant position under any market definition considered."⁹²

One must stress that the Commission did not assess this merger under the cultural clause of the EC Treaty, i.e., Article 151, paragraph 4 (now article 167). This cross-cutting provision requires "mainstreaming" of cultural concerns. That is, the Union shall take cultural aspects into account in its action under other provisions of the EC Treaty, particularly in order to respect and to promote the diversity of its cultures. As a consequence, the Sony /BMG decision is not consistent with the cultural clause of the EC Treaty. The Commission should have analysed the question of whether the concentration between Sony and BMG could have a negative impact on cultural diversity. It should have assessed the possibility that increased marketing power of the merged entities would have diminished the supply of recorded music from a variety of cultural origins. This assessment would have required analysing data on the link between marketing expenditures and the cultural origin of the recorded music. All other ways to subdivide the market, in particular on genres and compilations, is without legal relevance, and ultimately arbitrary and misleading for the purpose of defining the relevant market and assessing market power in relation to the diversity of cultural expressions. Furthermore, the Commission should have evaluated the effect resulting from a more concentrated oligopoly on cultural diversity in a correct manner as collective market dominance.

By judgement on 13 July 2006, the Court of first instance annulled the Commission's decision on the grounds that the Commission did not correctly assess the relevant facts, and erred in law with respect to the question of a collective dominant position. The Court, however, did not question the Commission's definition of the relevant markets, and did not further elaborate on the impact of the merger on the diversity of cultural expressions.⁹³ This sentence did not contribute to including cultural diversity concerns into the development of law; rather, it has the contrary effect. The lawyers for the complainants should have required the Court to define the relevant markets according to the "competitive relationships" or "substitutability" of the goods and services at stake as conditioned by marketing power. Indeed, the relevant markets should have been defined according to the investments in advertisement. Under such a definition of the relevant markets, the concentration certainly led to the creation or strengthening of a dominant position, and very likely to less diversity of cultural expressions being marketed in a competitive way.⁹⁴

⁹¹ A&R = Artist and Repertoire; the music industry's equivalent of research and development.

⁹² See the decision of the European Commission of 19 July 2004, C(2004) 2815, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case No COMP/M.3333 - Sony/BMG, OJ 62/30, 9.3.2005.

⁹³ Judgment of the Court of First Instance of 13 July 2006, Case T-464/04 Impala v Commission [2006] ECR II-2289.

⁹⁴ For a more detailed discussion on the desirable definition of the relevant market for cultural industries, see Christophe Germann, *Diversité culturelle et libre-échange à la lumière du cinéma Basle/Brussels/Paris 2008*, p. 90 – 98.

2.9.2. Applying the “Essential Facilities” Doctrine to Marketing Power

If policy makers decide to activate competition law resources in order to meet the objectives of the UNESCO Convention, they should explore the so-called “essential facilities doctrine” under U.S. and EU law. In a nutshell, this doctrine “imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.”

The United States Supreme Court first articulated this doctrine in *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). In this case, a group of railroads controlling all railway bridges and switching yards in and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. The Court held that this constituted both an illegal restraint of trade and an attempt to monopolise. Because it represents a divergence from the general rule that even a monopolist may choose with whom to deal, courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant access to an essential asset by its competitors.

Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors: (1) control of the essential facility by a monopolist; (2) the inability of the competitor practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.⁹⁵

This test for antitrust liability has been adopted by virtually every United States court that has considered an “essential facilities” claim. Opinions of these courts also suggest that antitrust liability under the essential facilities doctrine is particularly appropriate when denial of access is motivated by an anticompetitive animus. Given the varied contexts in which the essential facilities doctrine has been applied, courts have declined to impose any artificial limit on the kinds of products, services, or other assets to which the doctrine may appropriately be applied. The essential facilities doctrine does not unequivocally require that a facility be of a grand nature, nor is the doctrine specifically inapplicable to tangibles such as a manufacturer’s spare parts. The term “facility” can apply to tangibles such as sports or entertainment venues, means of transportation, the transmission of energy or the transmission of information, and to intangibles such as information itself.⁹⁶ The European Court of Justice adopted a similar approach that is summarised in the Advocates General’s opinion of the Oscar Bronner case of 28 May 1998.⁹⁷

The European Court of Justice recalled that the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of such a position. However, pursuant to this case-law, exercise of an exclusive right by the owner may, in exceptional circumstances, involve abusive conduct. Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only if the following conditions are met: The undertaking that requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary

⁹⁵ The European Court of Justice added a fifth criterion requiring the absence of legitimate business reasons to refuse the access to the facility.

⁹⁶ See Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law*, Paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, not dated. For a more detailed analysis of the development of the essential facilities doctrine in the US and the EU with further references to case law, see Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law*, op. cit., p. 502 ff.

⁹⁷ Case C-7/97, ECR 1998 I-07791. The Court came to the conclusion that there was no essential facility in the case at stake.

market by the owner of the intellectual property right; but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.⁹⁸

In the IMS case, the Court held that the refusal to grant a licence constitutes an abuse of a dominant position within the meaning of article 82 TEC (now Article 102 TFEU) when the following conditions are fulfilled: (a) the undertaking that requested the licence intends to offer, on the market at stake, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand; (b) the refusal is not justified by objective considerations; and (c) the refusal is such as to reserve to the owner of the intellectual property right the market at stake by eliminating all competition on that market. The Court therefore confirmed in this case that the application of the “essential facilities” doctrine to market dominating positions that rely on intellectual property rights requires the supply of a new good or service. Arguably, this is most often the case for cultural activities, goods and services that typically qualify as “prototypes”.⁹⁹ However, these requirements as applied to intellectual property are not relevant for the qualification of marketing power, including advertisement as an “essential facility”, except for marketing power resulting from trademarks and trade names. The latter cases need further research since the legal function or rationale of trademarks and trade names consist also in informing consumers about the origin and quality of the goods and services. In any case, the essential facilities doctrine shall not serve to promote mere imitations of cultural expressions since it would run contrary to the very essence of the objectives of the UNESCO Convention.

We submit that the “essential facilities” doctrine, when applied to cultural goods and services in this situation, shall be subject to a test on cultural discrimination to assess an abuse of dominant position. In other words, a competent court should find an abuse of dominant position if the entity having such a position in terms of marketing power violates the principles of “Cultural Treatment” or of “Most Favoured Culture” discussed below. In such a situation, the abuser arguably must be forced to grant access to its marketing power, including advertisement, trademarks, trade names and related intellectual property rights. More detailed modalities and exception for specific cases need further elaboration.

Mylly summarizes and briefly analyses a main trend of the essential facilities doctrine as follows:

“Since Bronner, the essential facilities doctrine has been in retreat in Europe. In the US, the *Trinko*-judgement has been said to represent the near extinction of the doctrine in the Supreme Court. These developments may be connected to the impact of the Chicago School on both sides of the Atlantic on the underlying ideological premises of competition law and antitrust, respectively. Chicago School competition literature insists that firms controlling various infrastructural facilities will internalise the complementary efficiencies, that is, they will benefit from new applications and complementary innovations produced by other firms,

⁹⁸ See *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, para. 34 ff., with references to the judgments in Case 238/87 *Volvo* [1988] ECR 6211, para. 8, and Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission* (“Magill”), ECR 1998 I-743.

⁹⁹ Compare also with the *Microsoft* case [2004] COMP/C-3/37.792 and T-201/04, *Microsoft Corp v Commission* [2007] ECR II-3601; see Tuomas Mylly, *op. cit.*, p. 523. According to the Court of First Instance, prejudice to consumers within the meaning of Art. 82(b) TEC could arise not only where the refusal to license causes a limitation of production or markets, but also technical development. The “new product” criterion became in this case a test of innovation incentives. The Court confirmed that in the examination of the “new product criterion” the innovation incentives of Microsoft were irrelevant. It only considered the impact of the refusal to licence on the incentives for Microsoft’s competitors to innovate. As an objective justification, the dominant firm must demonstrate a significant negative impact on its own incentives to innovate (para. 697 and 701).

as these will increase the price of the whole platform. Thus the policy recommendation is to abstain from competition law intervention as the platform owner will act rationally and open its platform whenever it is economically efficient and deny access only when it is inefficient.”¹⁰⁰

Obviously, the kind of “efficiency” thinking propagated by the Chicago School does not capture the specificities of cultural industries, except when market dominating corporations purchase intellectual property rights to re-make works from other cultural origins that were successful, or when they practice more or less overtly “cultural piracy”. In both cases, “internalization of efficiencies” will lead to synthesized cultural expressions. They can sometimes generate own cultural value (for example, by analogy, “tex mex” cuisine). Most often, however, they silence or mutilate the original cultural expressions when they are “domesticated” under the diktat of the economically dominating ones. The latter case is inconsistent with the objectives of the UNESCO Convention, genuine freedom of expression, and the underlying principles of equitable access, openness and balance. We therefore advise the EU Commission and the Court to review the negative trend adopted in the Bronner case law and to re-think the essential facilities doctrine in line with the specificities and complexities of cultural industries in order to render this doctrine compliant with article 167 TFEU and the UNESCO Convention.

TESTING THE “ESSENTIAL FACILITIES” DOCTRINE BEFORE STATE COURTS

In light of the market structure and mechanisms currently prevailing in the film, music and book sectors, most of the providers of cultural goods and services which are denied access to this essential facility cannot reach the audience independently of the public appeal of their content. This situation falls under the scope of article 7 of the UNESCO Convention. Either these creators and producers receive support from the state or they are driven out of business. This situation may inspire legislators and judges to elaborate and use competition rules based on the essential facilities doctrine, which are specifically aimed at enhancing a level playing field among cultural content providers from a variety of cultural origins. Furthermore, by forcing market dominating private players to contribute to the policy goals at stake, such a solution may substantially contribute to implementing cultural diversity without unduly relying on taxpayers’ money. It would therefore also constitute an affordable way for economically weaker countries to promote cultural diversity.

We advise concerned stakeholders to test before courts whether the current market situation that enables the majors to invest over USD 10 billion annually in marketing (stars, print and advertising) qualifies as an essential facility. Furthermore, the majors’ corporate and contract-based control of domestic and international film distribution and exhibition should also qualify as an essential facility. Hollywood majors own substantial intangible assets in the form of catalogues of intellectual property rights that serve to guarantee the financing of this marketing. These huge intangible assets are one of the majors’ main tools to dominate the markets on a permanent basis. One must recall that in Europe the ownership of such rights is fragmented among small and medium-sized producers, which are financed substantially by the state. One can therefore consider the majors’ marketing power and distribution control as an essential facility that content providers from other cultural origins cannot duplicate without tremendous state aid.

¹⁰⁰ Tuomas Mylly, *op. cit.*, p. 536, with further references (footnotes omitted).

Our proposal to adapt the “essential facilities” doctrine specifically to cultural goods and services, as well as our recommendations to introduce variable geometry for the duration of copyright protection and a progressive tax on marketing, aim at preventing cultural discrimination by players dominating a given market as defined in terms of marketing investments. Jessie Jackson’s protest of 1996 mentioned above and his attempt to raise consciousness about cultural bias and cultural lockout remains fully valid today *mutatis mutandis* in most jurisdictions. His call to stand up and organize redress shall inspire legislators in Europe and worldwide to act against cultural exclusion practiced by big corporations dictating uniform cultural contents to the public via the marketing hammer. In this undertaking nothing less than the artists’ freedom of expression, the public’s freedom of opinion and the protection and promotion of the diversity of cultural expressions are at stake.

2.9.3. “Cultural Treatment” and “Most Favoured Culture”

Given the economic specificity of cultural industries, we argue that states, and private players with a dominant market position, can restrict the free movement of cultural goods and services. In other words, such private players, notably the oligopoly of the Hollywood majors, control cross-border trade of cultural goods and services. For the time being, these corporations arguably keep the gate closed for the cultural goods and services from a diversity of cultural origins in a way that requires measures in keeping with article 7 of the UNESCO Convention. A combination of competition and intellectual property law could provide a remedy against this situation.

Intellectual property protection is the *nerf de la guerre* of cultural industries. This protection relies on state activities and resources such as the elaboration and implementation of national and regional legislation and policies on copyright, performers’ rights, trade marks, trade names, etc. The protection of copyright, related rights, trademarks and trade names is the Achilles heel of private and public cultural players that abuse their dominant market position and practice systematic cultural discrimination. The economically weakest state can strike this heel in order to force such players to contribute to the promotion of cultural diversity on its territory. If a state is eager to promote cultural diversity on its territory, it should make the receipt of public support in form of intellectual property rights protection by private sector firms a contingency for contributing to the legitimate state’s cultural policy goals.

We submit a new deal for stakeholders to discuss: states should protect the intellectual property of a rights holder having a dominant market position, only if the rights holder contributes commercially to preserving and promoting the diversity of cultural expressions in that state’s territory. On the other hand, if such a rights holder systematically discriminates on the basis of the cultural origin of films, music or books - that is, if it violates the principles of “Cultural Treatment” or “Most Favoured Culture” outlined below - the state should be entitled to refuse to grant intellectual property protection to its works. This is analogous to the cross retaliation applied in the Ecuador-Banana and Antigua-Gambling WTO cases.¹⁰¹

¹⁰¹ In the Ecuador arbitration case, the WTO Dispute Settlement Body authorised Ecuador to suspend national treatment in the field of intellectual property protection for right holders from the EC as a sanction against the EC’s violation inter alia of the Most Favoured Nation clauses concerning the distribution of Ecuadorian bananas into the EC (GATT and GATS violation were “cross retaliated” by a suspension of protection granted under TRIPS). In other words, this ruling legalised in Ecuador the copying of films, music and books of European rights holders without their consent and without remuneration for determined period of time. This suspension of intellectual property protection meant a retaliation against the European Community’s discrimination between African and Latin American bananas. For a more detailed analysis of this case, see also Fritz Breuss / Stefan Griller / Eric Vranes (eds.), *The Banana Dispute - An Economic and Legal Analysis*, Vienna / New York 2003. The WTO Dispute Settlement Body adopted the same approach in the case Antigua and Barbuda against the United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Decision by Arbitrator of 21 December 2007, WT/DS285/ARB) summarized at

Why should such a sanction be available against economic discrimination caused by the infringement of international trade rules and not against a violation of the desirable prohibition of cultural discrimination? We suggest states should be entitled to suspend the application of the National Treatment principle to trade-related intellectual property rights of foreign rights holders if they have a business practice that is detrimental to cultural diversity. This proposal is founded on article 7 of the UNESCO Convention in combination with articles 7, 8 and 40 of the TRIPS Agreement (the former treaty being linked to the latter via article 20 of the UNESCO Convention).¹⁰²

In order to structure this new approach, we propose a distinction in reference to the various cultural stakeholders mentioned in article 7 of the UNESCO Convention between:

- **“Factors of creation and production of cultural goods and services”** (artists, creative technicians and producers);
- **“Factors of commercial distribution and exhibition (marketing) of cultural goods and services”** (distributors and others who invest in marketing and exhibition);
- **“Factors of consumption of cultural goods and services”** (audiences and other media which use the original cultural goods and services in other formats and markets).¹⁰³

For most cultural goods and services, the factors of the second category condition the activities of the factors of the first and third categories. Distribution and exhibition (marketing) filter the access to cultural expressions from the factors of creation and production to the factors of consumption.¹⁰⁴

Both commercial considerations and cultural preferences affect this filter. States must intervene where “cultural bias” and “cultural lockout” without qualified commercial justifications cause cultural discrimination. Article 10 and 14 ECHR in combination with articles 5 to 7 of the UNESCO Convention make this state intervention compulsory in the European countries that are parties to the ECHR and the UNESCO Convention.

In summary, we recommend that legislators should implement a new balance between the factors of creation and production, distribution, and consumption of cultural goods and services in order to level the playing field. This desirable equilibrium should be based on new principles of law prohibiting “cultural discrimination”. These “meta-rules”, which we label “Cultural Treatment” and “Most Favoured Culture” principles, would mirror the WTO principles of National Treatment and Most Favoured Nation. They shall materialize “free culture” on an equal footing with “free trade”. The legal challenge consists in making them equally enforceable in order to implement freedom of expression and contribute to rendering international trade fairer.

www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm See also Associated Press, WTO Clears \$21M in Sanctions Vs. US, 21 December 2007,

www.antiguawto.com/wto/AP_WTOclears21MSanctionsVSUS_21Dec07.pdf and Nicholas Wapshott, U.S. May Suffer After WTO Rules Against Internet Gambling Ban, in New York Sun, 27 December 2007: www.nysun.com/foreign/us-may-suffer-after-wto-rules-against-internet/68620/.

¹⁰² For an introduction to articles 7, 8 and 40 of the TRIPS Agreement, see Thomas Cottier / Christophe Germann, Concise International and European IP Law - TRIPS, Paris Convention, European Enforcement and Transfer of Technology, London 2010.

¹⁰³ “Factors” means here labor and capital in the context of creation, production, distribution and exhibition, whereas it means intermediary or end consumers in the context of consumption. “Distribution and exhibition (marketing)” includes all forms of supply and communication to the public.

¹⁰⁴ Compare Fiona Macmillan, Copyright and corporate power, in Ruth Towse (ed.), Copyright in the Cultural Industries, Cheltenham, p. 99 – 118.

To illustrate our proposal, we have adapted GATS Articles II and XVII as follows:

Article I

Most Favoured Culture Treatment

With respect to any measure covered by this Agreement, each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord immediately and unconditionally to cultural goods and services and to the factors of cultural creation and production of another cultural origin treatment no less favourable than that it accords to like cultural goods and services and their suppliers of any other cultural origin.

Article II

Cultural Treatment

Each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord to cultural goods and services and to factors of cultural creation and production of any other cultural origin, in respect of all measures affecting the distribution and exhibition (marketing) of cultural goods and services, treatment no less favourable than that it accords to its own like cultural goods and services and like factors of cultural creation and production.

Article III

Maintenance of a culturally discriminatory measure

The public, private or mixed-economy factors of distribution and exhibition (marketing) of cultural goods and services having a dominant market position may maintain a measure inconsistent with articles I and II provided that such a measure is effectively demanded by the factors of consumption.

This tentative formulation of the principles of Cultural Treatment and Most Favoured Culture require more comprehensive elaboration. Private and mixed-economy factors will be bound under these principles by the states that grant them the protection of their intellectual property rights in their respective territories. In other words, the states that adhere to these principles will no longer protect the intellectual property rights of private and mixed-economy factors engaged in commercial activities in their jurisdictions as long as these factors do not comply with these principles.

TESTING “CT” AND “MFC” BEFORE NON-STATE COURTS

The parties to the GATT, and since 1995 the members of the WTO, have developed the National Treatment and Most Favoured Nation principles over the course of half a century. The full meaning of these rules still needs to be explored further. This relatively long period of time illustrates the complexity of non-discrimination principles as applied to trade. It will presumably also require considerable time to fully develop the cultural non-discrimination principles of Cultural Treatment and Most Favoured Culture.

This policy objective should start to flourish from grassroots initiatives and find its way up to the international level. We envisage a three step approach, starting from local action over national legislation and concluding with the international system. First, local public bodies such as cities or rural collectives would set up non-state tribunals where creators, producers and consumers of cultural goods and services could sue private and public players having a dominant market position and that are suspected of discriminating culturally. In such trials, the court would hear the stakeholders in order to establish the relevant facts and apply the principles of Cultural Treatment and Most Favoured Culture to these facts. The procedural rules could be inspired by those found in the WTO Dispute Settlement Understanding. If a moot court concludes that a corporation or a state practices cultural discrimination that affects the jurisdiction where the court is located, such a court can order the entity to change its behaviour in an appropriate way.

Concretely, this would mean that the convicted players are required to open their marketing and distribution facilities to contents from a greater variety of cultural origins. If these players refuse to follow the non-state court ruling, the court could order as a sanction that the intellectual property of the infringer would no longer be protected in the jurisdiction of the court for a given period of time. This sanction should be commensurate with the damage incurred to local diversity of cultural expressions. This trial and error process based on litigation would generate non-binding but authoritative case law. Eventually, guided by article 7 of the UNESCO Convention, this jurisprudence could be transformed progressively into state law by a codification on the national level as constitutional and legal norms. Once this codification process is achieved, the contributions by the moot courts would have become regular instruments of law, and their rulings and sanctions would become enforceable.

Arguably, our proposals are consistent with the Preamble and articles 7, 8 and 40 of the TRIPS Agreement in combination with article 20 of the UNESCO Convention. They rely on national competition laws appropriately constructed to address cultural diversity concerns. UNESCO and WTO Members should negotiate the integration of cultural diversity law, developed via moot courts and national courts, into the multilateral trading system in a similar way as public health concerns were addressed in the Doha round. UNESCO, UNCTAD and WIPO, as well as other relevant international, regional governmental and non-governmental organisations, should contribute to this process. Such an undertaking could ultimately generate new predictable and enforceable rules that would bring cultural diversity concerns on a level playing field with international trade concerns.

2.10. The Instrument of Non-State Tribunals in the Absence Of Access to State Judiciary

2.10.1. The Representation of Justice As Instrument for Civil Society¹⁰⁵

There are several noteworthy examples of representatives of civil society collectively taking initiative in different contexts in order to settle disputes or highlight a lack of accountability for grievances or abuses. These models contain important features that are easily transferrable to other contexts. That is, at a baseline they represent important examples of civil society taking the initiative to mobilise public awareness, promote constructive dialogue, and give a voice to public opinion. The following is a descriptive account of a selection of such models deployed in diverse settings.

2.10.2. The Women's International War Crime's Tribunal

The Women's International War Crime's Tribunal on Japan's Military Sexual Slavery ("Women's Tribunal") was organised in 1998 by national and international civil society groups aligned with the women's movement in the Republic of Korea. The purpose of this adjudicatory body was to address the widespread acts of sexual violence committed by members of the Japanese military against women. Several representatives of civil society in Asia convened the tribunal; and, thereafter, established an organising committee (comprised of Asian NGOs) and an International Advisory Committee (comprised of international NGOs). Prior to the tribunal proceedings, which were held over the course of a few days in December 2000, there were a series of preparatory meetings and conferences that served organisational and administrative purposes. During these preliminary sessions there were also various symposia and other public engagements that enjoyed international attention.

The tribunal proceedings featured testimonies from academic scholars and survivors; and were well attended by the public and media representatives. Evidence for the acts of violence in question was gathered and submitted to the tribunal by prosecution teams, which were represented by nine different countries and led by two chief prosecutors. A panel of four Judges presided over the proceedings and issued a preliminary judgment on the fourth and final day of the hearings. A final judgment was given a year later.¹⁰⁶

2.10.3. The Bertrand Russell War Crime Tribunal and the Permanent People's Tribunal

Prior to the end of the Vietnam War, Bertrand Russell founded the International War Crimes Tribunal with its first meeting in 1966. It was established to address the atrocities committed by the US against the Vietnamese people over the course of the war; and, accordingly provided a documenting of these abuses, which otherwise would have remained unrecorded. As Jean-Paul Sartre acknowledged in the Inaugural Statement, the tribunal was not an institution in the manner of being endowed with power from the state or established by mandate from a government authority; rather, the tribunal's 'legality comes [precisely from] both its absolute powerlessness and its universality.' Indeed, in this respect it was intended to be a 'Court of the People'.¹⁰⁷

¹⁰⁵ Author of this section: Jonathan Henriques

¹⁰⁶ See Violence Against Women in War – Network Japan for more information, available at <http://www1.ica.apc.org/vaww-net-japan/english/womenstribunal2000/whatstribunal.html>; and see the report for International Commission of Jurists detailing these events and providing some legal analysis, "Comfort Women: An Unfinished Ordeal – Report of a Mission 11-14" (International Commission of Jurists 1993).

¹⁰⁷ Prevent the Crime of Silence : Reports from the sessions of the International War Crimes Tribunal founded by

The tribunal's proceedings included testimonies regarding the abuses during the war, as well as expert analysis and opinion from leading academic scholars and representatives from non-governmental organisations. Indeed, the tribunal created a 'precedent for transnational solidarities'; and several more 'Russell Tribunals' have followed its blueprint, such as those addressing the situation in Iraq and Palestine.¹⁰⁸ Significantly, the Russell Tribunal also inspired the creation of the Permanent People's Tribunal. The Preamble of the Statute for the Peoples Tribunal states that the tribunal was created by and for the mobilisation of 'world public opinion':

"Whereas until the progressive governments accept and set up international organisms...it is up to enlightened political groups and advanced trade-unions, supported by world public opinion to create international structures to attract the attention of governments, political movements, trade-unions and world public opinion to the serious and systematic violations of the rights of people (...)." ¹⁰⁹

This statement is emblematic of the potential force and vitality of civil society to grapple with social problems even when confronted with ostensibly weak institutional support and political will at the state level. The Peoples' Permanent Tribunal has since addressed a variety of issues such as: the suppression of the Bangsa-Moro people in the Philippines during Marcos rule; allegations of the Armenian genocide in Turkey; the use of force by Indonesia in East Timor; and, the allegations surrounding the Chernobyl accident.

2.11. Enforcing the Access to Diversified Cultural Goods and Services as Freedom of Expression

The dispute settlement system of the UNESCO Convention is legally very weak and only accessible to States Parties of this instrument. At first sight it does not appear that members of civil society have access to a judicial remedy. However, it is worthwhile to further explore ways to overcome this substantial shortcoming of the UNESCO Convention. This is especially relevant for jurisdictions that are parties to the European Convention on Human Rights (ECHR), or that have national constitutions allowing for so-called "horizontal application" or "Drittwirkung" of human rights and fundamental freedoms.¹¹⁰ Representatives of civil society could provoke case law in these jurisdictions addressing the obligation to grant access to cultural expressions from diversified origins. For this purpose, they could argue that the provisions on freedom of expression, such as article 10 of the

Bertrand Russell.

¹⁰⁸ Jayan Nayar, *A People's Tribunal Against the Crime of Silence? The Politics of Judgement and an Agenda for People's Law*, Law, Social Justice & Development (2001) available at <http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html>.

¹⁰⁹ Paragraph 5, Preamble of the Statute of the Permanent Peoples' Tribunal.

¹¹⁰ Basic texts and case law on the ECHR at: www.echr.coe.int/echr/ Outside of Europe, Section 8 of the Bill of Rights of South Africa is an example that sets forth horizontal application, see: www.constitutionalcourt.org.za/text/rights/bill.html and Van der Walt, J, *Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism*, Law, Social Justice & Global Development Journal (LGD) 2003, at: www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/walt/ This author argues that the "horizontal application" under South African constitutional law has a specific meaning: "We invoke the term 'horizontal application' whenever fundamental rights find application in disputes between private legal subjects, that is, when fundamental rights are said to bind private individuals and not only the state as the classical theory concerning the application of fundamental rights suggests. This is the standard understanding of horizontal application, an understanding that is certainly not insignificant for my argument. The conflation of economic and political power often takes place today because of the impact of huge business concerns on national politics. In other words, neo-feudal or neo-colonialist power is most often wielded today by private legal subjects. However, the understanding of horizontal application in terms of the application of fundamental rights on private legal subjects is not always accurate. The South African legal system may in fact well be the only legal system in which horizontal application can be understood in this way, given the specific articulation of the application clause in section 8(2) of the Constitution of South Africa of 1996. It can nevertheless be argued that the South African judiciary has yet to come to terms with the articulation of horizontal application in section 8(2)."

ECHR or the equivalent in national constitutions, require the state to enforce access under article 7 of the UNESCO Convention.¹¹¹ In such trials, they could challenge excessive levels of intellectual property protection and selective state aid that manage to escape sound judicial scrutiny. They could argue that copyright and trademark protection for marketing investments drive “diverse cultural expressions from within their territory as well as from other countries of the world” out of the public's reach in violation of article 7.1 (b) of the UNESCO Convention. They could further argue that in the absence of substantive review by courts, one cannot exclude the risk that cultural policies based on selective state aid may serve as a tool for covert censorship practiced by experts with government mandates. Indeed, such a risk is incompatible with an “environment which encourages individuals and social groups (...) to create, produce, disseminate, distribute and have access to their own cultural expressions”, pursuant to article 7.1 (a) of the UNESCO Convention. In the first situation, private parties that dominate the market violate the freedom of expression. In the second situation, the state potentially violates this same freedom.

2.12. The Case of Abolishing “Selective” State Aid Procedures in Democratic Regimes

There are two primary mechanisms of awarding state aid in the form of direct payments for cultural goods and services: So-called “automatic” and “selective” procedures. Procedures are “selective” if they are based on the opinion of experts with mandates from public funding schemes to evaluate, in their personal capacity, artistic projects or completed works. Selective aid procedures refer to criteria such as quality, originality and cultural value. These criteria are essentially subjective, and thus allow for broad discretion in their interpretation. In contrast, state aid granting procedures are “automatic” if they are based on conditions established by the applicable rules that do not include experts’ discretion.¹¹² In this respect, we observe that granting automatic state aid is similar to the way that copyright allocates revenues to right holders.

When subsidies are selectively granted on the basis of state-appointed expert opinions, the creators’ freedom of expression and the public’s freedom of opinion are at risk, especially in the absence of effective legal safeguards.¹¹³

In practice, selective state aid provides a quasi-unrestricted discretionary power to governments. It relies on procedural rules that are insufficiently subject to the principles of transparency, accountability and predictability. Decisions founded on such experts’ opinions

¹¹¹ Freedom of expression is protected by article 10 of the European Convention on Human Rights and article 11 of the Charter of Fundamental Rights of the EU. In the case *Handyside v. the United Kingdom*, the European Court of Human Rights stressed the democratic necessity to respect in particular views that are different, para. 49: “Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (...), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.

¹¹² E.g., when a funding scheme grants a flat amount for each cinema ticket sold to the producer of a film that is eligible for such state aid.

¹¹³ The study conducted for the European Commission on the economic and cultural impact of territorialisation clauses of state aid schemes for films and audiovisual productions of 2008 demonstrated that most of the subsidies in the EU are distributed to beneficiaries on the basis of so-called “selective state aid” schemes; see the legal database on funding schemes in 25 Member States at: www.germann-avocats.com/documentation/index.htm. Rolf H. Weber and Rena Zulauf analysed the selective aid related objectives and concepts underlying the Swiss film promotion from 2003 to 2005 as set forth in an ordinance to the Swiss cinema law of 2002. They concluded that these provisions are excessively open and vague for legal purposes, see *Filmförderung und Recht – Schwierige Ausbalancierung von Anforderungen*, in: *Jusletter*, 14 April 2003, points 13–15.

normally cannot be challenged in the courts. The experts' decisions and funding recommendations are hardly suitable for judicial review, except on purely formal grounds: *De gustibus non est disputandum* - or, to put it in our specific context, there is no dispute in matters of taste. Criteria of quality, originality and cultural value are intrinsically unsuitable for a substantive scrutiny by courts. Thus, these selective aid granting decisions constitute in fact a legal "no man's land". This situation enables states to preserve a strong decision-making power that allows them to reject projects for "implicit" or "tacit" reasons under the cover of stated reasons that leave a broad margin of assessment. If states abuse their power, which is typically the case in authoritarian regimes, but can also happen in liberal democracies, they can censor content as well as tolerate and even facilitate forms of clientelism and corruption. When experts are incompetent and/or dependent, this way of distributing subsidies can destroy the creativity, originality and autonomy of artists. Furthermore, even when experts are competent and independent, this system does not stimulate the competitive and innovative spirit of cultural entrepreneurs (publishers, producers, distributors, etc.). Rather, it induces conformism vis-à-vis the experts' tastes. As a consequence, this "expertocracy" can oblige the audience to consume mediocre, uniform or censored cultural goods and services. Without appropriate legal safeguards, selective aid can drive creative and innovative talent and entrepreneurship out of reach of the public.

These possible consequences of the experts' diktat can be detrimental to the quality of the cultural industries affected by such practices when this diktat excludes real talent from the market. In this sense, selective aid can have a negative impact on the diversity of cultural expressions. Policy makers should therefore protect cultural industries not only from market economies that suffer from oligopolitic private power, but also from the power of the states to correct market failures damaging cultural diversity. The financial involvement of states in cultural industries should comply with the principle of an effective separation of the state and the culture - by analogy, the separation of the church and the state as inspired by the rationale underlying the principle of secularism ("principe the laïcité"). Such a desirable new approach would promote freedom of opinion and expression in conformity with article 2.1 of the UNESCO Convention. It would protect artists as the core contributors of contemporary cultural expressions, according to article 7.2; and, in a way that should be justiciable, it would protect artists from the states' and their experts' potential illegitimate covert control.

"AN INCONVENIENT TRUTH"

The example of "An Inconvenient Truth", a film by Davis Guggenheim, illustrates the various issues related to so-called "selective" state aid. This film covers former US Vice President Al Gore's efforts to halt the progress of global warming. In 2007, this film won an Oscar for the best documentary. Let us imagine a scenario where the producer, director and main performer are not Americans, but Chinese. They would apply for selective state aid in Beijing based on a written outline of their project. The authorities' experts would issue a negative opinion: the "screenplay" proposes a treatment of the topic that is not sufficiently visual since it essentially relies on a power point show. Based on these experts' opinion, the authorities would refuse state aid to the production of this work by stating that it lacks artistic value. The production company could not challenge this decision in court, essentially because one cannot litigate about taste.

In this example, we could never know whether the selective state aid funding scheme's statement of reasons referring to a lack of artistic quality actually hide politically motivated censorship. We submit that the same scenario could apply in any liberal democracy, including all EU Member States. If a film-maker applies for selective state aid in Switzerland in order to fund a project that is critical of the bank secrecy law, in the same vein as "An Inconvenient Truth", one cannot reasonably exclude a

similar outcome. In fact, selective state aid requires the applicants to blindly trust the state's power of decision. It therefore grants quasi-unrestricted power to States, both in authoritarian regimes and liberal democracies, to circumvent the rules protecting freedom of expression. Hence, we advocate applying the "precautionary principle" inspired from environmental and public health whenever selective state aid is granted: one cannot exclude censorship under the cover of taste.

At the same time, States that do not insure protection against prohibitive levels of advertisement protections induced by copyright, trade mark and related forms of intellectual property law will tolerate and even promote "marketing censorship".¹¹⁴ We doubt that "An Inconvenient Truth", if it was made outside of America today, would have enjoyed the same marketing facility to access such a broad audience. Market domination induced by excessive intellectual property protection fails to deliver a competitive level-playing field between cultural expressions of comparable potential audience appeal. This situation requires appropriate state action from jurisdictions that consider cultural activities, goods and services not to be exclusively economic matters.

2.13. The "Rougemarine" Case: *De Gustibus Non Est Disputandum*

The judgment of the European Court of First Instance of 9 July 2002 in the case of the French film production company Rougemarine SARL against the European Commission illustrates the issue of limited judicial scrutiny that is inherent to the selective aid criteria and procedures commonly followed in subsidizing cultural industries in Europe and elsewhere.¹¹⁵ It concerned the refusal by the European Commission to award financial support to Rougemarine in the framework of the MEDIA II programme in order to encourage the development and distribution of European audiovisual works. The applicant, Rougemarine, an independent film production company, was majority-owned by its manager who was not a national of any of the Member States of the European Union or of any other European State that participated in the MEDIA programme. Rougemarine alleged that the European Commission's refusal to aid its film project was discriminatory. It claimed that the Commission had refused to award financial support on the grounds that its majority shareholder was a Tunisian. While this was *not made explicit* in the contested decision, Rougemarine argued that it was *in fact* the decisive factor. It held that it was a victim of discrimination and challenged the legality of the contested decision; and, it claimed illegality with regard to the nationality condition laid down in the fourth paragraph of Article 3 of Decision 95/563.

Rougemarine alleged, first, that the contested decision infringed on article 12 of the EC Treaty and the fundamental principle of equality. In the applicant's view, the nationality criterion applied to it resulted in discrimination between European companies according to the nationality of their majority shareholder. Rougemarine argued that such discrimination was contrary to the general principle of equal treatment laid down in case-law and in article 12 of the EC Treaty. It further claimed that the projects which it had submitted in response to several calls for proposals satisfied the selection criteria with regard to the quality and originality of the concept, the know-how of the production company and its staff, the project's production potential, and the possibilities of transnational production. Last but not least, it argued that the subjective criterion of the quality of its project had been met. The applicant therefore considered the Commission's systematic rejection of its various projects

¹¹⁴ There is little systematic research on the relationship between freedom of expression and intellectual property protection. Compare from the perspective of intellectual property interest groups the legal database by the International Association for the Protection of Intellectual Property on "Conflicts between trademark protection and freedom of expression" 2005 at: www.aippi.org/?sel=questions&sub=listingcommittees&viewQ=188#188 In the context of cultural goods and services, trademark protection plays an important role for marketing; for example the star system fulfils a similar function as trademarks to sell films, music and books from the economic perspective.

¹¹⁵ Case T-333/00. For a more detailed critique of "selective" state aid, see Christophe Germann, The "Rougemarine Dilemma": how much Trust does a State Deserve when it Subsidises Cultural Goods and Services?, European University Institute, EUI MWP 2008/22: <http://cadmus.eui.eu/dspace/handle/1814/9027>.

as evidence that the real basis for the contested decision was the nationality of its majority shareholder.

2.13.1. Intrinsically Arbitrary “Selective” State Aid Criteria

The Commission stated that all the projects submitted in the context of the call for proposals at stake had been carefully examined by an “independent expert” in light of the following selection criteria:

- 1) quality and originality of the concept;
- 2) experience of the applicant company and its team members;
- 3) suitability of the project for production;
- 4) suitability for transnational distribution.

The Commission refuted Rougemarine’s allegation that its project had not been selected because it was not considered to be a “European” production company.¹¹⁶ It submitted that the sole basis of its decision was the fact that, following an assessment by the Commission’s independent expert, the applicant’s project had not satisfied the stated selection criteria of quality, and was not therefore eligible for Community funding. It alleged that there were no unstated grounds for rejection, and claimed that the refusal to grant support to Rougemarine’s film project was exclusively attributable to its intrinsic weaknesses and not to discrimination of any kind that might infringe on the EC Treaty.

In support of her allegation, the Commission produced the report of the independent expert who was responsible for evaluating the applications for financial support. This report pointed out the shortcomings of Rougemarine’s project, in particular that the script did not seem to be developed to a sufficient degree, and that the proposed budget was too large given the potential audience.

2.13.2. Problematic Burden of Proof and Terse Statement of Reasons

The European Court of First Instance ruled that Rougemarine had the burden to prove its allegation that the Commission’s decision was in fact based upon the nationality of Rougemarine’s main shareholder. Since Rougemarine was not able to provide this evidence, and since it was clear from the file that the Commission had considered the merits of the applicant’s project without mentioning the question of nationality, the Court concluded that Rougemarine’s project had been properly evaluated against the stated selection criteria.¹¹⁷

The Court concluded that it was because of the inherent quality of the project, and not for any reason relating to the applicant’s possible ineligibility, that the Commission had rejected Rougemarine’s application for financial support. In other words, the Court ruled that Rougemarine had been refused the subsidy because its project was qualitatively bad, and not because its main owner was Tunisian.

¹¹⁶ The Council submitted that the nationality criterion challenged by the applicant was objective and non-discriminatory. It pointed out that there was no general principle of Community law obliging the Community to accord the same treatment in all respects to third countries and their nationals as that accorded to Member States and their citizens Case 52/81 *Faust v Commission* [1982] ECR 3745, paragraph 25; Case C-122/95 *Germany v Council* [1998] ECR I-973, paragraph 56; and Joined Cases C-364/95 and C-365/95 T.

¹¹⁷ The Court left Rougemarine’s claim that the Commission’s decision infringed Article 12 of the EC Treaty open because it considered it as irrelevant since the Commission’s decision made no mention of Rougemarine’s eligibility for the MEDIA II programme with regard to the nationality of Rougemarine’s majority shareholder; see points 37 and 41 of the Judgment.

The Court of First Instance also rejected Rougemarine's complaint that the reasoning in the contested decision had been inadequate. It assessed the question of whether the statement of reasons met the requirements of article 253 EC not only in the light of its wording, but also in the light of its context and of all the legal rules governing the matter in question as follows:

"It is clear from the contested decision that the Commission rejected approximately 84% of the 577 applications for financial support which it examined. In those circumstances, providing more detailed reasons in support of each individual decision would have significantly slowed down the process of awarding the Community funds available under Call for proposals No 3/2000 (see by way of analogy Case C-213/87 *Gemeente Amsterdam and VIA v. Commission*, [1990] ECR I-221 (Summary publication), paragraph 2). Although terse, the statement of reasons in the contested decision did enable the applicant to defend its rights and the Court of First Instance to exercise its supervisory jurisdiction."¹¹⁸

The Court therefore concluded that the summary nature of the statement of reasons in the decision by which the Commission refused to award financial support seemed to be an inevitable consequence of the large number of applications for support submitted; and, from which the Commission had to give a decision within a short period of time.

2.14. Separation between Culture and State to Empower Artists and the Public

The Rougemarine case illustrates, in an emblematic way, several issues of selective state aid granting mechanisms that concern not only the film sector, but also cultural industries in general, including the book and music sectors. We label this problem the "Rougemarine Dilemma".

Applicants for selective state aid face a dilemma between the necessity to ask the state to finance their projects, and the need to trust that the state will act in good faith and in compliance with fundamental principles of law when granting or refusing support. The applicant must also contend with doubts regarding the state appointed experts' competence, independence and impartiality to opine on the quality of their projects on the other. Subjective statements of reasons form the essence of a decision on selective aid, and are on the whole excluded from judicial control. Therefore, the core issue lies in the absence of satisfactory legal protection for the applicant against abuses by the state and its experts. In practice, this means not only that one cannot challenge bad decisions, but also that the quality of the experts themselves remains beyond scrutiny.

State intervention necessitates a presumption of good faith. Accordingly, one should presume that both funding schemes and their experts act in good faith, particularly regarding impartiality, when assessing the quality of the projects submitted; and that they do not refuse selective aid upon the basis of hidden "implicit" conditions or reasons. As a consequence of this presumption, the burden of proof lies with the party that argues that a project was denied selective aid for such an implicit condition or reason. Nevertheless, one should treat this presumption with due scepticism and ask the fundamental question: How much trust does a state deserve when it subsidizes cultural expressions? This question is at the heart of the Rougemarine Dilemma.

The Rougemarine Dilemma arises whenever a party alleges that implicit conditions or reasons have been applied by funding schemes in order to refuse to support a film project; and, when the stated grounds of such a refusal are insufficient quality, originality or

¹¹⁸ Point 44 of the Judgment.

similarly vague concepts such as “artistic merits” or “cultural value”, etc. Generally, applicants whose projects were rejected will find no evidence of unstated reasons. Their dilemma in this case is either to continue trusting the state and submit new applications in the future, or exit the game that they perceive as unfair be it imaginary or real. In the latter case, those creators who leave will be lost as sources for the diversity of cultural expressions.

The financial involvement of EU Member States in cultural industries should comply with the principle of an effective separation of state and culture. This principle is analogous to the separation of church and state, as inspired by the rationale underlying the French principle of secularism (“principe de laïcité”). A mere formal separation between state and culture will not be sufficient.¹¹⁹ Only genuine separation between state and culture on formal and informal levels can promote freedom of opinion and expression in conformity with article 2.1 of the UNESCO Convention. In a manner that should be justiciable, such a separation of power would protect artists from States' and their experts' potential covert control. In this regard it protects the artists as the core contributors of contemporary cultural expressions. Consequently, it also protects the public in its freedom of choice.

RECOMMENDATIONS

- Both “selective” state aid and intellectual property rights provide immense power to States and large corporations, respectively. In the worst-case scenario, the abuse of this power facilitates censorship, propaganda, consumerism and cultural discrimination. Hence, this power must be constrained by strict democratic control. For this purpose, “selective” state aid must be abolished while the copyright system must be amended in order to replace it.
- The protection and promotion of intellectual property rights, in particular copyright (“droit d’auteur”), performers' rights (“droits voisins”), trademarks and trade names, must be balanced by appropriate rules of competition law.
- Cultural policy makers should envisage variable geometry for the terms of copyright protection. The higher the investments in the advertisement of cultural goods and services, the shorter the duration of copyright.
- Without an adequate and sector-specific balance between intellectual property rights and competition law, policies and measures aimed at protecting and promoting cultural diversity are at risk of being captured and wasted by the interests of economic players having a dominant market position. Such a situation constitutes a threat to freedom of communication, expression and opinion.
- Competition law must be adapted to the specific situation of cultural goods and services. This means that the relevant market and competitive relationships must be defined on the basis of investments in the marketing of cultural goods and services.
- Bilateral trade agreements between the EU and developing and least developed countries shall not impose higher standards of intellectual property protection without simultaneously imposing appropriate and effective safeguards based on

¹¹⁹ By analogy, see the Irish Commission to Inquire on Child Abuse on the importance of a strict separation between the church and the state in matters of justice at: www.childabusecommission.ie/.

competition law, which are specifically adapted to the economic situation of developing and least developed countries. In certain situations, additional flanking measures must be implemented in order to materialize equitable access to cultural goods and services on the bilateral level.

- Investments in marketing of cultural goods and services shall serve as the main criterion to define a relevant market or “competitive relationship” (substitutability of goods and services) for the purpose of assessing a dominant market position.
- The legal concept of abuse of a dominant market position under article 102 TFEU and the doctrine of “essential facilities” as developed by the case law of the European Court of Justice must be adapted to the specific situation of cultural goods and services in accordance with article 167 TFEU.
- The concept of abuse of a dominant position in combination with the doctrine of essential facilities should include a test on so-called “cultural discrimination”. This test shall rely on the principles of “Cultural Treatment” and “Most Favoured Culture”, and shall address the access to investments in marketing for cultural goods and services in each relevant territory.
- Civil society should contribute by way of dispute settlement procedures in non-state tribunals in order to render the Convention “justiciable”. Through such initiatives all concerned stakeholders can elaborate at a grassroots level a set of procedural and substantive rules to assess and adjudicate cultural discrimination based on the principles of “Cultural Treatment” and “Most Favoured Culture”. This would serve as a response to claims of trade distortion based on the WTO principles of “National Treatment” and “Most Favoured Nation”.
- Cultural diversity indicators for cultural activities, goods and services should be based on market shares in each relevant territory, and should be analysed against detailed statistical data on investments in the marketing of these cultural expressions.
- EU Member States should introduce a progressive marketing tax for blockbusters, hits and bestsellers whose proceeds of at least Euro 2 billion per year shall be distributed to the International Fund for Cultural Diversity and to local distributors of cultural goods and services from diverse cultural origins.
- This fiscal tool shall also serve as a statistical source to render patterns of consumerism of entertainment and cultural goods and services more transparent in an effort to promote substantive freedom of expression and opinion. Accordingly, the providers and distributors of cultural goods and services should be obliged to disclose these data in a transparent and reliable manner.
- In countries subsidising the production of cultural expressions, the intellectual property rights should be pooled and collectively managed for the purpose of exploiting such catalogues as collaterals to attract funding from private sources for the production of new cultural expressions.

NEW TASKS FOR PUBLIC AND PRIVATE STAKEHOLDERS

Civil society

Taking stock of the current situation regarding the diversity of cultural expressions, articulating and proposing law and policy instruments to improve the situation.

Identifying categories of cultural stakeholders according to their respective influence, economic power and interests; and, establishing a forum where the respective positions can be articulated and voiced.

Establishing non-state tribunals to hear cases on cultural discrimination in order to develop case law that further develops the rules of the Convention, and the principles of "Cultural Treatment" and "Most Favoured Culture".

MS institutions

Engaging in a "multicultural dialogue" and exchanges of best practices, which specifically refer to the Convention, between various categories of MS, communities and stakeholders.

Elaborating legal safeguards to insure a separation between state and culture by articulating guidelines to level the playing field between cultural bureaucracy and established creators on one side, and new entrants and outsiders on the other side; and, accordingly, critically reviewing existing schemes of so-called "selective" aid from the perspective of the promotion of freedom of expression and entrepreneurship.

EU institutions

Introducing the positions of a "Cultural Diversity Ombuds(wo)man" and a "Cultural Diversity Advocate" on the levels of the Member States and the European Union who shall apply the Convention in combination with the principles of "Cultural Treatment" and "Most Favoured Culture".

Encouraging the establishment of non-state tribunals to hear cases on cultural discrimination in order to develop case law that further develops the rules of the Convention and the principles of "Cultural Treatment" and "Most Favoured Culture".

Establishing a forum for a structured dialogue and exchange of experience on issues related to the further implementation of the Convention, particularly in economically weak states and authoritarian regimes, between (a) migrants and cultural minorities in Europe, (b) members of the European diaspora and expatriates world wide, and (c) cultural policy makers at the municipal and national levels in Europe in order to promote the principles of openness and solidarity.

Engaging in a "multicultural dialogue" that is specifically based on the Convention between various categories of MS, communities and stakeholders.

These structured dialogues would build on existing experience and contribute to an exchange of information on best practices that are relevant for the implementation of the Convention under its various sections.

Monitoring of implementation of the Convention and its compliance as effective for trade rules (WTO peer review mechanism) and anti-bribery treaties (International Transparency).

Involving civil society by transposing the Aarhus Convention into the cultural diversity domain and further developing this instrument in order to insure best practices for the internal decision making process, transparency and accountability of non-governmental organisations.

Insuring timely access to information from state agencies by civil society.

Introducing the position of the so-called Visiting Cultural Diversity Ministers on MS level. As a new complement to the Open Method of Coordination each MS' government would have such minister from another MS in its cabinet. This would contribute to reinforcing exchanges between MSs on cultural diversity policies and make these policies more open and dynamic. These Visiting Ministers shall contribute to the implementation of the Convention and of article 167. They shall meet twice a year in an EU visiting cultural diversity ministers' conference and inform the civil society, the European Parliament, and the Commission on the progress of the actions aimed at protecting and promoting the diversity of cultural expression in Europe.

Study Paper 2C: The Aarhus Convention and the implementation of the UNESCO Convention

Christine Larssen

Executive Summary

The 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters organises a detailed participatory system, based on three procedural rights: access to information, public participation in decision-making and access to justice in environmental matters.

The Aarhus Convention's participatory system could inspire the EU for the implementation of the participatory provisions of the UNESCO Convention – under certain conditions. Indeed, although presented as a “model” of participatory democracy, the Aarhus Convention's participatory system is not flawless.

This contribution highlights and develops concerns of the Aarhus Convention's participatory system of particular importance to cultural diversity, and offers lines of thoughts to the EU on how to address and avoid those concerns while implementing the participatory provisions of the UNESCO Convention.

2.1. The Aarhus Convention: A Source of Inspiration for Implementing the Participatory Provisions of The UNESCO Convention?

“Democratic governance presupposes forms of government and modes of decision-making that take account of the multicultural composition of contemporary societies and their wide variety of beliefs, projects and lifestyles. In promoting a more inclusive form of governance, the management of cultural diversity can turn a societal challenge into a democratic strength [...]”.¹²⁰

2.1.1. Introduction

The 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters organises a detailed participatory system, based on three procedural rights: access to information, public participation in decision-making and access to justice in environmental matters.

The Aarhus Convention's participatory system could inspire the EU for the implementation of the participatory provisions of the UNESCO Convention – under certain conditions, pinpointed by this contribution.

The expression “participatory provisions” of the UNESCO Convention includes here, not only the immediately relevant provision of Convention – article 11 (“Participation of civil society”¹²¹) –, but also, as we shall see, the following provisions:

¹²⁰ *Investing in Cultural Diversity and Intercultural Dialogue*, UNESCO Publishing, 2009, p. 221.

¹²¹ “Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.” On art. 11, see D. Ferri's contribution at www.diversitystudy.eu.

- **Article 7** (“Measures to promote cultural expressions”):

“1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:

(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;

(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.

2. Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.

- **Article 9** (“Information sharing and transparency”):

“Parties shall:

(a) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level;

(b) designate a point of contact responsible for information sharing in relation to this Convention;

(c) share and exchange information relating to the protection and promotion of the diversity of cultural expressions”.

And

- **Article 10** (“Education and public awareness”):

“Parties shall:

(a) encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, *inter alia*, through educational and greater public awareness programmes;

(b) cooperate with other Parties and international and regional organizations in achieving the purpose of this article;

(c) endeavour to encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries. These measures should be implemented in a manner which does not have a negative impact on traditional forms of production”.

Although qualified as a “[...] major step forward in international law [...]”¹²², and a model of (environmental) democracy¹²³, the participatory system of the Århus Convention is not flawless.

The present contribution highlights and develops concerns of the Århus Convention’s participatory system of particular importance to cultural diversity, and offers lines of thoughts to the EU on how to address and avoid those concerns while implementing the participatory provisions of the UNESCO Convention.

Though this critical analysis of the Århus Convention’s participatory system may seem rather disparaging, the aim of this contribution is by no means to defuse the participatory momentum.

On the contrary, by pinpointing democratic weaknesses of the Århus Convention’s participatory system, the wish is to contribute making “participatory democracy” truly democratic.

Ensuring the democratic nature of the participatory system, of importance in any area, is particularly vital for promoting and protecting the diversity of cultural expressions.

After a brief presentation of the Århus Convention’s participatory system (2.1.2), concerns of the system will be highlighted and developed (2.1.3), and measures adopted in the wake of the Århus Convention, addressing some of these concerns, will be presented (2.1.4).

The contribution then concludes with recommendations on how the EU could address and avoid the concerns of the Århus Convention’s participatory system while implementing the participatory provisions of the UNESCO Convention (2.1.5).

2.1.2. The Århus Convention’s Participatory System

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, drafted under the auspices of the United Nations Economic Commission for Europe (UNECE), was signed by 35 member states of the UNECE, and by the European Community, at the fourth “Environment for Europe” Ministerial Conference in Århus (Denmark) on 25 June 1998.¹²⁴

The Århus Convention entered into force on 30 October 2001.¹²⁵ At this time of writing, the Convention has 44 Contracting Parties, including the European Union.¹²⁶

¹²² Lucca Declaration, adopted at the first meeting of the Parties to the Århus Convention, held in Lucca (Italy) on 21-23 October 2002, ECE/MP.PP/2/Add.1, 2 April 2004, para.4.

¹²³ See e.g.: the Foreword of the Secretary-General of the United Nations Kofi Annan to the Århus Implementation Guide (on this Guide, see the note below), p. v; E. PETKOVA with P. VEIT, “Environmental Accountability Beyond The Nation-State: The Implications of the Aarhus Convention”, Governance Notes, April 2000, Washington, DC: World Resources Institute, pp. 1–12; J. EBBESSON, “Information, Participation and Access to Justice: the Model of the Aarhus Convention”, Background Paper No. 5, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva. This Background Paper was initially available online (<http://www.unhchr.ch/environment/bp5.html>), but the link is no longer valid. Please contact the author of the present contribution (clarssen@ulb.ac.be) for a copy of the text.

¹²⁴ On the “Environment for Europe” process, see <http://www.unece.org/env/efe/welcome.html>.

¹²⁵ Cf. *UNTC*, Part I, Chapter XXVII, Section 13 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en). Many of the documents directly related to the Århus Convention cited in this contribution are available on the Convention’s website: <http://www.unece.org/env/pp>. For the documents that are no longer available on this website, and that cannot be obtained elsewhere, feel free to contact the author of the present contribution (clarssen@ulb.ac.be).

In order to contribute to the protection of the “[...] right of every person of present and future generations to live in an environment adequate to his or her health and well-being [...]” (hereinafter the “right to a healthy environment”), article 1 of the Convention requires the Parties to guarantee three procedural rights, in accordance with the – detailed – provisions of the Convention: the rights of access to information, public participation in decision-making, and access to justice in environmental matters.

In addition to aiming at contributing to the protection of the right to a healthy environment, the Århus Convention’s participatory system is expected to strengthen democracy.¹²⁷ In sum, the overall purpose of the Århus Convention’s participatory system is to increase the democratic nature and legitimacy of public policies on environmental protection, and thereby to contribute to the protection of the right to a healthy environment.

General features of the Århus Convention include:

A 'floor', not a 'ceiling': the Convention establishes minimum standards to be achieved and does not affect the right of a Party “[...] to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters [...]” than required by the Convention.¹²⁸

Non-discrimination: article 3, para.9 of the Convention prohibits discrimination on the basis of citizenship, nationality or domicile¹²⁹ against persons seeking to exercise their rights under the Convention.

Definition of public authorities: the obligations contained in the Convention are imposed on public authorities.¹³⁰ Under the Convention (article 2, para.2), “public authority” means:

- (a) Governmental bodies from all sectors and at all levels (national, regional, local, etc.);
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment¹³¹;
- (c) Privatised bodies having public responsibilities or functions, or providing public services, in relation to the environment, under the control of the aforementioned types of public authorities;

¹²⁶ The European Union (which, as of 1 December 2009, succeeded the European Community in its obligations arising from the Convention) ratified the Convention via Council Decision (EC) No. 2005/370 of 17 February 2005, on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, *O.J.E.U.*, L 124/1, 17 May 2005. For the measures adopted by the EU in order to implement the Århus Convention, see <http://ec.europa.eu/environment/aarhus>. Among these measures, the “Århus Regulation”, applying to EU institutions and bodies, is of particular relevance to the present Study. See D. Ferri’s contribution at www.diversitystudy.eu.

As regards the States Parties to the Convention, roughly half are member states of the EU, the other half countries from Central and Eastern Europe, Central Asia and the Caucasus region.

For an up-to-date list of Parties to the Århus Convention, see the UNTC chapter cited in the note above.

¹²⁷ Cf., e.g., the 21st preambular para. of the Convention. See also the selected bibliography at the end of this contribution.

¹²⁸ Cf. art. 3, para.5 of the Convention (see also art. 3, para.6 of the Convention).

¹²⁹ In the case of a legal person, art. 3, para.9 of the Convention prohibits discrimination as to where the legal person has its registered seat or an effective centre of its activities.

¹³⁰ Either directly or via the Parties, as we shall see from the citations below.

¹³¹ Art. 2, para.2 (b) of the Convention.

(d) The institutions of any regional economic integration organisation referred to in article 17 of the Convention which is a Party to the Convention. As noted above, the European Union is a Party to the Convention. Thus, the participatory system of the Convention applies to the EU institutions.¹³²

It should be noted that the public authorities specified in sub-points (a), (b), and (d) of the definition are not limited to bodies operating only in the field of the environment.

Bodies acting in a judicial or legislative capacity are excluded from the definition of “public authority”.¹³³ However, where those bodies or institutions act in an executive capacity, they are covered by the Convention.¹³⁴

Promotion of the participatory system in international bodies: article 3, para.7 of the Convention provides that “[each] Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment”.

As we shall see, Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums – containing crucial elements for the purposes of this contribution (cf. *infra*) – were adopted on the basis of article 3, para.7.

Non-compliance mechanism: article 15 of the Convention requires the Meeting of the Parties to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. Such arrangements are to allow for “appropriate public involvement” and may include the option of considering communications from the public on matters relating to the Convention.

A Compliance Committee has been established by the Meeting of the Parties on the basis of article 15.¹³⁵

This rather unique compliance mechanism¹³⁶ reflects the participatory elements of article 15 as follows:

¹³² This was expressly declared by the EC upon signature of the Convention (cf. Report on the Fourth Ministerial Conference Environment for Europe, Århus, Denmark, 23-25 June 1998, ECE/CEP/41, Annex VIII, p. 73). It should be noted that the “Århus Regulation” (cf. D. Ferri’s contribution at www.diversitystudy.eu) applies to both EU institutions and bodies.

¹³³ Art. 2, para.2, *in fine* of the Convention.

¹³⁴ For further developments, see *The Aarhus Convention: an Implementation Guide*, United Nations, New York and Geneva, 2000 (hereinafter the “Århus Implementation Guide”), pp. 34-35. The Guide is a useful tool in grasping the complex participatory system of the Århus Convention. It should, however, not be forgotten that the Guide does not constitute an authentic interpretation of the Convention.

The Århus Implementation Guide is in the process of being updated (cf. Decision III/9, “Work Programme for 2009–2011”, ECE/MP.PP/2008/2/Add.17, 26 September 2008, Annex I, Activity III). It is intended to have the updated Guide published in early 2011 (cf. Report of the working Group of the Parties [to the Århus Convention] on its eleventh session, 8-10 July 2009, ECE/MP.PP/WG.1/2009/2, 28 October 2009, p. 18).

¹³⁵ Decision I/7, “Review of Compliance”, adopted at the first meeting of the Parties held in Lucca (Italy) on 21-23 October 2002, ECE/MP.PP/2/Add.8, 2 April 2004.

¹³⁶ Cf. V. KOESTER, « Review of Compliance under the Aarhus Convention: a Rather Unique Compliance Mechanism », *J.E.E.P.L.*, vol. 2, n° 1, January 2005, pp. 31-44. The Århus Compliance Committee was indeed unique when the aforementioned article was published. Since then, the Århus Compliance Committee has inspired compliance mechanisms of other UNECE multilateral environmental agreements. See, e.g., art. 15 of the Protocol on Water and Health to the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done in London, on 17 June 1999 (the Protocol entered into force on 4 August 2005). See also art. 14bis of the second amendment to the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo (Finland), on 25 February 1991 (the “Espoo Convention”), Decision III/7 (MP.EIA/2004/8, 29 March 2004), adopted at the third Meeting of the Parties to the Espoo Convention (the amendment is not yet in force).

- "Appropriate public involvement": Candidates¹³⁷ are presented, not only by Parties and Signatories, but also by non-governmental organizations falling within the scope of article 10, paragraph 5, of the Convention¹³⁸ and promoting environmental protection.¹³⁹ The candidates are then elected by the Meeting of the Parties¹⁴⁰;
- "Communications from the public": Communications may be brought before the Committee by one or more members of the public.¹⁴¹

Non-ECE countries: The Convention is open to accession by non-UNECE countries, subject to approval of the Meeting of the Parties.¹⁴² The latter has actively encouraged accession to the Convention by non-UNECE States¹⁴³, but this encouragement has not, so far, borne any fruit.

With these general features in mind, we are now ready to proceed with an overview of the Århus Convention's participatory system.

This system rests on three so-called "pillars" corresponding, respectively, to the three procedural rights: access to information (2.1.2.1), public participation (2.1.2.2), and access to justice (2.1.2.3).

2.1.3. Access to Information

The Århus Convention's information pillar covers both the "passive" aspect of access to information (the obligation on public authorities to respond to requests for information from members of the public) and the "active" aspect of access to information (obligations on public authorities to provide information to the general public, independently of a particular request).

Article 2, para.3 of the Convention broadly defines "environmental information". The notion encompasses "[...] any information in written, visual, aural, electronic or any other material form on:

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans

¹³⁷ Nationals of the Parties and Signatories to the Convention (para. 2 of Decision I/7).

¹³⁸ Art. 10, para.5 of the Convention: "[any] non-governmental organization, qualified in the fields to which [the] Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections".

¹³⁹ Para. 4 of Decision I/7.

¹⁴⁰ Para. 7 of Decision I/7. The members of the Committee serve in their personal capacity (para. 1 of Decision I/7).

¹⁴¹ Paras. 18–24 of Decision I/7.

¹⁴² Art. 19, para.3 of the Convention.

¹⁴³ See esp. Decision II/9, "Accession of Non-UNECE Member States to the [Århus] Convention and advancement of the principles of the Convention in other regions and at the global level", adopted at the second meeting of the Parties, held in Almaty (Kazakhstan) on 25-27 May 2005, ECE/MP.PP/2005/2/Add.13, 10 June 2005.

At its third session, the Meeting of the Parties included, in their strategic plan (2009-2014) for the Convention, an "[...] aim of, by 2011, having Parties which are not member States of UNECE" (Decision III/8, "Strategic Plan 2009-2014", adopted at the third meeting of the Parties held in Riga (Latvia) on 11-13 June 2008, ECE/MP.PP/2008/2/Add.16, 26 September 2008, Annex, II., B., para. 10, (d)).

and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above”.

Passive Access to Information

Passive access to environmental information is organised in article 4 of the Convention.

Any environmental information held by a public authority must be provided as soon as possible, and at the latest within one month, after the submission of a request by a member of the public.¹⁴⁴ The applicant does not have to state an interest.¹⁴⁵ The information must be provided in the form requested¹⁴⁶, and include, where requested, copies of the actual documentation containing the information.¹⁴⁷

A request for environmental information may be refused if the request is manifestly unreasonable or formulated in too general a manner¹⁴⁸, or concerns material in the course of completion or internal communications of public authorities.¹⁴⁹

A request may also be refused if the disclosure of the information would *adversely affect* one of the following interests:

- The confidentiality of the proceedings of public authorities¹⁵⁰;
- International relations, national defence or public security¹⁵¹;
- The course of justice¹⁵²;
- The confidentiality of commercial and industrial information¹⁵³
- Intellectual property rights¹⁵⁴;
- The confidentiality of personal data and/or files relating to a natural person¹⁵⁵;
- Interests of a third party which has supplied the information requested¹⁵⁶; or

¹⁴⁴ Cf. art. 4, paras.1 and 2 of the Convention. The latter paragraph authorises an extension of the period of one month up to two months if the volume and the complexity of the requested information justify this. The public authority is required to inform the applicant of any extension and of the reasons justifying it.

¹⁴⁵ Art. 4, para.1, (a) of the Convention.

¹⁴⁶ Unless it is reasonable for the public authority to make the information available in another form – in which case reasons shall be given for making it available in that form –, or the information is already publicly available in another form (art. 4, para.1, (b) of the Convention).

¹⁴⁷ Art. 4, para.1 of the Convention.

¹⁴⁸ Art. 4, para.3, (b) of the Convention.

¹⁴⁹ Art. 4, para.3, (c) of the Convention. The provision specifies that the exemption must be provided for in national law or customary practice, and that the public authority must take into account the public interest served by disclosure.

¹⁵⁰ Art. 4, para.4, (a) of the Convention. The provision adds “[...] where such confidentiality is provided for under national law”.

¹⁵¹ Art. 4, para.4, (b) of the Convention.

¹⁵² “[The] ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature” (art. 4, para.4, (c) of the Convention).

¹⁵³ “[Where] such confidentiality is protected by law in order to protect a legitimate economic interest [...]” (art. 4, para.4, (d) of the Convention). The provision further stipulates: “[within] this framework, information on emissions which is relevant for the protection of the environment shall be disclosed”. See also below on the special status of information relating to emissions into the environment.

¹⁵⁴ Art. 4, para.4, (e) of the Convention.

¹⁵⁵ “[Where] that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law” (art. 4, para.4, (f) of the Convention).

- The environment to which the information relates, such as the breeding sites of rare species.¹⁵⁷

For the latter grounds for refusals, the Convention thus imposes on the public authority an obligation to carry out a balance of interests, between the interest served by the disclosure of the information and the interest listed above, if the latter interests are adversely affected by such disclosure. However, the Convention weighs on the public side of the balance, in providing that the said grounds for refusal “[...] shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”.¹⁵⁸

Where separation of the information is possible without compromising the confidentiality of the exempted information, the public authority withholds only the exempted information, and supplies the remainder of the information.¹⁵⁹

A number of formalities apply to a refusal of a request.¹⁶⁰ Such refusal shall:

- Be in writing, if the request for information was in writing or if the applicant requested a written response;
- State the reasons for the refusal;
- Give information on access to the review procedure provided for in accordance with article 9, para.1 of the Convention (*cf. infra*);
- Be made as soon as possible, and at the latest within one month after the submission of the request.¹⁶¹

If the public authority to which the request was addressed does not hold the information requested, it may also, logically, refuse the request¹⁶², but that public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested. Alternatively, the public authority to which the request was mistakenly addressed shall, itself, transfer the request to the “right” authority, and inform the applicant accordingly.¹⁶³

Public authorities may impose a charge for supplying information, provided the charge does not exceed a “reasonable” amount.¹⁶⁴

Active Access to Information

Active information duties are provided for in article 5 of the Convention. Those duties include general obligations on public authorities to:

¹⁵⁶ “[Without] that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material” (art. 4, para.4, (g) of the Convention).

¹⁵⁷ Art. 4, para.4, (h) of the Convention.

¹⁵⁸ Art. 4, para.4 *in fine* of the Convention.

¹⁵⁹ Art. 4, para.6 of the Convention.

¹⁶⁰ Art. 4, para.7 of the Convention.

¹⁶¹ In parallel to paragraph 2 (*cf. the note above*), paragraph 7 of art. 4 authorises an extension of the period of one month up to two months if the complexity (paragraph 7 does not mention volume, contrary to paragraph 2) of the information justifies this. The public authority is required to inform the applicant of any extension and of the reasons justifying it.

¹⁶² Art. 4, para.3, (a) of the Convention.

¹⁶³ Art. 4, para.5 of the Convention.

¹⁶⁴ Art. 4, para.8 of the Convention. See this paragraph for transparency requirements applicable to such charge.

- Posses and update environmental information relevant to their functions¹⁶⁵;
- Ensure that environmental information is “effectively accessible” by the public¹⁶⁶;
- Disseminate certain types of information relating to the environment¹⁶⁷, including explanatory material on the Party’s dealings with the matters falling within the scope of the Convention.¹⁶⁸

The Convention also contains more specific provisions on active information, regarding:

- Emergency situations¹⁶⁹;
- Progressive Internet access¹⁷⁰ of various categories of environmental information¹⁷¹ “[...] provided that such information is already available in electronic form”¹⁷²;
- State-of-the-environment reporting¹⁷³;
- Provision of environmental information by private entities¹⁷⁴; and
- Linked to the above: pollutant release and transfer registers (PRTRs).¹⁷⁵

¹⁶⁵ Art. 5, para.1, (a) of the Convention.

¹⁶⁶ Art. 5, para.2 of the Convention.

“Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, *inter alia*, by:

- (a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;
- (b) Establishing and maintaining practical arrangements, such as:
 - (i) Publicly accessible lists, registers or files;
 - (ii) Requiring officials to support the public in seeking access to information under this Convention; and
 - (iii) The identification of points of contact; and
- (c) Providing access to environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.”

See also *infra* on this provision.

¹⁶⁷ Cf. esp. art. 5, para.5 of the Convention (see also art. 5, para.7 of the Convention):

“Each Party shall take measures within the framework of its legislation for the purpose of disseminating, *inter alia*:

- (a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;
- (b) International treaties, conventions and agreements on environmental issues; and
- (c) Other significant international documents on environmental issues as appropriate”.

¹⁶⁸ Cf. art. 5, para.7, (b) of the Convention.

¹⁶⁹ Art. 5, para.1, (c) of the Convention.

¹⁷⁰ Regarding Internet access, see also *infra*.

¹⁷¹ Art. 5, para.3 of the Convention:

“Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through telecommunications networks. Information accessible in this form should include:

- (a) Reports on the state of the environment [cf. hereafter];
- (b) Texts of legislation on or relating to the environment;
- (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
- (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention”.

¹⁷² Cf. art. 5, para.3 *in fine* of the Convention.

¹⁷³ Art. 5, para.4 of the Convention:

“Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment”.

¹⁷⁴ Cf. art. 5, para.1, (b); 5, para.6; and 5, para.8 of the Convention.

¹⁷⁵ Art. 5, para.9 of the Convention:

“Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites”.

PRTRs are inventories of pollution from industrial sites and other sources. Although regulating information on pollution, rather than pollution directly, PRTRs are expected to exert a significant downward pressure on levels of pollution – since no company wishes to be identified as among big polluters.

A Protocol on PRTRs was adopted, on 21 May 2003, at an extraordinary meeting of the Parties to the Aarhus Convention held in the framework of the fifth Ministerial Conference “Environment for Europe”, Kiev (Ukraine), 21-23 May 2003.¹⁷⁶ The Protocol entered into force on 8 October 2009.¹⁷⁷

Information may be exempted from dissemination on the grounds for refusal detailed in article 4 (cf. *supra*).¹⁷⁸

2.1.4. Public Participation

The Convention organises public participation during three categories of environmental decision-making:

- Decision-making regarding specific activities having, or which may have, a significant effect on the environment (article 6);
- Preparation of plans, programmes and policies relating to the environment (article 7); and
- Elaboration of executive regulations and/or [sic¹⁷⁹] generally applicable legally binding normative instruments that may have a significant effect on the environment (article 8).

In view of persistent difficulties regarding the implementation of the second pillar of the Aarhus Convention’s participatory system¹⁸⁰, the Meeting of the Parties agreed, at its third session (June 2008), to “[...] address the implementation of the second pillar of the Convention by establishing an intersessional [sic] body [...]”¹⁸¹ However, for “[...] practical reasons [...]”¹⁸², the Meeting decided to proceed *via* a two-step procedure:¹⁸³

First, an *ad hoc* expert group on public participation, established by the Meeting of the Parties at their third session¹⁸⁴, would coordinate information sharing among the

¹⁷⁶ As noted *supra*, the Aarhus Convention was adopted at the fourth “Environment for Europe” Conference.

¹⁷⁷ *UNTC*, Part I, Chapter XXVII, Section 13. a.

(http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXVII-13-a&chapter=27&lang=en).

¹⁷⁸ Cf. art. 5, para.10 of the Convention.

¹⁷⁹ This “and/or” is included in the title of art. 8, but no alternative is foreseen in the text of the provision. The “and/or” is likely to be an error (stemming from earlier draft versions of the provision). Indeed, the ultimate intention of the Parties seems to apply art. 8 both to executive regulations and normative instruments that may have a significant effect on the environment, without leaving any choice to the Party. In that spirit, the “and/or” will no longer be mentioned in this contribution. That being said, as we shall see, the wording of art. 8 is rather recommendatory.

¹⁸⁰ Report of the third meeting of the Parties to the Aarhus Convention, held in Riga (Latvia) on 11–13 June 2008, ECE/MP.PP/2008/2 26 September 2008, para.72. The report of the Expert Group on Public Participation on its first meeting, 7-8 July 2009, (http://www.unece.org/env/pp/ppeg/ppeg1_report_adv.pdf), Section IV., provides a detailed account of those difficulties.

¹⁸¹ Report of the third meeting of the Parties to the Aarhus Convention (cf. the note above), para.72.

¹⁸² *Id.*, para.73.

¹⁸³ *Id.*

¹⁸⁴ In addition to the report of the third meeting of the Parties, para.73, see: Decision III/8, “Strategic Plan 2009–2014”, ECE/MP.PP/2008/2/Add.16, 26 September 2008, Annex, Strategic goal III (para.11); Decision III/9, “Work Programme for 2009–2011”, ECE/MP.PP/2008/2/Add.17, 26 September 2008, Annex I, Activity VI.

Parties and other stakeholders, as well as advise the Working Group of the Parties on the terms of reference for a Task Force on public participation.

A Task Force on public participation would then be established as soon as possible and at the latest by the next ordinary meeting of the Parties, on the basis of a draft decision to be prepared by the Working Group of the Parties.

The question is still pending at this time of writing. Since the Task Force on Public Participation is likely to examine some of the concerns of the Convention's participatory system developed *infra*, the EU may wish to stay abreast with the work of the Task Force while implementing the participatory provisions of the UNESCO Convention.¹⁸⁵

With the preceding in mind, let us turn to the three hypotheses of public participation organised by the Convention.

Public Participation during Decision-Making Regarding Specific Activities Having, or Which May Have, a Significant Effect on the Environment

Article 6 of the Convention sets forth detailed requirements for public participation in decision-making on whether or not to permit certain types of activity having, or which may have, a significant effect on the environment.

Activities subject to the public participation procedures organised in article 6 are principally¹⁸⁶ determined pursuant to the first paragraph of that article.

According to article 6, para.1, (a), "[each Party shall] apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I". Thus, "Annex I activities" are irrefragably presumed to have a significant effect on the environment.¹⁸⁷

¹⁸⁵ Hoping to assist the EU in identifying the Task Force and its work, we shall summarise the main steps taken up until this time of writing:

On the basis of the conclusions of the first meeting of the *ad hoc* Expert Group on Public Participation (cf. the report cited *supra*), the Working Group of the Parties to the Convention, decided to hold, in the first half of 2010, an extraordinary session of the Meeting of the Parties to establish the Task Force on Public Participation. After following the procedural steps required by and pursuant to art. 10, para.5 of the Convention, an extraordinary session of the Meeting of the Parties to the Århus Convention was scheduled for 19-22 April 2010.

However, as the reader may recall, at that time, air traffic in Europe was seriously perturbed by the eruption of an Icelandic volcano: many delegations were unable to travel to Geneva to attend the extraordinary session. "As a result, no quorum was reached and so no formal decisions could be taken. The delegations present nevertheless discussed all the agenda items and reached provisional agreement, after which the session was suspended until 30 June 2010. Decisions were thus taken *ad referendum*, subject to approval at the resumed session. The Meeting of the Parties provisionally decided to establish a Task Force on Public Participation in Decision-making and provisionally agreed upon its terms of reference. [...]" (Cf. <http://www.unece.org/env/pp/emop2010.htm>. See also that webpage for the decision establishing the Task Force on Public Participation, taken *ad referendum*, thus).¹⁸⁵

¹⁸⁶ As well as by paragraphs 10 and 11 of art. 6 (respectively: reconsideration or updating of operating conditions for an activity referred to in paragraph 1; genetically modified organisms (GMOs)). On the application of art. 6 to GMOs, see also the following note.

¹⁸⁷ Annex I is based on the annexes relating to similar provisions in Directive 85/ 337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EEC (the "EIA Directive"), the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, adopted on 25 February 1991 in Espoo (Finland) and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC). Annex I to the Århus Convention does not include activities related to GMOs. Art. 6, para. 11 of the Convention states that "[e]ach Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment". "Recognizing the importance of further developing the application of the Convention to decisions on whether to permit the deliberate release of genetically modified organisms (GMOs) through applying *inter alia* more precise provisions than those set out in article 6, paragraph 11, of the Convention" (para. 1 of Decision II/1 cited hereafter), the Meeting of the Parties adopted an amendment to the Convention,

Article 6, para.1 (b), requires that, for decisions on proposed activities not listed in annex I, each Party shall determine, in accordance with its national law, whether the activity might have a significant impact on the environment. If this is the case, article 6 must be applied.

Proposed activities serving national defence purposes may be exempted from article 6, under certain conditions.¹⁸⁸

Paragraphs 2 to 9 of article 6 meticulously lay down the modalities of a public participation procedure organised further to paragraph 1.

First and foremost, article 6 doubtlessly provides that the “public” – defined by the Convention as “[...] *one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*”¹⁸⁹ – is entitled to participate in decision-making regarding specific activities.¹⁹⁰ In this spirit, effective participation of the general public shall be ensured, through reasonable timeframes¹⁹¹ and early in the process “[...] *when all options are open* [...]”.¹⁹²

Article 6 however only organises information of the public concerned. In the Århus Convention’s participatory system, the “public concerned” means “[...] *the public affected or likely to be affected by, or having an interest in, the environmental decision-making*”.¹⁹³ For the purposes of this definition “[...] *non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*”.¹⁹⁴ The public concerned is to be provided with comprehensive information regarding both the envisioned decision-making procedure (paragraph 2) and the proposed activity (paragraph 6).

This inconsistency of the Convention, of utmost concern to ensuring diversity of participants, will be further examined and commented on *infra*.

The final decision must take “due account” of the outcome of the public participation.¹⁹⁵ The public¹⁹⁶ must be informed of the decision. The text of the latter shall be made accessible to the public¹⁹⁷, “[...] along with the reasons and considerations on which the decision is based [...]”.¹⁹⁸

Public Participation during the Preparation of Plans, Programmes and Policies Relating to the Environment

Article 7 requires Parties to “ [...] make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment [...]”.

developing, *inter alia*, the public participation provisions of the Convention in the area (amendment annexed to Decision II/1, “Genetically Modified Organisms”, adopted at the second Meeting of the Parties, held in Almaty (Kazakhstan), 25-27 May 2005, ECE/MP.PP/2005/2/Add.2, 20 June 2005). This “GMO amendment” is not yet in force.

¹⁸⁸ See art. 6, para.1, (c) of the Convention.

¹⁸⁹ Art. 2, para.4 of the Convention.

¹⁹⁰ Cf. art. 6, paras.2, (d), ii and 7 of the Convention.

¹⁹¹ Art. 6, para.3 of the Convention.

¹⁹² Art. 6, para.4 of the Convention.

¹⁹³ Art. 2, para.5 of the Convention.

¹⁹⁴ *Id.*, *in fine*.

¹⁹⁵ Art. 6, para.8 of the Convention.

¹⁹⁶ And not only the public concerned.

¹⁹⁷ *Id.*

¹⁹⁸ Art. 6, para.9 of the Convention.

The provision neither defines the expression “plans and programmes relating to the environment”, nor refers to an annex (cf. article 6).

It is argued¹⁹⁹ that the term should be understood broadly, so as to include both plans and programmes aiming at protecting the environment, and plans and programmes having significant (negative) environmental implications (e.g. in the sectors of transport and tourism).

The provisions of article 6 relating to reasonable timeframes for participation, opportunities for early participation and the obligation to ensure that “due account” is taken of the outcome of the participation (cf. *supra* on those provisions) are to be applied in respect of public participation during the preparation of the plans and programmes covered by article 7.

By contrast, article 7 is much more laconic than article 6 regarding information to be provided to the potential participants²⁰⁰, and does not require information to the public of the adopted measure, nor, *a fortiori*, of the reasons and considerations on which the measure is based.²⁰¹

Article 7 also applies, although in a much more recommendatory manner²⁰², to public participation in the preparation of policies relating to the environment.

Public Participation during the Elaboration of Executive Regulations and Generally Applicable Legally Binding Normative Instruments that May Have a Significant Effect on the Environment

Article 8 foresees public participation during the preparation by public authorities of executive regulations and other generally applicable legally binding normative instruments that may have a significant effect on the environment.

Although the wording of article 8 is less prescriptive than the Convention’s other provisions on public participation (and especially article 6) – in that Parties are only asked to “strive to promote” public participation in the preparation of instruments falling within its scope – article 8 reflects the main trends of articles 6 and 7:

- Effective participation, including reasonable participation at an appropriate stage, while options are still open;
- Publication of draft rules²⁰³;
- Participation of the general public – however, here, such participation may be ensured through “representative” consultative bodies²⁰⁴;

¹⁹⁹ See the Århus Implementation Guide, pp. 113-115.

²⁰⁰ In sharp contrast to paragraphs 2 and 6 of art. 6 (cf. above), art. 7 briefly states that the “necessary information” shall be provided to the public – and indeed the public, and not only the public concerned. Art. 7 also differs from art. 6 in stating that “[t]he public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention”. As we have seen, every member of the public is entitled to participate in the procedures established by art. 6.

²⁰¹ Contrary to art. 6, para.9 of the Convention (cf. *supra*).

²⁰² “To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment”. No modality of this type of public participation is indicated in art. 7.

²⁰³ Art. 8, (b) allows for other means of making the draft rules *publicly* available. In either case, it is clear that the information is to be communicated to the public at large.

²⁰⁴ “Representative” in inverted commas, since, as we shall see (*infra*), the Århus Convention does not impose any democratic requirements on participants.

- Taking into account of the result of the public participation – in the present case, only “as far as possible”.

As article 7, article 8 does not require provision of information to the public of the instrument adopted, nor, *a fortiori*, of the reasons and considerations on which it is based.

2.1.5. Access to Justice²⁰⁵

The access to justice pillar of the Convention is contained in article 9.

This provision organises three types of review procedures:

- With respect to information requests (paragraph 1);
- Regarding decisions subject to public participation requirements (paragraph 2);
- To challenge breaches of environmental law in general (paragraph 3).

Thus, the access to justice pillar both underpins the two other pillars, and organises a general possibility of challenging breaches of environmental law.

Article 9 also contains general access to justice requirements, such as adequacy and fairness of the review procedures (paragraph 4), and assistance mechanisms (paragraph 5).

Review Procedures With Respect to Information Requests

“Any person who considers that his or her request for information under article 4 [cf. above on this provision] has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, must have access to a review procedure before a court of law or another independent and impartial body established by law”.²⁰⁶

In the circumstances where a Party provides for a review by a court of law, it shall ensure access to an expeditious procedure that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. By requiring that where a review procedure before a court of law is provided for (which can involve considerable resources in terms of costs and time), there is also access to an expeditious review procedure which is free of charge or inexpensive, the Convention aims to ensure a low threshold for appeals regarding access to information requests.

Final decisions under paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused.

Review Procedures Regarding Decisions Subject to Public Participation Requirements

Article 9, para.2 of the Convention provides for a right to challenge the substantive and

²⁰⁵ The aspects of the third pillar of the Århus Convention mentioned below are significantly detailed in the discussion paper prepared (by the author of this contribution) for the first meeting of the Task Force on Access to Justice established by the Meeting of the Parties (available at <http://www.unece.org/env/pp/a.to.i/discussion.paper.2003.1.pdf>). On this Task Force, as well as its predecessor and successor, see <http://www.unece.org/env/pp/a.to.i.htm>.

²⁰⁶ Art. 9, para.1, first subparagraph of the Convention.

procedural legality of any decision, act or omission subject to the provisions of article 6 and, “[...] where so provided for under national law and without prejudice to paragraph 3 of other relevant provisions of [the] Convention”.

Contrary to paragraph 1, paragraph 2 of article 9 does not grant an “any person” access to such an appeal: the scope of persons is limited to the members of the public concerned having a “sufficient interest”.²⁰⁷ This requirement²⁰⁸ is to be “[...] determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of [the] Convention”.²⁰⁹ “[The] interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient [...]”.²¹⁰

Review Procedures to Challenge Breaches of Environmental Law in General

Article 9, para.3 of the Convention requires Parties to provide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment.

Such access is to be provided to members of the public “[...] where they meet the criteria, if any, laid down in national law [...]”. In other words, here, the issue of standing is to be determined at national level – without any specific reference to the objective of the Convention to provide a wide access to justice. The Meeting of the Parties has nevertheless invited “[...] those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, to take fully into account the objective of the Convention to guarantee access to justice”.²¹¹

General Access to Justice Requirements

Article 9 of the Convention also lays down general access to justice requirements.

By virtue of article 9, para.4, the procedures organised in paragraphs 1, 2 and 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair²¹², equitable, timely and not prohibitively expensive. Decisions under article 9 shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Paragraph 5 of article 9 provides that “[i]n order to further the effectiveness of the provisions [of article 9], each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”.

~ ~ ~

The Århus Convention’s participatory system is far from perfect. Serious concerns of the system are particularly relevant to cultural diversity. In implementing the participatory

²⁰⁷ Or, alternatively, maintain impairment of a right, “[...] where the administrative procedural law of a Party requires this as a precondition” (art. 9, para.2, (b) of the Convention).

²⁰⁸ As well as the one mentioned in the note above.

²⁰⁹ Art. 9, para.2, third subparagraph 3 of the Convention.

²¹⁰ Art. 9, para.2, penultimate subparagraph of the Convention. This provision further specifies that the said NGOs “[...] shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above” (cf. the note supra on art. 9, para.2, (b) of the Convention).

²¹¹ Decision II/2, “Promoting Effective Access to Justice”, adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005 (ECE/MP.PP/2005/2/Add.3, 8 June 2005), para.16.

²¹² On adequacy and effectiveness in the area of the environment, see, in addition to the discussion paper cited above, p. 5, Decision II/2, paras.18 and 19.

provisions of the UNESCO Convention, the EU is recommended to pay due attention to the weaknesses pinpointed in the following section.

2.2. Concerns of the Århus Convention's Participatory System

2.2.1. "Public" or "Public Concerned"? A subtle *de Jure* Selection of the Participants

As noted *supra*, although the Århus Convention unquestionably provides that the "public" is entitled to participate in decision-making regarding specific activities, and specifically states that effective participation of the public shall be ensured, it only guarantees effective participation of the "public concerned": contrary to the public at large, the public concerned is entitled to procedural (article 6, §2) and material (article 6, §6) information relevant to the envisioned decision-making procedure.

The combination of article 6, §2 (procedural information of the public concerned) and article 6, §3 (effective participation of the public) is particularly problematic in the light of the Convention's democratic ambitions.

Article 6, §2 provides that "[t]he public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:
 - (i) The commencement of the procedure;
 - (ii) The opportunities for the public to participate;
 - (iii) The time and venue of any envisaged public hearing;
 - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure."

According to article 6, §3, "[t]he public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making."

When drafting paragraph 3, the authors of the Convention neglected that paragraph 2 only organises information of the public concerned.

How can the *demos* at large effectively participate if it is not provided with the information detailed in paragraph 2?

This odd and unfortunate inconsistency of the Århus Convention has engendered confusion between the “public” and the “public concerned”, including²¹³ at EU level: EC directives presented as implementing the Århus Convention organise participatory procedures open only to the “public concerned”.²¹⁴

In short, a subtle but nevertheless genuine *de jure* exclusion of the *demos* at large by the Århus Convention has led to confusion and, eventually, a manifest *de jure* exclusion of the *demos* at large by EU legislation.

One may wonder how such selection of the *demos* strengthens democracy – unless the *de facto* representation of the public by the public concerned is accompanied with democratic safeguards.

In other words, due to the stronger participatory guarantees of the public concerned, the members of this privileged fraction of the public factually represents the *demos*, and must, themselves, fulfil democratic requirements.

The Århus Convention does not lay down any democratic requirements for the public concerned. The Convention’s lack of such requirements regarding the *de facto* representatives of the public at large²¹⁵ is particularly preoccupying for a system claiming to strengthen democracy.

Hoping to assist the EU in remedying this Achilles' heel of the Århus Convention’s participatory system while implementing the participatory provisions of the UNESCO Convention, the following section outlines key questions that the EU is advised to address regarding this crucial question.²¹⁶

2.2.2. Towards Democratic Requirements of *De Facto* Representatives in the Participatory System?

As we have seen, article 2, para.5 of the Convention provides that non-governmental organizations (NGOs) promoting environmental protection and meeting any requirements

²¹³ The confusion, widespread, is also reproduced by key actors within or relevant to the Århus Convention’s system. See, e.g., European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union, Final Report, May 2000, p. 14. The IMPEL Network is an informal network of the environmental authorities of EU Member States. The European Commission is also a member of IMPEL and shares the chairmanship of management meetings. For more information on IMPEL, see: <http://impel.eu/> (the Report cited above is available on this website).

²¹⁴ See esp. art. 3, para.4 of Directive 85/337/EEC, art. 15, a), 1. of Directive 96/61/EC – both as amended by Directive 2003/35/EC (Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC).

²¹⁵ Cf. also above, concerning art. 8 of the Convention, which provides that the participation it organises can take place by the public at large, or *via* “representative” consultative bodies. Neither the Convention, nor its Implementation Guide, specifies how to guarantee the representativeness of such bodies.

²¹⁶ The questions pinpointed below are so broad and far-reaching that they could easily form the subject of (post-)doctoral research in their own right: I do of course not have any pretention of exhaustiveness. The following paragraphs merely aim at drawing the EU’s attention to key concerns of the current configuration of the participatory system (of which the Århus Convention is presented to be a model, cf. *supra*), especially relevant to the implementation of the participatory provisions of the UNESCO Convention.

under national law are *ipso facto* members of the public concerned – without setting forth any democratic requirements regarding those²¹⁷ *de facto* representatives of the public.

In a system aiming at strengthening democracy, a series of questions – that the Convention does not address – must be examined, such as:

- Are the NGOs accountable to the *demos*?²¹⁸
- How do the NGOs organise themselves; is their internal functioning democratic?

NGO Accountability²¹⁹

As expressed by Prof. Scholte, “[c]ivil society associations need to attend more rigorously to their own accountability, especially towards subordinated social circles that have had so little say in global governance to date”.²²⁰

Four Aspects of Accountability

The Framework chapter to the forthcoming book on *Civil Society in Global Action*²²¹ defines accountability as “[...] a condition and process whereby an actor answers for its conduct to those whom it affects”, and identifies four aspects of accountability: transparency, consultation, evaluation, and correction – applying “[...] whether the accountable agent is a global governance institution or any other kind of actor, be it a state, a corporation, a political party, a civil society association, a media organ, or an individual”.²²²

While examining the question of NGO-accountability, the EU is advised to draw inspiration from this interesting and useful four-tier approach.

In order to illustrate the pertinence of the four-tier approach, we shall examine whether and how NGOs have, themselves, dealt with their accountability.

²¹⁷ The considerations below, focussing on the NGO-members of the public concerned, are applicable, *mutatis mutandis*, to individual members of the public concerned.

²¹⁸ As developed elsewhere (« L'érosion électorale? La participation du public au processus décisionnel: pièges et paradoxes de proximité », *Les élections dans tous leurs états. Bilan, enjeux et perspectives du droit électoral. Actes du colloque organisé les 22 et 23 septembre 2000 par le Centre de droit public de l'Université libre de Bruxelles*, Bruylant, Bruxelles, 2001, pp. 437-483), democratic legitimacy encompasses, *inter alia*, two types of representativeness: representativeness regarding substance and formal representativeness. The different angles of accountability developed below cover those two types of representativeness.

²¹⁹ In addition to being based on several years of doctoral research based on – and related to – the Århus Convention (see the bibliography for relevant publications), conceptualisation of the following point was inspired by the highly interesting work carried out by the Building Global Democracy (BDG) Initiative (<http://www.buildingglobaldemocracy.org/>). Among several useful sources and links on the aforementioned website, see esp. the documents issued within the frame of the Initiative's pilot project on "Civil Society and Accountable Global Governance" (<http://www.buildingglobaldemocracy.org/content/books>). A book on the pilot project (with the provisional title *Global Civil Society in Action*) will be published with Cambridge University Press – according to the latter, in the beginning of 2011 (the information provided at <http://www.buildingglobaldemocracy.org/content/books> regarding title and publication date are no longer valid).

²²⁰ J. A. SCHOLTE, "Civil Society and Democratically Accountable Global Governance", *Government and Opposition*, Blackwell Publishing, Volume 39, Issue 2, 2004, (pp. 211-233), p. 233.

²²¹ Cf. the note *supra* on this forthcoming publication. The Framework chapter, available at <http://www.buildingglobaldemocracy.org/content/books>, does not, in its electronic form, contain page numbers. Reference will therefore be made to its sections, subsections, and paragraphs.

²²² The definition of accountability and the four facets of this notion are developed under section "Accountability", and esp. its first subsection: "What is 'accountability'?".

In this respect, the *International Non Governmental Organisations Accountability Charter*²²³ signed in June 2006 by 11 leading International Non-Governmental Organisations (INGOs)²²⁴ deserves special attention.

Before commenting the Charter through the lens of the four-tier approach suggested by the Framework chapter, it is important to note that, as specified on the website of the Charter²²⁵, “[...] the launch of the Charter merely represents a starting point of an ongoing process to establish and implement a system that not only sets common standards of conduct for INGOs but also creates mechanisms to report, monitor and evaluate compliance as well as provide redress.”

Hence, the illustrations and criticisms below should by no means be seen as aiming at defusing the momentum of interesting work in progress. However, the weaknesses of the Charter – in its current form, thus – fittingly highlight the concerns resulting from the Århus Convention lack of democratic requirements regarding the public concerned. The Charter – in its current form – is therefore used here as a “guinea-pig”.

While not defining “accountability” – its core theme – the Charter contains elements of the four aspects mentioned above:

Transparency: in the “Principles” section of the Charter²²⁶, the signatories declare that they are “[...] committed to openness, transparency and honesty about [their] structures, mission, policies and activities” and they “[will] communicate actively to stakeholders about [themselves], and make information publicly available”.²²⁷ The Charter then specifies what the signatories include in the notion of transparency: reporting, audit, accuracy of information.²²⁸

The Charter does not explicitly include “passive” publicity in the notion of transparency, *i.e.* an obligation for the signatories to respond to individual requests for information from members of the general public.²²⁹

Consultation: the Charter states that the signatories “[...] will listen to stakeholders’ suggestions on how [they] can improve [their] work and will encourage inputs by people whose interests may be directly affected. [They] will also make it easy for the public to comment on [their] programmes and policies.”²³⁰

²²³ <http://www.ingoaccountabilitycharter.org>.

²²⁴ *I.e.:*

1. ActionAid International;
2. Amnesty International;
3. CIVICUS World Alliance for Citizen Participation;
4. Consumers International;
5. Greenpeace International;
6. Oxfam International;
7. International Save the Children Alliance;
8. Survival International;
9. International Federation Terre des Hommes;
10. Transparency International; and
11. World YWCA.

The Charter has since its adoption been signed by a series of INGOs. For an up-to-date list of signatories, see <http://www.ingoaccountabilitycharter.org/list-of-signatories>, incl. the link to “more signatories” (upper left of the page).

²²⁵ At: <http://www.ingoaccountabilitycharter.org/about-the-charter>.

²²⁶ Pp. 3 et s.

²²⁷ P. 3 of the Charter.

²²⁸ Pp. 3-4.

²²⁹ Compare art. 4 of the Århus Convention, above.

²³⁰ P. 4 of the Charter.

However, the signatories do not envision proactive consultation of their stakeholders²³¹ – or any other form of method for the INGOs to proactively ensure that they reflect the views of those that they claim to represent. Thus, the INGOs will only hear the voices of those who are effectively able to communicate their suggestions to them. One may question whether such mechanism guarantees accountability towards “subordinated social circles” – or, as required by article 7 of the UNESCO Convention, pays sufficient attention to the “[...] special circumstances and needs [of] various social groups”.

Evaluation: under the section “professional management”, the Charter contains a subsection named “Evaluation”²³², in which the signatories declare that they “[...] seek to continuously improve [their] effectiveness”, and that they “[...] will have defined evaluation procedures for [their] boards, staff, programmes and projects on the basis of mutual accountability”.

Hence, in the Charter, evaluation is associated with effectiveness. As pertinently stressed in the Framework chapter cited above, “[...] a fixation on efficiency [such as on technical aspects of accountability: financial responsibility and efficient performance] can sideline and undermine democratic values [...]”.²³³

In other words, applied to the signatories’ declaration, the action of a given signatory to the Charter may well be efficient, without necessarily being appropriate. Especially when combined with the lack of proactive consultation of stakeholders (cf. *supra*), as well as of redress mechanisms (cf. *infra*), this fixation on efficiency appears democratically problematic.

Correction: “[...] accountability requires that A provides B with redress in cases where A’s actions have had harmful consequences for B. This compensation might take the form of apologies, policy changes, institutional reorganisations, [...]”.²³⁴

The INGO Accountability Charter does not organise any form of redress – as yet: on-going work in this regard is reported on the Charter’s website.²³⁵

Having examined and illustrated those four principal facets of accountability, we shall approach the question of NGO-accountability from three other, complementary, angles:

- To whom are the NGOs accountable?
- For what are the NGOs accountable?
- By what means can the NGOs be held accountable?

To whom are the NGOs Accountable?

It is important not to automatically assimilate “accountability” to “democracy”.

Accountability is not inherently democratic. Its democratic nature depends on which stakeholders benefit from the accountability: if only certain *strata* of the *demos* benefit from the accountability, the latter can hardly be regarded as democratic. On the contrary, certain kinds of accountability “[...] can actually widen social inequalities and entrench

²³¹ See below on the notion of “stakeholder” according to the Charter.

²³² P. 5 of the Charter.

²³³ Cf. the introduction to the Section on « Accountability », last paragraph before the subsection “What is ‘accountability?’”.

²³⁴ Framework chapter, fifth paragraph of the subsection “What is accountability?”.

²³⁵ See: <http://www.ingoaccountabilitycharter.org/about-the-charter/> *in fine*.

authoritarian rule”.²³⁶ In other words, “[...] accountability can, depending on its design and operation, either reinforce or counter established hierarchies [...]”.²³⁷

Hence, it is not sufficient to provide for “NGO accountability”, without establishing to whom the NGOs are accountable. Regarding the matter at hand, it is of utmost importance to design NGO accountability so as to include accountability to the “[...] various groups [...]” mentioned in article 7 of the UNESCO Convention.

A *propos* selective accountability, the INGO Accountability Charter again offers useful illustration. The signatories list as follows their stakeholders, to which they consider themselves accountable:²³⁸

- “Peoples, including future generations, whose rights [they] seek to protect and advance;
- Ecosystems, which cannot speak for or defend themselves;
- [Their] members and supporters;
- [Their] staff and volunteers;
- Organisations and individuals that contribute finance, goods or services;
- Partner organisations, both governmental and non-governmental, with whom [they] work;
- Regulatory bodies whose agreement is required for [their] establishment and operations;
- Those whose policies, programmes or behaviour [they] wish to influence;
- The media; and
- The general public.”

In a system claiming to strengthen democracy, it is striking that the *demos* – distinguished from “peoples, including future generations”, without further specifications – is at the bottom of the list.

For what are the NGOs accountable?

The question of “for what are the NGOs accountable?” is intrinsically linked to all of the four aspects of accountability detailed above (transparency, consultation, evaluation, correction).

First and foremost: in order to hold an NGO accountable for its actions, one needs to be able to clearly identify its mission(s): transparency is necessary. As we have seen, and while reiterating the reservation regarding “passive” publicity formulated above, transparency is one of the stronger points of the INGO Accountability Charter. In this respect, and still recalling the said reservation, the Charter could be considered complying with the necessity of transparency.

By contrast, the shortcomings of the Charter regarding consultation, correction, and redress – especially when these components of accountability are considered together –, are amplified in the light of the question “for what are the NGOs accountable?”. Indeed, in view of the lack of consultation *ex ante* regarding the “what”, the absence of both correction and redress procedures *ex post* appears democratically problematic.

²³⁶ Framework chapter, section “Accountability to whom?”, fourth paragraph.

²³⁷ *Id.*, *in fine*.

²³⁸ P. 2 of the Charter.

By what means can the NGOs be held accountable?

Finally, it is important to devise adequate mechanisms open to the general public through which the NGOs can effectively be held accountable.

Indeed, none of the above-examined aspects of accountability carry much weight if they are not accompanied with corresponding enforcement mechanisms.

As we have seen, the INGO Accountability Charter does not provide any means for the signatories' stakeholders to effectively hold the INGOs accountable.

In the absence of such means, declarations such as: "[w]e should be held responsible for our actions and achievements. We will do this by: having a clear mission, organisational structure and decision-making processes; by acting in accordance with stated values and agreed procedures; by ensuring that our programmes achieve outcomes that are consistent with our mission; and by reporting on these outcomes in an open and accurate manner"²³⁹ seem of rather limited concrete value.

Internal functioning of NGOs

Another set of questions regarding the *ipso facto* members of the "public concerned" – NGOs promoting environmental protection and meeting any requirements under national law – pertain to their internal functioning: in a participatory system, aiming at strengthening democracy, it seems coherent to require that these *de facto* representatives of the *demos* at large, function, themselves, according to democratic principles.

In addition to the rather vague declarations regarding the "good governance"-commitments of the signatories to the INGO Accountability Charter²⁴⁰, reference could here be made to the Council of Europe Committee of Ministers 2007 Recommendation to Member States on the Legal Status of Non-governmental Organisation in Europe.²⁴¹ This Recommendation²⁴² foresees a democratic procedure for the appointment of persons responsible for the management of membership-based NGOs. According to the Recommendation, those persons "[...] should be elected or designated by the highest governing body [i.e. the membership-base of the NGO²⁴³] or by an organ to which it has delegated this task".²⁴⁴

In sum, although public participation procedures are in principle open to the *demos* at large, the participatory system is evolving towards (effective) participation of only the public concerned. Such *de jure* selection of the participants – in itself questionable in a system intending to involve the *demos* at large – needs to be accompanied with democratic

²³⁹ P. 4 of the Charter.

²⁴⁰ *Id.*

"The governance structure of each organisation will conform to relevant laws and be transparent. We seek to follow principles of best practice in governance. Each organisation will have at least:

- A governing body which supervises and evaluates the chief executive, and oversee programme and budgetary matters. It will define overall strategy, consistent with the organisational mission, ensure that resources are used efficiently and appropriately, that performance is measured, that financial integrity is assured and that public trust is maintained;
- Written procedures covering the appointment, responsibilities and terms of members of the governing body, and preventing and managing conflicts of interest;
- A regular general meeting with authority to appoint and replace members of the governing body."

²⁴¹ Recommendation CM/Rec(2007)14, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies.

²⁴² Section V. ("Management").

²⁴³ Cf. para.20 of the Recommendation.

²⁴⁴ Para.46 of the Recommendation.

safeguards, regarding both the accountability and internal functioning of the factual representatives.

In a system claiming to strengthen democracy, it is equally important to ensure that the *demos* at large is empowered to participate in the procedures; that the procedures are open, *de facto*, to the public at large.

2.2.3. Participation of the fittest?

The Århus Convention organises three procedural rights – three “1st generation” rights – in order to contribute to guaranteeing a “3rd generation” right, the right to a healthy environment.

Where are the “2nd generation rights” in the Convention’s participatory system?

Every member of the public does not (always) have the (intellectual, physical, material, etc.) abilities to exercise his or her 1st generation rights. If the participatory system does not include 2nd generation rights, it is only open, *de facto*, to members of the public who have those abilities – *i.e.*, the elite, *sensu lato*.

In order to ensure *de facto* inclusion of the *demos* at large in the participatory system, special attention must therefore be paid to empowering the general public to participate – both intellectually and concretely.

Empowering the general public intellectually

Decision-making processes in the area of the environment are technically highly complex.

Even if the public at large were informed as the public concerned, it would not automatically mean that the public at large were actually capable of understanding and measuring the significance, in all its dimensions, of the information received, and, *a fortiori*, to place it into the context at hand, to form an opinion on the proposed activity, and to express that opinion.

Transformation of information into knowledge, and knowledge into opinion, takes time and attention.

As noted above, article 6, para.3 of the Århus Convention provides that “[t]he public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 [...] and for the public to prepare and participate effectively during the environmental decision-making”. This paragraph is of utmost importance to guaranteeing the democratic nature of the participatory system.

That being said, ensuring reasonable timeframes in the public participation procedures, however necessary, is not sufficient to empowering the public at large intellectually: even with time in her/his hands, it is not guaranteed that any member of the public will be able, on her/his own, to fully grasp the significance of all the technical and scientific aspects in the particular context of the proposed activity, and hence to form his/her opinion in that specific context.

Education, in this case environmental education, is crucial for the participatory system to be able to live up to its democratic ambition.

Article 3, para.3 of the Århus Convention does requires each Party “[...] to promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters”²⁴⁵, but in sharp contrast to the numerous task forces, working groups, expert groups, and other intersession bodies, established to examine various elements of the procedural rights of the Convention²⁴⁶, no specific “post-Århusian”²⁴⁷ work is carried out on article 3, para.3. Unless more attention is paid to this central and overarching provision, the particular efforts deployed to ensure effectiveness of a given (aspect of a) procedural right might well prove vain.

In its Strategy for Education for Sustainable Development, the UNECE declares that education is [...] an essential tool for good governance, informed decision-making and the promotion of democracy”.²⁴⁸ Moreover, this Strategy explicitly supports “[...] the implementation of the communication, education, public-participation and awareness-raising provisions of multilateral environmental and other relevant agreements [as well as the implementation of] the Aarhus Convention by promoting transparent, inclusive and accountable decision-making as well as people’s empowerment.”²⁴⁹

The UNECE Strategy, the regional implementation pillar of the UN Decade of ESD (2005-2014), is being carried out in close cooperation with UNESCO.²⁵⁰

In its recent Strategy for the Second Half of the United Nations Decade of Education for Sustainable Development²⁵¹, UNESCO specifically retains the Århus Convention as a tool to be used for furthering ESD.²⁵²

It is therefore surprising – not only in the light of article 3, para.3 of the Århus Convention, but also considering the focus on the Convention both by the UNECE and UNESCO – that no specific work on ESD is being carried out within the “post-Århusian” process.

As a Party to both the UNESCO and Århus conventions, the EU could fittingly take into account work on ESD while implementing the participatory provisions of the UNESCO Convention.

But the right to education is not the only “2nd generation right” to include in the participatory system.

Some members of the public may indeed need concrete assistance in exercising their rights.

²⁴⁵ See also the 14th preambular paragraph.

²⁴⁶ Within the limits of this contribution, it would be inappropriate – and impossible – to provide a full list these bodies. The interested reader will get an impression of the complexity of the “post-Århusian” system by consulting the links to task forces, expert groups, working groups, etc., provided on the Århus Convention’s website, under “Convention bodies”.

²⁴⁷ I.e. the framework and processes established at the international level to implement the Århus Convention.

²⁴⁸ UNECE Strategy for Education for Sustainable Development, adopted at the High-level meeting of Environment and Education Ministries, Vilnius (Lithuania), 17-18 March 2005, CEP/AC.13/2005/3/Rev.1, 23 March 2005, “Vision” (front page), second subparagraph.

²⁴⁹ Para.12 of the Strategy cited above.

²⁵⁰ Cf. Report of the fifth Ministerial Conference, “Environment for Europe”, Kiev (Ukraine), 21-23 May 2003, ECE/CEP/96, para. 77 (see also: http://www.unece.org/Intersectoral_Activities.htm).

²⁵¹ *Supporting Member States and other stakeholders in addressing global sustainable development challenges through ESD*, Education for Sustainable Development in Action, March 2010, 2010/ED/UNP/DESD/PI/1.

²⁵² P. 6 of the Strategy cited in the note above.

Empowering the public at large concretely

In the Convention's preamble, the Parties acknowledge that citizens may need assistance in order to exercise their rights²⁵³, and recognise that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them.²⁵⁴

A general operative provision of the Convention – in addition to article 3, para.3 cited above – states that “[e]ach Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters”.²⁵⁵

The Convention also contains specific “2nd generation-type requirements” within two of the participatory system's three pillars, requiring Parties to ensure effective access to environmental information²⁵⁶ and to “[...] consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”.²⁵⁷

It is striking that the core of the Århus Convention's participatory system – public participation – does not contain any specific “2nd generation-type requirement”.

Also, and perhaps especially, the Århus Convention's provisions noted above focus on assistance to members of the public that have been able to, by themselves, take the first step to exercise their participatory right (or manifested their wish to do so). This should not lead to negligence of those members of the public that are not in such position.

For the participatory system to truly strengthen democracy, it must also strive to include those that will otherwise be excluded by “natural selection”, e.g. because of illness or other disability.²⁵⁸ In other words, in order for the participatory system to rise to the status of democracy, special attention should be given to 2nd generation human rights, not only to rights assisting the public at large intellectually (e.g. the right to education), but also to rights aiming at including members of the public at large concretely (e.g. the right to health).

Empowering the public at large both intellectually and concretely is of utmost importance for any participatory system to become truly democratic – and vital for promoting and protection the *diversity* of cultural expressions.

The Århus Convention represents the first attempt to establish an entire participatory system, in the area of the environment, as more generally. It is therefore understandable that the system presents certain flaws, “childhood-illnesses”.

²⁵³ 8th preambular paragraph.

²⁵⁴ 12th preambular paragraph.

²⁵⁵ Art. 3, para.2 of the Convention.

²⁵⁶ Art. 5, para.2 of the Convention – cf. above, under active access to information.

²⁵⁷ Art. 9, para.5 of the Convention – cf. above, under general access to justice requirements.

²⁵⁸ Or for many other reasons. In addition to those suffering from sickness or ill-health, or with disabilities, let us think of “[...] refugees, the aged, ethnic and racial minorities [...], people released from institutions or prison, [...], the homeless and people in poor housing, asylum seekers, lone-parent families, other women with family and caring responsibilities, the long-term unemployed, older workers, economically vulnerable women [...]”. (Access to Social Rights in Europe, Report prepared by Mary Daly Queen's University, Belfast, with the assistance of the Editorial Group for the Report on Access to Social Rights (CS-ASR), adopted by the European Committee for Social Cohesion (CDCS) at its 8th meeting, Strasbourg, 28-30 May 2002, p. 51 – available online at: http://www.coe.int/t/dg3/socialpolicies/SocialRights/source/MaryDaly_en.pdf).

The Convention's participatory system has matured in the last decade. Several "post-Århusian" mechanisms and measures could fittingly inspire the EU when implementing the relevant provisions of the UNESCO Convention.

2.2.4. Maturing of the Århus Convention's participatory system

Initiatives born in the "post-Århusian" process, addressing the concerns highlighted above, could inspire the implementation of the participatory provisions of the UNESCO Convention: the Århus Clearinghouse for Environmental Democracy (2.1.4.1) and the Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums (2.1.4.2).

2.2.5. The Århus Clearinghouse for Environmental Democracy (and electronic tools in general)

The Århus Clearinghouse for Environmental Democracy²⁵⁹ aims at supporting the effective implementation of the Århus Convention through the collection, dissemination and exchange of information on laws and good practices relevant to the three procedural rights of the participatory system.

Among others, national focal points to the Convention provide information to the Clearinghouse. The Clearinghouse offers information to a wide range of users, including Parties, Signatories and other states; Intergovernmental organizations; NGOs; students and researchers; and the general public.

Recommendations and activities relevant to the Århus Clearinghouse are carried out with the aim of ensuring *de facto* access of the *demos* at large to electronic tools.

At its second session, the Meeting of Parties to the Århus Convention recommended²⁶⁰, Parties, Signatories and other interested States to, *inter alia*:

- "Support the reduction and as far as possible the removal of social, financial and technological barriers restricting public access to telecommunications networks, such as high connection costs and poor connectivity, as well as lack of basic computer literacy"²⁶¹;
- "Establish and, in the case of donor countries, provide financial and technological support for schemes for the transfer of technology and expertise so as to overcome or reduce the 'digital divide', e.g. through bilateral projects or partnerships"²⁶²;
- "Base the provision of environmental information on the assessment of user needs, monitor the form and content of the information provided in relation to user needs, and assess the impact of the information delivered, in order to raise environmental awareness and facilitate active engagement"²⁶³; and

²⁵⁹ <http://aarhusclearinghouse.unece.org/index.cfm>.

²⁶⁰ Recommendations on the more effective use of electronic information tools to provide public access to environmental information, annexed to Decision II/3 (ECE/MP.PP/2005/2/Add.4, 8 June 2005), adopted at the second meeting of the Parties to the Århus Convention, held in Almaty (Kazakhstan), on 25-27 May 2005.

²⁶¹ Para. 2 of the Recommendations.

²⁶² Para. 5 of the Recommendations.

²⁶³ Para. 6 of the Recommendations.

- "Promote the involvement of different stakeholders representing both providers and users of information, including civil society and private sector institutions, in the development and use of electronic tools with a view to improving the accessibility, as well as the availability, of environmental information to the public".²⁶⁴

The Task Force on Electronic Tools, also responsible for the Århus Clearinghouse Mechanism, conducts various activities in order to identify needs and challenges in implementing the Recommendations, and to suggest solutions.²⁶⁵

2.2.6. The Almaty Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums

Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums (the "Almaty Guidelines"²⁶⁶) were adopted in the wake of the Århus Convention.

The Almaty Guidelines are cautious of not excluding the *demos* at large from their participatory system, neither *de jure*, nor *de facto*:

- "[Care] should be taken to make or keep the processes open, in principle, to the public at large" (para. 14); and
- "Where members of the public have differentiated capacity, resources, socio-cultural circumstances or economic or political influence, special measures should be taken to ensure a balanced and equitable process. Processes and mechanisms for international access should be designed to promote transparency, minimize inequality, avoid the exercise of undue economic or political influence, and facilitate the participation of those constituencies that are most directly affected and might not have the means for participation without encouragement and support" (para. 15).²⁶⁷

2.2.7. Conclusion: recommendations on how the EU could address and avoid the concerns of the Århus Convention's participatory system while implementing the participatory provisions of the UNESCO

Since participatory procedures are not more intrinsically democratic than accountability (cf. *supra*), guaranteeing the democratic nature of the participatory system is of utmost importance.

Any participatory endeavour truly aiming at enhancing democracy should pay due attention to:

- *de jure* exclusion of participants;
- for the more privileged members of the public: their actual accountability, and to whom – as well as, for the associations, their internal functioning; and
- *de facto* exclusion of the *demos*.

²⁶⁴ Para. 18 of the Recommendations.

²⁶⁵ See <http://www.unece.org/env/pp/electronictools.htm>.

²⁶⁶ Almaty Guidelines on Promoting the Application of the Principles of the Århus Convention in International Forums, annexed to Decision II/4, adopted at the second meeting of the Parties to the Århus Convention, held in Almaty (Kazakhstan), on 25-27 May 2005 (ECE/MP.PP/2005/2/Add.5, 20 June 2005). The Guidelines were developed on the basis of art. 3, para.7 of the Århus Convention (cf. *supra*).

²⁶⁷ See also paragraphs 17 and 18 of the Guidelines.

The Århus Convention, a remarkable adventure in the area of “participatory democracy”, should not be seen as a flawless model. Its participatory system is a – crucial – step towards strengthening public involvement in public affairs. But it is merely a step.

The implementation of the participatory provisions of the UNESCO Convention is a highly opportune occasion for the EU to remedy the Århus Convention’s flaws.

In view of articles 7, 9, 10 and 11 of the UNESCO Convention, the EU is recommended to pay due attention to guaranteeing diversity of cultural expressions at three levels:

- 1) *De jure* exclusion from participating in implementing the UNESCO Convention should be avoided, including the unfortunate confusion between the “public” and the “public concerned” of the Århus Convention. Inspiration in this respect could be drawn from para.14 of the Almaty Guidelines (cf. above).
- 2) As stated in the short version of this Study: “[...] the objectives of the UNESCO Convention cannot be appropriately met if public actors only hear the voices of well organised, loud and powerful players among the cultural stakeholders”.²⁶⁸ Accountability of factual representatives of the *demos* should be ensured. The interesting work of the Building Global Democracy Initiative provides a useful source of inspiration for ensuring accountability of the “well organised, loud and powerful players among the cultural stakeholders”.
- 3) It is of utmost importance to avoid *de facto* exclusion of the *demos* at large from any participatory system – and especially the participatory procedures established to implement the relevant provisions of the UNESCO Convention.

In general, inspiration could again be drawn from the Almaty Guidelines (especially para.15, cf. above).

More specifically, if the EU envisions implementation of article 9 of the UNESCO Convention *via* a Clearinghouse such as the Århus Clearinghouse, it should take care not to exclude those stakeholders that do not have (easy) access to electronic tools. The Recommendations on the more effective use of electronic tools adopted by the Meeting of the Parties to the Århus Convention, including the relevant work carried out by the *ad hoc* Task Force, could provide guidance in the area.

Finally, the EU should also consider “2nd generation-type” arrangements empowering the *demos* at large to participate in the procedures. It would seem especially appropriate to take into consideration (UNECE’s) and UNESCO’s work on ESD.

By thus promoting a more inclusive and democratically accountable form of governance, the EU would democratically manage cultural diversity and indeed turn “[...] a societal challenge into a democratic strength [...]”.²⁶⁹

²⁶⁸ *Implementing the UNESCO Convention of 2005 in the European Union* (as available at: www.diversitystudy.eu, “Main Study”), p. 85.

²⁶⁹ *Investing in Cultural Diversity and Intercultural Dialogue*, UNESCO Publishing, 2009, p. 221, cited in the introduction to this contribution.

Study Paper 2D: New ideas for implementing article 11 of the UNESCO Convention

Delia Ferri

Executive Summary

This paper is part of the long version of the *Study on the Implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* for the European Parliament. It explores, from the point of view of EU law, new ideas to implement Art. 11 UNESCO Convention. This provision secures the participation of civil society in the implementation of the Convention and recognises the need for a constant dialogue between institutions and civic groups.

At the EU level, between 2007 and 2009, efforts were made to implement this provision, especially through civil society platforms established by the European Agenda for Culture. Each of these platforms convenes approximately 40 civil society organisations. However, this does not seem to be sufficient. Moreover, some criticism can be raised, since it is not clear how these platforms influence cultural policy-making, and since full access to information is still not guaranteed.

Civil society should be more involved in defining objectives to be achieved within the process of the implementation of the Convention, and a new legislative act (i.e. a regulation) specifically implementing Art. 11 UNESCO Convention should be adopted. This regulation could set out formal procedures to ensure civil society participation concerning plans and programs relating to cultural diversity (particularly in the implementation of the Convention).

A source of inspiration for a binding regulation which meets the objective of Art. 11 UNESCO Convention, in compliance with the UNESCO operational guidelines, could be found in the Aarhus package (i.e. a series of directives and regulations implementing the Aarhus Convention at, respectively, Member State and EU level). In particular, attention could be drawn to EC Regulation No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies.

In addition, civil society organisations excluded from the consultation process or whose rights have been violated during such a consultation process should be allowed to have a judicial remedy in front of the European Courts, i.e. the ECJ and the General Court, in compliance with art. 263 TFEU.

Civil society should also be involved in the Open Method of Coordination (OMC).

Foreword

The overall objective of the Study on the Implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions for the European Parliament (hereinafter “the Study”) is to provide a summary of the state of implementation of the UNESCO Convention and to highlight best practices and new measures to fully achieve the goals of the Convention. The Study aims to be a vital tool for policy makers and representatives of civil society, in view of overcoming the weaknesses of this treaty and entirely exploiting its opportunities.

The present paper is part of the long version of the Study. In particular, the paper is intended to complement Part Two of the Study, devoted to new ideas. It focuses on civil society’s participation in decision-making and on access to information within the European Union (hereinafter “EU”).

The analysis is characterized by an EU law perspective²⁷⁰, and complements the policy and economic perspective offered by other Study Papers. It supports the analysis presented by the other contributors²⁷¹, and explores new ways to apply Art. 11 of the Convention in the EU. This legal analysis is based on the Lisbon Treaty, which entered into force on 1 December 2009.²⁷²

The paper takes into consideration developments occurring in the last three years. In particular, it considers the period between the entry into force of the Convention for the EU (18 March 2007) and extends to a “cut off” date of 15 June 2010. The analysis in the paper results from predominantly desk-based research. Data gathered from legal surveys were also used where relevant or appropriate.

The paper is not intended to provide any doctrinal background on participatory democracy. We avoid a conceptualist approach and we do not revisit the axes of the debate on democracy in the EU multilevel constitutional framework. We employ, where appropriate, a descriptive and pragmatic approach.

Considering the purposes of the entire *Study*, the scope and the final recipient of the *Study* (the European Parliament), purely dogmatic arguments have not been considered. As clarified above, the paper is intended to be a part of the entire *Study* delivered by Germann

* I am grateful to dr. Mel Marquis for revising the language of the text. Of course, all errors and opinions remain my own.

²⁷⁰ The EU is considered a constitutional system. There is, of course, ample doctrine on this. See, *ex multis*, M. Poiares Maduro (2006), *A Constituição Plural. Constitucionalismo e União Europeia*, S. João do Estoril; D. Thym (2003), *European Constitutional Theory and the Post-Nice Process*, in M. Andenas, J. Usher, *The Treaty of Nice and Beyond*, Oxford, pp. 147 et seq.; R. Toniatti (2003), *Forma di Stato comunitario, sovranità e principio di sovranazionalità: una difficile sintesi*, in *Diritto pubblico comparato ed europeo*, 3/2003, pp. 1552 et seq. This doctrine is supported by the ECJ’s case law, as may be seen from Opinion 1/91: «the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions» (ECJ, 14 December 1991, Opinion delivered pursuant to Article 228 EC, Opinion 1/91, [1991] ECR I-6079).

²⁷¹ See www.diversitystudy.eu.

²⁷² The Treaty of Lisbon entered into force on 1 December, 2009, and formally abolished the distinction formerly drawn between the three pillars. With the Treaty of Lisbon, the European Union has replaced and succeeded the European Community (Art. 1(3) TEU). Thus, in the first part of this paper we will refer to the EC/EU, meaning that the EC concluded the agreement, but it is the EU that has now succeeded the EC. The EU now has an explicit legal personality, and it is subject to the obligations set out by the UNESCO Convention. Unless specified otherwise, we refer only to the EC when discussing the period before the entry into force of the Treaty of Lisbon.

Avocats. In order to avoid undue repetition, references are occasionally made to other parts of the *Study*, and to papers of the other researchers. All the opinions expressed in this paper are those of the Author.

2.1. Introduction

Participation of civil society in the implementation of the UNESCO Convention deserves particular attention for both policy makers and representatives of civil society themselves. This is so because the involvement of civil society is important to ensure democratic governance,²⁷³ and it is almost indispensable for preserving cultural diversity in the framework of supranational cultural governance.

Civil society can play a vital role in influencing the creation of an EU legislative framework respectful of the principles envisaged in the Convention, and in designing new measures for reaching the objectives of the Convention. In addition, civic groups can have a prominent influence on a "equitable" distribution of the EU funding for culture, and can push the EU towards the promotion of a range of arts in accordance with cultural diversity. In other words, the involvement of civil society, explicitly provided for in Art. 11 UNESCO Convention, can give an essential input towards the effective implementation of the Convention.

Upon these premises, Part Two provides a critical evaluation on how the EU/EC has applied Art. 11 UNESCO Convention. It also discusses "how far" the EU can go to implement Art. 11 and involve civil society in the further implementation process. First, the meaning of Art. 11 is investigated and actions envisaged by the Convention are explored. An assessment of EU action is then provided. Finally, proposals and recommendations on how to implement Art. 11 at the EU level are offered.

The information presented in this paper is supported by an Annex and by a Selected Bibliography.

2.2. Article 11 of the Convention: Opportunities and Challenges

Before starting the brief overview intended to clarify what actually is expected from Parties in terms of transposing Art. 11 UNESCO, it is useful to recall the text of this provision. Art. 11 reads as follows: "Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention".

To secure the participation of civil society, implementation of Art. 11 must come together with implementation of Art. 9 on information sharing and transparency,²⁷⁴ and Art. 10 on education and public awareness. Implementation of Art. 11 requires the equipping of European citizens of information on the Convention, adequate skills to understand new policy actions and legislation. It also presupposes civil society's capacity to demand and eventually produce diverse cultural products and to accept different cultural identities.

²⁷³ See *inter alia* F. Benvenuti (1994), *Il nuovo cittadino: tra libertà garantita e libertà attiva*, Venezia, pp. 22 et seq.; N. Bobbio (1991), *Il futuro della democrazia*, Torino, pp. 33 et seq.

²⁷⁴ Art. 9 UNESCO Convention refers to exchange of information among different Parties. Art. 11 "regulates" relations between Parties and public/civil society.

2.2.1. What is Meant by “Civil Society”?

The first step in the analysis is to understand the meaning of civil society within the context of the UNESCO Convention.

This is not easy as it may seem. As Scholte underlines, the meanings of ‘civil society’ have varied enormously across time and place²⁷⁵. Still it is a very abstract notion which encompasses many sorts of actors other than State institutions, with different legal forms, varying in their degree of formality²⁷⁶, autonomy from government, and power. Some scholars emphasize that “civil society is not the market: it is a non-commercial realm” and that “civil society bodies are not companies or parts of firms; nor do they seek to make profits”²⁷⁷. However, it is recognised that the distinction between the market and civil society is in practice far from absolute²⁷⁸. Thus many scholars adopt a broader notion of civil society, encompassing NGOs, consumers, professionals, lobbies, foundations, labour unions, local community groups, peace movements, professional bodies, religious institutions and think tanks.²⁷⁹ These “bodies” and movements share only one characteristic: they bring together people who share concerns about a particular policy area or problem.

Social sciences developed several working definitions, to guide research and reflections, especially within the bulk of participatory democracy conceptions.²⁸⁰ However, we do not yet have a prescriptive notion of civil society: i.e., we do not have any legally binding definition of civil society, commonly accepted in international or EU law. Nor does the UNESCO Convention define the concept of civil society. The UNESCO Guidelines²⁸¹ attempt to explain the concept. They declare that “civil society means non-governmental

²⁷⁵ “In sixteenth century English political thought the term referred to the state, whereas contemporary usage tends to contrast civil society and the state. Hegel’s nineteenth-century notion of civil society included the market, whereas contemporary concepts tend to regard civil society as a nonprofit sector. Seventy years ago Gramsci regarded civil society as an arena where class hegemony forges consent, whereas much contemporary discussion treats civil society as a site of disruption and dissent” (J.A. Scholte (2001), *Civil Society and Democracy in Global Governance*, at <http://www2.warwick.ac.uk/fac/soc/pais/staff/scholte/publications/>).

²⁷⁶ Scholte states in this respect: “In terms of organisational forms, civil society includes formally constituted and officially registered groups as well as informal associations that do not appear in any directory. Indeed, different cultures may hold highly diverse notions of what constitutes an ‘organisation’.³ Some civic bodies are unitary, centralised entities like the Ford Foundation and the Roman Catholic Church. Other civic associations like the International Chamber of Commerce or Amnesty International are federations where branches have considerable autonomy from the central secretariat. Other civic groups like the Asian Labour Network on International Financial Institutions (which links trade unions in four countries to campaign on labour rights and welfare issues) are coalitions without a coordinating office” (J.A. Scholte (1999), *Global Civil Society: Changing the World?*, at <http://www2.warwick.ac.uk/fac/soc/pais/staff/scholte/publications/>).

²⁷⁷ J.Habermas (1997), *Droit et démocratie*, Paris. Civil society does not exist to make financial profit (like firms) or to pursue public office (like political parties). However it is agreed that the lines between civil society, the market and the public sector can blur in practice: business associations often promote the commercial interests of their members. Some labour unions are closely allied with political parties, and some NGOs are creations of governments. See *inter alia* J.A. Scholte (2004), *Democratizing the global economy. The role of civil society*, at <http://www2.warwick.ac.uk/fac/soc/csgr/research/projects/englishreport.pdf>.

²⁷⁸ J.A. Scholte (2004), *Democratizing the global economy. The role of civil society*, at <http://www2.warwick.ac.uk/fac/soc/csgr/research/projects/englishreport.pdf>.

²⁷⁹ See *inter alia* M. Magatti (eds) (1997), *Per la società civile. La centralità del principio sociale nelle società avanzate*, Milano.

²⁸⁰ In this paper we do not consider the debate on the meaning and the differences among representative democracy, direct democracy, partecipative democracy, partecipatory democracy, deliberative democracy. In this respect see *ex multis* U. Allegretti (2006), *Verso una nuova forma di democrazia: la democrazia partecipativa*, in *Democrazia e diritto*, 3-2006, pp. 7 *et seq.*; L. Bobbio (2006), *Dilemmi della democrazia partecipativa*, in *Democrazia e diritto*, 4-2006, pp. 11 *et seq.*; R. Bilfulco (2009), *Democrazia deliberativa e democrazia partecipativa*, at www.astrid-online.it. See also F. Robbe (2007), *Démocratie représentative et participation*, in F. Robbe (eds), *La démocratie participative*, L’Harmattan, pp. 11 *et seq.*

²⁸¹ UNESCO Convention Operational Guidelines were approved by the Conference of Parties in June 2009 and published on the website at http://portal.unesco.org/culture/en/ev.php-URL_ID=38216&URL_DO=DO_TOPIC&URL_SECTION=201.html.

organizations, non-profit organizations, professionals in the culture sector and associated sectors, groups that support the work of artists and cultural communities".²⁸² Few requirements are then specified in Annex I of the abovementioned Guidelines, but they refer only to civil society organizations or groups to be admitted to the sessions of the organs of the Convention. These requirements are: a) interests and activities in one or more fields covered by the Convention; b) legal status in compliance with the established rules of the jurisdiction in the country of registration; and c) representativity of their respective field of activity, or of the respective social or professional groups.

The definition given by the Guidelines appears to involve a broad collectivity of natural or legal persons (and their associations), organisations and groups, since the abovementioned requirements do not apply in regard to Parties and fall outside the subjective scope of the obligation set out in Art. 11. In addition, "cultural communities" *per se* seems to refer to a very wide range of groups characterized by beliefs, attitudes, practices, or modes of behaviour, including ethnic and linguistic minorities, indigenous people, transnational minorities (e.g. Roma people)²⁸³, religious groups, but also local communities.

Therefore, the main opportunity offered by Art. 11 is to involve a large number of stakeholders, including non-profit organizations, representatives of cultural small and medium enterprises, but also groups and minorities, outside of government and the administration. Since civil society *ipso facto* represents divergent interests and mirrors different geographical coverage, different cultural constituencies and diverse goals and orientations²⁸⁴, the main challenge is to promote pluralism of objectives and diversity of goals, without generating cleavages and without undermining effective policy action. Indeed, the participation of civil society groups is essential to combine different interests, to ensure the free circulation of ideas, and to fully preserve cultural diversity. However, this huge diversity, with such dissimilar organisational capabilities, together with the fact that civic groups sometimes incorporate global networking or transborder civic groups, implies great challenges at the EU level.

2.2.2. What should "Civil Society" be allowed to do, according to Art. 11 and to the UNESCO Guidelines?

According to the UNESCO Guidelines, civil society "brings citizens', associations' and enterprises' concerns to public authorities, monitors policies and programmes implementation, plays a watchdog role, serves as value-guardian and innovator, as well as contributes to the achievement of greater transparency and accountability in governance". In other words, as stated by Gouvremont²⁸⁵, "civil society's involvement will have to go

²⁸² [Http://www.unesco.org/culture/diversity/article11_en.pdf](http://www.unesco.org/culture/diversity/article11_en.pdf).

²⁸³ On Roma as transnational minorities, see *inter alia* M. Goodwin (2006), *The Romani claim to non-territorial nationhood: taking legitimacy-based claims seriously in international law*, EUI, Firenze, pp. 48 *et seq.*

²⁸⁴ Scholte states that "in terms of objectives, civil society includes conformists, reformists and radicals. The general distinction is important, although the lines can blur in practice. Conformists are those civic groups that seek to uphold and reinforce existing norms. Business lobbies, professional associations, think tanks and foundations often (though far from always) fall into the conformist category. Reformists are those civic entities that wish to correct what they see as flaws in existing regimes, while leaving underlying social structures intact. For example, social-democratic groups challenge liberalist economic policies but accept the deeper structure of capitalism. Many academic institutions, consumer associations, human rights groups, relief organizations and trade unions promote a broadly reformist agenda. Meanwhile radicals are those civic associations that aim comprehensively to transform the social order. These parts of civil society are frequently termed 'social movements'". (J.A. Scholte (1999), *Global Civil Society: Changing the World?*, at <http://www2.warwick.ac.uk/fac/soc/pais/staff/scholte/publications/>).

²⁸⁵ V. Gouvremont (2007), *The Convention on the Diversity of Cultural Expressions: Implementation and Follow up—The Challenge of Concerted Action by Civil Society*, at http://www.diversite-culturelle.qc.ca/index.php?id=106&no_cache=1&L=1&tx_bulletinsirre_pi2%5Byear%5D=2007&tx_bulletinsirre_pi2%5Barticle%5D=2835&cHash=4e5b54ab77.

beyond the 'member/observer' status generally reserved for its representatives and take the form of a constructive dialogue and meaningful interaction".

The UNESCO Convention underpins a wide meaning of "active participation". This clearly implies that Parties should:

- Facilitate access for civil society to information relating to the protection and promotion of the diversity of cultural expressions, to the UNESCO Convention itself and to its implementation.²⁸⁶
- Include civil society, by appropriate means, in cultural decision-making and policy-making processes and so encourage civil society to bring new ideas and approaches to the formulation of cultural legislation and policies.
- Include civil society through appropriate tools and processes in the application of rules, in action planning, in the realization of public cultural policies, in collective management of cultural goods and services, in the urban planning activities (which is essential to preserve cultural heritage, traditions and biodiversity).²⁸⁷

Parties "could foresee the provision of *ad hoc*, flexible and effective mechanisms", and could involve civil society in data collection in the field of the protection and promotion of the diversity of cultural expressions.

Hence, the main opportunity offered by Art. 11 UNESCO Convention is to give EU legislator a new basis to improve existent flexible mechanisms of participation in cultural matters, but also to set forth a new regulatory framework to enhance participation. The main challenge is to keep and develop non-institutional participatory mechanisms in a constant informal dialogue with civil society, without neglecting formal and specific participatory rules that are judicially enforceable.

2.3. The Implementation of Article 11 UNESCO Convention in the EU

2.3.1. The Pertinent Legal Framework

The EU has over the time evolved toward a constitutional order, and it formally embraces democratic principles and procedures.²⁸⁸ It is clear that EU can no longer be understood as a mere international organisation, with legitimacy solely deriving from the Member States. In particular the EU is based on representative democracy²⁸⁹, but it has undertaken various participatory tools and outreach initiatives to include civil society.²⁹⁰ The most important of

²⁸⁶ This relates to the so called "*capacitazione*" (i.e. development of citizens' awareness, knowledge and ability to choose). See, in this respect, U. Allegretti (2009), *Democrazia partecipativa e processi di partecipazione*, at www.astridonline.it.

²⁸⁷ On participatory tools, techniques and experiences in Italian public policies see L. Bobbio (2004), *Amministrazioni pubbliche, imprese, associazioni e cittadini nei processi decisionali inclusivi*, Ed. Scientifiche Italiane.

²⁸⁸ See *supra* ft. 1.

²⁸⁹ Art. 10 TEU. Democracy belongs to those concepts that are essentially contested and hence should not be understood as fixed, but as open to challenge and dispute. We here understand democracy in its legal meaning of organizational form, and foremost as a legitimating principle taking constitutional form. In particular, "representative democracy" is founded on the principle of elected individuals representing the people.

²⁹⁰ It must be emphasised that this overview does not contain a discussion of the development of participatory tools within the EU, nor does it cover all the relevant norms and their meaning. There is an evolving body of reflections by EU institutions and civil society organizations on reciprocal expectations and on the modalities of access to consultative activities. *Ex multis*, see D. Siclari (2009), *La democrazia partecipativa nell'ordinamento comunitario*, at www.amministrazioneincammino.it; M. Picchi (2007), *Uno sguardo comunitario sulla democrazia partecipativa*, at www.astrid-online.it. See also D. Curtin (2006), *Framing Public Deliberation and*

these tools is the consultation of stakeholders before the elaboration of a legislative proposal by the Commission. Moreover, the EU has progressively increased its public dissemination of information.

Participation and consultation of civil society were envisaged in the well known 2001 White Paper on European Governance, which contained a set of recommendations on how to enhance democracy in Europe and increase the legitimacy of the institutions²⁹¹. The Commission recognized that civil society can strengthen the legitimacy and accountability of the European governance, improve the flow of information, support EU policy formulation.²⁹² Consultation of civil society was intended to complement the structure of social dialogue (which involves trade unions and employers) envisaged by the former EC Treaty.

Many other soft law documents and regulations envisaged the participation of civil society and stakeholders in EU policy making.²⁹³ In 2002, the Commission, in its Communication "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission", stated that "the essential role of these advisory bodies (i.e. Economic and Social Committee and the Committee of the Regions) does not exclude direct contact between the Commission and interest groups. In fact, wide consultation is one of the Commission's duties according to the Treaties and helps to ensure that proposals put to the legislature are sound".²⁹⁴

Starting from 2001, the Interactive Policy Making (IPM) has been set out.²⁹⁵ The objective of the IPM is to use technologies and "to allow both Member State administrations and EU institutions to understand the needs of citizens and enterprises better". It is also intended "to assist policy development by allowing more rapid and targeted responses to emerging issues and problems, improving the assessment of the impact of policies (or the absence of them) and providing greater accountability to citizens".²⁹⁶ This system has been put in place to facilitate the stakeholders' consultation processes by the use of easy-to-use and straightforward online questionnaires, which are carried out through a specific website called "Your Voice in Europe"²⁹⁷.

Within the stakeholders' consultation processes usually carried out at the EU level, transparency is deemed essential. Further to the Green Paper of 2006²⁹⁸, the Commission,

Democratic Legitimacy in the European Union, in S. Bosson, J.L. Marti (eds), *Deliberative Democracy and its Discontents*, Ashgate, pp. 133 et seq.

²⁹¹ *European Governance: A White Paper*, COM (2001) 428. On the White Paper see G. Tiberi (2002), *Il Libro Bianco sulla Governance europea: verso un rafforzamento delle istanze democratiche nell'Unione?*, in *Quaderni costituzionali*, pp. 163 et seq.; G. De Minico (2001), *Dal Libro Bianco sulla "governanza" all'incontro di Laeken del 2001*, in *Riv. it. dir. pubbl. com.*, pp. 877 et seq.

²⁹² Legal scholars recognised that participation of civil society was necessary to overcome the democratic deficit of the EU. N. Verola (2006), *L'Europa legittima. Principi e processi di legittimazione nella costruzione europea*, Firenze. See also P.C. Schmitter, *Come democratizzare l'Unione Europea e perché*, Bologna, pp. 78 et seq. On the democratic deficit see *ex multis* K. Featherstone (1994), *Jean Monnet and the "Democratic Deficit" in the European Union*, in *Journal of Common Market Studies*, 2/1994, pp. 149 et seq.

²⁹³ See Commission documents COM (2002) 704, COM (2002) 705. See also at http://ec.europa.eu/civil_society/apgen_en.htm.

²⁹⁴ COM (2002)704. The Commission also states that "this is fully in line with the European Union's legal framework, which states that "the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents". (Protocol N° 7 on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty).

²⁹⁵ Consultation takes place in the context of preparing Green and White Papers, consultation reports and communications. There are several fora for consultation such as advisory committees, expert groups and ad-hoc consultation structures. And there are informal consultation events such as during occasional meetings with civil society representatives and exchanges of documents. However, consultation through the Internet is now increasingly frequent as reflected in this 'Interactive Policy-Making Initiative'.

²⁹⁶ http://ec.europa.eu/yourvoice/ipm/index_en.htm.

²⁹⁷ http://ec.europa.eu/yourvoice/index_en.htm.

²⁹⁸ COM(2006) 194 final: "Green Paper 'European Transparency Initiative'". In 2007, the Commission adopted the Communication Follow-up to the Green Paper 'European Transparency Initiative', which included the decision to establish a framework for its relations with interest representatives.

in its 2008 Communication "European Transparency Initiative - A framework for relations with interest representatives"²⁹⁹, set forth a Register for interest representatives. In this respect, it is worth noting that "Interest representation" activities for which registration is expected are defined as "activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions", but they exclude activities of the social partners as actors in the social dialogue (trade unions, employers associations). With the exception of local, regional, national and international public authorities, any entity, irrespective of its legal status in the national framework, is expected to register if it is engaged in activities meeting the definition above mentioned. The Commission encourages European networks, federations, associations or platforms to produce, as a dimension of their self-regulation, common, transparent guidelines for their members. In addition, the Commission provides a specific Code of Conduct for Interest Representatives. This Code contains seven basic rules, specifying how interest representatives should behave when representing their interests.³⁰⁰

It is clear that the role of civil society and specifically of citizens' associations has significantly grown and is connected to a widely advocated process of democratization of the EU. With the entry into force of the Lisbon Treaty, participation has become a constitutional principle. Even if Art. 10(1) TEU states that the functioning of the Union shall be founded on representative democracy, it also provides for a wide involvement of civil society. In particular Art. 10(4) TEU states that: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

Article 11 TEU is extremely important. It establishes that "the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action". Article 11(2) TEU states that "the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society". The Treaty also expressly deals with the consultation of civil society by the Commission (Art. 11(3) TEU).

In addition, Art. 11(4) TFEU provides for the citizens' legislative initiative and states that "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties". To enable EU citizens to really benefit from this right, a new regulation will be adopted³⁰¹. For the purpose of adopting a new regulation, the Commission launched a new consultation process with the Green Paper of 11 November 2009³⁰². The replies to the Green Paper underlined the need for the procedures and conditions for the citizens' initiative to be simple, user-friendly and accessible to all EU citizens. At present, a Commission proposal for a new regulation on the citizens' initiative has been published.³⁰³ The Commission recognizes that this new regulation is a significant step forward in the democratic life of the Union, and "provides a singular opportunity to bring the Union closer to the citizens and to foster greater cross-border debate about EU policy issues, by bringing citizens from a range of countries together in supporting one specific issue". The guiding principles for the proposal are the following: "the conditions should ensure that citizens' initiatives are representative

²⁹⁹ COM (2008) 323.

³⁰⁰ http://ec.europa.eu/transparency/docs/323_en.pdf.

³⁰¹ Green Paper on a European Citizens' Initiative at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/.

³⁰² R. Mastroianni (2002), *L'iniziativa legislativa nel processo legislativo comunitario tra deficit democratico ed equilibrio interistituzionale*, in S. Gambino, *Costituzione italiana e diritto comunitario*, Giuffrè, pp. 433 et seq.

³⁰³ COM(2010) 119 final, 2010/0074 (COD) at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/.

of a Union interest, whilst ensuring that the instrument remains easy to use”; “the procedures should be simple and user-friendly, whilst preventing fraud or abuse of the system and they should not impose unnecessary administrative burdens on the Member States”.

Finally, Art. 15 TFEU should be mentioned. This new provision supersedes former Art. 255 EC and states that, “in order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible” (para. 1). This provision evokes the right of access to documents of the institutions, which is provided for in Art. 42 of the EU Charter of Fundamental Rights.³⁰⁴

In this brief overview we cannot discuss extensively all the relevant provisions, nor the complex of participatory tools. It is worth highlighting that the EU’s legal framework encourages participation, and allows for the development of participatory tools and of a participative, transparent and effective decision-making process. Nonetheless, the EU still lacks a legal definition of the term ‘civil society’.³⁰⁵ It is not clear whether, in the EU legal framework, civil society coincides with interest representatives, as defined in the abovementioned 2008 Commission communication.

Another weakness is the impossibility to create associations at the European level, even though the right of assembly and association is firmly embedded in the EU Charter of Fundamental Rights, specifically in Art. 12. We have, at present, the possibility of creating “European company”³⁰⁶, but there is no possibility to create a “European Association”, since the 1992 proposal in this respect has been deleted.

Additionally, the EU has to date done relatively little to “institutionalize” and regulate the participation of civil society. Consultation is still formally “outside” the legislative process, it precedes the elaboration of a proposal by the Commission and it is mainly governed by soft law and practice. Even if wide consultation of a variety of interested parties usually takes place, and even though consultation is, at present, an important means for ensuring that the Commission’s proposals are technically viable and practically workable, effectiveness of the consultation is doubtful. Indeed, a fully coherent and transparent consultation process is still lacking. There are numerous consultation fora, but the role of consultation is insufficiently recognized and the influence of consultation on the outcome of the legislative process is unclear.

³⁰⁴ Art. 42 reads as follows: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions agencies; in whatever form they are produced”. The right guaranteed in this Article has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions; bodies and agencies generally, regardless of their form. The right to access documents is not an absolute right. The first exception states that the institutions shall deny access if disclosure of the information contained in the documents would undermine the protection of the public interest or the privacy and integrity of an individual. This is one of the most frequently cited exceptions by the institutions of the EU.

³⁰⁵ Despite the clear definition of interest representation, still there is no commonly accepted definition of the concept of civil society. The Commission has often used the term differently to refer to a broad range of organisations representing both social and economic players. E.g. in the Green paper on the role of Civil Society in Drugs Policy in the European Union COM(2006) 316 final, the Commission embrace a narrow concept. In particular the Commission embraced a narrow concept of civil society and recalled the definition suggested by the Council’s Horizontal Drugs Group in its thematic debate on the subject in September 2005 (i.e. civil society was defined “the associational life operating in the space between the state and market, including individual participation, and the activities of non-governmental, voluntary and community organisations”).

³⁰⁶ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001.

2.3.2. The Implementation of Art. 11 UNESCO Convention in the EU: an Assessment

Having briefly traced the pertinent legal framework, we now investigate whether and how Art. 11 UNESCO Convention has been implemented at the EC/EU level between 2007 and 2009.

Indeed, the Commission, in its famous 2007 Communication³⁰⁷, underlined the importance of a structured dialogue with the cultural sector. The Commission recommended the following: identifying all actors in the cultural sector; organising a "Cultural Forum" that brings together all these stakeholders; representing at European level the views of stakeholders in this sector; developing the social dialogue for the social partners in the cultural sector; and bringing a cultural dimension to European public debates by using, in particular, the permanent representations of the Commission.

In the field of intercultural dialogue, a Platform for Intercultural Europe was established in 2006: it brings together committed organisations from the culture sector and beyond. The Platform, formerly known as the Rainbow Platform, initiated in 2006 by EFAH (European Forum for Arts and Heritage) and ECF (European Cultural Foundation), now comprises over 300 civil society organisations and individual members engaged in intercultural action throughout Europe.

At present, participation of civil society in the implementation of the UNESCO Convention is organised through additional civil society platforms established by the European Agenda for Culture. Each of these platforms convenes approximately 40 civil society organisations and address issues such as access to culture, and cultural and creative industries. These platforms complement the abovementioned Platform for Intercultural Europe³⁰⁸ and were designed to cover the additional following areas: cultural and creative industries³⁰⁹, and access to culture³¹⁰.

According to the Commission, a structured link with civil society and the consultation of stakeholders and professionals are best practices related to the implementation of the UNESCO Convention³¹¹, and from 2007 and 2009, their significant efforts to implement Art. 11 UNESCO Convention must be acknowledged.

However, these efforts should be increased. The platforms mentioned above seem to be insufficient for the following reasons:

- These platforms remain almost unknown to the public;

³⁰⁷ Communication from the Commission of 10 May 2007 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world [COM(2007) 242 final].

³⁰⁸ <http://www.intercultural-europe.org/>.

³⁰⁹ See http://ec.europa.eu/culture/our-policy-development/doc/platform_CCI_paper.pdf. The board of the platform comprises European Film Companies Alliance, IMPALA, European Forum for Architectural Policies, European Music Office and Culture Action Europe/EFAH. The European Forum for Architectural Policies will insure the chairmanship while the European Music Office will act as the Secretariat with logistical support offered by the Alliance Mondiale du Cinéma – Europe. See http://ec.europa.eu/culture/our-policy-development/doc1583_en.htm. In September 2009, the recommendations of the Cultural Industries Stakeholders' platform aiming to unlock the potential of the European cultural and creative industries in particular SMEs, have been presented (http://ec.europa.eu/culture/our-policy-development/doc/platform_CCI_paper.pdf)

³¹⁰ The Platform on Access to Culture has a clear mandate to bring in the voice of civil society to provide recommendations for policies that can foster the access of all to cultural life in its different dimensions. The document of the Platform published in 2009 places access and participation within a human rights framework. Participation in cultural life as such is a fundamental human right. See http://ec.europa.eu/culture/key-documents/doc/forum/platform_access_culture_july09.pdf.

³¹¹ See European Commission's survey in the section "Regional Organizations Surveys" at www.diversitystudy.eu.

- Membership in these platforms is still not fully transparent. As previously noted the principles of accountability, but also of representativity are frequently reasserted in EU documents, however it is not clear how they are applied in respect to the platforms. It is not clear how controls (if any) on racists, ultra-nationalists, religious fundamentalists organizations are carried out.
- It is not clear how and how much these platforms actually influence cultural policy-making. It seems that these platforms are “soft” mechanisms with dubious “effectiveness”³¹².
- Participation is not supported by full access to information.

Another concern is that the efforts made at the EU level are not supported by participatory processes at the national level. From the surveys carried out, in the Member States no formal or structured processes of participation in the implementation of the Convention can be found. In some cases, civil society representatives stated that they have been ignored at national policymaking levels.³¹³

Concluding, even if the EU has often been conceptualised as largely a pluralist system, it is not clear whether the platforms themselves respect and promote cultural diversity. On the contrary, it seems that the Commission has favoured only European networks and umbrella groups. In addition, these platforms are characterized by an overarching emphasis on participation, which is actualized mainly in terms of a consultative role and an information-providing role. There is no clear evidence of a desire to include civil society in debates on the merits of proposing legislation implementing the Convention.

2.4. New Ideas to Fully Implement Art. 11 UNESCO Convention within the EU

This section provides recommendations on how the EU can involve civil society. It embarks on an investigation of new ideas that can put into practice Art. 11 UNESCO Convention.

As mentioned above, public participation is a constitutional value of the EU, and it is an important means to ensure subsidiarity (i.e. to ensure that EU action is as close to the citizens as possible)³¹⁴. Thus, implementation of Art. 11 of the UNESCO Convention primarily responds to a principle of the Treaty.

2.4.1. New Binding Rules on Participation of Civil Society

In general terms, participation in the EU is mainly ruled by soft law and practice. The lack of binding regulations makes participation flexible, and makes it possible to develop new informal mechanisms. However, this lack leaves undetermined and formally limited the effectiveness of participation. In addition, the absence of a binding regulation makes

³¹² Effectiveness involves the existence of an impact, an observable and positively appraised change in the context of EU cultural policies.

³¹³ See the section “Civil Societies Surveys” at www.diversitystudy.eu. It is worth recalling that involvement of civil society would be essential also in fostering the transposition of legislation through sectoral pressure on policy makers in Member State.

³¹⁴ Although the legal articulation of subsidiarity within the Treaty still focuses on the respective roles and competences of the EU and the Member States only, and on the EU legislative institutions, the significance of the principle and the ideas it represents are, arguably, not so limited in practice. The more diffuse notion of decision-making which takes place “as closely as possible to the citizen” implies that EU law is concerned not only with ensuring appropriate action at the level of the Member States, but also at any level which brings decision-making in some way closer to those who are affected. Thus, even if the primary legal discourse of subsidiarity is still focused on the issue of resolving questions of EU-Member State action, it is also clear that within the EU, law-making power must be exercised and decisions must be taken by an array of actors and institutions, both public and private and include civil society. See *ex multis* G. De Burca (1999), *Reappraising Subsidiarity's Significance after Amsterdam*, at <http://centers.law.nyu.edu/jeanmonnet/papers/index.html>; A. Estella (2002), *The EU Principle of Subsidiarity and its Critique*, Oxford-New York.

participation *per se* “provisional” (e.g. it may be suspended arbitrarily, and it may exclude parts of civil society).

Thus, a new legislative act setting out a binding framework for the purpose of implementing Art. 11 UNESCO Convention could be important to ensure that the participatory tools are more effective, more transparent and in compliance with the rule of law. As concerns the legal base for the proposed legislative act, Art. 11 TEU (especially paras. 1 to 3), together with Art. 11 UNESCO Convention, would be appropriate.³¹⁵

A source of inspiration for a binding regulation which meets the objective of Art. 11 UNESCO Convention, in compliance with the UNESCO operational guidelines, could be found in the Aarhus package (i.e. a series of directives and regulations implementing the Aarhus Convention at, respectively, Member State and EU level). In particular, attention could be drawn to EC Regulation No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies (hereinafter the *Aarhus Regulation*)³¹⁶.

The new Regulation should:

- 1) Include a comprehensive definition of civil society in compliance with the UNESCO Guidelines, mentioned above. The regulation should require transparency and democratic standards internal to the civil society associations, since the relevant provision of the 2008 Code of Conduct (in the 2008 Commission communication) seems to be insufficient.
- 2) Provide for “institutional” access to information: i.e. civil society should be specifically allowed and facilitated to obtain relevant information from EU institutions about the measures planned or already implemented to protect and promote the diversity of cultural expressions. This would be a specification of the right granted by the EU Charter of Fundamental Rights.

In this respect the Regulation should:

- specifically guarantee the right of public access to information on cultural diversity policies, acts, received or produced by EU institutions or bodies and held by them;
 - set out the basic terms and conditions of, and practical arrangements for, the exercise of that right;
 - provide that where information requested is not held by that EU institution or body, it, promptly as possible within a fixed term, informs the applicant group or body where it is possible to apply for the information requested.
- 3) Ensure that information on the implementation on the UNESCO Convention is made available to the public, in order to achieve its widest possible systematic dissemination. To that end, the use of computer telecommunication and/or electronic technology, where available, is to be promoted.
 - 4) Lay down rules and methods to associate civil society in cultural policy-making. In particular, this regulation could set out formal procedures to ensure civil society participation concerning plans and programs relating to cultural diversity (i.e. to the

³¹⁵ In view of implementing of Art. 11 UNESCO Convention, the ordinary legislative procedure applies to the following fields: Open, transparent and regular dialogue with representative associations and civil society (Art. 11 TEU and Art. 24(1) TFEU); and the Right of access to documents (Art. 15(3) TFEU).

³¹⁶ <http://ec.europa.eu/environment/aarhus/>. On the Aarhus Convention see C. Larssen’s Study Paper at www.diversitystudy.eu.

implementation of the Convention). This “structured” participation would support informal and flexible mechanisms of consultation, also within the OMC.

- 5) Lay down provisions devoted to ensure participation of civil society in the preparatory (i.e. pre-legislative) phase. These provisions should provide not only for consultations, but also for public debates.³¹⁷ Public debates would play a significant role in the political discourse and are an important factor in seeking to implement the Convention (see below Figure 1)³¹⁸. An *ad hoc* body (i.e., an agency)³¹⁹ for participation³²⁰, to organise public debates, should be established.
- 6) Include specific provisions on the citizens’ legislative initiative, to be coordinated with the contents of the new general regulation on the European citizens’ initiative, which will be adopted in the near future. The latter will be a general piece of legislation and will not preclude a specific provision in a comprehensive regulation devoted to implement Art. 11 of the UNESCO Convention. In any case, the general regulation on European citizens’ initiative will offer an important occasion for stakeholders and European citizens to participate in the legislative implementation of the UNESCO Convention.
- 7) Lay down provisions for participation within the legislative process, and eventually in the subsequent phase (i.e. in the application of the law). Participation in the post-legislative phase, i.e. in favouring and in monitoring the application of legislative measures discussed before with civil society, is imperative.

In addition, civil society organisations excluded from the consultation process or whose rights have been violated during such a consultation process should be allowed to have a judicial remedy in front of the European Courts, i.e. the ECJ and the General Court, in compliance with art. 263 TFEU.³²¹

In cases such as the undue exclusion from the consultation processes, the possibility to complain to the European Ombudsman is doubtful and, in any case, is not sufficient. The European Ombudsman investigates complaints about the maladministration of the institutions and bodies of the EU (i.e. when an institution fails to act in accordance with the law,³²² or fails to respect the principles of good administration).³²³ According to Art. 228 TFEU, the Ombudsman can receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State (businesses,

³¹⁷ National experiences such as the *débat public* in France or the Regional Tuscany law on Participation (<http://www.regione.toscana.it/partecipazione>) could be a source of inspiration in this respect. See Y. Mansillon (2006), *L’esperienza del débat public in Francia*, in *Democrazia e Diritto* 3/2006, pp. 101 et seq.; M. Ciancaglini (2008), *La democrazia partecipativa in Toscana. Note a margine della legge regionale 69 del 2007*, at <http://www.consiglio.regione.toscana.it/partecipazione/documenti/articoli/La%20democrazia%20partecipativa%20in%20Toscana.%20Note%20a%20margine%20della%20legge%20regionale%2069-2007.pdf>; A. Floridia (2007), *La democrazia deliberativa, dalla teoria alle procedure. Il caso della legge regionale toscana sulla partecipazione*, in *Le istituzioni del federalismo*, 5-2007, pp. 603 et seq.

³¹⁸ These debates should be used also to improve the general public’s awareness and the understanding on the Convention goals together with the acceptance of cultural pluralism.

³¹⁹ An EU agency is a body governed by European public law; it is distinct from the Institutions and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task.

³²⁰ The Tuscany *Autorità Garante per la Partecipazione*. See <http://www.consiglio.regione.toscana.it/partecipazione/default.aspx>. See also Italy’s Legal Survey in the section the section “Civil Societies Surveys” at www.diversitystudy.eu.

³²¹ “Access to justice” (which is a fundamental feature of EC Regulation 1376/2006) is not provided by the UNESCO Convention itself. However, it would be important to provide effective judicial remedy, in order to ensure participation of civil society.

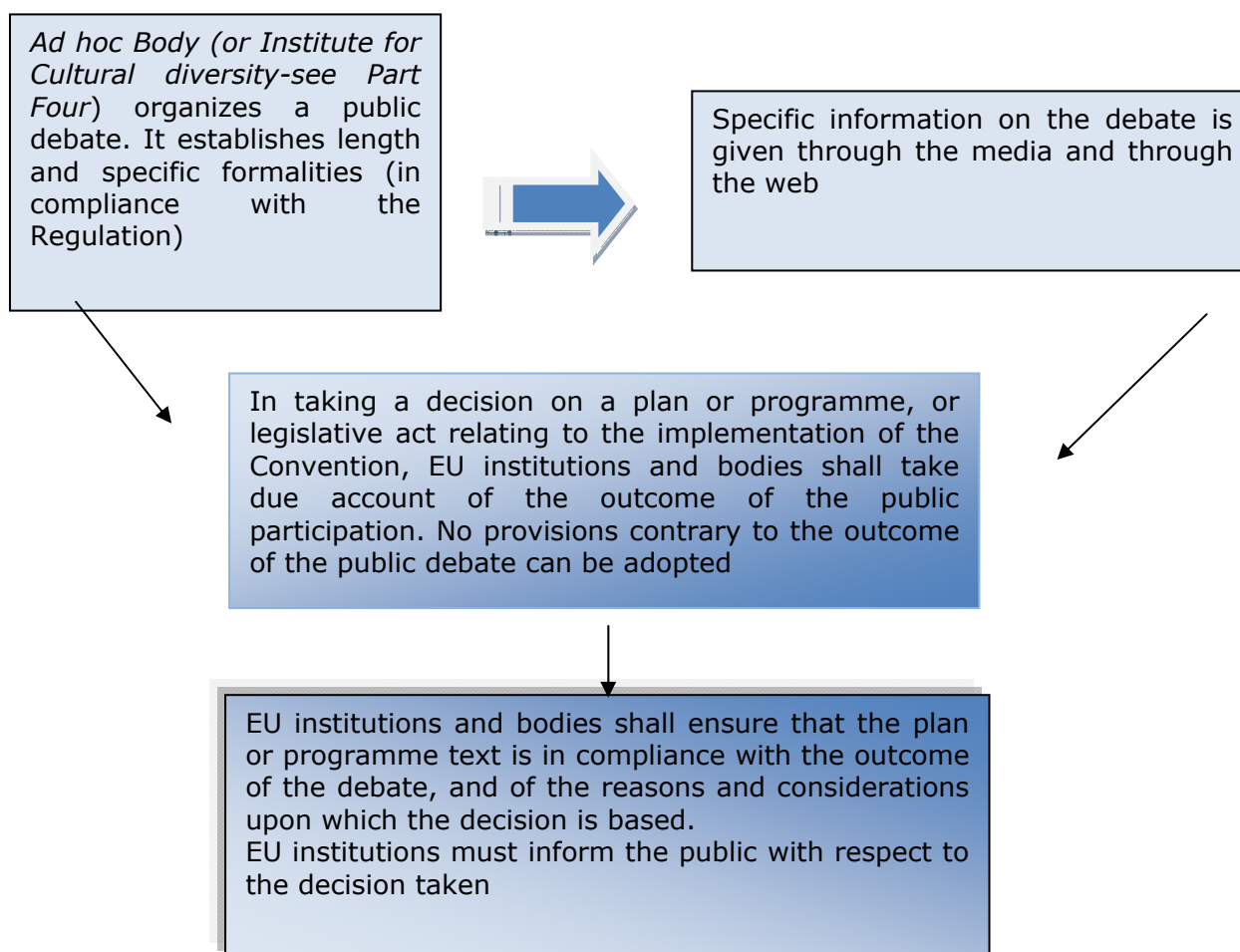
³²² I.e. Complaints can be raised in case of refusal of documents access, abuse of powers, lack of competence, discrimination, avoidable delay, transparency.

³²³ [Http://www.ombudsman.europa.eu/home/en/default.htm](http://www.ombudsman.europa.eu/home/en/default.htm).

associations or other bodies)³²⁴. This limitation *ex parte subjecto* is *per se* an obstacle, given the wide definition of civil society. Moreover, most cases before the Ombudsman are settled by means of mediation and friendly solutions, and only relatively few cases lead to critical remarks or recommendations. Generally, the Ombudsman may simply need to inform the institution concerned about a complaint in order for it to resolve a given problem. If the case is not resolved satisfactorily during the course of his inquiries, the Ombudsman tries to find a means of conciliation. If the attempt at conciliation fails, the Ombudsman can make recommendations to resolve the case. If the institution does not accept his recommendations, he can make a special report to the European Parliament. However, the Ombudsman does not have the power to launch infringement proceedings before the ECJ. Hence, the envisaged new regulation should also be designed so that the EU Courts will ensure the transparency and effectiveness of the participation of civil society, in compliance with the TEU and the TFEU.

Consideration should be given to the possibility of requiring that a legislative act that follows a consultation process comply with the results of the consultation.³²⁵ If it does not, the legislative act should be voidable by the ECJ.

Figure 1: Public Debates in the EU



³²⁴ Art. 43 of the EU Charter of Fundamental Rights stresses the possibility for every European citizen to take grievances to the Ombudsman. See *inter alia* M.C. Baruffi (2007), *Mediatore europeo: ricorsi record nel 2006 per chiedere una maggiore trasparenza*, in *Diritto Comunitario e Internazionale-Guida al Diritto*, July/August 2007, pp. 76 et seq.

³²⁵ In the national experiences, usually there is no obligation for the public authorities to respect the outcome of the debate (e.g. in the French experience on the *débat public*; see <http://www.debatpublic.fr/>).

2.4.2. Civil Society's Access to Information

The greater the demand for a diversity of cultural expressions, the more Parties will protect this diversity. The stronger the knowledge of the Convention is among actors, the more likely that they will refer to the instrument and to cultural diversity in their discourses, the more they could participate to the implementation process of the Convention.

Therefore, specific tools on the collection and dissemination of information on the UNESCO Convention, and on the implementation of the Convention should be established at the EU level. In particular, an electronic database publicly accessible should be created. The "Århus Clearinghouse Mechanism"³²⁶ provides a useful model with respect to such a public database³²⁷.

In addition, information materials on the Convention and on cultural diversity should be produced and distributed by EU. In this respect, the "Diversity Toolkit for factual programmes in public service television", distributed in 2008 by the Fundamental Rights Agency, represents a best practice and serves as a relevant example.³²⁸

2.4.3. Participation of Civil Society in the OMC Process

The Open Method of Coordination (OMC) provides a framework for cooperation among the Member States. The OMC is a method of so-called "soft governance": it is devoted, through a process of *information sharing* and monitoring, to implementing norms. It is based on jointly identifying and defining objectives to be achieved (adopted by the Council); jointly establishing measuring instruments (statistics, indicators, guidelines); and benchmarking, i.e. performance review based on comparison of results and on the exchange of best practices (monitored by the Commission).³²⁹ The OMC has considerable potential for the implementation of the UNESCO Convention. However, this method still lacks full participation, accountability and legitimacy. Thus a more "participative" OMC would be important. The involvement of civil society can only happen where a greater visibility of the OMC is ensured. This can be achieved through media and a devoted website, as mentioned above.

In other words, effective and active participation of civil society should be ensured within the OMC. Hence, it is recommended that:

- The OMC opens up to the participation of civil society, in particular NGOs and cultural professionals, but also to regions, and local authorities.³³⁰

³²⁶ [Http://aarhusclearinghouse.unece.org/](http://aarhusclearinghouse.unece.org/)

³²⁷ See C. Larssen's Study Paper at www.diversitystudy.eu.

³²⁸ The Toolkit contains a wealth of information on how to promote the principles of cultural diversity in broadcast organisations and TV programmes. It brings together practical elements (checklists, references) and good practice advice that can be used, applied and learned from. The Toolkit comes in the form of a handy ring binder and is available free-of-charge from FRA. It includes a DVD with examples from news and current affairs programmes from a dozen European countries illustrating some of the difficulties facing journalists when they report on minorities and its associated documentation (http://fra.europa.eu/fraWebsite/media/materials_trainings/diversity_toolkit_en.htm).

³²⁹ See Annick Schramme -S. Van der Auwera's Study Paper at www.diversitystudy.eu. See also M. J. Rodrigues (2001), *The Open Method of Coordination as a New Governance Tool*, in M Telo, *L'evoluzione della governance europea*, 2/3- 2001, pp. 96 *et seq.*, at <http://eucenter.wisc.edu/OMC/Papers/rodrigues.pdf>.

³³⁰ Participation' is explicitly mentioned in the OMC template, although there is no specification on the mechanism through which this is to happen. Peer reviews phase of the OMC should involve more local and regional levels, since often cultural matters are dealt with by local entities.

- Civil society is involved in defining the objectives to be achieved within the process of the implementation of the Convention.
- Member States should present “preliminary reports” covering the challenges of the implementation of the Convention, following an open consultation process. These reports should be written involving the main national stakeholders and National Coalitions for Cultural Diversity. They should also enable cultural professionals and other groups to formulate and present cultural policy proposals to their respective government authorities.³³¹
- The OMC reports take into account stakeholders requests/vision.
- The expertise of culture professionals is used to assess what is deemed to be a best practice.

2.5. Concluding Remarks

This paper has documented the ways in which civil society has been involved in the implementation of the UNESCO Convention. It has also envisaged a greater and more effective participation, since there is ambiguity in the present consultation process and, in particular, in the platforms system established by the European Agenda for Culture.

Participation of civil society is envisaged in many soft law documents, and it is provided for in the Lisbon Treaty, but there is still a tension between representative democracy and innovative participatory tools, conducted jointly by civic groups and political institutions. Hence, in the EU legal framework, the search for “rules of participation” of civil society to European governance is still in an early stage. The involvement of civil society does not need to be strictly governed by hard formal procedures, but it would benefit from a more “mature” and regularised procedure expressed in a binding act that guarantees rights of participation.

In this paper it is impossible to address the complex issue of participation of civil society. However, we have tried to give the reader new ideas suitable for the implementation of Art. 11 UNESCO Convention and to discuss the contents of a new regulation. In this respect, we suggest that the legislative participatory model introduced by the *Aarhus Regulation* provides a good example for further experimentation with new rules implementing Art. 11 UNESCO Convention and for encouraging and enabling civil society to participate as co-policy makers.

Pending the adoption of a new regulation, informal mechanisms should be strengthened and given more effectiveness and transparency, taking into account national best practices: the EU must consider and try to implement best practices already present in the Member States or previously tested at the national level.

³³¹ Thus, through the OMC, participation should also be fostered at the national level. This is extremely important, as responses to the civil society questionnaire for our survey indicated that participation of civil society in policymaking and implementation remains low.

Annex

Below we present some “best practices” at the national level.

BEST PRACTICES AND SUCCESS STORY

Participation of Civil Society in Cultural Matters

The Tuscany Law 21/2010

On February 2010, Tuscany adopted a new piece of legislation on cultural activities. This regional law valorises participation of civil society. Among the general principles (art. 1) participation is expressly mentioned (Art. 1(d)). In addition, Art. 1(a) specifically provides for participation for determining the meaning of cultural goods and the value of cultural activities. Art. 16 provides for “eco-museums” to be realized through civil society’s participation.

This law does not include “rules of participation” of civil society, which are provided for in a specific law (Tuscany Law 69/2007). However, it seems extremely relevant since it valorises participation of civil society in the field of culture.

Participation of Civil Society in Cultural Matters

Italian Experience

The non-profit Italian organisations *Labsus*³³² and ICOM³³³ promoted a protocol to foster the application of the subsidiarity principle in cultural matters (especially cultural heritage issues). ICOM is one of the most important NGOs of museums and cultural centres at the global level. *Labsus* is an NGO dealing with participatory democracy and horizontal subsidiarity in Italy.

This protocol represents an important experience to foster the role of civil society in cultural matters.

The successful involvement of civil society in cultural policy can “start” from civil society itself. This project demonstrates the capacity of private partnership to deliver benefits to the entire civil society. This Italian experience could be a source of inspiration for similar experiences that promote the creation of cultural goods but also traditional knowledge all around Europe. This experience could involve National Coalitions for Diversity.

Cultural Diversity – More than a Slogan

Switzerland Experience

In Switzerland, the National Coalition for Cultural Diversity and the Swiss UNESCO Commission published in October 2009 the report “La diversité culturelle – plus qu'un slogan” containing proposals for the implementation of the UNESCO Convention.³³⁴ These recommendations are based on stock-taking and analyses of the current situation of cultural diversity in Switzerland that resulted from the work of eight expert groups addressing the areas of international cooperation, theatre and dance, cinema, education, music, literature, visual arts and conservation of cultural heritage, and media. This stakeholders' report is a valuable tool for the implementation of the UNESCO Convention in Switzerland.

³³² See <http://www.labsus.org>.

³³³ See <http://www.icom-italia.org/>.

³³⁴ See report and related documentation at <http://www.diversiteculturelle.ch/visio.php?en,01>.

PART THREE. IMPLEMENTATION OF THE UNESCO CONVENTION IN EU EXTERNAL RELATIONS

Study Paper 3A: The WTO System and the implementation of the UNESCO Convention: two case studies

Lucia Bellucci and Roberto Soprano

3.1. Introduction

China and the United States are both parties to the WTO Agreements. China is also party to the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (hereafter the *UNESCO Convention*) while the United States was one of the two countries that opposed and never ratified it. The United States was concerned by its potential to be misinterpreted in ways that might impede the free flow of ideas and affect areas like trade, justifying protectionism. According to Article 34 of the *Vienna Convention on the Law of Treaties*, the *UNESCO Convention* does not create obligations for the United States.

Both *China-Publications and AV Products* case and *China-IPRs* case were settled by the WTO Dispute Settlement Body ("DSB") and involved the protection and promotion of non-trade concerns. Specifically they both refer, directly or indirectly, to cultural diversity.

3.2. The China-Publications and AV Products Case

The Panel considered a complaint by the United States concerning a series of Chinese measures regulating activities relating to the importation and distribution of: reading materials, audiovisual home entertainment products, sound recordings, and film for theatrical release. The United States claimed that certain challenged measures violated trading rights commitments undertaken by China in the Protocol on the Accession of the People's Republic of China to the World Trade Organization and the Report of the Working Party on the Accession of China to the WTO. It was argued that they restrict the right of enterprises in China, foreign enterprises, and foreign individuals to import the relevant products into China by limiting trading rights to Chinese State-owned enterprises. Furthermore, they claimed that some of the measures were inconsistent with Article XVI and/or Article XVII of the *General Agreement on Trade in Services* ("GATS"), and Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").³³⁵ The

³³⁵ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, 12 August 2009, at para. 3.1 and WTO Appellate Body Report, WT/DS363/AB/R, 21 December 2009, at para. 2 *et seq.* Full text available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm, [http:// www.worldtradelaw.net/reports/wtopanels/wtopanels.asp](http://www.worldtradelaw.net/reports/wtopanels/wtopanels.asp) and <http:// www.worldtradelaw.net/reports/wtoab/abreports.asp>.

Panel found that the challenged measures³³⁶ were inconsistent with the above mentioned legal instruments and the Appellate Body upheld its decision.³³⁷

3.1.1. China's defence: cultural diversity and public morals

In its defence China referred to the *UNESCO Convention* and to the *UNESCO Universal Declaration on Cultural Diversity* (hereafter *UNESCO Declaration*), which, as China underlined, was adopted by all UNESCO Members including the United States. China submitted that cultural goods and services share a unique nature. They do not merely satisfy a commercial need but are "vectors of identity, values and meaning" (Article 8 of the *UNESCO Declaration*; see also Article 1(g) of the *UNESCO Convention*), playing an essential role in the evolution and definition of aspects such as societal features, values, ways of leaving together, ethics and behaviours.³³⁸

China established a link between cultural goods and the protection of public morals: cultural goods have a major impact on societal and individual morals as emphasized in particular in the *UNESCO Convention*. It was therefore of vital interest for this country to impose a high level of protection of public morals through an appropriate content review mechanism that prohibited any cultural goods with content (ranging from violence or pornography to the protection of Chinese culture and traditional values) that could have a negative impact on public morals. The challenged Chinese regulations were therefore necessary to protect public morals and fully justified under Article XX(a) of the GATT and its chapeau.³³⁹

To address the meaning of the concept of "public morals" as it appears in Article XX(a), the Panel adopted the same interpretation of the expression as it is used in Article XIV of the GATS, given in *US – Gambling*; that is an "open" interpretation, culturally and socially oriented.³⁴⁰ Despite that, the Panel considered the relevant provisions were not "necessary" within the meaning of Article XX(a), because China had not demonstrated that they were necessary to protect public morals within the meaning of this article, and particularly that the alternative put forward by the United States was not a genuine one or was not reasonably available to China. Therefore, the Panel considered there was no need to examine whether the relevant measures satisfied the requirements of the chapeau of Article XX and came to the overall conclusion that these measures were not justified under the provisions of Article XX(a).³⁴¹ The Panel's finding has therefore a procedural character more than a substantive one. On appeal, China requested the Appellate Body to be "mindful" of the specific nature of cultural goods, but the Appellate Body upheld the Panel's conclusion.³⁴²

³³⁶ For details on some excluded "measures", see WTO Appellate Body Report, WT/DS363/AB/R, at paras. 5 and 10.

³³⁷ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, at paras. 8.1-8.2 and WTO Appellate Body Report, WT/DS363/AB/R, at para. 414 *et seq.*

³³⁸ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, at paras. 4.89, 4.276 and 7.751.

³³⁹ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, at paras. 4.109 *et seq.*, 4.276 *et seq.*, 7.714 and 7.753. The "chapeau" is the introductory paragraph of Article XX. It contains general requirements that must be satisfied by a measure in order to comply with it.

³⁴⁰ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, at para. 7.759.

³⁴¹ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, at paras. 7.911 and 7.913.

³⁴² Except for what concerns the State plan requirement in Article 42 of the *Publication Regulation*, see WTO Appellate Body Report, WT/DS363/AB/R, 21 December 2009, at paras. 25, and 414 *et seq.*, particularly at para. 415.(b).(iii).

3.2 The China-IPRs Case

In the *China-IPRs* case, the United States alleged inconsistencies with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS") in relation to 1) the thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties; 2) the usage of goods that infringe intellectual property rights and that are confiscated by Chinese customs authorities, in particular the disposal of such goods following removal of their infringing features; 3) the scope of coverage of criminal procedures and penalties for unauthorised reproduction or unauthorised distribution of copyrighted works and 4) the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China. The Panel found certain inconsistencies between China's laws and its obligations under the TRIPS Agreement, though it held that the United States failed to prove the non-compliance of some of the measures with WTO norms.

It is important to stress that China's denial of copyright protection was based on Article 17 of the *Berne Convention for the Protection of Literary and Artistic Works* (hereafter the *Berne Convention*), which sets forth that its provisions "cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right". The aforementioned article is mainly related to censorship and public order.³⁴³

3.3 Intellectual property rights and cultural diversity: the protection and promotion of non-trade concerns

The *China-IPRs* case shows the relevance and limits of the adoption of IPR-related measures in order to protect non-economic interests. It could be argued that these measures fall under the sovereign rights of a state, recognized by the *UNESCO Convention* to maintain, adopt and implement policies and measures that it deems appropriate for the protection and promotion of the diversity of cultural expressions within its territory.

Denying copyright protection is not only about tolerating piracy, but can be considered a measure aimed at protecting and promoting the diversity of cultural expressions. The excessive penetration of foreign cultural goods and activities hampers the flourishing and expression of cultural diversity. If domestic cultural industries cannot compete with foreign competitors there is a risk that domestic cultures, traditional knowledge and languages cannot find the needed space to emerge and thus succumb to dominant mass culture.

Cultural goods present aspects similar to other industries (i.e. pharmaceutical). The huge investments that only some industries can afford create market dominance for their products and prevent products from other origins from having access to markets. Furthermore, TRIPS obligations have contributed to create or increase a high degree of global concentration in the ownership of intellectual property in cultural goods and services. On one hand, the rationale of intellectual property rights is to provide an incentive for innovation and creation by granting a competitive advantage in the form of an exclusive right. On the other, intellectual monopolies might concentrate interests to the detriment of the masses. The market for audiovisual cultural goods, for example, is dominated by the

³⁴³ WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, 26 January 2009, at para. 7.120. Full text available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

“Hollywood oligopoly”. Interesting studies have shown that by controlling markets, private corporations have the power to act as a cultural filter and thus increase tendency towards homogeneity in cultural products and services (Macmillan). It has been underlined that a large proportion of the recorded music offered for retail sale has “about as much cultural diversity as a Macdonald’s menu” (Capling). Although copyrights contribute to foster investments in cultural goods and activities, they might reduce the variety.

3.3. The European Union as a Third Party

In both WTO cases the European Union (European Communities in the cases) supported the United States’ complaint.³⁴⁴ In neither case did the EU make legal or political statements in support of cultural diversity.

In the *China publications and AV products* case the EU took the opportunity to reaffirm some of its positions regarding services,³⁴⁵ without reference, in contrast with other third parties, to the *UNESCO Convention and Declaration*. The EU position is coherent with the Commission’s position expressed in the Communication of 2006 concerning the EU-China partnership. The Communication opposed barriers to market access and discrimination of foreign cultural goods in favour of trade relationships and the defence of cultural rights, in particular the right of free access to culture. A positive statement from the EU would have reinforced the effectiveness of its position on services. Particularly because, given the lack of a solution within the multilateral context of the WTO, the United States has turned to bilateral agreements to implement its digital agenda – the *Free Trade Agreements (FTAs)* – which require states to establish a definitive list of restrictions rather than enabling them to gradually make liberalising commitments.

In the *China-IPRs* case the EU did not refer to the *Berne Convention* to deny copyrights. A statement from the EU concerning the prospects of limiting copyrights in order to protect non-trade concerns would have contributed to maintain coherence with the EU position regarding the *UNESCO Convention*.³⁴⁶

3.4. Forecast on Further Developments in the WTO System

It is possible to affirm, as exemplified in the *Canada – Periodicals* case, that the Panel and Appellate Body are not willing to let “cultural issues” prevail over trade issues, given that “cultural issues” are *a priori* difficult to define and politicised. These bodies will hardly stray from a system of rules that have been efficiently working for years through a tested dispute settlement system, in favour of the *UNESCO Convention* that is vague in many ways and shows some weaknesses:

- key provisions are expressed in aspirational terms.
- it shall not “be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”(Article 20.2).
- its dispute settlement procedures (negotiation, mediation, and conciliation) are

³⁴⁴ First Submissions of the USA, 13 May 2008 and 30 January 2008. For the whole briefs and further documents on the panels proceedings, see the section *Pending US briefs filed in WTO dispute settlement proceedings* at <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/measures-affecting-pr> and http://www.ustr.gov/webfm_send/319.

³⁴⁵ Third Party Written Submission by the European Communities, 4 July 2008, at 16 *et seq.*, available at http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140292.pdf.

³⁴⁶ Third Party Written Submission by the European Communities, 26 March 2008, at 8, available at http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140289.pdf.

essentially co-operative and not legally constraining: there is no provision for formal sanctioning and therefore for a dispute settlement system that will produce concrete interpretations of its terms and concepts with the aim of making its rules more predictable and transparent.

- it does not deal with intellectual property rights.

Nevertheless, some measures can be put forward to foster a better harmonization between trade and culture in the WTO system and a better implementation of the *UNESCO Convention*.

3.5. Policy Recommendations for a Better Harmonization between Trade and Culture in the WTO System and a Better Implementation of the UNESCO Convention

- 5) With the aim of linking Panel's and Appellate Body's interpretations to the *UNESCO Convention*:
 - I.a) Amending the Preamble of the *Agreement Establishing the World Trade Organization* and/or the GATS and TRIPS agreements by including the goal of cultural diversity (see case *US-Shrimp*).
 - I.b) Introducing a *procedural clause* for cultural diversity into the body of the "covered agreements" in the form of a Ministerial Decision.
 - II) Introducing a specific "cultural diversity safeguard" under GATS.
- 6) Including a procedural rule in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that the Panel needs to include one "cultural" expert.
- 7) Agreeing on a waiver³⁴⁷ for cultural policies negotiated under Article IX: 3-4 of the WTO Agreement.
- 8) Introducing specific cultural exemptions or exceptions under Article XX of GATT 1994 or GATS Article XIV, and a new TRIPS article which provides specific exemptions for cultural goods.
- 9) Reforming the existing services classification [the W/120 with reference to the United Nations Central Product Classification (CPC)] (see case *US – Gambling*).
- 10) Providing some additional leeway for developing countries, or at least the least-developed countries.
- 11) Adopting anti-dumping measures for the services context and particularly in response to "dumping" of audiovisual services.³⁴⁸
- 12) Adopting a competition-based approach through EU/State law with regard to cultural goods and services and intellectual property rights,³⁴⁹ and creating a special joint team between the DG Competition and the DG Education and Culture/DG Information Society and Media to balance the exclusive rights provided to IPR holders which can limit competition, in particular where the firms enjoy high market

³⁴⁷ A permission granted by WTO Members allowing a WTO Member not to comply with normal commitments. Waivers have time limits and extensions. They have to be justified and shall be approved by $\frac{3}{4}$ of the Members.

³⁴⁸ In the current round there is no mandate to negotiate this issue and, at the actual stage, WTO and EU antidumping law only apply to goods, not to services.

³⁴⁹ Competition law is currently outside the negotiation mandate of the WTO Members.

shares.

- 13) Supporting the Intergovernmental Committee of the *UNESCO Convention* in compiling a body of case law regarding its interpretation and application.
- 14) Regulating the possibilities and limits on the use of IPR-related measures within the *UNESCO Convention*.
- 15) The EU should maintain coherence between WTO and UNESCO negotiations, and support legal and political positions regarding the protection and promotion of the diversity of cultural expressions when acting as a third party during WTO disputes.

3.6. Conclusion

Both *China-Publications and AV Products* case and *China-IPRs* case involve the protection and promotion of non-trade concerns, particularly of cultural diversity. They both concern “cultural industries”, whose markets are particularly affected by distortions. They are shaped at the international level by horizontal and vertical concentrations and particularly by oligopolies (i.e. with regard to the audiovisual sector the oligopoly of the US majors).

In neither case did the EU make legal or political statements in support of cultural diversity, although they would have helped the implementation of the *UNESCO Convention*, and strengthen its role in the interpretation of existing international agreements and negotiations over their future development.

Both cases show, directly or indirectly, some of the weakness of the *UNESCO Convention*. This weakness does not help reversing the trend within the WTO DSB, which seems not willing to let “cultural issues” prevail over trade issues and to stray from a system of rules that have already been tested through the years. Some policy recommendations therefore need to be adopted to improve the implementation of the *UNESCO Convention* and to reduce the distortions of the “cultural industries” markets.

Among the recommendations that have been proposed one can identify two major ones that relate to both cases:

- a competition-based approach (a mechanism guaranteeing free trade, sanctioning “unfair trade practices” or “restrictive business practices”).
- a harmonization-based approach (between WTO rules and those of the *UNESCO Convention*).

Study Paper 3B: the UNESCO Convention and the WTO: promoting dialogue on the legal relationship

Tania Voon

3.1. Executive Summary

The meaning of Articles 20 and 21 of the UNESCO Convention remains unclear, and further discussion is required within and beyond the WTO of the relationship between the UNESCO Convention and WTO rules. Although the current environment for such discussions is not conducive to making rapid concrete progress, both UNESCO and the EU should continue to encourage dialogue on this issue while taking additional steps to promote cultural diversity in a manner consistent with the objectives of the WTO.

3.2. UNESCO Convention Articles 20 and 21

Articles 20 and 21 of the UNESCO Convention concern its 'Relationship to other instruments' (Part V). In particular, Article 20 governs the relationship between the Convention and other treaties, providing that Convention parties must 'foster mutual supportiveness between this Convention and the other treaties to which they are parties' and 'take into account the relevant provisions of this Convention' 'when interpreting and applying' those treaties or 'entering into other international obligations' (Art 20.1). At the same time, Article 20.2 states that nothing in the convention is to be 'interpreted as modifying rights and obligations of the Parties under any other treaties'. The ambiguity of Article 20 is heightened by the fact that Article 20.1 implies that the Convention is not 'subordinate' to any other Treaty. Article 21 goes beyond treaties to require parties 'to promote the objectives and principles of this Convention in other international forums', including by consulting each other, 'bearing in mind these objectives and principles'.

Particularly given the inclusion of Article 20.2, Part V of the Convention imposes on parties relatively limited obligations that would be difficult to enforce. Part V is also clearly restricted to the actions of parties to the Convention and does not purport to influence the actions or decisions of non-parties. Nevertheless, these provisions are key to the relationship between the UNESCO Convention and the WTO agreements.

3.3. Discussing the UNESCO Convention at the WTO

Of the 153 Members of the WTO, 96 are parties to the Convention (hence, the vast majority of the 110 Convention parties are also WTO Members). Discussing the UNESCO Convention under the auspices of the WTO would be one way for WTO Members who are also parties to the Convention (such as the EU) to implement Articles 20 and 21 of the Convention, while simultaneously providing a forum to analyse the meaning and significance of those provisions.

To date, discussion of the UNESCO Convention within the WTO has been minimal. During the drafting of the UNESCO Convention, following a request by the Director-General of UNESCO to the WTO Secretariat, WTO Members gave their views on the draft text at an informal session on 11 November 2004 with UNESCO's Director of the Division of Cultural

Policies and Intercultural Dialogue.³⁵⁰ The provisions of the draft Convention regarding the relationship with other treaties was the subject of considerable discussion and interest at that session.³⁵¹ Occasional references to the UNESCO Convention have been made in documentation circulated at the WTO by the WTO Secretariat, observers, and Members.³⁵² Other, less formal and typically less transparent discussions of the relevance of the UNESCO Convention to the WTO (and to services trade in particular) appear to have been held in the form of events such as: WTO negotiations to improve the GATS from April 2004; a seminar on trade and culture arranged by certain WTO Members and held at the WTO on 30 September 2004; and a discussion among WTO Members on 25 August 2005.³⁵³

One difficulty in holding discussions of the UNESCO Convention at the WTO is in striking a balance between, on the one hand, transparency and participation of interested groups outside the WTO, and, on the other hand, the willingness of WTO Members to engage in open and frank debate. Just as individuals, non-governmental organisations and community groups typically have no standing to listen to or be involved in WTO meetings, UNESCO itself lacks observer status in any WTO body. Although inclusion of these non-WTO entities might enrich the discussion and increase awareness of policy objectives beyond trade, restricting attendance to WTO Members would probably increase the chances of reaching agreement on some narrow common ground. Moreover, because of the substantial number of both parties and non-parties to the Convention among the WTO Membership, and the inter-departmental discussions and public consultations that can be expected at a domestic level, interests from all aspects of the debate would likely be well represented. Separate meetings inviting non-WTO entities including UNESCO could also be arranged.

Issues for discussion in future meetings could usefully include: the obligations under Articles 20 and 21 of the UNESCO Convention of a WTO Member who is also a Convention party in the context of WTO negotiations and WTO disputes; the extent of any inconsistency between the UNESCO Convention and WTO rules; the measures that WTO Members have adopted to implement the Convention; and the WTO-consistency of those measures.

3.4. Legal impact of WTO discussions

Conducting discussions in the WTO regarding the UNESCO Convention would certainly contribute to the Convention objectives of 'foster[ing] mutual supportiveness' with other treaties and promoting its principles, as required by its Articles 20.1 and 21. However, the following factors would render extremely difficult the task of making any concrete progress towards a better reconciliation of trade and culture or even an agreed understanding of the role and meaning of Articles 20 and 21:

³⁵⁰ UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 23-27; UNESCO General Conference, *Preliminary Report by the Director-General Setting out the Situation to be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied by the Preliminary Draft of a Convention on the Protection and of the Diversity of Cultural Contents and Artistic Expressions*, 33 C/23 (4 August 2005) [17]. See also UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Preliminary Report of the Director-General*, CLT/CPD/2004/CONF.201/1 (July 2004) [13]; WTO General Council, *Minutes of Meeting Held on 20 October 2004*, WT/GC/M/88 (11 November 2004) [64]–[85]; WTO General Council, *Annual Report 2004*, WT/GC/86 (12 January 2005) 20.

³⁵¹ CLT/CPD/2004/CONF.607/1, partie IV, 25-26.

³⁵² See, eg, WTO Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 14-15 June 2005*, IP/C/M/48 (15 September 2005), [92] (Peru); WTO Ministerial Conference, *Organisation Internationale de la Francophonie (OIF): Statement Circulated by HE Mr Abdou Diouf, Secretary General (As an Observer)*, WT/MIN(05)/ST/57 (15 December 2005), 2; WTO Council for Trade in Services, *Audiovisual Services: Background Note by the Secretariat*, S/C/W/310 (12 January 2010), [71]. See also Appellate Body Report, *China – Publications and Audiovisual Products*, n 538; Appellate Body Report, *China – Publications and Audiovisual Products*, [25].

³⁵³ See WT/GC/M/88, [64]; International Network for Cultural Diversity, *Newsletter* n. 5(11) (November 2004).

- The large number of WTO Members, and the fact that around one-third of them are not parties to the Convention.
- The traditional WTO rule of decision-making by consensus rather than voting.
- The continued delays and challenges in concluding the Doha Round negotiations.
- Continuing concerns arising from the Global Financial Crisis in many WTO Members, which may increase suspicion about protectionist measures (in the case of Members who would prefer to allow no special recognition of culture in the WTO) and decrease willingness to liberalising trade in culture-related sectors (in the case of Members who are convinced that culture requires special protection).
- Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, which provides that the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the WTO agreements.
- The factual and conceptual difficulties in distinguishing between genuine cultural policy measures and purely protectionist measures designed to assist local industry.
- The long history of controversy concerning the need for an exception from WTO rules with respect to 'cultural products' (such as audiovisual products and publications), culture or cultural diversity. This controversy has played out in the context of the Uruguay Round negotiations, more recent services trade negotiations, and disputes between WTO Members.
- The complexity of the underlying legal questions regarding: how to resolve conflicts between treaties, either in general or in the specific context of the WTO; the role of non-WTO international law in interpreting the WTO agreements (particularly treaties to which not all WTO Members are party);³⁵⁴ and the applicability in a non-interpretative manner of non-WTO international law in WTO disputes.

3.5. Recommendations for UNESCO

The WTO's increasing engagement with non-trade policy areas such as public health and the environment, and particularly its relationship with other intergovernmental organisations such as WIPO and the WHO, demonstrate the range of ways in which UNESCO could enhance its role in the WTO, such as by:

- Applying to become an observer on a permanent or ad hoc basis in relevant WTO bodies such as the Council for Trade in Services, and encouraging participation of the WTO Secretariat as observers in relevant UNESCO meetings.
- Exploring opportunities for collaboration with the WTO in public activities such as organising seminars, and researching and writing publications.
- Arranging informal discussions between the WTO and UNESCO Secretariats.
- Preparing reports on specific areas of interaction between trade and culture.

3.6. Recommendations for the EU

As a WTO Member and Convention party who is committed to the promotion of both trade liberalisation and cultural diversity, the EU is advised to:

- Continue to highlight cultural implications and interests in domestic, regional and multilateral fora engaged in developing decisions, policies or laws, with the goal of encouraging respect for UNESCO Convention objectives in a manner consistent with WTO rules, and taking account of the views of cultural interest groups.
- Assist other WTO Members, particularly developing and least-developed countries, in identifying and developing cultural industries of potential value, and in

³⁵⁴ See, eg, Panel Report, *EC - Biotech*, [7.67]-[7.72].

understanding the complex relationship between cultural diversity and international trade.

- Promote discussion of the UNESCO Convention in the WTO as a short-term measure, with a view to optimising conditions for reaching more ambitious agreements on the relationship between trade and culture when conditions improve in the medium term (for example, once Members have successfully concluded the Doha Round and fully recovered from the financial crisis).

Study Paper 3C: Protocols on Cultural Cooperation

Caroline Pauwels and Jan Loisen

Executive Summary

The following note addresses the implementation of the UNESCO Convention in the EU's external (trade) relations. Firstly, the policy context is set out that requires the EU to make culture in international relations a priority by means of the development of a European strategy of incorporating culture in its external relations. The section includes a concise discussion on the interinstitutional dialectics between the EU, the WTO and the UNESCO Convention, in the latter's beginning phases of implementation. Secondly, an analysis is provided with regard to the new practice of negotiating Protocols on Cultural Cooperation with third countries. These Protocols are the first policy frameworks in which several provisions of the UNESCO Convention are implemented and the external and trade related dimension of the new European strategy is addressed. Finally, an overview of Strengths and Weaknesses, Opportunities and Threats is given and a number of recommendations is drawn up with regard to the implementation of the Convention in external (trade) relations.

Immediately after the entry into force of the UNESCO Convention on the promotion and protection of the diversity of cultural expressions, the European Commission issued the European Agenda for Culture. The Agenda sets out a general framework for the development of a new cultural pillar in global governance under European leadership. In its external relations, the EU shall therefore draw up a European strategy that consistently and systematically incorporates culture. The implementation of the UNESCO Convention is at the heart of this process. Many questions remain, however, as this implementation process is at its onset.

The first concretization of the implementation of the UNESCO Convention in EU external relations, within the framework of the European Agenda for Culture has been the negotiation of two Protocols on Cultural Cooperation. In 2008, the first Protocol was agreed to with CARIFORUM, a regional grouping of several developing countries. In 2009, a Protocol was concluded with Korea, a developing country. On the one hand these protocols, negotiated by the European Commission, give a first set of indications on how the abovementioned guidelines and objectives are to be fulfilled. On the other hand, their development process has revealed a number of issues that need further reflection and analysis, as different aspects of the Commission's approach have been criticized quite fiercely.

The different goals the European Commission aims to realize with negotiating these new cultural agreements with third countries are:

- to implement the UNESCO Convention, the latter's Articles 20 and 21 in general, its Article 16 in case of developing countries and Article 12 in case of developed countries in particular;
- the ratification of the UNESCO Convention by third parties to increase support for its development as the heart of a cultural pillar in global governance;
- to develop a new approach for the facilitation of the exchange of cultural goods and services, within a larger framework of EU policy frameworks and measures, and with due consideration for differences among trading partners (i.e. a modular approach on a case per case basis evaluation); and
- acknowledgement of the specific position of the audiovisual sector, including implementation of the Audiovisual Media Services Directive.

In the process of negotiation of these protocols, and with future agreements in prospect the new approach has come under increasing scrutiny by a number of EU Member States and professional organizations. The different criticisms can be clustered into the following themes:

- The subordination of culture due to parallel trade and cultural negotiations.
- An overfocus on trade considerations to the detriment of the spirit of the UNESCO Convention and the substantial issue of cultural diversity in Europe and the world.
- A lack of prior study to the negotiations of a Protocol on Cultural Cooperation, particularly in the case of co-productions in the audiovisual sphere.
- The question of the fundamental model on which future protocols or cultural cooperation agreements will be based.

The interaction between stakeholders on the basis of the abovementioned goals, critiques, and dynamics have contributed to different changes to the agreements negotiated and to further reflection on agreements in the pipeline. This process, in parallel with the implementation of the UNESCO Convention, is clearly not definitive and will be debated and finetuned further.

Similarly, albeit clearly in its infancy, a start has been made with the implementation of the UNESCO Convention in relation to the multilateral trading system. Although much has been expected from the Convention, as a counterbalance to developments in the WTO deemed counterproductive for cultural diversity, several elements contribute to a very incremental process of mainstreaming culture internationally. Implementation is for the time being directed towards capacity building and empowerment to raise issues of cultural diversity, and to a certain legitimization of policies for the benefit of cultural diversity.

In conclusion, an overview of strengths and weaknesses, opportunities and threats with regard to the new strategy of mainstreaming culture in external relations sums up the main conclusions. In addition, a set of recommendations is drawn up, which aim to:

- strengthen the UNESCO Convention, augment the number of ratifications, and raise awareness and visibility in order to contribute to more broad based support and implementation;
- highlight the importance of evidence-based policy making for tailored cultural cooperation (agreements) and launch ideas for the improvement of cultural diversity analysis; and

- put forward ideas to organize and strengthen reflection and debate in a transparent environment.

Introduction

This note³⁵⁵ addresses the implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the European Union's external trade relations – by means of Protocols on Cultural Cooperation in particular.

The latter represent a new practice by the European Commission, which negotiates the Protocols, as it intends to implement the UNESCO Convention, which has been operative since March 2007. The first Protocol has been concluded in the framework of the Economic Partnership Agreement signed with CARIFORUM on 15 October 2008. In 2009, the EU and Korea initialed another Protocol on Cultural Cooperation.

This note will focus particularly on the Protocol with Korea, a developed country that has a relatively strong and well-developed cultural and audiovisual sector in global economic terms. Arguably, Korea's strength in the audiovisual sector has contributed to the fact that in comparison with the EU-CARIFORUM Protocol, the second Protocol has generated much more concern and discussion among European stakeholders with regard to the consequences of the new practice. On the one hand, the European Commission, backed by some EU Member States, argues that this new practice will benefit cultural exchange and diversity. A Protocol is seen as a means to implement the UNESCO Convention and to gather global support for it. On the other hand, a number of European Member States, cultural diversity coalitions and cultural and audiovisual professional organizations fear that the Commission, the EU's single voice in these negotiations, will not adequately take into account the specificity of culture.

The core aim of this note is to understand why such different appraisals exist among European stakeholders, notwithstanding the Protocol's intricate relation with the UNESCO Convention, which all actors seem to subscribe to. Other goals are, firstly, to provide insight in the context of the development of Protocols on Cultural Cooperation and their underlying rationale. Secondly, to address the criticisms raised by stakeholders in the Protocols' development process. Finally, to evaluate the practice on its strengths, weaknesses, opportunities and threats and to draw up a set of recommendations.

Methodologically, a review of relevant literature was supplemented by a document analysis of the Protocol's negotiating texts and a series of expert interviews. 12 interviews were held in total from the end of September 2009 to the end of November 2009. Firstly, interviews have been conducted with representatives of Directorates-General responsible for the negotiation of Protocols on Cultural Cooperation. Secondly, telephone interviews were held with representatives of a set of Member States, of international organizations, and of European Coalitions for Cultural Diversity and professional organizations. Due to reasons of confidentiality no explicit reference to the names of the interviewees is made - unless we were authorized to do so. Finally, the responses of stakeholders to the civil

³⁵⁵ This note provides an extended account of the research conducted in the framework of the research project conducted by Germann Avocats and multidisciplinary research team, which led to the study *Implementing the UNESCO Convention of 2005 in the European Union*, requested by the European Parliament's Committee on Culture and Education (IP/B/CULT/IC/2009_057). The authors would like to thank the team and project coordinator Christophe Germann in particular for useful comments. Errors and shortcomings in this note remain ours however.

societies and regional and international organizations surveys (available at www.diversitystudy.eu) provided relevant data as well.

Context

Towards a European strategy of mainstreaming culture in EU external relations

On 10 May 2007, the European Commission issued its communication on a European agenda for culture in a globalizing world, the first comprehensive policy document on culture at EU level.³⁵⁶ In the document, the entry into force of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions takes central stage. It is seen as a fundamental step, to which the EU has greatly contributed, to respond to challenges for a global order based on peace, mutual understanding and respect for shared values. The challenge of cultural diversity equally provides an opportunity to define a new role of cultural diversity at the international level. With the development of the UNESCO Convention, the Community and its Member States are set to develop and reinforce a new cultural pillar of global governance and sustainable development by means of strengthened international cooperation.³⁵⁷

Consequently, the promotion of culture as a vital element in the Union's international relations is considered as one of the main sets of objectives of the European agenda for culture. All actors, within their respective fields of competence and through appropriate instruments and channels, are to support a new and more pro-active role for Europe with regard to its international relations. In this respect, the EU aims to follow a 'twin-track' approach: firstly, to systematically integrate culture in external and development policies in general, and, secondly, to support specific cultural actions and events in particular. This approach intends to realize the following objectives:³⁵⁸

- The development of political dialogue with all partner countries and regions concerning culture and the promotion of cultural exchanges between the EU and its partners.
- The promotion of market access for cultural goods and services from developing countries to European and other markets, including by means of agreements that grant preferential treatment.
- The use of the EU's external and development policies for the protection and promotion of cultural diversity.
- Take into account local culture and contribute to people's access to culture and the means of cultural expression in all EU cooperation programmes and projects.
- Promotion of active involvement of the EU in the work of international organizations dealing with culture.

Welcoming the Commission Communication, the Council of the European Union issued on 20 November 2008 its Conclusions on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States. The Council calls upon the Member States and the Commission to, *inter alia*, strengthen the role of culture

³⁵⁶ Response to the Regional Organizations Questionnaire by the European Commission, p 2.

³⁵⁷ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda for Culture in a Globalizing World*, COM(2007)242 final, Brussels, 2007a, pp. 2-3, 7.

³⁵⁸ *Idem*, pp. 8, 10-11.

within the framework of external relations; promote the 2005 UNESCO Convention, cooperation with third countries and international organizations, and intercultural dialogue; and draw up a European strategy for incorporating culture consistently and systematically in the external relations of the Union with due regard for complementarity between the Union's activities and those of the Member States.³⁵⁹

Framework for dealing with culture in external trade policy

The latter remark can be interpreted as referring to the treatment of policy issues where different policy domains and competence regimes meet. On the one hand, Article 167 TFEU (on Culture, formerly Article 151 TEC) makes clear that cultural matters take on a specific position in the European Union. In principle, this policy domain is reserved for the Member States. The Union only has supporting and supplementary competences with regard to culture. Policy domains where the Union has the prime responsibility often do have a cultural dimension, however. In his respect, Article 167(4) TFEU stipulates that the Union shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures. With the entry into force of the UNESCO Convention, which is considered to be a relevant and effective pillar for promoting cultural diversity and cultural exchanges, also the implementation of Article 167(4) TFEU needs to be made more explicit and visible, because:

"Concerned to ensure a broader consideration of cultural diversity in the development of state policies, it could be argued that in effect, the Convention replicates the cultural mainstreaming obligation of Article 167(4) at the international level."^{360,361}

On the other hand, when dealing with policy issues that have a dual nature, related both to cultural policy and trade policy, Article 207 TFEU (on the Common Commercial Policy, formerly Article 133 TEC) is essential as well. This article stipulates that EU trade policy is an exclusive EU competence for all sectors. Following the Lisbon Treaty's entry into force,

³⁵⁹ Council of the European Union, *Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States* (2008/C 320/04), Official Journal of the European Union C 320, 2008.

³⁶⁰ Response to the Regional Organizations Questionnaire by the European Commission, p. 3.

³⁶¹ Cultural mainstreaming should thus not only apply throughout the EU and in the Union's policies (on the basis of Art. 167(4) TFEU). On the basis of the UNESCO Convention, it should also be replicated worldwide. It should be borne in mind, however, that the application of the cultural mainstreaming clause of Art. 167(4) TFEU is not straightforward. Notwithstanding the inextricable link between market and cultural issues, this transversal concern has led to different interpretations (Psychogiopoulou, E., *The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?*, European Law Journal, 2006, vol. 12, no.1, pp. 576, 582, 584) - and appraisals of its implementation. Fisher, in a note requested by the European Parliament's Committee on Culture and Education (Fisher, R., *Briefing Paper on the Implementation of Article 151.4 of the EC Treaty*, note requested by the European Parliament's Committee on Culture and Education, Brussels, European Parliament, June 2007, p. iii), evaluates the Article as a neglected obligation, whose implementation represents both a failure to ensure coordination across Commission Directorates and a failure of resolve indicating culture's subordination to other Commission concerns. Others remain hopeful for the cross-sectional clause to realize its full potential in the delicate balancing act for different goals to be sustained and complemented on various related policy levels (Psychogiopoulou, *Op. Cit.*, 2006, pp. 591-592). Nonetheless, a general and returning criticism on the concept of mainstreaming is how it will eventually be concretely implemented and monitored. To strengthen the abovementioned full potential of the mainstreaming clause, a number of potential avenues (e.g. cultural impact assessments or coordination procedures and platforms between different Directorates, with input from relevant stakeholders) should be explored more actively (Fisher, *Op. Cit.*, 2007, p. 4; Craufurd Smith, R., *A New EU Agenda For Culture?*, 2007, p. 5 - available at www.efah.org/components/docs/Agenda%20For%20Culture%20EN.Pdf). If the aim of mainstreaming culture is to be replicated worldwide, concrete action on how to mainstream culture in other policy domains in light of the UNESCO Convention is required and would underline the European Union's leadership in the implementation of the Convention.

sectoral carve-outs, shared competences or mixed agreements have been dispensed with³⁶² in order to streamline³⁶³ and simplify the EU's Common Commercial Policy.³⁶⁴

Notwithstanding the abolition of sectoral carve-outs, the specificity of audiovisual goods and services remains acknowledged in Article 207 TFEU, however. Article 207(4) subparagraph 3(a) explicitly stipulates that "[t]he Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity."

The interpretation and implementation of this provision might prove difficult, however. Who will and how can one judge and measure that a risk exists for cultural and linguistic diversity – a concept that is not defined in the TFEU? A related question, is how the provision will function?

Two options seem plausible. The Council could opt to continue the former practice to decide unanimously in case of agreements that include cultural and audiovisual services. Another option would be that the Member State(s) requesting unanimity should demonstrate a risk actually exists. Should other Council members not follow the argument made, the normal qualified majority vote would hold, and the Court of Justice of the European Union would become the last recourse of parties that claim the agreement poses a risk for cultural and linguistic diversity.³⁶⁵

The future will clarify how the provision will be implemented. But it is clear that dealing with cultural aspects in the context of trade negotiations and agreements is both politically and practically complex, sensitive and often ambivalent – as is illustrated by the continuing perseverance of a 'dialogue de sourds'³⁶⁶ or 'tale of two solitudes'³⁶⁷ in the inter-institutional dialectics between UNESCO and the WTO on this matter.

³⁶² Before the Lisbon Treaty, Article 133 TEC, which set out the procedures for action in the framework of the Common Commercial Policy, provided for a sectoral carve-out for cultural and audiovisual services in paragraph 6. Notwithstanding that external trade policy was ordinarily dealt with exclusively by the Union, Article 133(6) TEC stated that agreements that include provisions regarding cultural and audiovisual services fall within the shared competence of the Union and its Member States. Consequently, decisions in the Council needed to be taken by unanimity and such mixed agreements were to be concluded jointly by the Union and the Member States. See, *inter alia*, Krajewski, M., *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, *Common Market Law Review*, 2005, vol. 42, no. 1, pp. 95-97; Meunier, S. & Nicolaïdis, K., *The European Union as a Trade Power*, in: Hill, C. & Smith, M. (Eds). *International Relations and the European Union*, Oxford, Oxford University Press, 2005, p. 257.

³⁶³ Concretely, in the conduct of the Common Commercial Policy, the European Commission first makes a proposal to the Council with regard to the contents and initiation of international trade negotiations. It is the Council of the EU that grants the negotiating mandate to the Commission. Although the mandate is not legally binding, it sets certain borders for the negotiators, as the full package of agreements needs to be approved by the Council at the end of the process. Secondly, the actual negotiations are conducted by the Commission, which continually gives feedback to and discusses the negotiations with the Trade Policy Committee - formerly, the Article 133 Committee, referring to the Common Commercial Policy article in the TEC. Because the Member States can take on varying positions, depending on the subject matter discussed, the Commission usually tries to realize a consensus. Finally, the Council and the European Parliament approve or reject the trade agreement at the end of the negotiations. See, *inter alia*, Baldwin, M., *EU trade politics - heaven or hell?*, *Journal of European Public Policy*, 2006, vol. 13, no. 6, p. 931; Dur, A. & Zimmermann, H., *Introduction: The EU in International Trade Negotiations*, *Journal of Common Market Studies*, 2007, vol. 45, no. 4, p. 780; Meunier & Nicolaïdis, *Op. Cit.*, 2005, pp. 254-256.

³⁶⁴ See, *inter alia*, Woolcock, S., *The Treaty of Lisbon and the European Union as an Actor in International Trade*, ECIPE Working Paper No.1/2010, 2010.

³⁶⁵ For a discussion, see Krajewski, *Op. Cit.*, 2005, p. 122; Leal-Arcas, R., *Will EU Member States play any role at the WTO after the EU reform treaty?*, *Vienna Online Journal on International Constitutional Law*, 2007, vol. 1, no. 2, p. 87; de Witte, B., *The Value of Cultural Diversity in European Union Law*, in: Schneider, H. & Van den Bossche, P. (Eds), *Protection of Cultural Diversity from a European and International Perspective*, Antwerpen, Intersentia, 2008, p. 238.

³⁶⁶ Roy, M., *Audiovisual Services in the Doha Round: Dialogue de Sourds, the Sequel?*, *Journal of World Investment and Trade*, 2005, vol. 6, no. 6, pp. 923-952.

Culture in the EU's external trade policy and the WTO

In the following paragraphs we indeed concisely address whether the entry into force of the UNESCO Convention and its current implementation have generated any effects on its position in the World Trade Organization.

Many observers - not least the critics of the UNESCO Convention - argue that the Convention has been developed to respond to past developments in the WTO with regard to the cultural sector - the audiovisual sector in particular.³⁶⁸ Nonetheless, it is rather early to evaluate the Convention's impact on the World Trade Organization. A direct effect of implementation of the Convention, in legal terms, has been confined mostly to academic debate and contemplation. Several elements indicate that any 'offensive' action from the EU to force the Convention into proceedings in the WTO is hardly to be expected.

Firstly, the EU position as it stands in the WTO with regard to cultural and audiovisual policy is quite robust. As a consequence of specific practices in the WTO, especially with regard to the General Agreement on Trade in Services, it is still able to engage (or not) with the liberalization of the sectors in question largely on its self-defined terms:

"In the framework of the World Trade Organization (WTO) the European Union has preserved the capacity, for itself and for the Member States, to define and implement cultural policies for the purpose of preserving cultural diversity; in this respect it has taken relevant Most Favoured Nation exemptions, covering national (such as cinema co-production agreements) and EU measures (such as the "Television Without Frontiers" Directive - now "Audiovisual Media Services Directive"). Such position, allowing for the preservation of existing as well as future measures, has been confirmed in 1999 by the EU Council in its conclusions, which have been confirmed also for the current WTO/Doha Development Agenda (DDA) negotiations."³⁶⁹

Secondly, the current Doha negotiating Round is progressing very slowly. A *démarche* with regard to the politically sensitive issue of trade and culture would hardly contribute to a renewed dynamism in the trade liberalization negotiations. Moreover, there is no clearly articulated challenge from EU trading partners in the WTO that would like to proceed with the liberalization of sectors, goods and services related to cultural diversity.

Thirdly, the implementation of the UNESCO Convention itself is in the beginning. Concrete action to define the relationship between the Convention and the WTO, and the trade agreements it administers, presupposes more ratifications of the new international cultural instrument, as well as fleshing out the rights and obligations it puts forward - a process which is currently going on. In other words, the place of the UNESCO Convention as the cultural pillar in global governance needs to be reinforced and thought through by means of the current implementation process that goes in small steps. Nonetheless, its mere existence has already contributed to agenda-setting which now needs to be capitalized on.³⁷⁰

³⁶⁷ Gómez Bustos, L. & Sauvé, P., A tale of two solitudes? Assessing the effects of the UNESCO Convention on cultural diversity on WTO law. Conference 'The new agenda for international trade relations as the Doha Round draws to an end', Barcelona, 29-30 January 2007, 48 p.

³⁶⁸ Martin, R.S. Final Statement of the United States Delegation. Paris, 3 June 2005, available at <http://www.america.gov/st/washfile-english/2005/June/200506071629501CJsamohT0.2950403.html>.

³⁶⁹ Response to the Regional Organizations Questionnaire by the European Commission (p. 12) in the section "Regional Organizations Survey" at www.diversitystudy.eu.

³⁷⁰ Response to the Civil Society Questionnaire by the German UNESCO Commission, p. 32.

Fourthly, from the EU's viewpoint, one of these steps is seemingly the further development and discussion of its strategies with regard to the implementation of the UNESCO Convention, both internally and in its external relations. A learning process has been initiated but needs to be continued before it can act convincingly with one voice in all processes that are being dealt with in the multilateral trade forum.

Fifthly, the US – arguably one of the WTO members with the largest interests in cultural trade, audiovisual services trade in particular – remains opposed to the UNESCO Convention. It seems highly questionable that the process of implementation of the Convention could overthrow the contours of a history of what has been termed 'the perennial disputes over cultural trade.'³⁷¹

Finally, and from a politically realist perspective, it is clear that the UNESCO Convention is no panacea to deal with all problems of imbalances between cultural and economic objectives. As pointed out by a representative of another international organization following-up on the interinstitutional dialectics between the Convention and other forums (such as the WTO, UNCTAD or WIPO), the reality of the new instrument is that it is only one, albeit very important, element in the whole multilateral global process.³⁷²

This is not to say, however, that the implementation of the UNESCO Convention has no consequences at all with regard to processes in other forums such as the WTO. The EU's implementation of the UNESCO Convention in relation to the multilateral trade forum is not necessarily negligible or null, but needs to be seen more on the level of capacity building and the empowerment of stakeholders³⁷³, to raise issues regarding the diversity of cultural expressions at all levels of governance – including in the WTO.³⁷⁴

Firstly, the entry into force of the UNESCO Convention and the steadily rising ratification count can be seen³⁷⁵ as legitimizing the European position in the WTO:

*"La convention UNESCO donne un poids politique, et dans une certaine mesure juridique, à la position constante de l'Union européenne à l'OMC sur les services audiovisuels."*³⁷⁶

In other words, the mainstreaming of culture in the EU's external relations lies foremost, in the capacity of the UNESCO Convention as an instrument to strengthen the EU's position in the WTO. In addition it allows the EU to convince others, for example in procedures for the accession of countries to the WTO, of its necessity as the global cultural pillar in international governance – the latter in accordance with Article 21 of the UNESCO Convention. In the context of Article 20 of the Convention, the European Commission feels strengthened to refrain from commitments that would jeopardize the balance with regard

³⁷¹ VanGrasstek, C., *Treatment of Cultural Goods and Services in International Trade Agreements*. In: UNESCO CCT Team (Eds), *Trends in Audiovisual Markets. Regional Perspectives from the South*, Paris, UNESCO, 2006, p. 93.

³⁷² Interview with Ms. E. Dos Santos-Duisenberg (Chief, Creative Economy & Industries Programme, Trade Analysis Branch UNCTAD), available in the section "International Organizations Survey" at www.diversitystudy.eu.

³⁷³ This is an important goal, not only within the context of the WTO. As is acknowledged in the Commonwealth Foundation's response to the Regional Organizations Questionnaire (p. 6), smaller developing states have limited capacity to engage with the Convention or with the Convention implementation: international coordination is deemed poor and processes at UNESCO headquarters concerning the Convention dominated by voices of large countries. In the Commonwealth Foundation's view, there is a need for active development of government capacity and the promotion of voices that can speak on behalf of small developing states.

³⁷⁴ Response to the Regional Organizations Questionnaire by the European Commission, p. 18.

³⁷⁵ French Ministry for Foreign and European Affairs, *Communication from France. For a new European Union external cultural strategy*, Paris, 2009, p. 4.

³⁷⁶ Reding, V., *De la télévision sans frontières à l'audiovisuel sans frontières*. Speech at the Rencontres cinématographiques de Beaune, Beaune, Speech/05, 2005.

to the dual nature of the diversity of cultural expressions. In turn, the EU does not ask for commitments of its trading partners in the case of cultural and audiovisual services.³⁷⁷

Secondly, the obligation of promoting the Convention, also in a WTO context, can be fulfilled in case important topics should be under negotiation (e.g. with regard to the debate on MFN exemptions or subsidies). It can play an important role in case disputes are brought forward in the WTO's dispute settlement proceedings – whether the EU would be a respondent or a third party in a case.

Finally, however, the position it takes on in the abovementioned circumstances needs to be refined further. In relation to the development of the external cultural strategy and to bilateral agreements with third parties (see next part on Protocols on Cultural Cooperation), a fundamental debate on this matter is required and seems to be unfolding.³⁷⁸

Protocols on Cultural Cooperation

Notwithstanding the impact the 2005 UNESCO Convention has already generated on the level of political discourses, implementation is only at the beginning.³⁷⁹ Nevertheless, in the trade and culture domain, the Convention has been seized as an opportunity to reassess the place and role of culture in external relations. It has already led to the first concrete acts of implementing the UNESCO Convention. Aware of the challenge for the EU – being one of the driving forces behind the successful conclusion of the 2005 UNESCO Convention – to lead by example in the implementation of the new instrument, the European Commission has undertaken action to develop a new approach to the treatment of cultural activities and industries in its bilateral and regional agreements.³⁸⁰

Concretely, the instrument of a Protocol on Cultural Cooperation has been specifically developed within the context of bilateral trade negotiations. It aims to promote the principles of the Convention and to implement its provisions. The first such Protocol has been appended to the Economic Partnership Agreement with CARIFORUM, which was signed in October 2008.³⁸¹ It represents the first initiative by the EU of implementing the Convention in its external relations, particularly with regard to the latter's Article 16.³⁸² The Protocol targets preferential treatment³⁸³ for cultural goods, services and practitioners of

³⁷⁷ Response to the Regional Organizations Questionnaire by the European Commission, p. 12.

³⁷⁸ See, for example the French Communication on the development of a new EU external cultural strategy, *Op. Cit.*, 2009, which puts forward several proposals and discussion points and the *Weissbuch 1.0.*, prepared by the Deutsche UNESCO Kommission. Also the European Commission plans to issue a strategy paper on this issue shortly.

³⁷⁹ Although, as is pointed out in the Response to the Regional Organizations Questionnaire by the European Commission (p. 5), implementation of the UNESCO Convention can consist of both legislative activity and the pursuit of policy developments.

³⁸⁰ European Commission, *Commission Staff Working Document on the External Dimension of Audiovisual Policy* (SEC(2009) 1033 final), Brussels, 2009a, pp. 15, 17.

³⁸¹ For a detailed description of the EU-CARIFORUM Protocol on Cultural Cooperation, see Bourcieu, E., in: *Expert Reports on Preferential Treatment for Developing Countries. Article 16 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Paris, UNESCO – Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (CE/08/2.IGC/8), 2008.

³⁸² Bourcieu, E. *Op. Cit.*, 2008, p. 12.

³⁸³ As has been indicated in the interview with Ms. E. Dos Santos-Duisenberg (Chief, Creative Economy & Industries Programme, Trade Analysis Branch UNCTAD), it is important that this concept is well understood in terms of the implementation of the UNESCO Convention. Preferential treatment as conceived in the UNESCO Convention is different from the concept of special and differential treatment that is used in the WTO framework. In the words of Bourcieu, *Op. Cit.*, 2008, p. 9: "Il existe d'importantes différences entre le concept de traitement préférentiel / traitement spécial et différencié au sein de l'OMC, et celui qui ressort de l'Article 16 de la Convention. Le traitement spécial et différencié prévu par l'OMC a par nature un champ d'application limité car il n'est conçu que comme une exception aux règles, visant à corriger temporairement une situation donnée, alors que le traitement préférentiel au sens de l'Article 16, et en matière de coopération culturelle en général, implique nécessairement la notion d'effets durables et structurants sur les échanges culturels."

developing countries, albeit outside the trade liberalization provisions of the general trade agreement to which it is attached.³⁸⁴ Hereafter, in October 2009, another Protocol with Korea has been concluded in parallel with the EU-Korea Free Trade Agreement.

Both Protocols are influenced by the UNESCO Convention and provide concrete examples on how the Commission aims to implement the Convention in its external trade policies and to fulfil its leadership role in this respect. The development and contents of both Protocols, the EU-Korea Protocol in particular, have been met with several criticisms from European professional organizations³⁸⁵ and a number of EU Member States,³⁸⁶ however.

In the bulk of this note, we will therefore focus on this new practice. It provides an interesting testcase on how the EU exercises leadership and coordination in the concrete implementation of provisions in the Convention. Moreover, the negotiation of both Protocols, and plans to continue the new approach in the future, has led to a debate among relevant stakeholders with regard to the way the dual nature of cultural expressions should be taken into account in EU external policies. In effect, a new strategy for dealing with culture in external policy, and in bilateral, regional and multilateral (trade) relations is beginning to unfold. Its contours remain up for discussion, however. The following issues will therefore be further addressed:

- What is the rationale and contents of Protocols on Cultural Cooperation³⁸⁷?
- How do provisions of the Convention implemented via these Protocols, take into account the development level of the partner country or region?
- What is the position of the Protocols vis-à-vis other rules and actions in European cultural and audiovisual policy?
- How does this new approach contribute to cultural diversity? What are its strengths and opportunities, its weaknesses and threats?

3.1. Rationale and goals

In developing Protocols on Cultural Cooperation, the European Commission puts forward the following goals and strategy:³⁸⁸

- Implementation of the UNESCO Convention by the European Union.
- Ratification of the UNESCO Convention by third parties.
- Facilitation of exchanges in cultural goods and services, linked to the acknowledgement of the dual nature of the cultural industries.
- A modular approach for cultural cooperation with third countries.

³⁸⁴ Response to the Regional Organizations Questionnaire by the European Commission, pp. 9, 10.

³⁸⁵ E.g. the letter of European Coalitions for Cultural Diversity to the President of the European Commission with regard to the negotiation of the Protocol with Korea, 7 May 2009, available at www.coalitionfrancaise.org/wp-content/.../Barroso-Coree-18-03-09.pdf.

³⁸⁶ E.g. French Ministry for Foreign and European Affairs, *Op. Cit.*, 2009, pp. 4-5.

³⁸⁷ In the abovementioned Communication, the term Protocol in itself is questioned and is proposed to be replaced by a 'framework' for cultural cooperation. This more general term stresses France's call for a comprehensive yet differentiated approach to cultural cooperation in international agreements, in which culture and trade need not always be negotiated in parallel.

³⁸⁸ European Commission, *Argumentaire on the Title on Cultural Cooperation in future EU trade agreements*, Brussels, 2007b; European Commission, *Follow-up Argumentaire On the Cultural Cooperation Protocol in future EU trade agreements*, Brussels, 2008; European Commission, *Op. Cit.*, 2009a.

- Specific treatment for the audiovisual sector, i.e. exclusion of market access provisions for audiovisual services in free trade agreements, and implementation of the Audiovisual Media Services directive.

3.1.1. Implementation of the UNESCO Convention

The first objective of developing Protocols on Cultural Cooperation with third parties is to assure rapid implementation after the UNESCO Convention's entry into force, in accordance with Articles 20 and 16 of the UNESCO Convention.³⁸⁹

The former stipulates that Parties to the Convention shall take it into account when entering into other international obligations such as international (trade) agreements. The latter urges developed countries that are Parties to the Convention to facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries. As such, the commitment to strengthen international cooperation in the cultural domain, as is expressed in the European Agenda for Culture, is transposed to the EU's external trade framework. In support of the idea of mainstreaming Article 167(4) TFEU at the international level (cf. supra), the firstly negotiated Protocol on Cultural Cooperation with CARIFORUM represents:

*"a new formula for addressing cultural capacity building and cultural exchanges in a trade agreement, as it does not consist of traditional trade commitments but rather cooperation through concrete means which have the effect of improving cultural exchanges between Europe and the countries concerned while preserving the capacity to develop cultural policies."*³⁹⁰

3.1.2. Ratification by third parties: building an alliance behind the Convention

Secondly, the Protocols on Cultural Cooperation represent a tool to encourage third parties to ratify the UNESCO Convention as quickly as possible. Through the implementation of the UNESCO Convention in its internal and external policies, the EU aims to provide leadership and to set an example towards its international partners.³⁹¹ Reminiscent of Pacal Lamy's call in 2003 to the Commission of Culture of the European Parliament, it is essential that the EU's role as one of the main advocates of the necessity of the UNESCO Convention is continued in order to stimulate other parties more forcefully to join the alliance behind the UNESCO Convention:

"Pour rester crédible, nous devons bien être conscients que la promotion de la diversité culturelle ne doit pas se résumer en la défense par chaque état membre de son industrie nationale. Sinon, ce serait, comme le disent certains, une forme de protectionnisme déguisé qui ne convaincrat personne. Nous pourrions mieux convaincre, notamment les pays en développement, de la légitimité de notre discours si nous savons démontrer notre réelle ouverture à la diversité."^{392,393}

³⁸⁹ Bourcieu, *Op. Cit.*, 2008, p. 12.

³⁹⁰ Response to the Regional Organizations Questionnaire by the European Commission (p. 10) in the section "Regional Organizations Survey" at www.diversitystudy.eu.

³⁹¹ European Commission, *Op. Cit.*, 2009a, p. 15.

³⁹² Lamy, P., *Les négociations sur les services culturels à l'OMC*. Speech, Commission de la Culture du Parlement européen, Brussels, 19 May 2003.

³⁹³ For UNCTAD this development dimension of the Convention represents the starting point for further processes. In its view, the Convention on Cultural Diversity does not exist in a vacuum and it needs to be assured that there are flexibilities in policy implementation, particularly taking into account the interests of

3.1.3. Facilitation of exchanges on a case per case basis: a modular approach

In this respect, the European Commission, thirdly, aims to facilitate the exchange of cultural goods and services by means of a Protocol on Cultural Cooperation. Exchanges shall be facilitated with due regard for the specific, multifaceted nature of cultural goods and services and the EU's relationship with negotiating partner.

Firstly, a Protocol on Cultural Cooperation is not a substitute for other measures taken within other policy frameworks, but should act complementary to already existing cultural and audiovisual programmes (e.g. as included within the Cotonou Agreement). It represents one element within a broader policy framework for cultural diversity that consists, *inter alia*, of the rules set forth in the Treaty of Lisbon; secondary legislation such as the AVMS; cultural and audiovisual support programmes (e.g. the MEDIA program); and other policy domains with linkages to culture such as competition, convergence and information society, development, ...³⁹⁴

Secondly, each partner's capacity to develop its own cultural diversity policy, albeit in line with the UNESCO Convention's aim to protect and promote the diversity of cultural expressions, should be safeguarded. Cooperation for the purpose of more balanced exchanges is necessary, but the level of cooperation is dependent upon several parameters and conditions. E.g., audiovisual services need to be excluded from the free trade agreement that is negotiated in parallel and are to be treated in a separate Protocol or agreement. The latter's concrete content is dependent upon several conditions as well (e.g. the level of cultural exchanges or the existence of preferential mechanisms for the promotion of local cultural content). This is "*meant to allow for a modulation of the provisions of the CCP according to the differing situations and characteristics of the partners with whom the EU enters into negotiations.*"³⁹⁵

In other words, a modular approach is put forward to differentiate both among and within developed and developing countries because enormous variation exists in the level of development of the cultural and audiovisual sectors of different trading partners (vis-à-vis the EU).

The approach towards developing countries

Protocols on Cultural Cooperation the EU concludes with developing countries need to reflect the asymmetrical relations between the negotiating partners. In this respect, the EU aims to concretely implement Article 16 of the Convention. Article 5 of the Protocol on Cultural Cooperation with CARIFORUM sets an example. It encourages the conclusion of bilateral audiovisual co-production agreements between countries of both regions. Moreover, preferential treatment is, in accordance with Article 16 of the Convention, granted to co-productions between the EU and CARIFORUM members if certain minimal conditions are fulfilled. The appropriate framework is provided for by the Audiovisual Media

developing countries: the Convention should supplement and complement efforts of developing countries to build a competitive capacity in terms of cultural goods and services and to be able to not only promote their creative industries, but also to be able to export their products in national and international markets (Interview with Ms. E. Dos Santos-Duisenberg - Chief, Creative Economy & Industries Programme, Trade Analysis Branch UNCTAD). In this context, the Commonwealth Foundation argues, however, that the Convention is not well articulated or explained as a development instrument. Work remains to be done to raise the levels of understanding of what the Convention is and what it stands for. More efforts should be made to promote the Convention, in particular regarding its relevance for global social justice, in order to gain more popular support (Response of the Commonwealth Foundation to the Regional Organizations Questionnaire, p. 6).

³⁹⁴ European Commission, *Op. Cit.*, 2009a, pp. 4-7; Bourcieu, *Op. Cit.*, 2008, p. 13.

³⁹⁵ European Commission, *Op. Cit.*, 2009a, p. 18.

Services Directive, in which the qualification as 'European Work' has been broadened (in comparison with the Television without Frontiers Directive) to include "*works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements.*"³⁹⁶ This preferential market access targets the facilitation of access to the EU market of co-productions to which cultural industries of CARIFORUM contribute and of strengthening cultural ties between both regions. Only if CARIFORUM countries set up a support system for local and regional cultural content of their own should an equivalently preferential treatment be awarded to EU Member States.³⁹⁷

The approach towards developed countries

The general goal to realize a broader and more balanced cultural and audiovisual exchange remains the same for international partners that have already developed cultural industries. In these cases reference is made to Articles 12 and 20 of the Convention. The implementation of these articles were the basis to negotiate a Protocol on Cultural Cooperation with Korea for which a logic of strict reciprocity of benefits and cooperation among equal partners should be followed according to the European Commission.³⁹⁸ As a result, the provisions with regard to audiovisual co-productions have been reiterated but adapted substantially. Euro-Korean co-productions can be qualified as 'European works', but only in case of reciprocity. Therefore, the conditions for qualification are different and co-productions should reap the benefits of preferential treatment mechanisms both in the EU and Korea. Dependent on the relationship to other countries with developed cultural industries, the provisions for cooperation and preferential treatment could be different and will be set on a case per case basis.³⁹⁹

3.1.4. Provisions with regard to the audiovisual sector

Finally, with regard to the audiovisual sector, the European Commission reiterates that this very sensitive sector should only be dealt with within the framework of a Protocol on Cultural Cooperation. In other words, any provision relating to the audiovisual sector is to be disconnected from trade and market access provisions that are part of the trade agreement that is negotiated in parallel.⁴⁰⁰

Nevertheless, the Protocol on Cultural Cooperation also functions as an instrument to implement the Audiovisual Media Services Directive, which broadens the definition of 'European works' for certain audiovisual co-productions with third countries for the benefit of the diversity of cultural expressions. The European Commission stresses however that nothing in the text prevents the parties to retain its capacity to develop public cultural policies that target the protection and promotion of the diversity of cultural expressions.⁴⁰¹ With regard to the latter, the Member States remain the first responsible parties with the EU acting in a complementary fashion.

These goals underlie the development of a global framework and strategy for future cultural cooperation agreements. For the time being only two Protocols on Cultural Cooperation have been concluded.⁴⁰²

³⁹⁶ Article 1 n) (i) AVMS.

³⁹⁷ European Commission, *Op. Cit.*, 2009a, pp. 18-19.

³⁹⁸ *Idem*, pp. 19-20.

³⁹⁹ European Commission, *Op. Cit.*, 2008.

⁴⁰⁰ European Commission, *Op. Cit.*, 2007; Bourcieu, *Op. Cit.*, 2008, p. 12.

⁴⁰¹ European Commission, *Op. Cit.*, 2008; Bourcieu, *Op. Cit.*, 2008, p. 20.

⁴⁰² Initially a third Protocol on Cultural Cooperation was planned with ANDEAN countries Peru and Colombia. But

3.2. Criticisms towards the Protocols and responses

Although both the Protocol on Cultural Cooperation with CARIFORUM and the Protocol with Korea have been approved, the build-up to the final texts during the negotiating process – the negotiations with Korea in particular – revealed several sceptic positions among some Member States and among European professional organizations and coalitions for cultural diversity.⁴⁰³

The criticisms raised can be clustered into the following issues: (i) subordination of culture to trade interests and the related division of competences within the EU; (ii) the relationship of the Protocols to the UNESCO Convention; (iii) the critical co-production provisions in the Protocol with Korea; and (iv) the fundamental model on which (future) Protocols are based.

3.2.1. Parallel trade and cultural negotiations

A first cluster of criticisms revolves around the division of competences and the parallel negotiations on free trade and culture:

*"The Brussels Commission has no mandate to sign this agreement under conditions that threaten cultural diversity."*⁴⁰⁴

Several stakeholders fear that the specific character of culture and the audiovisual sector will be downgraded in the negotiations because a trade perspective is predominant. Firstly, the Protocols are only discussed in the Trade Policy Committee. Secondly, DG Trade takes the lead in the actual negotiations, whereas other DGs with a more cultural orientation (DG EAC in particular) have a secondary role. Consequently, and finally, a Protocol would become a mere bargaining chip in the overall negotiations on trade in services.

From a legal perspective⁴⁰⁵, the simultaneous negotiations are not mutually exclusive and are a consequence of the dual nature of audiovisual goods and services. Moreover, coincident negotiation and ratification processes have a clear practical benefit.

because of, *inter alia*, the latter's strong television industry, the EU and its Member States have opted not to continue preferential treatment of co-productions in this agreement. Moreover no Article V GATS protection was needed. Therefore, instead of a Protocol annexed to a free trade agreement, a separate agreement was negotiated that excludes provisions for co-productions that resemble market access commitments. This indicates according to the Commission that each time and on a case per case basis the modalities for cultural cooperation will be outlined. The nearest upcoming negotiations are with Central America, Canada and India. It remains to be seen whether a Protocol on Cultural Cooperation or agreement on culture with any of these partners is necessary or desirable.

⁴⁰³ For the Member States, France in particular has been vigilant. See, for example, its recent (2009) Communication on a new European external cultural strategy. As regards the professional sector, the European Coalitions for Cultural Diversity sent letters to different EU officials of the Commission and its relevant DGs (i.e. to Mr. Barroso, Baroness Ashton, Mr. Figel and Ms. Reding) expressing concern about the proceedings with the EU-Korea cultural cooperation Protocol (available at www.coalitionfrancaise.org/wp-content/.../Barroso-Coree-18-03-09.pdf). Different national coalitions for cultural diversity and sectoral organizations followed suit and targeted similar letters to their national representatives (e.g. a letter from the Flemish Independent Television Producers, available at http://www.votp.be/cms/uploads/Brief_Vrije_handelsovereenkomst_tussen_EU_Korea_-_Audiovisuele_sector_incl_VOTP.pdf). See also, for example, the comments of the French Coalition for Cultural Diversity to the Civil Society Questionnaire, p. 8.

⁴⁰⁴ French minister for culture Christine Albanel in Berretta, E., *Albanel proteste contre un accord entre l'Europe et la Corée du Sud*, in: *Le Point*, 18 March 2009.

⁴⁰⁵ Van Elsuwege, P. & Adam, S., *Consultatie Vlaamse overheid, departement Internationaal Vlaanderen betreffende ontwerp Protocol EG-Korea inzake culturele samenwerking*, Gent, Europees Instituut, 2009. [Consultation Flemish Government, Flemish Department of Foreign Affairs, concerning draft Protocol EC-Korea on cultural cooperation].

With regard to the substantial critique that a cultural reflex is absent in the negotiations, a clear answer is more difficult to give. On the one hand, DG Trade's leadership and the unpredictability of the give-and-take process in negotiations could indeed put cultural dimensions of an issue under strain. Moreover, some Member States – in the trade and culture dossier usually the United Kingdom, Sweden and the Netherlands – have put forward in the past that the specific nature of culture does not necessarily exclude them from trade negotiations.⁴⁰⁶ On the other hand, respondents indicated that more liberal oriented Member States remained quite silent in the debates, as did most other Member States. Critical countries, especially France, have been more active to express cultural concerns.⁴⁰⁷

This in turn has led to debate on the position and strategy the Commission should take in upcoming negotiating sessions. Moreover, the European Commission stresses that the idea to develop Protocols, as well as the preparation of negotiations, have always been worked out after deliberation of the three responsible DGs (TRADE, EAC and INFSO). In addition, as a consequence of mainstreaming culture in different EC policies, in accordance with the European Agenda for Culture, interdepartmental and interservices consultation and coordination has been strengthened according to the Commission.⁴⁰⁸ Nevertheless, the changes that have been made in the course of the negotiations with Korea seem to have been communicated insufficiently and quite late to the relevant European stakeholders. This, in turn, could have contributed to the confusion and anxiety among the latter.⁴⁰⁹ In this respect, more structural coordination within EU institutions, within the Member States⁴¹⁰ and between these different governance levels should be improved in order to assure European wide conformity with the spirit and letter of the UNESCO Convention.⁴¹¹

⁴⁰⁶ According to M. Rentzhog of the National Board of Trade, a Swedish independent governmental agency that works closely with the Swedish Foreign Ministry, culture has got its specificity, but is nevertheless trade related and becomes stronger by culture exchange, including via trade. Also a number of representatives of EU Member States, who wish to remain anonymous, expressed similar views.

⁴⁰⁷ This has been confirmed by all interviewees that were questioned with regard to the issue of Protocols on Cultural Cooperation.

⁴⁰⁸ Response to the Regional Organizations Questionnaire by the European Commission, pp. 14-15. This is also acknowledged in the Response to the Civil Society Questionnaire (p. 26) by the representative of the German Commission for UNESCO: the creation of an Inter-Service Group that includes all relevant DGs can provide an example for similar coordination and synergy searching among actors dealing with cultural policy and cultural diversity on the national level.

⁴⁰⁹ See, in this respect, a more general remark with regard to the complexity of the UNESCO Convention and its implementation: *"The assessment is that we are still in the first stage for key players in the cultural field to develop their own understanding of the complexity of this 2005 UNESCO Convention and to gain more clarity how they might be able to contribute to its implementation, including on the regional and international level."* (German Commission for UNESCO in the response to the Civil Society Questionnaire, p. 23). Although not referring to the issue of Protocols on Cultural Cooperation per se, the quote illustrates comprehensibly that the implementation of the Convention is in a beginning phase and can be confusing. Transparency and clear communication with regard to acts of implementing the Convention therefore seem essential to improve understanding, debate, support, and finally, implementation itself (idem, p. 32).

⁴¹⁰ Very large differences exist with regard to institutional measures taken within Member States that allow for (interdepartmental) coordination. These range from very close coordination on different levels – interministerial, with Civil Society, and with regional and international organizations – in France (Response to the Legal Questionnaire by the French Commission for UNESCO) to no institutional measures in Hungary (Response to the Legal Questionnaire by the Hungarian Department of Cultural Heritage and Coordination, p. 7). On the basis of different interviews that were conducted with Member State representatives that followed up on these negotiations, the specific topic of Protocols on Cultural Cooperation has been usually dealt with by trade ministries responsible for the economic or trade agreement it is appended to. Interdepartmental coordination has been minimal in most Member States.

⁴¹¹ Deutsche UNESCO Kommission, *Kulturelle Vielfalt Gestalten. Handlungsempfehlungen aus der Zivilgesellschaft zur Umsetzung des UNESCO-Übereinkommens zur Vielfalt kultureller Ausdrucksformen (2005) in und durch Deutschland (Weissbuch Version 1.0.)*, Deutsche UNESCO Kommission, Bonn, 2009, p. 17.

3.2.2. Translation of spirit and provisions of the Convention

A second cluster of criticism targets the relationship between the Protocols and the UNESCO Convention. Why putting that much energy in the development of a new international instrument to, *inter alia*, counterbalance developments in the WTO, to subsequently re-integrate culture in a trade context?: “PCCs, as they have been negotiated up to the present time, do nevertheless run the risk of allowing a *de facto* reintroduction of audiovisual services into trade negotiations.”⁴¹²

A predominant economic approach is illustrated according to France by the articles in the Protocols that resemble market access provisions. Moreover, the critical parties claim there is an excessive focus on access for audiovisual co-productions. This imbalance also disregards the specific needs of developing countries. The spirit of the Convention should be abided by and, in any case, prior ratification of the Convention is necessary, sceptics claim.⁴¹³

A first (technical) reason is that the Protocol appended to the FTA would allow for possible discriminatory measures in the Protocol vis-à-vis other partners because of its compatibility with Article V GATS (Economic Integration)⁴¹⁴. Secondly, strategic considerations seem to have played a role as well. Swift action is seen as essential to stress the EU’s leadership in promoting the implementation of the UNESCO Convention as the cultural pillar in global governance, and as a counterbalance to (future) developments in other institutions that could possibly harm cultural diversity. In this respect, moreover, the Protocol can be seen as a response to US bilateral strategies to further audiovisual trade liberalization.⁴¹⁵ Developing partnerships with third countries by means of a Protocol could broaden and strengthen the alliance in support of the Convention. It would also support, in turn, Korean interest groups that protest against the ratification of the Korea-US FTA, which is seen as incompatible with the principles of the UNESCO Convention.⁴¹⁶ The Protocol with Korea could be an instrument to align an important Asian partner to the EU’s position regarding the inter-institutional dialectics between the WTO and UNESCO in the case of cultural diversity.

⁴¹² French Ministry for Foreign and European Affairs, *Op. Cit.*, 2009, p. 5.

⁴¹³ Idem, pp. 5, 8; Response of the French Coalition to the Civil Society Questionnaire, p. 8. See also Thiec, Y., *The first assessment of the EU-Korea Protocol* by Yvon THIEC, INCDEurope Chairman, 2009, available at www.eurocinema.eu/docs/EU_Korea_PCC_Assessment_03.09.pdf.

⁴¹⁴ Art. V GATS on Economic Integration allows for an exception to the MFN principle if a non-multilateral economic integration agreement is concluded that meets certain conditions in terms of substantial sectoral coverage and does not exclude a priori certain sectors.

⁴¹⁵ For more information on the US bilateral trade strategies with regard to the cultural sector, the audiovisual sector in particular, see Bernier, I., *The Recent Free Trade Agreements of the United States as Illustrations of Their New Strategy Regarding The Audiovisual Sector*, 2004, available at http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/conf_seoul_ang_2004.pdf; and Wunsch-Vincent, S., *The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*, *Aussenwirtschaft*, 2003, vol. 58, no. 1, pp. 7-46.

⁴¹⁶ Choi, W., *Screen Quota and Cultural Diversity: Debates in Korea-US FTA Talks and Convention on Cultural Diversity*, *Asian Journal of WTO & International Health Law and Polic*, 2007, vol. 2, no. 2, p. 271. The importance of the political context in which the Protocol with Korea has been negotiated was also highlighted during an interview with C. Merkel, an expert who has been following the matter from the perspective of the European Alliance of Coalitions for Cultural Diversity and has been present at some of the briefing sessions offered by the Commission on these issues.

3.2.3. Co-production provisions and absence of preliminary study

A third cluster of critiques concerns the provision on co-productions and the possible qualification of Euro-Korean co-productions as 'European works.' Firstly, critical Member States and civil society organizations find that this provision is incompatible with other international commitments the EU and its Member States have taken. In this view, preferential treatment should only be awarded to developing countries, according to Article 16 of the Convention. Secondly, no preliminary study has been carried out to investigate the effects the functioning of this provision would have for European audiovisual companies. They fear, finally, that should the European Commission proceed with its approach in the future (with e.g. India), this would be detrimental for European cultural industries. In other words, the Protocol would be counterproductive for cultural diversity.⁴¹⁷

From a legal perspective, the Protocol seems reconcilable with other international obligations. With regard to the Convention, Article 16 indeed refers to developing countries. But other provisions, such as Articles 12 and 20 of the Convention, give a legal base to promote the Convention's goals through cooperation with non-developing countries.⁴¹⁸

With respect to the critique of taking 'a leap into the dark' as no preliminary study has been carried out, the Commission's argument is more susceptible to further criticism. It argues that an ex ante impact study would be difficult to achieve and of limited practical use as it would entail speculation on parameters and actor behaviour. Therefore study and evaluation should be organized ex post.⁴¹⁹

On the one hand, the problem of reliable data on cultural and audiovisual industries, services and services trade is well known. Data and statistics are fragmentary and incomplete.⁴²⁰ Moreover, the concept of cultural diversity in itself is difficult to measure. A study beforehand would probably be very difficult and time-consuming, considering also the urgency to act. On the other hand, the Commission argues at the same time that the reciprocal basis of the co-production provision would contribute to cooperation, more balanced exchanges, better circulation of audiovisual works and opening up markets that are difficult to penetrate.⁴²¹ Critical parties fear however that these benefits would primarily apply to the other party. The Commission's argument that Protocols with partners that have a strong and already developed audiovisual sector are based on reciprocity does not hold according to them. The EU and Korea markets are incomparable (e.g. in size, number

⁴¹⁷ See, for example, the Response of the French Coalition for Cultural Diversity to the Civil Society Questionnaire, p. 9. For these reasons, the French Coalition asks the renunciation by the European Commission of negotiating Protocols on Cultural Cooperation that are attached to trade agreements.

⁴¹⁸ Van Elsuwege & Adam, *Op. Cit.*, 2009, pp. 1-3.

⁴¹⁹ European Commission, *Concept Paper Cultural Cooperation Protocol with Korea*, Brussels, 2009b, p. 3.

⁴²⁰ As is acknowledged by all researchers and organizations dealing with the measurement and classification of cultural and creative industries and economies, goods and services. Major reports in this respect by, for example KEA (for the European Commission's DG EAC, 2006), UNESCO (2005) and UNCTAD (2008) indicate the complexity of and problems with measuring the creative and cultural economy, cultural and audiovisual services (trade) in particular. It is also acknowledged in the Response to the Regional Organizations Questionnaire by the European Commission (p. 18) in which the Commission indicates that the measurement of cultural diversity and of the cultural sector in general will be one of its priorities. In this respect, a network of national statistical offices on cultural statistics (ESSnet) under the auspices of Eurostat has been set up. Also other instruments exist, such as the Compendium on Cultural Policies and Trends in Europe. Partnerships between different institutions (e.g. the EU, the Council of Europe, UNCTAD, UNESCO, ...) to strengthen synergy and coherence in their work on measurement and mapping of cultural and creative industries would be most welcome for supporting evidence based policies aiming for cultural diversity. (See, *inter alia*, the Response to the Civil Society Questionnaire by the German UNESCO Commission and the interview with Ms. E. Dos Santos-Duisenberg (Chief, Creative Economy & Industries Programme, Trade Analysis Branch UNCTAD).

⁴²¹ European Commission, *Op. Cit.*, 2009b, p. 2.

of consumers or wages of audiovisual professionals). Moreover, the smaller Korean market is already saturated with Korean and Hollywood productions. Consequently, critics argue that in reality not cooperation and exchange, but one-way-traffic from Korea to the EU would be the result of the co-production provision in the Protocol.⁴²²

These fears should be nuanced on the one hand. The current number of Euro-Korean co-productions is marginal at best.⁴²³ Moreover, other supporting mechanisms the EU has installed are left unaffected. Market opening is limited, as the provision only applies to one very specific form of cultural exchange. On the other hand, the approach would set a possibly dangerous precedent as future negotiations with considerably larger and powerful countries such as India are already planned.⁴²⁴ Notwithstanding critical parties' support to the goal of strengthening global support for the Convention, the concrete benefits for European stakeholders are very limited, sceptics maintain. If, nevertheless, the process of negotiating cultural cooperation Protocols is continued, the criteria and mutual duties concerning co-production should be very strict.⁴²⁵

In any case, it is clear that the admittedly difficult cost benefit analysis of the Protocol on Cultural Cooperation with Korea, taking into account both long term strategic policy goals and short term economic repercussions, has been evaluated divergently by the European stakeholders. An additional problem is that in the current debate on cultural cooperation agreements the reiteration of old and unproductive contradictions looms, i.e. debates in terms of either liberalization of the cultural and audiovisual sectors or state support for the European cultural industries. This would be opposite to the goal of the UNESCO Convention, which stresses the dual nature of these sectors and access of the diversity of cultural expressions for third parties to each other's cultures and markets. It is questionable whether the current proposals for Protocols on Cultural Cooperation or other cultural cooperation frameworks meet these goals, especially with regard to developing countries, which neither benefit from liberalization, nor have the means to support the diversity of cultural expressions on their territory.⁴²⁶

Many questions remain and will return in the case of future endeavours in creating cultural cooperation frameworks. Consequently, transparency and a timely and clear communication on future strategies from the EU negotiators to the European stakeholders would be advisable.

3.2.4. Which model for future cultural cooperation?

In this regard, a final aspect that comes to the fore in discussions on the new practice is the model from which the European Commission sets out to negotiate and close a cultural Protocol with a trading partner. The European Commission has indeed been criticized for

⁴²² Interview with Ms. Cécile Despringre, Executive Director of SAA (Society of Audiovisual Authors).

⁴²³ A search in the Lumière database of the European Audiovisual Observatory, which admittedly only gives a very general overview, indicates that only a couple of cinema films per year are EU Member State-Korea co-productions.

⁴²⁴ All interviewees questioned stated that upcoming negotiations with India would be an interesting case. It remains to be seen, however whether a Protocol on Cultural Cooperation will be on the agenda as it is unclear whether both the EU and India would be interested in an agreement on cultural cooperation with one another.

⁴²⁵ Interview with Ms. Cécile Despringre and Member State representatives who wish to remain anonymous.

⁴²⁶ Pauwels, C., Donders, K. & Loisen, J., *Culture Inc. or Trade revisited? How interinstitutional dialectics and dynamic actor positions affect the outcomes of the debate on cultural trade and diversity*, in: Obuljen, N. & Smiers, J. (Eds), *Unesco's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Making it work*, Special Issue of Culturelink, Zagreb, Culturelink, 2006, pp. 155-156. See also the response by UNESCO in the section "International Organizations Survey" at www.diversitystudy.eu. - especially the reference to Article 16 of the UNESCO Convention regarding preferential treatment for developing countries.

only minorly adapting the CARIFORUM model when entering negotiations on a Protocol on Cultural Cooperation with Korea.⁴²⁷

Due to the confidential nature of the discussions in the Trade Policy / Article 133 Committee, it is difficult to reconstruct the exact nature of internal debates, the actual negotiations with a trading partner and the drafting process of a Protocol text. However, we can roughly divide the process that led to the adoption of the Protocol on Cultural Cooperation with Korea in three phases. These phases have been identified in comparing three texts that have been produced with regard to both Protocols: The CARIFORUM final Protocol; a draft version of the Korea Protocol (early 2009); and the final Korea Protocol (see figure below).

Table: Differences in Protocols on Cultural Cooperation⁴²⁸

Protocol on Cultural Cooperation	EU-CARIFORUM final	EU-KOREA draft	EU-KOREA final
Provisions			
Preamble			
Scope, objectives and definitions	Article 1	Article 1	
Horizontal provisions			
Cultural exchange and dialogue	Article 2	Article 2	
Artists and cultural professionals	Article 3	Article 4	
Technical assistance	Article 4	Not applicable	
Committee Cultural Cooperation	Not applicable	Article 3	Article 3
Arbitration	Not applicable	Not applicable	Article 3BIS
Sector specific provisions			
Audiovisual cooperation, co-productions	Article 5	Article 5	Article 5
Other audiovisual cooperation		Article 6	
Temporary imports of material to record audiovisual content	Article 6	Article 7	
Performing arts	Article 7	Article 8	
Publications	Article 8	Article 9	
Protection cultural and historical heritage	Article 9	Article 10	

⁴²⁷ French Ministry for Foreign and European Affairs, *Op. Cit.*, 2009, p. 4; Response of the French Coalition for Cultural Diversity to the Civil Society Questionnaire, p. 8; Interview with Ms. Cécile Despringre.

⁴²⁸ The column of the final EU-CARIFORUM Protocol represents the starting point. If cells in the second and / or third column are in grey no, or only marginal, changes have been made. The light blue colour indicates that important changes have been made in the EU-Korea Protocol, in comparison with the EU-CARIFORUM Protocol. Dark blue indicates important changes made during the negotiations with Korea as the final text differs considerably from the draft Protocol with Korea.

Comparison of the EU-CARIFORUM Protocol with the EU-Korea draft Protocol

When comparing the CARIFORUM Protocol with the 2009 draft of the Korea Protocol, few articles have been changed in the latter. The maintained articles seem acceptable for the different partners (i.e. European Union, EU Member States and third partners) and other interest parties (i.e. the European cultural industries). These maintained articles are rarely discussed in debates on the Protocols on Cultural Cooperation. Debates have mainly focussed on the general approach the European Commission takes, the internal working of the Commission, the relation between the European Commission and the Member States, and a number of other specific provisions in the Protocols.

There are four important differences between the CARIFORUM Protocol and the draft text for the Protocol with South Korea.

First of all, one can observe that in both texts the preamble refers to the implementation of the Convention on the diversity of cultural expressions. The Convention provides the framework for both Protocols. However, the specific articles of the Convention to which the Protocols refer are different. In the EU-CARIFORUM text, reference is made to articles 14 and 16 of the Convention. For the draft text of the EU-Korea Protocol, reference is made to articles 7, 11, 12, 20 and 21. Besides this, the former text refers to cultural cooperation as a means to stimulate development. In the latter reference is made to cultural cooperation on the basis of reciprocal relationships.

Secondly, the draft text on the Korea Protocol introduces a new article in which a Committee on Cultural Cooperation is established. Such a committee consists of senior officials of both parties. These have to monitor the implementation of the Protocol. In addition, Domestic Advisory Groups are to be set up in which representatives of the cultural and audiovisual sector can be consulted with regard to certain aspects of the Protocol's implementation.

Thirdly, article 5 of the EU-CARIFORUM Protocol is divided in the draft text on the Korea Protocol, separating other audiovisual cooperation from the provision on co-production. With regard to the latter, and in order to be considered a European work as defined in the AVMS, the EU-CARIFORUM Protocol stipulates that: (i) co-productions must be realized between undertakings that are owned (or of which a majority share is in the hands of) by (nationals of) a EU Member State or CARIFORUM State; (ii) the managers or directors of these undertakings should hold the nationality of a EU Member State or a CARIFORUM State; and (iii) the financial share of both partners in the co-production shall be above 20% and below 80%. In the draft Protocol with Korea, this last element is made more strict. The EU, firstly, proposes that more than one undertaking participates in a co-production effort with Korea. Secondly, the EU stipulates that the minimal financial participation cannot be lower than 30%. For animation, the threshold is 35%. Thirdly, besides the financial specifications, one also suggests that there should be a balance between the technical and artistic input.⁴²⁹ Fourthly, it is stipulated that producers from third countries can only pay 20% of production costs. Moreover, the proposal is that these third countries need to have ratified the Convention on Cultural Diversity. Finally, the EU suggests that the proposed system can be adapted after an evaluation in due time. In case, for example, one of the parties changes its framework for preferential treatment, it should be possible for the other

⁴²⁹ The contribution of producers of each party (EU Member States on the one hand, Korea on the other hand) cannot differ more than 20% with regard to financial contributions and cannot be higher than 70%. For animation, the criteria are again stricter. There is a maximal variation of 15% and a maximum of 65% of the production cost can be spent on technical or artistic costs.

party to ask for a re-evaluation of the framework in order to ensure the reciprocity of relationships.

Finally, it is proposed to make explicit when the Protocol would enter into force. For CARIFORUM it was deemed sufficient that its members at least had the intention to ratify the UNESCO Convention, whereas with Korea this ought to be a precondition.

It is unclear whether these alterations have been introduced on the initiative of the Commission, after consultations with the 133 Committee, or after criticisms of the Member States and professional sector representatives. According to the critics, the EU-Korea Protocol drafts were identical to the CARIFORUM Protocol in the first stage of negotiations. Alterations were allegedly only made after France and Belgium asked for changes in the 133 Committee and the sector appeared to be highly critical of the Protocol.⁴³⁰ The European Commission, however, emphasizes that the two Protocols were never identical and that the idea of reciprocity was from the beginning of the negotiations at the core of the South Korea Protocol.⁴³¹

Comparison of the draft EU-Korea Protocol with the final EU-Korea Protocol

In any case, it is important to acknowledge that discussions between the different stakeholders initiated a dynamic process in which the EU-Korea Protocol was adapted and refined. A comparison of the draft and final text illustrates this. In particular, fundamental changes are to be observed in articles 3 and 5 of the EU-Korea Protocol.

In first instance, article 3 on the Committee for Cultural Cooperation is elaborated and refined. A first important addition is that the Committee will consist of senior officials who have experience and expertise with regard to cultural affairs and practices. In addition, it is specified that the Trade Committee for the EU-Korea Free trade Agreement does not have any competences with regard to the Protocol on Cultural Cooperation. Consequently, a possible 'trade approach' of the cultural Protocol is excluded to the benefit of a more cultural approach to the implementation of the Protocol. Furthermore, the adapted article 3 provides that each party can ask for consultations on an issue linked to the Protocol with the other trade partner within the Committee for Cultural Cooperation. The Committee will then meet and try to find a solution for the dispute, which both parties can settle with. In case one cannot reach a consensus, an arbitration procedure will be started up.

In second instance, and related to the latter, article 3BIS is created in the final EU-Korea Protocol. In case a dispute arises and consultations in the Committee for Cultural Cooperation do not result in a consensus, a general arbitration procedure – foreseen in the general trade agreement – is initiated. There are several differences between the arbitration procedure for disputes relevant to the Free Trade Agreement and the Protocol on Cultural Cooperation, however. First of all, all references to the Trade Committee are replaced by references to the Committee for Cultural Cooperation. Secondly, a panel occupied with the arbitration on matters related to the Protocol consists of people that are knowledgeable about and have experience with its substantial aspects. For that purpose, a list of 15 competent individuals will be composed that can serve as arbitrators. A last difference concerns the issue of remediation. In case the panel decides that there is an actual breach of the Protocol, the complainant can stop its commitments in light of the

⁴³⁰ Interview with Ms. Cécile Despringre.

⁴³¹ See, for example, a letter (10 May 2008), available at <http://www.coalitionfrancaise.org/wp-content/uploads/2009/11/rep-mandelson100508.pdf>, of P. Mandelson to P. Rogard, President of the French Coalition for Cultural Diversity, responding to concerns made in this regard.

Protocol, whereas commitments taken in the context of the Free Trade Agreement are unaffected (and vice versa). In other words: any dispute in relation to the Protocol on Cultural Cooperation is disconnected from the Free Trade Agreement.

Finally, there was an additional set of changes to article 5 that focuses on co-productions. After discussions with Member States and sector representatives the European Commission successfully negotiated that, firstly, at least two EU Member States should be involved in a co-production – in case of animation co-productions, 3 undertakings. Moreover, each EU producer should at least bear 10% of the financial cost. Secondly, the criteria for animation are adapted. The technical and artistic contribution of each party cannot vary more than 10% with regard to the financial contribution (previously this was first 15%). Thirdly, the participation of third countries is made dependent on the ratification of the UNESCO Convention. Finally, one evaluates the system after it is three years in operation. One can then prolong the Protocol with another three years – provided one of the partners does not wish to end the preferential treatment system. In other words, any of the Member States can unilaterally stop the application of the provisions related to entitlement for co-productions to benefit from the respective schemes for the promotion of local/regional cultural content with regard to co-production.

As a consequence of additional safeguard mechanisms and specifications to the criteria co-productions have to comply with to benefit from the qualification as 'European work', the EU Member States have accepted the Protocol on Cultural Cooperation with Korea.

Scepticism remains however because a multiplication of the number of Protocols in parallel with upcoming bilateral trade negotiations is to be expected. Both some representatives of the Member States and of the professional sector are concerned that in upcoming Protocols, their concerns might not be met. For that reason, the European Commission needs to communicate her approach very clearly. In this respect, it has been indicated that different responsible DGs are in the process of developing a general framework and strategy for the negotiation of future Protocols or cultural cooperation agreements. In this regard, it should be open to discussion whether a proliferation of bilateral cultural cooperation agreements or Protocols would not lead to too much fragmentation and asymmetries among (trading) partners. Instead of a so-called spaghetti bowl of bilateral agreements, a plurilateral approach could be considered to address the issue of the diversity of cultural expressions in a trade context more structurally with a larger number of international partners.

Conclusion: SWOT

Strengths

Although the UNESCO Convention's implementation is only beginning to unfold, the new legal instrument has already had an impact on the EU's external policies related to trade. The EU has clearly expressed its leadership in accordance with the objectives of the European Agenda for Culture. With the negotiation of Protocols on Cultural Cooperation, a start has been made with the concrete implementation of Articles in the Convention, especially those articles the European Commission considers to be of a more binding nature (e.g. Articles, 12, 16, 20, 21 of the Convention). Moreover, the new framework the Convention contributes to, has led to new and innovative approaches for dealing with culture in the EU's external trade policy. Although not all are convinced that the new practice of negotiating Protocols will ultimately lead to cultural diversity, an important process of reflection has been started.

The debates (e.g. in the Trade Policy Committee or within the context of the Trade Civil Society Dialogue) that have unfolded during the negotiations of Protocols on Cultural Cooperation have been beneficial to improve its contents and built-in safeguard mechanisms for a balance in the dual nature of cultural diversity. Moreover, the EU's engagement with implementing the Convention also resonates in the non-EU context and in international organizations that deal with matters related to cultural diversity. Although it remains early days to assess the Convention's concrete impact on the level of the WTO, it has contributed to a certain legitimacy and preservation of the EU position in the multilateral trading regime. A learning process appears to have begun on how to deal with the complexity of the UNESCO Convention, to allow for differentiation with regard to the EU's trading partners, and to balance cultural diversity concerns with policy actions in other domains. In this respect, the strengthened role of the European Parliament in the follow-up of trade negotiations and the common commercial policy development also offers new possibilities for monitoring and finetuning processes related to trade and culture.

Weaknesses

Notwithstanding the apparent start-up of a fundamental debate on how to implement the UNESCO Convention in the EU's external relations, and to mainstream culture in general, a number of weaknesses should be addressed to align reflection and policy-making successfully. On a general level, the concept of mainstreaming culture needs to be fleshed out and clarified more concretely, including in terms of appropriate procedures, monitoring and remediation.

With regard to the Protocols on Cultural Cooperation, there has been only limited prior study of the impact these (and the provision with regard to co-production in particular) could generate for the diversity of cultural expressions in the EU. In a sense, a 'leap into the dark' is taken, albeit that this is to be corrected by several safeguards and ex post evaluation and adjustment mechanisms that have been developed in the process of negotiations on the Protocols on Cultural Cooperation – particularly the Protocol with Korea. In addition, the problems associated with the definition and measurement of cultural exchange and cultural diversity, make evidence based policy development difficult.

Moreover, a number of stakeholders experienced a lack of transparency and sometimes faltering communication on proceedings in trade and economic negotiations with third parties. This, in turn, can give rise to anxiety and confusion among stakeholders, suboptimal conditions for constructive debate and fragmentation in policy developments to implement the Convention in external relations. Furthermore, as the implementation of the UNESCO Convention is an obligation for all EU parties concerned, and its effectivity depends on a broad based support within the EU, the fact that many Member States remained silent with regard to the negotiations on the Protocols on Cultural Cooperation may be an indication of diminished interest in the process of implementing the UNESCO Convention. In this respect, structural dialogue among stakeholders must be improved – not only between the EU institutions, national levels and civil society, but also within Member States (e.g. between trade and cultural ministries).

Opportunities

The start of a process of reflection among EU stakeholders on a general framework with regard to the position of culture in the EU's external relations offers the chance to reassess and strengthen that position in light of the opportunities the UNESCO Convention provides.

As is already unfolding, at least on a discursive level, the mainstreaming of culture in related EU policies and instruments offers prospects to clearly articulate, both within the EU and vis-à-vis the EU's international partners, that culture and its specificity is a key pillar in the EU integration process and in global governance at large. This dynamic could now be seized to make concrete the mainstreaming of culture in terms of improving coordination procedures and platforms, of considering and making use of input from different stakeholders, and of assessment and adjustment of procedures and practices underlying the goal of mainstreaming culture in the EU and on a global level.

In addition, the new practice of negotiating Protocols on Cultural Cooperation or other cultural cooperation frameworks provides a tool to urge third parties to ratify and implement the UNESCO Convention. In this context, the alliance in favour of making the UNESCO Convention the global pillar for cultural policies can be broadened. The new approach also explicitates to the EU's international partners an alternative in dealing with the dual nature of the diversity of cultural expressions, as opposed to, for example, US bilateral liberalization strategies for the audiovisual and cultural sector. The EU can take on a central role in capacity building and empowerment of its international partners.

The negotiations on Protocols on Cultural Cooperation have made possible the reflection about and development of new safeguarding mechanisms in the spirit of the UNESCO Convention. Moreover, these experiences have generated new ideas to differentiate between third parties the EU will hold new negotiations with. In addition, it has provided opportunities to strengthen the relationship between different policies and frameworks that are related to the cultural diversity issue, e.g. the relationship between a Protocol on Cultural Cooperation and the implementation of the AVMS Directive. Although the new process will have to be improved and finetuned, it has provided input for the reflection on policy development that balances cultural with economic goals. In other words, the dual nature of the cultural and audiovisual sector requires supporting policies that are not mutually exclusive, but aim for a win-win situation for the parties concerned.

Threats

Among the many and different stakeholders within the EU, the strained relationship between cultural and trade objectives seems to remain very pervasive and clutters the relationship between EU institutions, Member States, and the professional sector. This in turn lessens the capacity of the EU to speak with one voice in cultural diversity related matters in international negotiations (although this can also have benefits during negotiations from a strategic viewpoint). In this respect different views on the scope of the Convention have led to considerable differences in expectations and approaches. This, in turn, can lead to confusion and friction among the stakeholders within the EU, as well as the weakening of a broadly supported position in the EU and its Member States. In light of the changes induced by the Treaty of Lisbon, the division of competences on culture and trade issues between the EU institutions and the Member States can lead to future frictions among stakeholders – which is however not necessarily new (nor bad). Transparency and adequate communication to relevant stakeholders on the development and implementation of a new strategy for cultural diversity in external relations is essential and must be guaranteed in order to achieve success and broad based support in the case of future negotiations and agreements.

With regard to Protocols on Cultural Cooperation, this is but one instrument to implement the UNESCO Convention in EU external relations. It has generated a certain momentum, but essentially targets only a small number of international partners. How can the

implementation, in a similar vein, include more third parties, developing countries particularly? It should be watched over that in the implementation of the UNESCO Convention by the EU, the goal of a worldwide diversity of cultural expressions is not minimized due to inward-looking or short-term EU specific interests. If especially developing countries remain between a rock and a hard place - i.e. either a liberalization scenario, or minimal access to other markets and state support for which many third parties countries do not have the resources and cannot compete with - the implementation of the UNESCO Convention could result in failure.

Recommendations

In light of this SWOT evaluation, the following policy recommendations are formulated:

Strengthening the UNESCO Convention

With the aim of strengthening and implementing the Convention, and developing it into the cultural pillar of global governance, the prior ratification of the Convention should be – and seems to be – a requirement for any cultural cooperation agreement or Protocol to come into force. To include more international partners and avoid fragmentation, a plurilateral approach should be considered by the EU – or at least a further explicitation on how the EU aims to implement the UNESCO Convention's provisions (e.g. Arts. 12-16, 18, 20) in its relations with international partners and how it fits in the EU's culture-related policy framework and strategy in general.

Another option for the promotion of the implementation of the UNESCO Convention is to include, in the spirit of mainstreaming culture and of Articles 1 and 10 of the UNESCO Convention, a unit for cultural diversity in the EU's diplomatic machinery. The team would act as a promoter for the implementation of the Convention in other countries; would be an office to answer questions of and offer best practices for third parties; and would prepare missions to other countries and international organizations for further cooperation in the promotion of the Convention. Efforts aiming at the promotion of the Convention in third countries should not solely be targeted at partners sympathetic to the UNESCO Convention. Making the Convention a cultural pillar of global governance implies that also hesitant or reluctant countries are at least approached, informed and involved with regard to the EU's intentions in implementing the Convention. For example, the inclusion of the cultural diversity issue in the transatlantic dialogue should take place in the future.

Evidence-based policy making for tailored cultural cooperation

Protocols on Cultural Cooperation should be judged and evaluated on a case per case basis in order to take into account the specificity of third parties and their relationship with the EU. The latter, as well as the commitment to cultural diversity in general, implies that investments should be made in studying and measuring the diversity of cultural expressions both in the EU and in the world. With respect to the new practice of negotiating cultural cooperation agreements and Protocols, this also means preliminary study for evidence-based negotiations. Therefore, urgently, different stakeholders should contribute to more study, the gathering of data and the refinement of definitions and concepts in particular, on different platforms. This is not an easy task, which is in need of a sound conceptualization.

The European Commission should take the lead in this process, albeit that other actors are co-responsible. The Commission should set up a platform and gather experts and specialists for the development of indicators for the diversity of cultural expressions and the enhancement of measuring methods. From a mainstreaming point of view, including in measurement and definition of cultural diversity, experts from the Commission and other EU institutions, from the Member States, and from international and regional organizations should be contacted and convinced of the benefits of this endeavour. A broad understanding of the concept of the diversity of cultural expressions is advisable. Although the cultural diversity concept primarily refers to the diversity of cultural expressions as embodied in cultural goods and services, ancillary definitions and concepts should be

included, at least in the preparatory work, as well. As the UNESCO Convention and the concept of cultural diversity itself are vivid, a broad approach seems necessary to include as many parameters as possible. Cooperation with international and regional organizations (e.g. the Council of Europe, UNESCO, UNCTAD, la Francophonie, the Commonwealth, ...), as well as research and statistical institutions (e.g. the Compendium project, the European Audiovisual Observatory), would have to be a fundamental objective – including for the development of common definitions and approaches.

The Commission would be primarily responsible for the gathering of data and data analysis with regard to EU external relations and exchanges. It would also provide coordination for measurement of cultural exchanges by and among EU Member States. The investment should be borne by the latter however. For each level a 'cultural diversity barometer' could be developed to measure cultural diversity, including cultural exchanges, on the aggregate EU-level, in different countries, regions and sectors, and taking into account variety, balance and disparity indicators on the supply and consumption side.

Organize and strengthen reflection and debate in a transparent environment

Past negotiations on Protocols have shown the value of debate among the European Commission, Member State representatives and civil society. Stimulating more and more structured dialogue among these stakeholders is to be recommended and would contribute to the implementation of Articles 9, 11 and 19 of the UNESCO Convention. E.g., one particular topic in need for further debate and clarity is the concept of mainstreaming culture. It would be useful to organize meetings among different stakeholders to discuss how this goal shall be concretely realized and which policy actions can, as well as cannot, be taken under the banner of 'mainstreaming culture.'

The increased role of the European Parliament after the Lisbon Treaty with regard to the common commercial policy can be grasped to follow-up more strongly on cultural matters in the framework of international negotiations – both in the Committee on International Trade and in the Committee on Culture and Education. As a consequence of cultural diversity's cross-cutting character, exchange between these committees or the set-up of a joint committee or working group that systematically follows up on culture and trade policy issues is advisable. The Civil Society dialogue has been important to inform civil society organizations and to make use of their expertise and analysis. Meetings could be set up on a more regular basis, dependent of the phase negotiations are in. For important evolutions in the negotiating process, a regular meeting could be organized. For other developments, an online briefing – possibly after registration and check of interested parties - of developments could be advisable.

Transparency is essential in these processes. Because of the multilevel governance context in which the EU aims to implement and mainstream the UNESCO Convention, the European Commission should take the lead in timely communication to stakeholders and as much transparency of proceedings as possible. However, because of all the involved parties commitment to implementing the UNESCO Convention, they equally have the responsibility to set-up frameworks for deliberation and reflection. Member States ought to increase efforts to formulate positions after internal dialogues (between relevant ministries and after consultation of civil society organizations and the professional sector) and communicate these equally timely to its representatives that are in contact with negotiating teams.

Study Paper 3D: Culture and development policies: a case study on the ACP Film Fund

Teresa Hoefert de Turegano

KEY FINDINGS

- Within the EU-ACP context, culture has been an area of intervention since the mid-1980s, when it was included into the Lomé III Agreement, and thus predates the Convention. ACP film funding has been one of the longstanding hallmarks of this cultural cooperation.
- The Convention does not appear to have had any significant effect, thus far, on existing EU-ACP cultural policies and practices.
- The main strengths of ACP film funding are: a) crucial contribution to the diversity of global film production, b) an essential funding mechanism for the production of cinema in the ACP region c) subsidy amounts which are consequential. The main weaknesses of the programme are: a) heavy administrative and application processes that are unadapted to the realities of the film/culture industries, b) insufficiently refined decision-making processes, c) irregularity of calls and the limited budget of the fund.
- International public funding mechanisms are crucial for cultural production in countries of the Global South. Such funding mechanisms are optimised when attention is also given to ensuring that the basic organisational structures of the sector as a whole function properly. Funding production alone is insufficient as a means to achieve a sustainable cultural livelihood. There must be government commitment, demonstrated through appropriate national (and regional) cultural policies (e.g., local funding mechanisms – whatever form that may take).

3.1. Introduction

The European Union provides over half of all official development assistance (ODA) worldwide.⁴³² As such, it can provide a leadership role, de facto, in development policy. EU development policies are primarily governed by two directorates: DG Development⁴³³, which is responsible for Community relations with Africa, the Caribbean and the Pacific (ACP) regions and the Overseas Countries and Territories (OCT); and the DG External Relations⁴³⁴ (RELEX), which is responsible for relations with all other regions and countries in the world.⁴³⁵ The implementation of external aid, whether it is funded by the Union's

⁴³² http://ec.europa.eu/development/how/monterrey_en.cfm

⁴³³ <http://ec.europa.eu/development/>

⁴³⁴ http://ec.europa.eu/external_relations/

⁴³⁵ The geographical regions are divided as follows: 1) Europe, the Southern Mediterranean, the Middle East and the Neighbourhood Policy; 2) Latin America; 3) Sub-Saharan Africa, the Caribbean and the Pacific; 4) Asia and Central Asia.

budget or the European Development Fund (EDF), is done by the EuropeAid Co-operation Office,⁴³⁶ created in 2001. Within the overall context of EU development policies culture has received most attention within the EU-ACP relationship.

This case study focuses on EU-ACP cooperation in the realm of culture and in particular, through a case study of the ACP film fund. It analyses ACP film funding to draw lessons from its strengths and weaknesses in order to propose optimisation measures to the existing process and so that a "best practice" can be applied to other international cultural funding mechanisms. This section also questions whether the Convention has contributed to a change in measures taken with respect to the inclusion of cultural issues in its development policies in this domain.

The detailed description provided in this section regarding the functioning of ACP film funding is intended to give concrete substance to overarching calls for new legislation, policies and funding programmes. It is an example of an EU programme which has existed for many years. It has been improved, modified, criticised, evaluated, etc. such that this preexisting knowledge enables an opportunity, with respect to the further implementation of new and existing programmes.

This study is structured in three parts. It begins with a brief overview of EU development policy and culture, focusing on the ACP region. The second part consists of a stock-taking and critical analysis of ACP film funding. The third part addresses issues related to international funding programmes in the domain of culture and development. The fourth part consists of conclusions and recommendations and takes a more prospective position discussing measures that could be taken into account in other similarly envisaged programmes.

It is important to note from the outset that in the realm of EU-ACP culture and development policies, culture has been an area of intervention since the mid-1980s. ACP film funding has been one of the longstanding hallmarks of the cultural cooperation within EU development policy. It is an example of cultural policy instituted by the EU, which predates the Convention and thus has comparative analytical value. Such an analysis is ultimately relevant for implementing Article 18 of the Convention, which calls for the establishment of an International Fund for Cultural Diversity. Furthermore, it is relevant in terms of Article 16, which stipulates preferential treatment for developing countries; and, more broadly, in Article 14 regarding the subject of Cooperation for development.

3.2. EU-ACP Relations – Overview

3.2.1. European Development Fund (EDF)

Cooperation between the EU (at that time Community) and countries in sub-Saharan Africa, the Caribbean and the Pacific started in 1957 with the signature of the Treaty of Rome. Part 4 of the Treaty enabled the creation of the European Development Fund (EDF) aimed at giving technical and financial aid to certain African countries.⁴³⁷ In 1963 the EEC developed a first generation of economic cooperation agreements (Yaoundé Convention),⁴³⁸

⁴³⁶ <http://ec.europa.eu/europeaid/>

⁴³⁷ http://ec.europa.eu/development/geographical/lomegen_en.cfm

⁴³⁸ European Development Fund: First EDF: 1959-1964; Second EDF: 1964-1970 (Yaoundé I Convention); Third EDF: 1970-1975 (Yaoundé II Convention); Fourth EDF: 1975-1980 (Lomé I Convention); Fifth EDF: 1980-1985 (Lomé II Convention); Sixth EDF: 1985-1990 (Lomé III Convention); Seventh EDF: 1990-1995 (Lomé IV Convention); Eighth EDF: 1995-2000 (Lomé IV Convention and the revised Lomé IV); Ninth EDF: 2000-2007 (Cotonou Agreement); Tenth EDF: 2008-2013 (Revised Cotonou Agreement).

and in 1975 the ACP group, an alliance of 46 states was established which, now in 2010, includes 79 states.⁴³⁹

The EDF budget is not part of the Community's general budget, although the European Parliament has requested⁴⁴⁰ its integration. Nevertheless, EDF funding will continue in its current form at least for the period between 2008-2013. EDFs are funded by the Member States, subject to their own financial rules and managed by a specific committee. While there is ongoing debate regarding the inclusion of the EDF funding into the Community's budget⁴⁴¹ one clear element in favour of such a shift is that the implementation procedures would be simplified. Under the EU-ACP agreements the administrative process linked to implementing projects appears to be extremely heavy, that is, if ACP film funding is taken as an example.

One of the notable characteristics of the EDF funding is the collaborative nature through which commitments are made. In every country, the government is closely associated with multiannual indicative programming, the preparation of annual action plans, etc. This means that cultural programmes could be included if a government so desires. As a result of the insistence of a small number of ACP governments, culture was integrated into certain national/regional indicative programmes (NIP/RIP) (Ghana, Mali, Burkina Faso, Senegal, Benin, Tanzania, Haiti, South Africa etc.). Many ACP countries have not included culture into the NIP/RIP. This is an area of intervention where the EU could increasingly lobby in favour of the inclusion of cultural cooperation along the lines opened through the Convention.

As an example, the overall budget of the 9th EDF, for the period of 2000-2007, was 23.6 billion €. Of this total, 14 million € was allocated for culture through the intra-ACP funds. The tenth EDF covers the period from 2008 to 2013 and has an overall budget of 22.6 billion €. ⁴⁴² Of this total, 30 million € was allocated for culture in the intra-ACP funds. The amounts which have been allocated to culture in this context are minor. A more committed implementation of the Convention, in particular of Articles 14 and 16 would mean more resources going in the direction of culture.

3.3. Bringing Culture into EU Development Policy

In 1984, a cultural chapter was added to the legislation in the Lomé III agreement defining cooperation between the EU and participating countries in the ACP region.⁴⁴³ This created the possibility for operations in the sector of culture, and namely the film and audiovisual sector. This judicial opening was not accompanied by a defined policy, but it enabled

⁴³⁹ http://ec.europa.eu/development/how/source-funding/edf_en.cfm

⁴⁴⁰ http://europa.eu/legislation_summaries/development/overseas_countries_territories/r12102_en.htm

⁴⁴¹ http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r12110_en.htm

⁴⁴² Of this amount, 21 966 million € is allocated to the ACP countries, 286 million € to the OCT and 430 million € to the Commission as support expenditure for programming and implementation of the EDF. The amount for the ACP countries is divided accordingly: 17 766 million € to the national and regional indicative programmes, 2 700 million € to intra-ACP and intra-regional cooperation and 1 500 million € to Investment Facilities.

⁴⁴³ <http://www.acpsec.org/en/conventions/lome3e.htm> Title VIII. Cultural and social co-operation [Chapter 1: Cultural and social dimension](#) [Chapter 2: Operations to enhance the value of human resources](#) [Chapter 3: Promotion of cultural identities](#)

Agreements in the area of culture and development

Signed by the European Union:

- 1) The Treaty of the EU imposes on the European Community and its Member States the promotion of cultural aspects in their international relations as well as in their development and trade-related policies, to contribute to a world order based on sustainable development, peaceful coexistence and dialogue between cultures.
- 2) The European Agenda for culture in a globalising world (2007) is evidence of the growing recognition of the fact that culture is essential to the welfare of humanity.
- 3) The European Consensus for Development (2005) places emphasis on the role of cultural cooperation in the eradication of poverty and in sustainable development.
- 4) The UNESCO Convention for the protection and promotion of the diversity of cultural expressions (2005).

Signed by the ACP countries:

- 1) Santo Domingo Resolution (2006) which states the important role of culture in sustainable development and the achievement of the millennium development objectives.
- 2) The UNESCO Convention for the protection and promotion of the diversity of cultural expressions (2005). Most of the ACP countries have ratified the convention.
- 3) The Dakar Plan of Action for the Promotion of ACP Cultures and Cultural Industries (2003).
- 4) Lomé III (1984), Lomé IV (1989) and the Cotonou Agreement (2000) are common to both parties. The Cotonou Agreement seeks to make culture an integral part of cooperation.

various forms of direct and indirect intervention in film making, which have further developed in successive agreements. In June 2000, the Cotonou Partnership Agreement, a twenty year agreement, was signed, providing a strong mandate to support culture in Article 27.⁴⁴⁴ Cotonou creates a comprehensive framework for cultural cooperation that ranges from mainstreaming culture in development activities to: the promotion of intercultural dialogue, the preservation of cultural heritage, support for cultural industries and improved access to European markets for ACP cultural goods and services.

At the intra-ACP level the Commission finances programmes that are implemented on the basis of calls for proposals. The two most important programmes, which total more than one third of EC's financial support to culture in ACP countries within the 9th EDF (2000-2007) are: a) the cinema and audiovisual support programme, which co-finances the production and diffusion of audiovisual works from ACP countries and the training of audiovisual professionals (ACP Films)⁴⁴⁵ (6.5 million € in funding); and, b) the creative industries support programme, which provides support to cultural actors (6.3 million €). It is open to all ACP countries, but the focus is on five pilot countries that have been identified to maximise the economic and job potential (4 million €) as well as the ACP Cultures⁴⁴⁶ (2.3 million €). The ACP Cultures supported projects in the fields of contemporary visual arts, performing arts and music, including the organisation of art events, technical training, professional seminars and networking as well as artists' residences.

⁴⁴⁴ Reference to Art 27 of the Cotonou agreement

⁴⁴⁵ www.acpfilms.eu

⁴⁴⁶ www.acpcultures.eu

Other support in the domain of culture under the 9th EDF includes, for example: a) the ACP Cultural Observatory; b) in some ACP countries support for micro-projects run by associations, communities or private individuals; and, c) funding for various national and regional projects (preserving, displaying and marketing cultural heritage; producing and disseminating works of art; promoting artistic events; and providing training).⁴⁴⁷ There are also regional programmes for culture (with ECOWAS and PALOP). In addition, culture is included in the national programmes of a number of countries.

At the intra-ACP level the 10th EDF (2008-2013) provides 30 million € for culture, as noted above. While much discussion has revolved around the use of this funding to create an ACP Cultural Fund this is being debated by the Secretariat.⁴⁴⁸ In principle, these funds will be used primarily to support the distribution (mainly local distribution) of ACP cultural goods and works of art; and secondly, production and promotion, thus encouraging the emergence of local and regional markets and industries.⁴⁴⁹

3.4. Culture and EU Development Policy - Beyond ACP

Within the scope of this study, it is not possible to cover all the policies and programmes related to culture in the EU development context.⁴⁵⁰ Nonetheless a number of other programmes are especially noteworthy.

Beyond the ACP region there has also been a fairly consistent policy with respect to culture in the Southern Mediterranean region. Following the Barcelona meeting in 1995, Euromed Heritage I was launched in 1998 to promote cultural dialogue. Euromed Heritage II and III (2002-2008) followed with a 40 million € budget. Heritage IV (2008-2011) has been allocated 17 million €.

Another important cultural programme in the MEDA context is Euromed Audiovisual, which has now launched its third programme. Euromed Audiovisual I (2000-2004) and II (2005-2008), with a budget 15 million €, have had good visibility in the film sector. The aims of the programme are to bring European and Mediterranean cultures together by promoting audiovisual and cinema exchange. For the period of 2007-2013, the Euro-Mediterranean Partnership is being financed through a new instrument, the European Neighborhood and Partnership Instrument (ENPI), for which a total amount of €12 billion is foreseen (approximately 10% is allocated for regional projects.) Euromed Audiovisual III has a budget of 11 million € for the period of 2009-2012. If one compares this amount, which is destined in the case of Euromed Audiovisual III to 9 countries, and compares it to the ACP film programme with 79 countries, one quickly notes the comparatively small resources allocated in the ACP context.⁴⁵¹

The Commission is also promoting culture in new regions, outside the ACP countries and the southern Mediterranean, where it has long been active.⁴⁵² For all developing countries beyond the ACP framework, within the financing perspectives for 2007-2013, EU cooperation is governed through the Development Cooperation Instrument (DCI) in order to better coordinate funding in EU external assistance. The DCI includes a Thematic

⁴⁴⁷ http://ec.europa.eu/development/policies/9interventionareas/humandev/humandevculture_en.cfm

⁴⁴⁸ Kasasa, Aya. ACP Secretariat. Conversation with author. 4 March 2010.

⁴⁴⁹ Culture for Development: http://ec.europa.eu/culture/our-policy-development/doc1749_en.htm

⁴⁵⁰ See for example, European Commission (2007), "Inventory of Community actions in the field of culture" SEC(2007) 570 (Accompanying document to a European agenda for culture)

⁴⁵¹ http://ec.europa.eu/europeaid/where/neighbourhood/regional-cooperation/documents/infonotes_enpisouth_regional_cooperation_en.pdf

⁴⁵² Website: <http://www.euromedaudiovisuel.net/index.aspx?treeID=1&lang=en>

Programme called Investing in People⁴⁵³ which has provisions on culture as follows: for promoting intercultural dialogue, cultural diversity and respect for other cultures; for international cooperation between cultural industries; for support of social, cultural and spiritual values of indigenous people and minorities; and for culture as a promising economic sector for development and growth. An amount of 50 million € has been allocated for the period of 2007-2013 for promoting access to local culture, and protecting and promoting cultural diversity and multiethnic and multicultural dialogue.⁴⁵⁴ EU development policies in Latin America⁴⁵⁵ and Asia⁴⁵⁶ are also covered by the DCI; however, activities in the domain of culture are more recent and less extensive than in the ACP and Southern Mediterranean regions.

3.5. ACP Film Funding

3.5.1. Overview

The availability of funding for ACP film making began in 1986, although it remained rather limited until 1989 when a number of film projects received financing. In most cases films were directly supported although organisations or events, etc. which also received support. The *Festival Panafricain du Cinéma et de la Télévision de Ouagadougou* (Fespaco), the largest cultural event on the African continent, has received biannual support since 1988. The *Fédération Panafricaine des cinéastes* (FEPACI) was also granted support in 1990, although the dynamic created through the funding was lost once the ACP funding ceased. There was no specific film fund but ACP film makers could apply for funding if culture had been inscribed in the national or regional indicative programmes (NIP and RIP) and from the intra-ACP funding.

The number of projects increased during the 7th EDF and by 1995 the funding available for ACP film gave the EU the status of being the top funder of ACP films. It surpassed the French government, which had long been the most important supporter of ACP cinemas. From 1988-1990 an average amount of 791,000 Ecus was allocated for film activities in the ACP region while from 1992-1995 approximately 2,349,000 per year were allocated, the majority of which was for film production. In 1995 there were three selection rounds with an average amount per film allocated of 295,000 Ecus. In general the amounts allocated by the EU were much larger than most of the other European funding possibilities and this gave a real boost to production from the region.

Nonetheless, the possibilities for cultural cooperation which were opened by the Lomé IV Agreement remained largely untapped. In an evaluation of the ACP film programme for the EU completed in 1996 by Dominique Wallon, the former head of the French *Centre national de la cinématographie* (CNC), it was clear that while there was absolutely no doubt about the importance of this ACP funding, there were many weaknesses to the whole procedure.⁴⁵⁷

The support for film production resulted in many films, which were seen on screens worldwide, some of which were programmed and won prizes in the most prestigious film festivals, including Cannes, the Berlinale and Venice. This support contributed in a very

⁴⁵³ http://ec.europa.eu/development/policies/9interventionareas/humandev/humandevhealth7_en.cfm

⁴⁵⁴ Culture for Development: http://ec.europa.eu/culture/our-policy-development/doc1749_en.htm

⁴⁵⁵ See for example: http://ec.europa.eu/europeaid/where/latin-america/documents/ec-la_development_cooperation_guide_2008-2010_en.pdf

⁴⁵⁶ See for example: [EU for the period 2007-2013](http://ec.europa.eu/external_relations/asia/index_en.htm) http://ec.europa.eu/external_relations/asia/index_en.htm

⁴⁵⁷ Wallon, Dominique. "Rapport d'évaluation de l'appui financier de l'union européenne à la promotion du cinéma des pays ACP" Tome 1 – Rapport, novembre 1996.

significant way to the thriving scene of sub-Saharan film making. In its early stages, ACP film funding went mostly to African film makers, because, in part, they were the most dynamic in seeking funding. Today allocations given to the various regions within the ACP is somewhat more balanced, although the Africans still are the most active. A high point was in 1990 when *Tilai* by Idrissa Ouedraogo from Burkina Faso won the Prix du Jury in Cannes. It became clear that the support of the EU had become crucial to the existence of ACP film making and many hopes were pinned on the next EDF.

However crucial the ACP support was to the existence of film making in the ACP region, it was still insufficient, because local infrastructures were not being developed at the same time. For example, the lack of local markets, distribution problems and training possibilities were all hampering factors. In spite of the success in one area, these various other pillars continued to be problematic and prevented veritable and sustainable growth in the film sector. It was a period of rather ad hoc support for ACP cinemas, with no clear policies or objectives in place, and with no transparent procedures or clarity in selection processes.⁴⁵⁸

The problems which were evoked in Wallon's evaluation and in particular the lack of transparency of the existing film funding resulted in a practical standstill on funding from the EU DG VIII at the end of the 90s. Given the increasingly important role of this funding for the existence of film production, the negative effects on ACP film making were considerable.

After the evaluation, analysis and restructuring the ACP cinema support fund was launched in a new programme (2000-2006) with a budget of 6 million €. It functioned through a call for proposals and attempted to apply the notions of transparency, neutrality, professionalism and monitoring. Management was organized through a Technical Assistance Desk of external experts. Four calls took place. The total budget of the ACP film industries support programme was 14 million € (2000 to 2006).⁴⁵⁹ This total included activities in the following areas: production, distribution and promotion, post-production and exhibition, festival support, training, among others (studies, etc.).

Georges Goldenstern (Cinéfondation-Cannes) evaluated ACP film support for the period 2000-2004. He writes: "There would be no films from the ACP region without EU support: 90% of ACP films received production support from the Commission."⁴⁶⁰ In his study, Goldenstern made three main recommendations to improve the programme: 1) The total resources available through the intra-ACP funding in the cinema support fund were insufficient. Governments should include culture development programmes in their NIP/RIPs, as Mali had done. In addition, ACP governments needed to create regulatory frameworks to accompany and enhance the ongoing efforts in the sector. The film sector needed to be better structured and professionalized. For example, the relationship between broadcasters and film sector had to be reinforced. 2) The administrative procedure needed revision, for example, a simplification and more realistic administration process was needed, and calls should be made on a regular basis. 3) Increased promotion and distribution measures were necessary for the projects.⁴⁶¹

⁴⁵⁸ Wallon, Dominique. "Rapport d'évaluation de l'appui financier de l'union européenne à la promotion du cinéma des pays ACP" Tome 1 – Rapport, novembre 1996.

⁴⁵⁹ Gehringer, Johannes. Europeaid cooperation office 2007 http://www.culture-and-development.info/f_pdf/04adGehringerEurAidVienna.pdf

⁴⁶⁰ Original : « Il n'y aurait pas de films ACP sans l'aide européenne: 90% des films ACP ont reçu une aide à la production de la Commission. » Author's translation. Goldenstern, Georges. "Evaluation rétrospective de la politique européenne d'appui aux cinémas de la zone ACP (2000-2004)" avril 2005, p. 8.

⁴⁶¹ Goldenstern, Georges. "Evaluation rétrospective de la politique européenne d'appui aux cinémas de la zone ACP (2000-2004)" avril 2005.

The ACP film fund then remained suspended from the last call in 2003 (decisions in 2004) until it was again renewed with a new call in 2008 under the 9th EDF. Because the ACP funding was so essential to the existence of film making from this region, this irregularity in the funding possibilities, with long interruptions between calls, was detrimental to the development of the sector and the learning of skills and professionalism.

Finally, in response to the evaluation and the proposed recommendations the Secretariat of the ACP Group of States, the EU then designed a new ACP-EU Support Programme for the ACP audiovisual sector called ACP Films (for cinema and television). The management process was revised and this time the ACP Films fund was to be managed by the ACP Secretariat with a Programme Management Unit (PMU). It was planned that this second programme of ACP Films would be launched mid 2006 with a budget of 6.5 million € and only one call for proposals.

In spite of the coherence of having the management of the ACP fund carried out by the ACP Secretariat, the film fund has been clearly hampered by the heavy administrative mechanisms of implementation within the EU-ACP partnership.

3.6. ACP Films (2008-2009 call)

3.6.1. Objectives

The overall objective of the ACP film fund is to contribute to the development and structuring of audiovisual, cinema and television industries in ACP States in order to optimise their capacity to create and distribute their own images and products; and to enhance the promotion of ACP cultural diversity, cultural identity, and inter-cultural dialogue. Assistance is aimed at stimulating the emergence or building of production capacity in cinema and audiovisual industries in ACP States, on one hand; and on the other, to enhance the circulation of audiovisual works, primarily within ACP States, but also in EU Member States and at the international level.

3.6.2. Structure and Funding

Three types of support, in the form of grants, were available: 1) Assistance for film production by ACP producers (cinema: feature-length fiction, documentary and animation) (television: TV films, fiction, animated and documentary series, one-off documentaries) (3.8 million €); 2) Assistance for distribution, development and promotion of ACP films and creation of networks for ACP audiovisual professionals (1.7 million €); 3) Assistance for training to enhance professionalism in the ACP audiovisual sector (1 million €). The total amount of funding for the programme was 6.5 million €.

A basic prerequisite is that eligible projects had to have a minimum of three partners, two of which had to be from ACP states.

The different categories reflect the attempt to address not only production but also distribution, promotion and training. These are all pillars which have to be worked on simultaneously. The funding subsidies in the area of production for example, are substantial amounts, up to 400,000 € and this is a very positive aspect of the ACP Films funding mechanism. Nonetheless, expectations of what 6 million € can accomplish in terms

of the given challenges in the ACP region, need to remain realistic. Again, as a comparison, the Euromed Audiovisual III programme, mentioned above, has a similar budget but is designed for 9 countries. Looking beyond EC programmes, one could make a comparison with, for example, the regional film fund of Berlin-Brandenburg which provides approximately 25 million € per year in film production funding alone.

3.6.3. Administration

The administrative process encountered in the ACP film fund programme continues to be overwhelming and insufficiently adapted to the film industry/cultural industry. The extreme heaviness of the application procedure is inappropriate. None of this is conducive to contributing to the development of professionalism or to the growth of film and cultural sector. In sum, administrative processes must be coherent with and have a basis in the realities of the industries and sectors in which they are situated, ie film and culture.

3.6.4. Decision-making process

There are a multitude of decision-making procedures possible in selective project funding schemes. This would be the subject of a study in itself. In the case of ACP film funding and ACP cultures, the programmes run on calls for proposals. This funding is based on an elaborate selective process which combines evaluations by film professionals and the ACP Secretariat.

In the case of the ACP Film 2008-2009 call one can note that the evaluation grids used in order to assess projects were not sufficiently adapted to projects in the film industry and this was especially evident in the area of production support. If one compares the ACP film fund evaluation grid with the evaluation guide used, for example, by the EU Media programme (single project - development) one notes that one of the main concerns in the evaluation procedure of the Media grid is with the quality of the project, from various perspectives. The questions are designed so that they are relevant for film projects. This needs to be improved in the evaluation process under ACP Films.⁴⁶²

If one takes the example of the ACP film fund, a number of recommendations can be made in terms of decision-making procedures:

- An evaluation process cannot be borrowed from other sectors and must be appropriately adapted and sector specific.
- Decisions should be based on the quality of projects.
- Thematic requirements that promote projects with a "development dimension" should be avoided in the selective process in an open film/cultural fund. Supporting a good project is already, in itself, a contribution to development. A good film or project has real value and the possibility of longevity, while a mediocre film remains a mediocre film even if it addresses a particular development "problem."

It is crucial to reiterate, that if the aim is to support the growth of sustainable cultural livelihood and activity, then multiple pillars must be addressed for real growth to take place. Along with the public funding available through international programmes such as the ACP film fund, which are absolutely vital, attention should simultaneously be given to the development of national and regional policies. Professional associations also need to be nurtured, as they are often a motor in encouraging public policy. In addition, the promotion

⁴⁶² Based on the author's personal experience as an "assessor" of projects for the ACP film fund during the call in the 9th EDF.

of ACP cinemas and its access and entry into the professional inner circles of the sector also need to be supported. It is only through a combination of measures and a real commitment of support that such a cultural sector can develop.

Finally, the ACP film fund is currently (2010) undergoing another evaluation process, the results of which are not yet available. Experience shows that with each evaluation of ACP film funding, specific issues have been addressed and redressed, and it is again likely to be the case with the next evaluation. And yet, in spite of previous recommendations in the evaluations noted above, the administrative problems and decision-making procedures seem to continue to be problematic. But perhaps this will change in the new call under the 10th EDF!

3.7. International Funding Mechanisms for Culture

International public funding in the domain of culture, through subsidies, is critical to the existence of cultural vitality in any society. For countries of the South it is vital to create enabling possibilities through public funding sources. This can be seen as a responsibility and obligation of wealthier countries and Articles 14, 16 and 18 of the Convention lay the groundwork in this domain.

Funding production - any kind of cultural production - should be done with a view to addressing a) the internal aspects of the sector and b) the overall context of the sector. In terms of the internal aspects of a sector, it is necessary to keep in mind entire creative process. Does the production funding exist in isolation or does it fit into the overall scheme, which takes into account the creative process beginning with training, project development, following through with production, distribution, promotion, exhibition, international access and so forth? In terms of the overall context, cultural funding mechanisms for production, distribution, promotion etc. are optimised when they find coherence with the sector as a whole. Do national and regional cultural policies also exist? Is there a legal context for the profession? Are there professional associations in place? Etc.

3.7.1. Establishing local regional funds

Another very critical aspect in the development of sustainable, cultural livelihood and diversity is to enable the possibility of locally established funding mechanisms, which might even be regional. Along with international funding sources such as ACP film funding or a funding mechanism such as the International Fund for Cultural Diversity, it is extremely important to enable local empowerment through locally driven sources of public funding.

In this optic, there are models of international, regional funds which involve a large number of member states, which work quite successfully. Budgets are constituted through contributions from each member country and the funding is then redistributed through selective processes. For example, Eurimages, the European co-production fund administered through the Council of Europe, has 34 member states and a well constructed decision-making process.

Ibermedia is another international, regional film fund with 18 members: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Ecuador, Spain, Guatemala, Mexico, Panama, Peru, Portugal, Puerto Rico, Dominican Republic, Uruguay and Venezuela. The National Film Institutions of each country are members. Each state allocates a proportional amount to the Ibermedia budget. In addition, the Spanish Ministry of Foreign Affairs (Cooperation and Development) also contributes to the fund, in particular, by providing the administrative

personnel, offices, etc. based in Madrid, for running the fund. Such schemes mean that dependence on international sources is mitigated and it creates a positive internal effect in all the member countries. The overall budget of Ibermedia is approximately 3-4 million €, which may be considered modest, but it is a successful model of empowerment. The member states also assist each other mutually in developing their film sector, for example, by sharing experience and knowledge in policy making and creating national film laws.

Additional financing that would become available for international public funding mechanisms for culture might consider contributing to regionally functioning funding mechanisms – similar to the Ibermedia model. For example, the input coming from an international fund, could be similar to that of the Spanish government's input in the case of Ibermedia. In addition each country from the determined region would allocate proportional amounts into the funds budget.

3.8. Conclusions and Recommendations

3.8.1. Conclusions

This study questioned the contribution of the Convention in terms of EU development policy and in particular EU-ACP cultural policy. Taking the example of ACP cooperation in the film and audiovisual sector, the signing of the Convention does not appear to have given additional impetus or contributed to improvements in this cooperation. Nevertheless, the activities of EU-ACP support to film making and the cultural sector in general, are directly in line with the aims of the Convention. However, thus far, there does not appear to be specific dialogue bringing together these similar aims. This should clearly be an EU objective in the process of implementing the Convention.

DG Development did organize an international colloquium in Brussels, in April 2009, entitled "Culture and Creativity – vectors for development" which resulted in various documents and a "Brussels declaration."⁴⁶³ While the conference does attest to renewed EU interest for the subject of culture and development, surely inspired by the Convention, the concrete results thereof will likely lie largely in the future. Although, according to the Director General for Development, Stefano Manservigi, "... seven other countries have recently requested to introduce cultural programmes during the mid-term reviews of their NIPs as a consequence of the successful debates aroused during the recent Brussels Colloquium on Culture."⁴⁶⁴

What is certain is the longevity of EU-ACP cultural funding, as a concrete example of how cultural funding works and doesn't work. In the area of EU development policy and culture, programmes already exist, which need to be improved on the one hand, and complemented with new programmes and policies on the other hand.

ACP film funding is a valuable international funding mechanism designed to support projects and contribute to the film cultures and industries in 79 countries. An example can be taken from the strengths and weaknesses of ACP film funding that can be applied to other international cultural funding mechanisms.

⁴⁶³ <http://www.culture-dev.eu/website.php?rub=accueil&lang=en&suite=suiteaccueil>.

⁴⁶⁴ Manservigi, Stefano. "Is there a New Approach to Culture and Development in the Strategy of the EU Development Policy?" http://www.culture-dev.eu/pages/en/en_introduction_part1.html.

The main strengths of ACP film funding are: a) crucial contribution to the diversity of global film production, b) an essential funding mechanism for the production of cinema in the ACP region c) subsidy amounts which are substantial and particularly valuable. The main weaknesses of the programme are: a) heavy administrative and application processes that are unadapted to the realities of the film/culture industries, b) insufficiently refined decision-making processes, c) irregularity of calls and overall insufficient resources for the fund.

3.8.2. SWOT Analysis

<p>Strengths</p> <ul style="list-style-type: none"> - ACP film funding has been the cornerstone of EU cultural policy within its development mandate. The existence of the programme predates the signing of the Convention and is evidence of a long standing commitment by the EU to integrate culture into its development policies. - The fund is a crucial support system for the film making sector in ACP countries - Investing in the development of the film and audiovisual sector in developing countries is a clear EU priority, given both the cultural benefits and economic potential of the sector. 	<p>Weaknesses</p> <ul style="list-style-type: none"> - The ACP film fund lacks financial resources - The administration is overwhelming and the application process is not sufficiently adapted to the realities of film sector -The decision-making procedure is insufficiently adapted to the sector - The irregularity of the calls disrupts the professionalization process and diminishes the potential local impact. - The fund lacks visibility in the European film industry
<p>Opportunities</p> <ul style="list-style-type: none"> - Improve the ACP Film fund – benefit from experience - Use an improved model of the ACP film fund to adapt other international cultural funding mechanisms - Consider additional and complementary cultural funding mechanisms (ie. regional funds which have cultural and economic objectives; more automatic funding mechanisms; matching funds; different budget structures) - Encourage Ibermedia and Eurimages type models in other regions - Use the impetus of the Convention to increase the visibility of the ACP film and audiovisual sector in Europe and globally - Use the Convention as a tool to accompany programmes which exist, such as the ACP film fund 	<p>Threats (Dangers)</p> <ul style="list-style-type: none"> - Funding should focus on quality projects and not impose a thematic “development dimension” (ie gender equality, literacy, modernity/tradition conflicts, environment, etc.). Supporting cultural projects in developing countries is, in itself, supporting development. - One size fits all model of funding is not applicable within or across the cultural sectors - Unrealistic expectations – public funding mechanisms are not miracle machines. They function best when they are coherent with the larger context

3.8.3. Forecast

Funding for culture in the ACP regions should benefit from the EU's commitment to the Convention, as should the other regions included in the EU's development policy sphere. The impetus given by the Convention should lead to a critical overhaul of the ACP funding, addressing and rectifying weak points. The Convention will contribute to an increase in resources available for culture as a specific theme and as a cross-cutting theme. The EU will not ignore its existing policies in culture and development but instead build upon them and establish complementary programmes, policies and legislation.

3.8.4. Recommendations

New selective funding mechanisms should take into account the experience gained from the ACP context, drawing on its strengths and learning from its weakness and it should take inspiration from other existing film funding models.

- Funding mechanisms are optimised when attention is also given to overall sectoral context – ie government commitment, an appropriate national/regional cultural policy context, incentive mechanisms, overall professional structure of a sector, even, local funding mechanisms
- Funding for culture within a development context should avoid thematic restrictions (ie "development dimension") and focus on funding quality projects
- Application process must be adapted to the realities of the cultural sector
- Decision-making process be adapted to the realities of the cultural sector
- Aims and methodology should be realistic and reviewed on a regular basis
- Visibility of the funding mechanism and its projects should be reinforced within each specific cultural sector that is addressed
- Expectations have to be realistically defined in terms of resources and in terms of the targeted sector
- Ensure the continuity of the funding

The Convention can be used as an accompanying tool of the ACP cultural funding mechanisms, such that they may be strengthened.

- Reinforce and improve the ACP film fund, addressing its weaknesses
- Resources allocated to culture in the ACP context should be increased and culture should be made a cross-cutting theme included into other ACP budgets
- Creating a dialogue between the ACP programmes and the Convention's implementation process would be mutually beneficial

With respect to cultural funding mechanisms in the development context, the EU should not only optimise its selective funding procedures but could also envisage other types of funding schemes, such as automatic funding, private-public partnerships, industry transfer mechanisms or certain tax based funding models and so forth. A key aspect of international funding mechanisms could also be to enable and facilitate locally established funding mechanisms, beginning at the regional level.

PART FOUR. IMPLEMENTATION OF THE UNESCO CONVENTION IN EU INTERNAL POLICIES

Study Paper 4A: Legal aspects of the implementation of the UNESCO Convention in EU policies ⁴⁶⁵

Delia Ferri

Executive Summary

Overview of Contents

This paper is part of the long version of the *Study on the Implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* for the European Parliament. It provides a legal analysis of the implementation of the Convention at the European Union level.

This paper is characterized by an EU law perspective and a cross-cutting approach. It is divided into two main sections, preceded by an Introduction and followed by Conclusions.

The Introduction presents the context of the analysis and sets out the legal background. It has an introductory character and offers “a big picture”, indispensable to further grasp how the EU possibly will adjust current practices and take new steps to implement the Convention.

The following section corresponds to Part Three of the Study. It covers the implementation of the UNESCO Convention in the EU's external relations. It provides a legal assessment of how the EU/EC has applied the UNESCO Convention in its external relations, and it briefly examines the extent to which current EU external policies fully comply with the Convention. It also discusses “how far” the EU can go to implement the Convention and focuses on the implementation of the Convention in the framework of Human Rights Dialogue.

Then, we focus on the implementation of the UNESCO Convention in the EU's internal policies (Part Four of the Study). The second main section of this paper gives a legal assessment of how the EU/EC has applied the UNESCO Convention in its internal policies, and examines the extent to which current EU legislation complies with the Convention. We note that the Convention may potentially have numerous implications for a wide range of policy fields, but we will then focus on the role of the EU institutions in the implementation of the Convention.

In this paper we assess the implementation of the UNESCO Convention in terms of its impact on EU legislation and on EU political discourse. On the basis of this assessment we

⁴⁶⁵ *Editor's Note:* this Study Paper is an analysis of the legal aspects of the implementation of the UNESCO Convention in EU external relations and EU internal policies. Therefore, while it is included in Part Four of the long version, the portion of the discussion addressing EU external relations is directly applicable to Part Three above.

identify legal challenges and measures which would contribute, in the future, to achieving the objectives of the UNESCO Convention.

Context of the Legal Analysis

The implementation of the UNESCO Convention by the EU implies a solid understanding of what is required by the Convention itself, of the scope of the Convention, and of the EU legal framework.

The 2005 UNESCO Convention

The UNESCO Convention is a landmark piece of legislation, and it is largely perceived by policy makers as a normative instrument for future international and national cultural policy making. Despite this general acknowledgement, the Convention is still only a programmatic document, containing weak obligations. There is no agreement on the scope of the Convention. According to the Commentary of the Convention, published by UNESCO in 2007, the Convention is not a general instrument, but it focuses primarily on the diversity of cultural expressions, as circulated and shared through cultural activities, goods and services. However, a wider interpretation of the scope of the Convention is preferable and more respectful of its underlying rationale. For the purpose of this paper, we consider that the Convention affects a wide range of policy fields (e.g. external relations, education and culture, trade, language, competition, but also immigration, citizenship and human rights) and it must be implemented equally within all these policy fields, through new legislative actions, administrative measures and soft law tools, involving civil society.

The UNESCO Convention as “mixed agreement”

From a purely EU law perspective, the Convention covers some areas which fall under the exclusive competence of the EU, but it also covers other subjects that remain part of the Member States’ (MS) competence, and furthermore there are issues with respect to which the EU and its Member States have shared competence. Such a coexistence of EU and MS competences implies that the Convention is a mixed agreement, ratified by the MS and by the EC/EU. Accordingly, the Convention must be implemented on both levels, i.e. by the EU and by its Member States. The implementation of the Convention at the EU level can only proceed in fields within the EU’s competences, as defined in the Declaration annexed to the concluding Decision 2006/515/EC, in compliance with the principle of conferral and with the principle of subsidiarity.

EU External Relations

The EU has started the process of implementation of the UNESCO Convention in its external relations. The analysis conducted in this report shows that the UNESCO Convention has deeply impacted the European “political discourse”. However, there is room for improvement. The EU should promote cultural diversity and the main principles of the Convention in all relevant bilateral and multilateral agreements through cultural cooperation clauses and cultural protocols. Additionally, the EU should promote the ratification and the implementation of the UNESCO Convention as the cultural pillar of global governance through conditionality clauses and human rights clauses. In particular, human rights clauses should include an explicit reference to cultural diversity and to the UNESCO Convention. Through these clauses, the protection of cultural diversity would complement and support respect for human rights and would become legally binding. In the event of serious and persistent breaches of cultural diversity by the partner country

part to the agreement, the clause enables the EU to take restrictive measures (including the termination of the agreement) against the offending party.

EU Internal Policies

The specific implementation of the UNESCO Convention in the EU internal policies is not significant. This does not mean that the EU policies neglect cultural diversity. On the contrary, the analysis shows that cultural diversity is a very important value in the EU and a "hot" political topic. Under Art. 167 TFEU (former Art. 151 EC), we note constant efforts to *mainstream* culture in all EU activities and many internal policies aimed at fostering cultural diversity. We nonetheless suggest the EU does "more" for mainstreaming the principles of the Convention in its binding legislation and for increasing the visibility of the Convention in its hard law. Mainstreaming does not prevent the EU from adopting a specific programme to implement the Convention, and to supplement Culture 2007-2013.

The implementation of the UNESCO Convention involves all the EU institutions and bodies. In this part we thus focus on the "institutional" level and we identify the key actors in the implementation process. First, among the EU institutions, the European Parliament can play a very important role. The "ordinary legislative procedure" (formerly known as "codecision") is now applied when adopting the vast majority of EU laws: the TFEU has provided the European Parliament with considerable powers *vis-à-vis* the Council of Ministers and the European Commission. All the other bodies could play a relevant role, in particular the ETF and the FRA. In addition, a new body ("European Institute for Cultural Diversity") could be established for the purpose of assisting the EU institutions and the Member States in the implementation of the Convention. In the implementation process, the role of the EU judiciary is also extremely relevant, to enforce and "put into practice" the values embedded in the Convention.

Foreword

The overall objective of the Study on the Implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions for the European Parliament (hereinafter “the Study”) is to provide a summary of the state of implementation of the UNESCO Convention and to highlight best practices and new measures to fully achieve the goals of the Convention. The Study aims to be a vital tool for policy makers and representatives of civil society, in view of overcoming the weaknesses of this treaty and entirely exploiting its opportunities. The Study offers an interdisciplinary analysis, and gives the reader diverse insights for a better understanding of the Convention implementation process.

The present paper is part of the long version of the Study. It provides a legal analysis of the implementation of the UNESCO Convention as carried out by the EU; it focuses on new measures designed to achieve the goals of the Convention, investigating their feasibility within the EU legal context. It aims at answering the following questions. What *must* be done to fully implement the Convention? What *has* been done in terms of implementation within the EU? What *could* the EU do to implement the Convention?

The paper is intended to complement the policy and economic perspective offered by other Study Papers, to support detailed analysis presented by the other contributors⁴⁶⁶, and to explore new ways to apply the Convention in the EU.

The analysis is characterized by a cross-cutting approach, and by an EU law perspective.⁴⁶⁷ In particular, the scope of the legal analysis is limited to the range of subjects that fall within the European Union legal order. It is thus based on the Lisbon Treaty, which entered into force on 1 December 2009.⁴⁶⁸

The paper is divided into two main sections, preceded by an Introduction and followed by brief Conclusions. The Introduction presents the context of the analysis and sets out the legal background. The first main section covers the implementation of the UNESCO Convention in the EU's external relations (Part Three of the Study). It provides a cross-cutting evaluation of how the EU/EC has applied the UNESCO Convention in its external relations and examines the extent to which current EU external policies fully comply with the Convention. It also discusses “how far” the EC can go to implement the Convention, focusing

I am grateful to dr. Mel Marquis for revising the language of the text. Of course, all errors and opinions remain my own.

⁴⁶⁶ See at www.diversitystudy.eu.

⁴⁶⁷ The EU is considered a constitutional system. There is, of course, ample doctrine on this. See, *ex multis*, M. Poiares Maduro (2006), *A Constituição Plural. Constitucionalismo e União Europeia*, S. João do Estoril; D. Thym (2003), *European Constitutional Theory and the Post-Nice Process*, in M. Andenas, J. Usher, *The Treaty of Nice and Beyond*, Hart Publishing-Oxford University Press, pp. 147 et seq.; R. Toniatti (2003), *Forma di Stato comunitario, sovranità e principio di sovranazionalità: una difficile sintesi*, in *Diritto pubblico comparato ed europeo*, 3/2003, pp. 1552 et seq. This doctrine is supported by the ECJ's case law, as may be seen from Opinion 1/91: «the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions» (ECJ, 14 December 1991, Opinion delivered pursuant to Article 228 EC, Opinion 1/91, [1991] ECR I-6079).

⁴⁶⁸ The Treaty of Lisbon entered into force on 1 December, 2009, and formally abolished the distinction formerly drawn between the three pillars. With the Treaty of Lisbon, the European Union has replaced and succeeded the European Community (Art. 1(3) TEU). Thus, in the first part of this paper I will refer to the EC/EU, meaning that the EC concluded the agreement, but it is the EU that has now succeeded the EC. The EU now has an explicit legal personality, and it is subject to the obligations set out by the UNESCO Convention. Unless specified otherwise, I refer only to the EC when discussing the period before the entry into force of the Treaty of Lisbon.

on the implementation of the Convention in the framework of Human Rights Dialogue. The second main section covers the implementation of the UNESCO Convention in the EU's internal policies (Part Four of the Study). It provides a horizontal legal assessment of how the EU/EC has applied the UNESCO Convention, and it briefly examines the extent to which current EU legislation complies with the Convention. It focuses on "key actors" responsible for the implementation at the EU level.

The information presented in this paper is supported by an Annex and by a Selected Bibliography.

The paper takes into consideration developments occurring in the last three years. In particular, it considers the period between the entry into force of the Convention for the EU (18 March 2007) and extends to a "cut off" date of 15 June 2010.

The analysis results from predominantly desk-based research. Data gathered from legal surveys were also used where relevant or appropriate. However, since the entry into force of the Convention is quite recent, the materials available do not allow for an assessment of the implementation of the UNESCO Convention in terms of policy outcomes (i.e. the direct impact on the improvement of the lives of persons).

The paper is not intended to provide any doctrinal background. It gives a comprehensive and horizontal overview of the main legal issues related to the implementation of the Convention. We avoid a conceptualist approach and employ, where appropriate, a descriptive and pragmatic approach. Considering the purposes of the entire *Study*, the scope and the final recipient of the *Study* (the European Parliament), purely dogmatic arguments have not been considered.⁴⁶⁹ As clarified above, the paper is intended to be a part of the entire *Study* delivered by Germann Avocats. In order to avoid undue repetition, references are occasionally made to other parts of the *Study*, and to papers of the other researchers. All the opinions expressed in this paper are those of the Author.

⁴⁶⁹ Criticism on highly sensitive topics concerning the European integration process as well on political claims has been avoided. Use of terms such as "erosion of powers", "acquiescence of Member States", which might show an implicit judgement regarding the sharing of powers, has been avoided.

Introduction: context of the legal analysis

4.1. Introductory Remarks

This Introduction sets out the pertinent legal framework and gives the reader a “big picture” for the subsequent investigation.

This Introduction is divided into two sections, followed by concluding observations. First, for the sake of completeness, some remarks on the significance and the scope of the Convention are provided. The implementation implies a solid understanding of what is required by the Convention itself and of the scope of the Convention. Such an understanding is the first step towards full implementation at the EU level. This brief overview does not contain a discussion of the contents of the Convention, nor does it cover all the norms and their meaning. It aims at summarising the distinctive features of the Convention. Section two briefly addresses the status and the effects of the UNESCO Convention in the EU legal system, for the purposes of the following analysis.

4.2. The UNESCO Convention: the “*Magna Charta of International Cultural Policy*”⁴⁷⁰

4.2.1. The Significance of the Convention

The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions is the most recent convention adopted by UNESCO in the field of cultural diversity. It provides for the Parties’ sovereign right to undertake measures on cultural policy and for incentives for the Parties to engage in the promotion of the diversity of cultural expressions in their territory. The Convention includes a non-exhaustive list of measures that may be applied to protect and promote diversity of cultural expressions and which must be implemented with due consideration for human rights and basic freedoms. The Convention also addresses international cooperation among the Parties to create favourable conditions for the protection and promotion of cultural diversity.⁴⁷¹

As unanimously underlined by the legal scholarship, the UNESCO Convention is drafted in a programmatic way, outlining policy in general terms without giving a precise description of what can be done. Furthermore, the obligations it contains are very weak.⁴⁷² However, policy makers, conscious of the potential of this instrument, defined it as the “*magna charta of international cultural policy*”: they fully acknowledged the Convention’s potential and recognized that the Convention needs to be effectively implemented through appropriate legislative, administrative and other measures⁴⁷³.

⁴⁷⁰ This definition was used at the 2007 Essen Conference organized by the UNESCO German Commission together with the EU. See <http://www.unesco.de>.

⁴⁷¹ See *ex multis* M. Cornu (2006), *La Convention de l’UNESCO sur la protection et la promotion de la diversité des expressions culturelles*, in *JDI*, 3/2006, pp. 929 *et seq.*

⁴⁷² *Inter alia* H. Ruiz Fabri (2006), *Reflections on Possible Future Legal Implications of the Convention*, in N. Obulijen, J. Smiers (eds), *UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Making It Work*, Zagreb, pp. 73 *et seq.*

⁴⁷³ See *supra*, ft. 3.

4.2.2. The Scope of the Convention

Despite the recognition of the significance of this Convention, the scope of this piece of legislation remains unclear. It is quite evident that this ambiguity can negatively condition the full implementation of the Convention.

The Commentary of the Convention, published by UNESCO in 2007, states that the Convention does not cover all the aspects of cultural diversity addressed in the UNESCO Universal Declaration on Cultural Diversity. According to this Commentary, the Convention deals only with specific thematic fields such as: the need to recognize that cultural goods and services cannot be considered as mere commodities or consumer goods like any others; the need for States to take all appropriate measures to protect and promote diversity of cultural expressions, and the need to redefine international cooperation “as each form of creation bears the seeds of a continuing dialogue”⁴⁷⁴. Accordingly, part of the scholars reduced the scope of this Convention to the protection of the production and dissemination of cultural goods and services.⁴⁷⁵

This narrow interpretation adopted by the UNESCO *bureau*, embraced by some outstanding scholars, is not formally binding: the Commentary is “for information purposes only and aims neither to interpret nor to complement the Convention”⁴⁷⁶.

This narrow interpretation does not seem consistent with the rationale of the Convention; thus, before embarking our analysis, we need to understand whether it is the only one possible, and whether it is the best one.

It is well known that the rules of an international treaty interpretation are codified in the 1969 Vienna Convention on the Law of Treaties. Art. 31 of the 1969 Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In addition, the interpreter is bound to take into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Interpretation must be carried out following the traditional criteria: the linguistic criterion, which focuses on the text itself as the expression of the common will of the Parties⁴⁷⁷; the systemic or contextual criterion, which regards the meaning of terms in their nearer and wider context⁴⁷⁸; and the dynamic (teleological or functional) criterion, which concentrates on the object and purpose of the treaty and, if necessary, transcends the “confines” of the text⁴⁷⁹.

⁴⁷⁴ See the 2007 Commentary on the UNESCO Convention, p. 4.

⁴⁷⁵ I. Bernier (2008), *The Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions: A Cultural Instrument at the Junction of Law and Politics*, at <http://www.diversite-culturelle.qc.ca/index.php?id=133&L=1>. See also J. Wouters M. Vidal (2007), *UNESCO and the Promotion of Cultural Exchange and Cultural Diversity*, in Abdulqawi A.Y. (ed.), *Standardsetting in UNESCO, Vol. I: Normative Action in Education, Science and Culture. Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, Leiden/Boston.

⁴⁷⁶ See the Commentary on the UNESCO Convention.

⁴⁷⁷ It derives legal arguments from the semantic and syntactic features of the language in which legal provisions are expressed, or from the comparison of the different language versions in which legal provisions are formulated.

⁴⁷⁸ They take into consideration the normative context in which the legal provision is placed and derive consequences—in a logically binding way or, more often, in a way which is not logically binding, but which is persuasive—from other legal norms belonging to the same normative text, or belonging to the same area of the legal system, or belonging to different areas of the same legal system. The systemic criteria of interpretation assume that legal provisions shall be interpreted, in case of doubt, in a way which is consistent with the “system”, that is to say, coherent with the principles, the rules and the concepts characteristic of the same area of the legal system to which the provision belongs, or characteristic of distinct areas within the same legal order.

⁴⁷⁹ They take into consideration neither the wording of the provisions nor the “static system” to which they belong, but the objectives of the piece of legislation (in this case, of the UNESCO Convention).

First, it is worth recalling that Art. 3 states that the Convention “shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions”. The term “cultural expressions,” as understood in the Convention, refers to those expressions “that result from the creativity of individuals, groups and societies, and that have cultural content”. “Cultural expressions” are embodied and conveyed in the production, dissemination, and distribution of cultural goods, services, and activities. Hence, Art. 3 deals with “policies and measures [...] relating to the protection and promotion of the diversity of cultural expressions”. Many policies are directly related to the diversity of cultural expressions (e.g. human rights policies, language measures ...). Dissemination and distribution of different cultural goods and services that express different identities can happen only where cultural identities and freedom of expression are protected.

Secondly, we cannot neglect that the Convention deals with cultural diversity in very general terms. According to Art. 4, cultural diversity “refers to the manifold ways in which the cultures of groups and societies find expression”. These expressions are passed on within and among groups and societies. In addition, the Convention states that “cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used”.

Clearly, cultural diversity as defined above refers both to the pluralistic ethno-cultural identity and to the diversity of art forms or contents transmitted by diverse media, accessed by diverse audiences. This definition represents the development of the well known concept of the cultural exception.⁴⁸⁰ Such an evolution represents neither a purely linguistic change, nor a mere semantic evolution: it lies upon an ideological change and goes beyond an “economic” vision of culture. The concept of cultural diversity adopted by the Convention embraces a broader vision and includes protection and promotion of individual and collective cultural rights, as well as identity claims. As Von Bogdandy has pointed out, “the success of the term ‘cultural diversity’ relies conceptually on the theme of identity. Looking at international documents for the answer to why ‘cultural diversity’ is worthy of protection, one regularly finds the allusion to its role in the formation and protection of identity”.⁴⁸¹

Third, the definition of cultural content as “symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities” leaves the door open to find cultural contents in goods which are not cultural *strictu sensu*, such as, e.g., food products. The definition of cultural policies is also very wide and includes both policies focused on culture and policies designed to have a direct effect on cultural expressions of individuals, groups or societies, and encompasses policies directed at regulating the integration of immigrants which *per se* affect cultural expression of individuals and groups.

⁴⁸⁰ The “cultural exception” is defined as the possibility to maintain European and National policies of “quotas” and grants of state aid to cultural sectors. S. Foa, W. Santagata (2004), *Eccezione culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate*, in Aedon at <http://www.aedon.mulino.it/archivio/2004/2/santfoa.htm>. See *inter alia* S. Regourd (2004), *Avant-Propos; De l’exception à la diversité culturelle*, in *Problèmes politiques et sociaux*, Septembre 2004, pp. 5 et seq.; R. Mazza (2007), *Liberalizzazione del commercio internazionale degli audiovisivi e salvaguardia dei valori culturali*, in *La comunità internazionale*, pp. 761 et seq., at 764.

⁴⁸¹ A. Von Bogdandy (2008), *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship*, in *European Journal of International Law* 2/2008, pp. 241 et seq.

Cultural policies embrace two main complementary issues: cultural rights⁴⁸² and human rights; and the links between creativity, commerce and economy.

Moreover, the Convention recognises the need to support all citizens to participate in cultural life and cultural activities, to protect their freedom to express their linguistic and cultural identity. Linguistic diversity is a fundamental element of cultural diversity and subsequently, Article 6(2)(b) of the Convention states that Parties can take, at the national level, specific measures relating to minority languages.

Thus, the linguistic and the contextual criteria seem to lead to a wide interpretation of the scope of the Convention. We think the Convention is conceived to protect and promote different cultures in terms of individual and community cultural practices, thus addressing the diversity of producers and of productions as well as the diversity of supply and demand together with the defence of cultural identities and cultural groups⁴⁸³.

If we then consider the dynamic criterion and the objectives of the Convention (i.e. to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner, to protect citizen choice in order to diversify audiences and generate potential demand for diverse cultural contents, to foster intercultural dialogue; see Art. 1 UNESCO Convention), we can say that the Convention encompasses the promotion of all cultural expressions through a "preferential" economic treatment, and through national policies promoting cultural identities.

Finally, there are other arguments in support of this thesis. With the Universal Declaration on Cultural Diversity of November 2001, cultural diversity was recognised, probably for the first time, as being in need of protection. However, the Declaration was an inadequate legal response to threats to cultural diversity caused by the economic globalization, by authoritarian regimes resisting in many States, and by fundamentalisms. There was an urgent need for a truly binding international instrument, in order to give to the concept of cultural diversity effectiveness and a juridical *status*. The Declaration paved the way for a binding text (namely, the Convention). The Convention is intended to fill a legal *lacuna* by establishing a series of rights and obligations, at both national and international levels, with a view of the effective protection and promotion of cultural diversity. The Declaration and the Convention are clearly connected; they have the same *rationale*. Both of them state that cultural diversity forms a common heritage of humanity and must be preserved, creating the conditions for cultures to flourish and freely interact. Both of them underpin the recognition of different cultural identities, of different groups. Both of them acknowledge the need for intercultural dialogue.

Last but not least, having regard to the surveys carried out within this Study, it appears evident that the majority of respondents have seen the Convention affect many and different policy fields (such as intercultural dialogue, immigration...)⁴⁸⁴ and protect cultural diversity in its comprehensive meaning and in all its "nuances"⁴⁸⁵.

⁴⁸² Article 5 of the UNESCO Declaration on Cultural Diversity states: "Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights".

⁴⁸³ In the UNESCO World Report on Cultural diversity and Intercultural Dialogue it is stated that a new approach to cultural diversity should be assumed. It is envisaged an approach "that takes account of its dynamic nature and the challenges of identity associated with the permanence of cultural change".

⁴⁸⁴ See e.g. Ireland's reply 10 to the legal questionnaire in the section "Legal Survey" at www.diversitystudy.eu. See also Italy's reply 9 to the civil society questionnaire in the section "Civil Societies Survey" at www.diversitystudy.eu.

⁴⁸⁵ See e.g. Bulgaria's reply 4.2 to the legal questionnaire in the section "Legal Survey" at www.diversitystudy.eu.

From what has been said so far, a wider interpretation of the scope of the Convention seems largely preferable. We therefore consider that the Convention potentially has numerous implications for a wide range of policy fields: external relations, education and culture, trade, language and competition, but also immigration, citizenship and human rights.

4.3. The Convention as a mixed agreement within the EU legal system

4.3.1. The Status of the Convention in the EU Legal System

From an EU law perspective the Convention covers some areas which fall under the exclusive competence of the EU, but it also covers other subjects that remain part of the Member States' competence. Then there are issues with respect to which the EU and its Member States have shared competence. Such a coexistence of EU and MS' competences is clearly and expressly reflected in the Declaration of competences annexed to Council Decision 2006/515/EC⁴⁸⁶.

Normatively speaking, the UNESCO Convention is a "mixed agreement"⁴⁸⁷, and was negotiated and then ratified by the various Member States, and concluded by the EC (now EU)⁴⁸⁸. Since its entry into force, the Convention has become part of the EU legal order, and it is binding on the institutions of the EU and on the Member States⁴⁸⁹. Accordingly, the Convention must be implemented on both levels, i.e. by the EU and by its Member States.

The ECJ, *inter alia* in case C-293/03⁴⁹⁰, considered that mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, following the so called "*Demirel* doctrine"⁴⁹¹. Thus, the hierarchical position of the UNESCO Convention in the legal order of the EU is inferior in rank to the TFEU (i.e., primary EU law), but superior to EU regulations, directives and decisions (i.e., secondary EU law).⁴⁹²

4.3.2. The Implementation of the Convention in the EU Legal System: General Remarks

As to the implementation of an international agreement concluded by the EU, there were no specific provisions in the former EC Treaty, and still there are no specific norms in the TFEU. However, it is worth recalling that the ECJ has stated that measures needed to implement the provisions of an agreement concluded by the EC/EU are to be adopted, according to the state of EU law for the time being, in the areas affected by the provisions of the agreement, either by the EU institutions in the fields of EU competence or by the Member States.

The EU competences are now defined by TFEU. In the fields of exclusive competences, Member States have relinquished the possibility of taking action and must intervene in the areas concerned in order to implement EU acts (Art. 2(1) TFEU). In the areas of shared

⁴⁸⁶ Decision 2006/515/EC of 18 May 2006, in *OJ L* 201 of 25.07.2006, pp. 15 *et seq.*

⁴⁸⁷ On mixed agreements see *ex multis* J. Heliskoski (2001), *Mixed Agreements as a Technique for Organizing the International Relations of European Community and its Member States*, The Hague.

⁴⁸⁸ See *supra* ft. 1.

⁴⁸⁹ As Wouters (cited *supra* footnote 10) recalls that the hierarchical position of the Convention in the legal order of the EC is below the provision of the Treaty establishing the European Community (primary EC law) but above secondary EC law (Regulations, Directives, Decisions).

⁴⁹⁰ ECJ, 7 October 2004, *Commission v French Republic*, Case C-239/03, [2004] ECR I-09325.

⁴⁹¹ ECJ, 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*. - *Reference for a preliminary ruling: Verwaltungsgericht Stuttgart*, Case 12/86, [1987] ECR 03719.

⁴⁹² Mixed agreements have the same status in the Community legal order as purely Community treaties. ECJ, 7 October 2004, *Commission v French Republic*, Case C-239/03, [2004] ECR I-09325.

competences, both the EU and the Member States may adopt legally binding acts; however, Member States can only exercise their power to the extent that the EU has not yet exercised, or has ceased exercising its competence (Art. 2(2) TFEU). By contrast, in the fields of supplementary or supporting competences, the EU can only carry out activities to support, coordinate or supplement Member States actions.

The Treaty confers on the EU exclusive competence in the areas of the creation and establishment of the competition rules necessary for the functioning of the internal market and of the common commercial policy. The EU also has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or when it is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope (Art. 3 TFEU). Art. 4 TFEU confers on the EU shared competence *inter alia* in the areas of internal market and social policy. In the areas of research, technological development and space, the Union has competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence must not result in Member States being prevented from exercising theirs. In the areas of development cooperation and humanitarian aid, the Union has competence to carry out activities and conduct a common policy (Art. 4(4) TFEU). Finally, EU supplementary competences exist in the areas of culture and education. Pursuant to Article 167 TFEU (ex article 151 EC), cultural diversity is a cross-cutting concern of the European Union.⁴⁹³

From the above we can affirm that the EU can implement the UNESCO Convention only in the fields of its competence. Consequently, Member States would have to adopt implementing provisions for matters not covered by EU competence, but they would also have to adopt national legislation to implement EU acts adopted in compliance with the international agreements. This requires close coordination between the EU and its Member States. The ECJ has also emphasized the need for common action and cooperation⁴⁹⁴. In its famous *Opinion 1/94*⁴⁹⁵, the ECJ stated: “[...] *it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into*”. The principle of cooperation, expressed in a general manner in the Treaty (now Art. 4(3) TEU), and consistently “applied” by the ECJ to mixed agreements, will also be essential in the implementation of the UNESCO Convention.⁴⁹⁶

4.3.3. The Effects of the Convention in the EU Legal System

Having briefly recalled the status of the UNESCO Convention and the general modalities of its implementation within the EU legal framework, we conclude the Section with a few words on the effects of the Convention.

As mentioned above, the Convention obligations are formulated in a weak way, constituting little more than commitments to make efforts. The Convention outlines objectives and policies in general terms. This leads us to exclude that the provisions of the Convention may have direct effect within the EU legal system. In that regard, the ECJ has clearly stated that only international provisions which contain a “clear, precise and unconditional

⁴⁹³ See below [Part Four].

⁴⁹⁴ See ECJ, 16 March 1996, *Commission v. Council*, case C-25/94, ECR 1996, p. I-01469.

⁴⁹⁵ ECJ, 15 November 1994, *Opinion on Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, ECR 1994, p. I-05267, para 13.

⁴⁹⁶ Close cooperation is thus compulsory and can be achieved mainly using political instruments, soft governance instruments and soft law tools, including the Open Method of Coordination (hereinafter OMC). On the role of the OMC in the implementation of the Convention, see A. Schramme and S. Van Auwfer’s Study Paper at www.diversitystudy.eu. On soft law see *inter alia* L. Senden (2004), *Soft Law in European Community Law*, Hart Publishing, Oxford.

obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure” can have direct effect.⁴⁹⁷

The provision of the UNESCO Convention cannot *per se* be invoked before the European Court of Justice (ECJ).⁴⁹⁸ However, as the ECJ has stated, there is always a duty of consistent interpretation: EC/EU legislation (and national measures) must be interpreted in accordance with the relevant international agreement (*Commission v. Germany*⁴⁹⁹ and *Hermès*⁵⁰⁰).

Finally, considering that international agreements concluded by the EC/EU are part of EU legal system, there can be no doubt as to the full jurisdiction of the ECJ over them with regard to the interpretation of such agreements under Article 267 TFEU.⁵⁰¹

Building upon this, we will be able to better explore the role of the EU judiciary in the implementation of the Convention.

4.4. Concluding Remarks

This introduction has given the reader the essential elements to understand the legal feasibility of new ideas on how the EU may apply the Convention in its fields of action. How international rules are implemented into EU law depends firstly on the EU constitutional structure and principles, on the sharing of competences and lays on the practice nurtured in the last fifty years. It is also derives from ECJ judgments and from scholars’ findings. This brief overview is thus only a useful point of departure.

The table below, in light of the overview provided, is intended to summarise some of the main general features to be taken into account in analysing the implementation of the UNESCO Convention.

Table 1: Implementation of the UNESCO Convention in the EU legal system

UNESCO Convention	Implementation in the EU legal system
PROGRAMMATIC PROVISIONS OUTLINING POLICY IN GENERAL TERMS “WEAK” OBLIGATIONS	WIDE MARGIN OF APPRECIATION IN THE CHOICE OF THE SUBSTANTIVE TOOLS TO ACHIEVE THE GOALS
PROGRAMMATIC PROVISIONS	NO DIRECT EFFECT OF THE PROVISIONS The Convention may be given full effect in the Community legal order by means of policy measures and legislative measures.
PROGRAMMATIC PROVISIONS	WIDE MARGIN OF APPRECIATION IN THE CHOICE OF THE TYPE OF MEASURES MAINSTREAMING CULTURAL DIVERSITY

⁴⁹⁷ ECJ, 14 December 2000, *Dior et al.*, Joined Cases C-300/98 and 392/98, [2000] ECR I-11307, para. 42. See also ECJ, 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, Case 104/81, [1982] ECR 03641.

⁴⁹⁸ However, in some cases the Court does not even require direct effect for the invocability of an international treaty provision. This is the case when a EC/EU act is intended to implement a particular obligation arising from an international agreement (the *Nakajima* exception). ECJ, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, Case C-69/89, [1991] ECR I-02069. i

⁴⁹⁹ ECJ, *Commission v. Germany*, Case 61/94, [1996] ECR I-3989.

⁵⁰⁰ AG, par. 39. See ECJ, Case 53/96, *Hermès International v. FHT Marketing Choice BV*, [1998] ECR I-3603.

⁵⁰¹ The Court follows a more delicate approach. It considers that to the extent that the EC/EU has assumed obligations under a mixed agreement, the norms by which the EC/EU is bound form part of EU law. In that quality they are binding on the EU and its Member States, and they are subject to the ECJ’s jurisdiction.

Legal aspects of the implementation of The UNESCO Convention in the EU's external relations

4.1. Introduction

This section provides a critical evaluation of how the EU/EC has applied the UNESCO Convention in its external relations. It examines the extent to which current EU external policies fully comply with the Convention and discusses "how far" the EC can go to implement Arts 12 *et seq* of the Convention, bearing in mind the UNESCO Operational Guidelines.

First, a brief overview of the Convention obligations in the field of international cooperation is provided. Secondly, the framework for EU action at the international level is briefly summarised. Then, the implementation of the UNESCO Convention is assessed in terms of its impact on EU policies (i.e. in term of its ability to inform the European "political discourses")⁵⁰² and legislation. Recommendations on how to implement the Convention are included.

It should be borne in mind that this part adopts a cross-cutting legal approach, and aims to complement other Study papers addressing specific issues. Particular attention will be given to the implementation of the Convention in the framework of human rights policy. Neither EU action in the WTO context nor EU development policies will be analysed, as they will be examined in other papers of the Study⁵⁰³.

4.2. The relevant provisions of the UNESCO Convention

Before examining whether and how the EU has implemented the UNESCO Convention in its external relations, clarity is needed regarding the content of the Convention obligations. Since the substance and the legal significance of these obligations has been explained by several scholars⁵⁰⁴, we limit ourselves to a brief overview for the purposes of this legal analysis.

The UNESCO Convention provides for several commitments aimed at fostering international cooperation in cultural matters. Particular attention is given to developing countries. Arts. 12 to 19 address the cooperation of the Parties with a view to creating favourable conditions for the promotion of cultural diversity.

Art. 12 of the UNESCO Convention encourages the Parties to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions and draws up a list of specific goals to be pursued in those contexts. To implement this provision the Parties must enhance cooperation through dialogue on cultural policy, professional and international cultural exchanges and sharing of best practices, the reinforcement of partnerships with and among civil society, non-governmental organisations and the private sector, the promotion of the use of new technologies to enhance information sharing, and the conclusion of co-production and co-distribution agreements.

⁵⁰² This assessment takes into account the European Commission's survey in the section "Regional Organizations' Surveys" at www.diversitystudy.eu.

⁵⁰³ C. Germann's Study Paper and J. Loisen- C. Pawels's Study Paper at www.diversitystudy.eu. See also T. Voon's Study Paper's and R. Soprano-Lucia Bellucci's Study Paper at www.diversitystudy.eu. On ACP see T. Hoefert de Turegano's Study Paper at www.diversitystudy.eu.

⁵⁰⁴ See various contribution in N. Obulijen, J. Smiers (eds) (2006), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Making It Work*, Zagreb.

Arts. 14, 15, 16 deal specifically with cooperation for development. These provisions must be read in light of the principle of international solidarity and cooperation (Article 2(5) of UNESCO Convention). In particular, Art. 14 enumerates different means that Parties could use in order to foster the emergence of a dynamic cultural sector in developing countries⁵⁰⁵. In order to fully implement this provision, UNESCO Guidelines suggest, *inter alia*, the setting-up and improvement of support mechanisms, including institutional, regulatory, legal and financial incentives for the production, creation, and distribution/dissemination of cultural activities, goods and services. In addition, the conclusion of co-production and co-distribution agreements between developed and developing countries and amongst the latter, as well as market access for co-productions, should be fostered. Art. 15 encourages “the development of partnerships, between and within the public and private sectors and non-profit organizations, in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions”. The Convention also envisages the granting of preferential treatment for developing countries (Art. 16).

In addition, Art. 18 provides for an International Fund for Cultural Diversity. According to the UNESCO Guidelines, the Fund is “a multilateral tool for promoting and developing the diversity of cultural expressions in developing countries, underlining however, that the Fund shall not act as a substitute for means and measures used bilaterally or regionally to provide support to these countries”. According to the UNESCO Guidelines⁵⁰⁶, given the links between Arts. 14, 16 (Preferential treatment for developing countries) and 18 (International Fund for Cultural Diversity), Parties should apply coherently and consistently these three articles.

International cooperation in situations of serious threat to cultural expressions is governed by Art. 17.⁵⁰⁷ Finally, exchange, analysis and dissemination of information is provided for in Art. 19.⁵⁰⁸

This brief synopsis highlights that the Convention puts great emphasis on international cooperation⁵⁰⁹ and gives the EU a significant opportunity to strengthen its role on the global scene.

4.3. The External Relations of the EU: the Legal Framework

Before answering the two core questions: “What has been done in terms of implementation within the EU?” and “What could the EU do to implement the Convention?”, it is important to recall the EU “external” competences and to set out the pertinent legal framework.

The “general principles” of the EU external action are set forth in Arts. 21 - 22 TEU. These principles are also referred to in Art. 205 TFEU, which expressly states that the EU on the international scene “shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union”.

In particular, from Art. 21 TEU it emerges that the EU must respect its own constitutional principles (rule of law, human rights and fundamental principles, democracy) in its external

⁵⁰⁵ The means in question are regrouped in four categories which are: 1) the strengthening of the cultural industries in developing countries; 2) capacity-building; 3) technology transfer; and 4) financial support.

⁵⁰⁶ http://portal.unesco.org/culture/en/ev.php-URL_ID=38216&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵⁰⁷ See C. Germann’s Study Paper at www.diversitystudy.eu.

⁵⁰⁸ Articles 20 and 21 of the UNESCO Convention concern its ‘Relationship to other instruments’ . See T. Voon’s Study Paper at www.diversitystudy.eu.

⁵⁰⁹ See J. Baltà Portolés (2010), *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU’s External Policies*, at <http://www.europarl.europa.eu/studies>.

relations. Art. 21(1) TEU states that the EU action on the international scene “shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” General objectives of the EU external relations are stated at Art. 21(2) and include fostering democracy and sustainable development. Additionally, according to Art. 21(3) TEU, the EU “shall ensure consistency between the different areas of its external action and between these and its other policies”. Pursuant to Art. 22 TEU, it is up to the Council to set specific and strategic goals within the framework of Art. 21 TEU.

Provisions concerning EU external powers are set forth in the TFEU. The EU has competence in concluding international agreements, where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules (Art. 216 TFEU). The EU has exclusive competence in concluding commercial agreements under Art. 207 TFEU (ex Art. 133 TEC). The EU has a shared competence in development cooperation (Arts. 208 ss. – ex arts. 177 ss.). In addition, Art. 212 TFEU (ex art. Article 181a TEC) provides that the Union is to carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Art. 186 TFEU sets out the framework for scientific and technological cooperation agreements. Last but not least, Art. 167(3) TFEU states that the EU (and the Member States) “shall foster cooperation with third countries and the competent international organisations in the sphere of culture”.

Beside the Treaties provisions recalled above, there are specific Regulations concerning the EU cooperation with third countries, which lay down the framework for external economic and political assistance to other countries⁵¹⁰. These regulations are extremely important for the implementation of Arts. 12 *et seq.* of the Convention.

Concluding, this legal framework allows the EU to fully implement the UNESCO Convention through:

- The conclusion of bilateral and multilateral international agreements concerning cultural goods and services
- The conclusion of bilateral and multilateral international agreements which include cultural clauses or cultural protocols in other agreements
- Programmes and financial measures on the basis of the abovementioned regulations. These programmes can implement Arts. 14 *et seq.* UNESCO Convention

⁵¹⁰ I.e. Regulation (EC) No 1934/2006 establishes a financing instrument for cooperation with industrialised and other high-income countries and territories; Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishes a financing instrument for Development Cooperation; Regulation (EC) No 1889/2006 establishes a financing instrument for the promotion of democracy and human rights worldwide (European Instrument for Democracy and Human Rights); Regulation (EC) No 1717/2006 establishes a financing instrument for Stability (IFS) providing assistance in situations of crisis and emerging crisis, and specific global and transregional threats, Regulation (EC) No 1638/2006 establishes a European Neighborhood and Partnership Instrument (ENPI) providing direct support for the EU's European Neighborhood Policy, Regulation (EC) No 1085/2006 establishes an Instrument for Pre-Accession Assistance (IPA) for Community assistance to candidate and potential candidate countries. Another regulation should be mentioned: Regulation (EC) No 1257/96 concerning humanitarian aid, most recently amended by Regulation (EC) No 219/2009 of 11 March 2009.

4.4. The Implementation of the UNESCO Convention in EU External Relations from 2007 to 2009

In order to answer the question “What has been done in terms of implementation within the EU?”, we provide a succinct assessment of EU action between 2007 and 2009. In particular, we aim to understand the impact the UNESCO Convention has had on EU external action. We will consider first the “political discourse” and then the legal implementation⁵¹¹, without providing an extensive discussion⁵¹².

4.4.1. The Impact of the Convention on the European “Political Discourses”

As underlined by Baltà Portolés⁵¹³, “when analysing the impact of the text in specific EU policies [...] it should be borne in mind that some pre-existing approaches in cultural policy and foreign affairs already responded to the Convention’s aims” . Cultural cooperation with third countries, such as the taking into account of cultural aspects across other EU policies (*mainstreaming*) has been part of EU legislation since the coming into force of the Maastricht Treaty; we can nonetheless assert that the EU has firmly embraced the UNESCO Convention in its external relations⁵¹⁴.

The European Commission, in its Communication of 10 May 2007 on a European agenda for culture in a globalizing world, stated that the entry into force of the UNESCO Convention illustrates “the new role of cultural diversity at international level”⁵¹⁵.

It should also be recalled that, in the first half of 2008, the Slovenian Presidency made the external dimension of culture a priority. In May 2008, with the support of DG EAC, a conference in Ljubljana was organized, with a specific focus on the Western Balkans and the ENP⁵¹⁶. During the conference the need for a comprehensive European Strategy on External Cultural Policy, which takes into account the UNESCO Convention, was underlined⁵¹⁷.

The meeting of Ministers for Culture held in May 2008 launched a process leading to the elaboration of a fully-fledged Euro-Mediterranean Strategy on Culture. An *ad hoc* working group of EuroMed experts will be created in order to develop this strategy for approval by the next meeting of Culture Ministers in 2010.

The European Council of June 2008 acknowledged efforts to promote the European Year of Intercultural Dialogue⁵¹⁸ and recognised the value of cultural cooperation and intercultural dialogue as an integral part of all relevant external policies (in line with the recommendations of the Ljubljana conference). The Council underlined the importance of cultural cooperation in addressing political processes and challenges, based on dialogue

⁵¹¹ In the European Commission’s survey (see in the section “Regional Organizations’ Surveys” at www.diversitystudy.eu) it is clearly stated: “the implementation of the UNESCO Convention within the EU is not a strict legislative activity as such but rather the pursuit of policy developments, both in internal and external policies, which might take the form of legislative action in specific instances.”

⁵¹² In this respect see J. Baltà Portolés (2010), *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU’s External Policies*, at <http://www.europarl.europa.eu/studies>.

⁵¹³ See *supra* footnote 47.

⁵¹⁴ http://ec.europa.eu/culture/our-policy-development/doc1567_en.htm.

⁵¹⁵ COM(2007) 242 final. See at http://europa.eu/legislation_summaries/culture/l29019_en.htm.

⁵¹⁶ http://www.mzz.gov.si/fileadmin/pageuploads/Kulturno_sodelovanje/PRESIDENCY_DECLARATION.doc.

⁵¹⁷ This strategy should build on the principles enshrined in the European Neighbourhood Policy, the Thessaloniki Agenda, and the 2005 UNESCO Convention.

⁵¹⁸ The European Year of Intercultural Dialogue has been deemed important by many Member States (see Ireland’s and Bulgaria’s Survey in the section “Legal Surveys” at www.diversitystudy.eu).

with civil society, in promoting people-to-people contacts and in fostering good neighbourly relations⁵¹⁹.

In November 2008, the Council approved the "Council Conclusions on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States". The Council called the Commission and the Member States to strengthen the place and the role of culture in the policies and programmes conducted within the framework of external relations. The Council invited the Commission and the Member States to encourage the ratification and implementation of this UNESCO Convention. The Council also highlighted the specific and "dual" nature of cultural activities, goods and services.

The cultural pillar of the Asia-Europe Meeting (ASEM) has been actively developed. The 3rd ASEM Culture Ministerial Meeting (held in Kuala Lumpur in April 2008) focused on the theme of "*Cultural Diversity – Realizing the Action Plan*".⁵²⁰ Policy dialogues on cultural policies, including exchanges on the implementation of the UNESCO Convention, have been initiated with certain partners who are Parties to the UNESCO Convention, such as Brazil, Mexico and China⁵²¹.

Concluding, in the period between 2007 and 2009, the UNESCO Convention deeply affected the "political discourses" relating to EU external action.⁵²²

4.4.2. The Impact of the Convention on the European Legislation

Despite the abovementioned strong commitment with regard to the Convention, between 2007 and 2009, legal implementation of the Convention (i.e. implementation through legally binding agreements or acts) has not advanced very far.

There are many bilateral agreements concluded by the EU between 2007 and 2009⁵²³. They mainly affect security field, commercial issues, fisheries or textiles. They do not contain any reference to the UNESCO Convention, nor do they include cultural clauses. In the period considered, there are no bilateral agreements which mention or relate to cultural diversity.

There are also several multilateral agreements concluded between 2007 and 2009⁵²⁴. They mostly affect trade or economic matters and they do not contain any reference to the UNESCO Convention, nor to culture. There are, in some of the agreements, clauses which indirectly refer to culture. For example, the "Interim Agreement with a view to an Economic Partnership Agreement between, the European Community and its Member States, on the one part, and the SADC EPA States, on the other part"⁵²⁵ contains in Art. 3 (Sustainable development) a clause stating: "the application of this Agreement shall fully take into

⁵¹⁹ Intercultural dialogue is an integral part of the EU's relations with third countries. In the framework of Euro-Mediterranean relations at regional level, culture is a priority sector, as recognised in the Barcelona Declaration of 1995. Among the objectives of Euro-Mediterranean cooperation, special attention is devoted to the social, cultural and human dimension elements.

⁵²⁰ <http://www.aseminfoboard.org/MinisterialMeetings/CMM/>.

⁵²¹ Bilateral Cultural Cooperation and Structured Policy Dialogue with China, European Union-China Cultural Cooperation, February 2009.

⁵²² For the analysis of EU Action in the WTO context see J. Baltà Portolés (2010), *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU's External Policies*, at <http://www.europarl.europa.eu/studies>. See also C. Germann's Study Paper and J. Loisen- C. Pawels's Study Paper at www.diversitystudy.eu. See also T. Voon's Study Paper's at www.diversitystudy.eu

⁵²³ <http://ec.europa.eu/world/agreements/searchByType.do?id=1>.

⁵²⁴ <http://ec.europa.eu/world/agreements/searchByType.do?id=1>.

⁵²⁵ The objectives of this Agreement are to: (a) contribute to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement; (b) promote regional integration, economic cooperation and good governance thus establishing and implementing an effective, predictable and transparent regional regulatory framework for trade and investment between the Parties and among the SADC EPA States.

account the human, cultural, economic, social, health and environmental best interests of their respective populations". We could argue that a reference to the UNESCO Convention would have been very much in line with the commitments expressed in the political discourses, and would have been particularly appropriate.

A very important cultural protocol (i.e. a protocol to an international agreement exclusively devoted to set out a framework for cultural cooperation) has been concluded: the Protocol on Cultural Cooperation annexed to the EU-CARIFORUM States Economic Partnership Agreement of December 2007. The Protocol deliberately aims at implementing the UNESCO Convention. An analogous protocol (but focussing on audiovisual cooperation) has been concluded within the agreement between the EU and South Korea.⁵²⁶ The sectoral provisions on audiovisual co-productions in the Protocol provide a framework to implement the recently adopted Audiovisual Media Services Directive⁵²⁷. These protocols show that cultural cooperation agreements are not negotiated distinctly from trade agreements⁵²⁸.

The ENP has strengthened bilateral relationships between the EU and neighbours countries, building upon a mutual commitment to common values: democracy and human rights, the rule of law, good governance, market economy principles and sustainable development and cultural diversity.⁵²⁹ However, the central role of cultural diversity in external relations is for the most part evidenced by cooperation programmes: e.g. the Anna Lindh Foundation (including by "1001 actions for dialogue"), EuroMed Audiovisual, EuroMed Heritage, the Regional Information and Communication programmes, the EuroMed Youth programme and the EuroMed Gender programme.

Culture and cultural diversity are key elements in the EU's cooperation with the Council of Europe, which includes the joint action "*Intercultural Cities*".

Finally, we would highlight that the EU is also the largest provider of international development aid in the world. A variety of legal instruments provide the basis for development aid programmes, including multilateral or bilateral international agreements or conventions and unilateral arrangements based on specific Treaty Articles. This contribution cannot find any evidence of the presence of legal instruments specifically targeting development aid for the purpose of implementing the UNESCO Convention. However, sometimes, existing cooperation mechanisms are used for the benefit of culture, e.g. via the setting up of the "Indian Culture for Development Fund, the EU-Mexico Cultural Fund, or the ENPI in the case of Russia, which support cultural projects. In addition, it is noteworthy that the thematic programme "Investing in people"⁵³⁰ has allocated funds to the culture strand under the heading "Access to local culture, protection and promotion of cultural diversity"⁵³¹.

⁵²⁶ See J. Loisen- C. Pawels's Study Paper at www.diversitystudy.eu.

⁵²⁷ It has been proposed to develop a clause providing for the possibility for finished audiovisual works co-produced between European and Korean partners to qualify as European and Korean works in accordance with the legislation in place in the partners' countries provided they meet the criteria defined therein. This clause would thus foster the circulation of audiovisual works for the mutual benefit of the EU and Korea.

⁵²⁸ From the French point of view (emerging from the survey compiled by the French Coalition, but also from the Official paper of the French Ministry) this is not a valuable choice.

⁵²⁹ [Http://ec.europa.eu/world/enp/pdf/progress2009/sec09_522_en.pdf](http://ec.europa.eu/world/enp/pdf/progress2009/sec09_522_en.pdf).

⁵³⁰ The thematic programme "Investing in People" has its legal base in Regulation (EC) No 1905/2006 of the European Parliament and the Council establishing a financing instrument for development cooperation.

⁵³¹ [Http://ec.europa.eu/europeaid/how/finance/dci/investing_en.htm](http://ec.europa.eu/europeaid/how/finance/dci/investing_en.htm). See J. Baltà Portolés, *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU's External Policies*, at <http://www.europarl.europa.eu/studies>.

4.5. The Implementation of the UNESCO Convention in EU Agreements

4.5.1. General Remarks

This Section aims to understand what the EU could do in order to implement the Convention in its external action, in particular through international agreements. There is great potential and a wide room of manoeuvre, in this area, to implement the Convention. As we will explain later in this section, the EU should adopt a “differentiated strategy”, considering countries which have ratified the Convention and countries which have not yet ratified it⁵³².

Besides a “differentiated strategy”, the EU should mainstream the principles of the Convention, in all its agreements with other countries. Thus, in all its agreement with third countries, an express reference to the UNESCO Convention in the Preamble of an agreement should be inserted. This express reference would not be a merely formalistic requirement. It would be important from both a legal and symbolic point of view. The Preamble is an introductory and explanatory statement which lays down the purpose and rationale of the agreement. However, the Preamble may contain additional provisions designed to bridge gaps in the agreement, and it is an important tool for the agreement interpretation. Even if it does not in itself produce a binding effect, it is essential for the application of provisions contained in the relevant act. Thus, a reference to the UNESCO Convention could be a means to reinforce the interpretation/application of the provisions contained in the act in light of the Convention obligations. In addition, a citation of the UNESCO Convention could have a symbolic value. That is, it could confirm and reinforce the value of the Convention in the EU legal framework and as a “pillar of the external policies” and on the international scene. Such a reference would be an essential step to promote the “visibility” of the Convention at the international level.

Where applicable, formal clauses such as the following should be added to the agreement:

“The application of this Agreement shall fully take into account the principles of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions”.

4.5.2. EU vs Third Countries Parties to the Convention

The EU should implement the Convention concluding new agreements on cultural goods and services on the basis of Art. 207 TFEU and, where appropriate, 167 TFEU with third countries which are already Parties to the Convention. These agreements should have the objective to strengthen bilateral dialogue and cooperation in support of the goals of the Convention.

At present the EU concludes different kinds of trade, aid, partnership, development and cooperation agreements with third parties. New and forthcoming agreements (other than specific agreements) must take into account the goals of the Convention: they should include cultural cooperation clauses.⁵³³

⁵³² See below Sections 4.2 and 4.3.

⁵³³ This could be done e.g. in the association agreement being negotiated between the EU and the Central American region (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama as observer). The discussions have addressed the three pillars of the Agreement (political dialogue, cooperation and trade). See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/200&format=HTML&aged=0&language=EN>

The EU should always tailor the agreement (its contents, the specific cultural clauses) considering the situation of the other Country⁵³⁴. Such a screening exercise to assess cultural policy and programming would be important to adapt the agreement (and/or a specific cultural clause) to the specific conditions of each partner. This screening could be done by the new *ad hoc* body, the "Institute for Cultural Diversity", envisaged below in this contribution⁵³⁵.

Additionally, the EU can conclude Protocols on Cultural Cooperation on the model of the CARIFORUM PROTOCOL. The integration of these protocols in what is primarily a bilateral economic agreement has raised a lot of criticism, particularly because the integration of cultural aspects in trade agreements "could have the ironic consequence of transforming culture into a selling point for proceeding with trade deals".⁵³⁶ However, from a legal point of view, these protocols appear to be in compliance with the mainstreaming principle expressed in Art. 167 TFEU, and they recognize the double nature of cultural goods and services embedded in the UNESCO Convention. These protocols should be proposed for inclusion in a number of trade agreements and should take into account the situation of the other signatory countries (as happened in the case of the CARIFORUM and South Korea Protocols)⁵³⁷.

These protocols should expressly refer to the Convention. In this respect, the CARIFORUM Protocol is an important example. These Protocols should include:

1. intercultural dialogue actions
2. the entry and the permanence of artists and cultural practitioners (artists from the parties of the agreement)
3. financial and technical assistance to support cultural industries
4. encourage the exchange of cultural goods and services
5. encourage audiovisual co-production agreements;
6. cooperation for the protection of sites and historic monuments.

In terms of facilitating the movement of artists and other cultural professionals and practitioners from the developing world, cultural cooperation protocols may be important. However, the free circulation of non-EU artists in the EU affects visa policies. The Protocol can be effective if the Member States themselves apply it (visa policies fall under the authority of Member States).⁵³⁸ Close coordination between the EU and Member States will be required. This coordination could also be effectuated in the context of the OMC.

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⁵³⁴ The EU can precede the conclusion of the agreement by an analysis concerning cultural policies and measures of the other country. The necessity for a preliminary analysis has been underlined by the strategy paper just released by the French Foreign and European Affairs Department.

⁵³⁵ See below [Part Four].

⁵³⁶ J. Baltà Portolés (2010), *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU's External Policies*, at <http://www.europarl.europa.eu/studies>.

⁵³⁷ See in this respect the Short version of the Study, spec. pp. 65 *et seq.* See also J. Loisen- C Pawels's Study Paper at www.diversitystudy.eu.

⁵³⁸ J. Baltà Portolés (2010), *The Implementation of the UNESCO Convention on the Diversity of Cultural Expressions in the EU's External Policies*, at <http://www.europarl.europa.eu/studies>.

Table 2: Cultural Cooperation Clauses

	Cultural cooperation clauses
Legal feasibility / legal base	<p>In order to implement Art. 12 of the UNESCO Convention, cultural cooperation clauses should be included in all agreements with countries which have ratified the Convention.</p> <p>There is no need for a specific and autonomous legal base for these clauses⁵³⁹. These clauses are in compliance with (and implement) Art. 167(3) TFEU, which states that the EU (and the Member States) "shall foster cooperation with third countries and the competent international organisations in the sphere of culture".</p>
Differentiated Content	<p>These clauses should be different and tailored considering the political, economic and cultural situation of the country.</p> <p>Where appropriate (in the case of developing countries), the clause should also express the link between culture and development.</p>
Content	<p>Through these clauses the EU may agree to:</p> <ul style="list-style-type: none"> • undertake joint operations in cultural matters • to encourage direct cooperation between cultural institutions, organizations and individuals in the EU and the State Party to the agreement • carry out exchanges of information on subjects of mutual interest in the fields of culture and information, events of a cultural nature with the purpose of promoting cultural diversity, cultural exchanges. • support the exchange of music, theatre, visual and plastic arts, design, dance and all other artistic groups or individuals participating in tours, festivals and other cultural events, including conferences, symposia, mutual performances, workshops, artistic exposures and meetings involving the exchange of information and experiences. <p>A reference e.g. to traditional knowledge, indigenous art products... should also be inserted, where appropriate.</p>

⁵³⁹ Art. 27 expressly considers cultural goods and services. It must be recalled that a Community measure has more than one purpose and one of the purposes can be identified as the main or predominant purpose: the EC measure must be adopted on the legal base corresponding with that main purpose ("single legal base"). Only if an EC measure has more than one purpose without one being secondary, can it (exceptionally) be based on more than one legal base. If examination of a Community measure reveals that it pursues a manifold purpose or that it has diverse components, and if one of those is identifiable as the main or predominant purpose or component, whereas the others are merely incidental, the act must be based on a single legal base, namely that required by the main or predominant purpose or component. Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases. However, recourse to a dual legal base is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament.

Formulation	These clauses could be formulated as follows: <i>“The Contracting Parties agree to undertake joint operations in strengthening existing links between them for the purpose of implementing the UNESCO Convention ...”</i>
Rationale of the clauses	The idea underpinning these clauses is to mainstream “cultural cooperation” and the principles of the UNESCO Convention.
Strength	These clauses are a tool to develop cultural relations among countries, and to facilitate dialogue on cultural policies.
Weakness/Challenges	Cultural cooperation clauses are effective only if there is political will to apply and implement them.

Table 3: Cultural Cooperation Protocols

	Cultural cooperation protocols
Legal feasibility / legal base	In order to implement Art. 12 of the UNESCO Convention and/or Arts. 14 et seq. of the UNESCO Convention, cultural cooperation protocols should be annexed to trade and partnership agreements with countries which have ratified the Convention. These protocols could be concluded on the basis of Art. 207(4) TFEU or 212 TFEU in conjunction with Art. 216 TFEU
Differentiated Content	These protocols should be different and tailored considering the political, economic and cultural situation of the third country(ies).
Content	These Protocols should include: <ul style="list-style-type: none"> • intercultural dialogue actions; • financial and technical assistance to support cultural industries; • encourage the exchange of cultural goods and services; • encourage audiovisual co-production agreements; • cooperation for the protection of sites and monuments.
Strength	These protocols are a tool to reinforce cultural cooperation, to develop cultural relations among countries. They can provide a detailed legal framework to develop cultural policies in a mutual relationship.
Weakness/Challenges	Cultural cooperation protocols are effective only if there is political will to apply and implement them.

4.5.3. EU vs Third Countries Parties to the Convention: the Case of Scientific Agreements

The EU can fruitfully implement the Convention through its scientific and technological cooperation agreements.

Over the last 25 years, the EU has developed international scientific and technological cooperation to address the needs and opportunities of an interconnected world. The EU has strengthened its strategy and concluded several bilateral agreements, especially on the basis of Art. 170 EC (now Art. 186 TFEU). However, current scientific and technological cooperation agreements do not even mention cultural diversity or the UNESCO Convention.

We consider these agreements to be central for the implementation of the Convention. In particular, technological cooperation can be a means to spread cultural diversity (as we can infer from Art. 4 UNESCO Convention), and to develop the creation of cultural contents, as envisaged by Art. 12 UNESCO Convention. Thus, these agreements should include cooperation that promote the use of new technologies, they should provide technological exchange to enhance cultural understanding and to foster the diversity of cultural expressions (as required by Art. 12(1)(d) UNESCO Convention); and more generally they should take into account the goals of the Convention. We therefore recommend that these agreements should:

- 1) include "culture", among areas of cooperation (i.e. they should concern technologies applied to cultural goods and services);
- 2) include clauses to facilitate cooperative activities and technological cooperation with the purpose of promoting cultural diversity;
- 3) aim to expand the cooperation in scientific and technological research with a view to strengthening cultural industries;
- 4) lead to cooperative activities in the areas of cultural industries/technologies;
- 5) encourage, through *ad hoc* mechanisms, the application of the results of such cooperation for the benefit of cultural diversity⁵⁴⁰.

In addition, the conclusion of bilateral agreements on scientific and technological cooperation with developing countries would be important for implementing Art. 13 (in particular Art. 13(c) UNESCO Convention).

4.5.4. EU vs Third Countries not yet Parties to the Convention

The EU can play an essential role in promoting the ratification and the implementation of the Convention. In particular, the EU can promote the ratification of the Convention through "conditionality clauses": this means that the EU could condition the conclusion (or the entry into force) of new agreements on trade or other partnership agreements on the previous ratification of the UNESCO Convention⁵⁴¹. These "conditionality clauses" do not alter the characterization of the agreement, and thus they do not seem to need a specific legal base. In addition, they appear to comply with Art. 21(2) TEU.

Since protection and promotion of cultural diversity is an international commitment under the UNESCO Convention, but also a high value of the EU, when the partner country has

⁵⁴⁰ These agreements should be based on the principles of mutual benefit and reciprocal opportunities, in order to foster cultural diversity in both the partners. They should nonetheless protect intellectual property and the equitable sharing of intellectual property rights.

⁵⁴¹ The necessity of such a conditionality has been underlined by the strategy paper released by the French Foreign and European Affairs Department.

ratified the Convention but is reluctant to apply it, the EU, through a specific clause in the agreement, can make observance of the UNESCO Convention an “essential element” and a condition of trade terms and development aid. This clause could give the EU the ultimate right to suspend all or part of an agreement if a partner country does not fulfil its obligations under the Convention. Of course, the EU may use diplomatic dialogue with an offending government, and the channelling of aid to non-governmental organisations, rather than the total suspension of the agreement.

Table 4: Conditionality Clauses

	Conditionality Clauses
Conditionality <i>ex ante</i>	Clauses which condition the conclusion (or the entry into force) of new agreements on the previous ratification of the UNESCO Convention by the Partner country
Conditionality <i>ex post</i> (“suspension clauses”)	Clauses which make observance of the UNESCO Convention an “essential element” and a condition of trade terms and development aid. These clauses give the EU the ultimate right to suspend all or part of an agreement if a partner country does not fulfil its obligations under the Convention.

4.6. The Implementation of the UNESCO Convention in the Framework of Human Rights Policies

4.6.1. Introductory Remarks

Having provided a wide-ranging analysis and general recommendations, we now focus on the need to implement the Convention in the framework of the human rights policies.

In the Preamble of the UNESCO Convention it is clearly stated that cultural diversity flourishes “within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures”. The Convention clarifies “the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments”. Art. 2 of the UNESCO Convention states that “cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed”.

In spite of these general and explicit commitments, the implementation of the Convention in connection with human and cultural rights⁵⁴², including minority rights, has been quite neglected. Generally speaking, the implementation of the Convention by the EU has focused exclusively on economic aspects (e.g. co-production, funding of creative industries, etc.), but has mistreated the “human rights dimension”.

⁵⁴² On cultural rights as human rights see *ex multis* G. Famiglietti (2010), *Diritti culturali e diritto della cultura*, Torino, pp. 13 *et seq.*

Indeed, human rights policy is one of the most highly-developed facets of the EU's external relations, nevertheless current EU documents in the field of human rights do not adequately take into account the UNESCO Convention. In particular, even though both the 2006 and 2007 EU's Reports on Human Rights in the World⁵⁴³ mentioned the Convention, the subsequent Reports were quite poor in this respect. In addition, the Guidelines on Human Rights Dialogue with Third Countries, which aim to mainstream human rights and democratisation into all aspects of the EU's external policies, only address freedom of expression and the role of civil society. Surprisingly, they fail to address diverse cultural expressions and cultural rights.

Concluding, there is a risk that the Convention will be misinterpreted and misused to legitimise national cultural policies that in fact curtail internal diversity and pluralism. However, despite the fact that the EU is bound by the Convention itself and by its own constitutional principles⁵⁴⁴ to protect human rights and cultural diversity, there is a lack of EU human rights policies addressing cultural diversity.

4.6.2. Implementing the Convention within Human Rights Dialogue

The EU is currently engaged in a substantive Human Rights Dialogue with many countries as part of its external policy. We argue that this dialogue is the best political forum in which to promote the ratification and the genuine application of the Convention, to protect indigenous people and minorities, and to eliminate traditional "cultural" practices which infringe human rights.

It is worth recalling that this dialogue concerns a range of instruments. It is based on regional or bilateral agreements or treaties in the context of the relations with EU accession states, and on the *Cotonou* Agreement with the African, Caribbean and Pacific (ACP) States. The dialogue is also carried out in the context of the Development and Cooperation Agreement with South Africa, in relations with Latin America, in the so-called Barcelona Process (Middle East and Mediterranean countries)⁵⁴⁵, and in the framework of the political dialogue with Asian countries in ASEAN and ASEM. In addition, the human rights dialogue involves relations with the Western Balkans. The format of the Human Rights Dialogue varies to a certain degree, depending on the overall relationship between the EU and the other party.

However, we can easily consider the Human Rights Dialogue the best political forum to affirm that cultural diversity can flourish only where human rights are respected, and that the protection and promotion of cultural diversity does not cover any practice which is likely to infringe human rights, any inhuman or degrading treatment (e.g. genital mutilation...).

⁵⁴³ [Http://ec.europa.eu/external_relations/human_rights/index_en.htm](http://ec.europa.eu/external_relations/human_rights/index_en.htm)

⁵⁴⁴ See Art. 2 TEU, Art. 3 TEU, Art. 6 TEU. Fundamental rights form an integral part of the general principles of law whose observance the ECJ ensures. In the *Kadi* case the ECJ stated that respect for human rights is therefore a condition of the lawfulness of EU acts, and measures incompatible with respect for human rights are not acceptable (ECJ, 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, [2008] ECR). The ECJ stated that it drew inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. See *ex multis* S. Gambino (2009), *Diritti fondamentali e Unione Europea*, Milano.

⁵⁴⁵ [Http://ec.europa.eu/external_relations/euromed/barcelona_en.htm](http://ec.europa.eu/external_relations/euromed/barcelona_en.htm): "The Barcelona Process was launched in November 1995 by the Ministers of Foreign Affairs of the then-15 EU members and 14 Mediterranean partners, as the framework to manage both bilateral and regional relations. Guided by the agreements of the Barcelona Declaration, it formed the basis of the Euro-Mediterranean Partnership which has expanded and evolved into the Union for the Mediterranean. It was an innovative alliance based on the principles of joint ownership, dialogue and co-operation, seeking to create a Mediterranean region of peace, security and shared prosperity."

Third Countries involved in the dialogue could be asked to ban or condemn these practices, in order to comply with the principle expressed in Art. 2 UNESCO Convention. Particular efforts should be made within the framework of Human Rights Dialogue to ensure that cultural diversity is not used to justify practices discriminatory against women.

In addition, the Human Rights Dialogue is also the best forum to effectively protect cultural expression from the risk of extinction, or where such expression is under serious threat or otherwise in need of urgent safeguarding (Art. 8-Art. 17 UNESCO Convention).⁵⁴⁶ In these cases, the EU could intervene through diplomatic *démarches*⁵⁴⁷ or declarations where cultural expressions are at risk of extinction, especially in the case of cultural/physical threats.⁵⁴⁸ In cases of economic threat the EU could grant financial aid⁵⁴⁹; humanitarian aid could also be also provided under Art. 214 TFEU.

4.6.3. New Guidelines as a Tool for Implementing the Convention

In March 2009, the Council adopted the Guidelines on Human Rights issues.⁵⁵⁰ The EU Guidelines are not legally binding, but they represent a strong political signal because they have been adopted at ministerial level. The Guidelines assist EU Missions (Embassies, Consulates of EU Member States and European Commission Delegations) in their approach to human rights defenders. At present, in these Guidelines, there is no reference to the UNESCO Convention on cultural diversity, nor to cultural diversity.

For the purpose of implementing the Convention, in compliance with Art. 1(b)(c)(d), Art. 2(1), Art. 12, Art. 8 and 17 of the UNESCO Convention, new guidelines on Human Rights and Cultural diversity should be approved. Cultural diversity should be explicitly mentioned as a means to protect human rights. Such a reference would be consistent with the rationale of the UNESCO Convention and could represent an additional strong signal that human rights and cultural diversity are complementary.

These new Guidelines should be a “road map” for the implementation of the Convention in the framework of human rights policy. They should consider that universal human rights do not impose a cultural standard, but rather a legal standard of minimum protection necessary for human dignity. Guidelines could also “lay down” this minimum standard and list condemned traditional practices which infringe human rights.

In addition, they should consider the protection of cultural expressions at risk of extinction and provide that the EU will pro-actively contribute to ensure the implementation of Arts. 8-17 of the UNESCO Convention.

Finally, the Guidelines should provide that the EU will employ *démarches* and issue public statements urging third countries to undertake effective measures against the violation of cultural diversity.

⁵⁴⁶ UNESCO Guidelines on Arts. 8-17.

⁵⁴⁷ *Démarches* are usually carried out jointly, in a confidential manner, by the current and incoming Presidencies and the Commission.

⁵⁴⁸ See C. Germann’s Study Paper at www.diversitystudy.eu.

⁵⁴⁹ In accordance with Art. 17, the Parties shall cooperate in providing assistance to each other, paying particular attention to developing countries, in situations referred to under Article 8. Parties may seek assistance from other Parties in accordance with Art. 17, and that assistance may be *inter alia* technical or financial (see UNESCO Guidelines).

⁵⁵⁰ [Http://www.consilium.europa.eu/showPage.aspx?id=1681&lang=EN](http://www.consilium.europa.eu/showPage.aspx?id=1681&lang=EN).

4.6.4. Human Rights Clauses Encompassing Cultural Diversity

The Human Rights Dialogue and the Guidelines are mainly “soft” policy tool, which can have huge impact. However, the most important tool for implementing the UNESCO Convention within the framework of the Human Rights Policies could be “new” comprehensive human rights clauses. These clauses represents an “hard” legal tool to actively promote the respect of the UNESCO Convention.

The EU’s policy of including human rights clauses in its economic/commercial (*i.e.* trade and cooperation) agreements has been pursued with impressive consistency.⁵⁵¹ Since 1995, the EC/EU has sought to insert a human rights clause in all agreements (other than sectoral agreements) concluded with non-industrialised countries. It must be clarified that the EU does not need a separate legal base to include human rights clauses in its international agreements⁵⁵². In the event of serious and persistent breaches of human rights, the clause enables the EU to take restrictive measures against the offending party, in proportion with the gravity of the breach. The 1995 Communication of the Commission⁵⁵³ focussed on the content and the application of the human rights clauses and explained the scope of the “appropriate measures” referred to in the clauses. These “appropriate measures” should be taken in the event of human rights abuses but this does not necessarily mean suspension or termination of the whole treaty; it could mean applying sanctions such as changing the cooperation programmes or the channels used, reducing cultural, scientific and technical cooperation, postponing or suspending bilateral contacts or new projects, trade embargoes or suspending all cooperation. The human rights clause itself does not establish how sanctions should be applied or how the Community should proceed in these cases. The Commission has emphasised positive sanctions, such as entering into a dialogue with the government concerned, rather than negative sanctions, such as suspension or termination.⁵⁵⁴ The latter should be a sanction of last resort and should not affect humanitarian assistance to non-government channels.⁵⁵⁵

At present, many clauses contain reference to international instruments, in particular to the Universal Declaration on Human Rights, and in case of agreements with OSCE countries, a number of OSCE documents as well.⁵⁵⁶ Existing human rights clauses do not refer to either cultural rights or cultural diversity. Nonetheless, they should be interpreted as encompassing cultural rights and cultural diversity. Manifest violations of cultural diversity by a country (e.g. cultural genocide) could be a situation covered by the human rights clause. Since it is almost impossible to amend existing clauses, a wide interpretation such as the one suggested is advisable.

As regards the future, a reference to cultural diversity and to the UNESCO Convention could be appropriate and advisable. Thus, through these clauses respect for cultural diversity together with human rights would become legally binding and would become an essential

⁵⁵¹ See L. Bartels (2005), *Human Rights Conditionality in the EU’s International Agreements*, Oxford, pp. 32 *et seq.*

⁵⁵² ECJ, 3 December 1996, Case C-268/94, *Portuguese Republic v. The Council of the European Union* [1996] ECR I-6177.

⁵⁵³ COM (95) 216.

⁵⁵⁴ The main challenge concerning the human rights clause today is the lack of an effective mechanisms to make it operational and therefore to ensure that States comply with their human rights obligations. A human rights clause in itself does not set out unambiguously how sanctions should be applied in case of failure to uphold the treaty obligations, nor does it set out clear procedures on the internal operation of the EU in these cases. With regard to the clause’s vagueness concerning the possibility of sanctions, all bilateral and cooperation agreements concluded with the EU are supposed to be based on the particular need of the country involved. As a result, human rights clauses (and their effects) may vary greatly between different agreements.

⁵⁵⁵ See Annex 2 of COM (95)216.

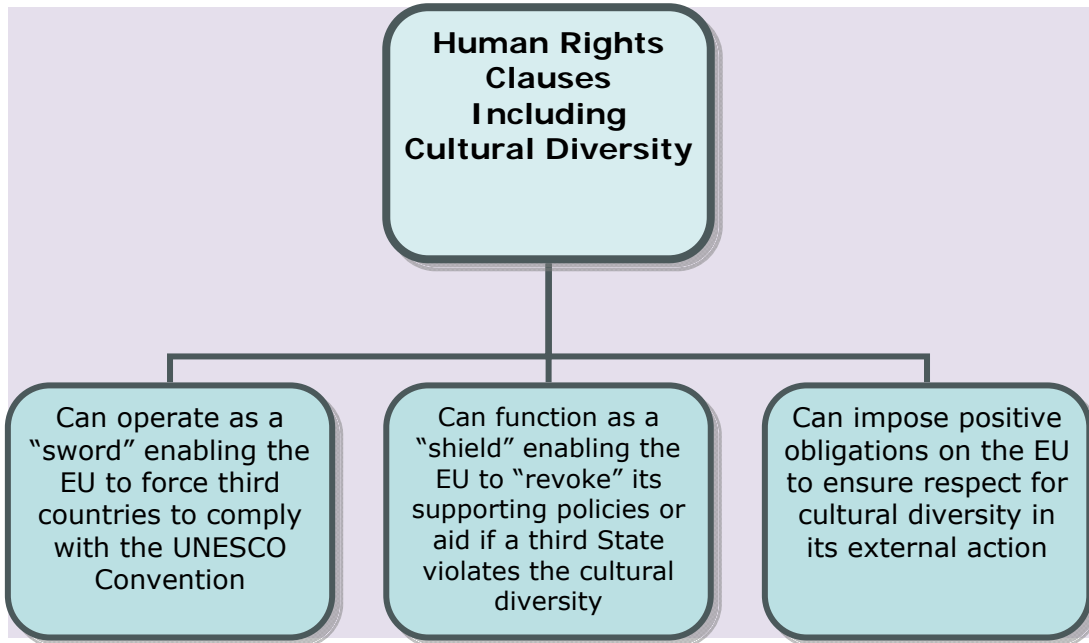
⁵⁵⁶ Currently, the human rights standards referred to here were based on three declaratory human rights instruments: the 1948 *Universal Declaration of Human Rights*, and later on, the 1975 *Helsinki Final Act* and the 1990 *Charter of Paris for a new Europe*.

element of the agreement. This means that in the event of serious and persistent breaches of cultural diversity, the clause explicitly enables the EU to take restrictive measures against the country which violates the Convention. When the Partner country does not respect the Convention, or when it otherwise threatens cultural diversity, the EU can apply sanctions, suspend the agreement or terminate it or apply positive sanctions, such as entering into a dialogue with the government concerned.

Table 4: « New » Human Rights Clauses

	Human Rights Clauses
Legal feasibility / legal base	<p>These clauses implement and are in compliance with Art. 1(b)(c)(d), Art. 2(1), Art. 8 and 17 UNESCO Convention (and with Art. 12 UNESCO Conv.)</p> <p>There is no need for a specific and autonomous legal base for these clauses.</p>
Formulation	<p>These clauses could be formulated as follows: <i>"Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the [...], respect for international law principles and the rule of law, respect for cultural diversity as reflected in the UNESCO Convention shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement"</i></p>
Rationale of the clauses	<p>The idea underpinning these clauses is to link respect of human rights with respect for cultural diversity.</p>
Strength	<p>Respect for cultural diversity together with human rights would become legally binding.</p>
Weakness/Challenges	<p>Lack of an effective mechanism to make it operational and therefore to ensure that States comply with their human rights obligations. A human rights clause cannot set out unambiguously how sanctions should be applied in case of failure to uphold the treaty obligations, nor does it set out clear procedures on the internal operation of the EU in these cases.</p>

Figure 2: The role and the purpose of human rights clauses including a reference to cultural diversity



4.7. Concluding Remarks

The analysis carried out above allows us to state that the EU has started the process of implementation of the UNESCO Convention in its external relations. In light of the dynamic and evolving character of external relations, and the reinforced role of the EU as a key actor on the international scene following the entry into force of the Lisbon Treaty, the EU can do more in the implementation process.

The EU could more systematically make use of cultural cooperation clauses and cultural protocols, and it could implement the Convention through its scientific and technological cooperation agreements. But it should also start to efficiently promote the implementation of the Convention in the framework of human rights dialogue. New guidelines on human rights and cultural diversity should be approved. This would represent an additional strong signal that human rights and cultural diversity are complementary.

Legal aspects of the implementation of the UNESCO Convention in the EU's internal policies

4.1. Introduction

This Section examines the implementation of the UNESCO Convention in the context of EU's internal policies. In particular, it investigates the extent to which current EU legislation fully complies with the Convention and discusses "how far" the EC can go to implement the Convention (in particular Arts. 5 and 6). The term "internal policies" is understood very broadly, and this Part will adopt a cross-cutting legal approach. However, it will mainly focus on the role of the EU institutions.

Internal market rules, intellectual property law and competition law will not be considered; they will be dealt with in other Study papers.⁵⁵⁷ In addition, the Open Method of Coordination (OMC) will not be discussed, as it is analysed from a pure policy perspective in another part of the Study.⁵⁵⁸

A brief overview of the relevant provisions of the Convention is first provided. Secondly, the framework of EU action is summarised. Then, the implementation of the UNESCO Convention is assessed in terms of its impact on EU policies (i.e. its ability to inform the European "political discourses") and on legislation⁵⁵⁹. Wide-ranging recommendations on how to implement the Convention are provided, and detailed reflections on what could be done by the EU institutions will be offered.⁵⁶⁰ Attention will also be given to the role of the judiciary. The section ends with concluding remarks.

4.2. Relevant Provisions of the Convention

Before examining whether and how the EU has implemented the UNESCO Convention in its internal policies, we briefly discuss the content of the relevant Convention obligations

It is worth recalling that one of the main objectives of the Convention is to establish the sovereign right of the States "to maintain, adopt, and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory".

Art. 5 provides for the sovereign right of the Parties to adopt measures on cultural policy both internally and on the international level. Art. 6 specifies this sovereign right with regard to measures promoting and protecting cultural diversity. It provides a non-exhaustive list, enumerating eight categories of regulatory, institutional and financial measures Parties may choose to adopt. The types of measures mentioned are extremely broadly defined. They include all kinds of regulatory and financial measures supporting the development, production, dissemination and enjoyment of cultural expressions and support schemes for individual artists, domestic cultural industries, public institutions and non-governmental organisations.

⁵⁵⁷ C. Germann's Study Paper at www.diversitystudy.eu.

⁵⁵⁸ See A. Schramme-S. Van Auwfer's Study Paper at www.diversitystudy.eu. See also M. Burri, *Study on the Implementation of the UNESCO Convention in the EU's Internal Policies*, at <http://www.europarl.europa.eu/studies>.

⁵⁵⁹ This assessment takes into account the European Commission's survey, published in the section "Regional Organizations' Surveys" at www.diversitystudy.eu.

⁵⁶⁰ As mentioned *supra* in footnote 1, we consider the EU a constitutional order.

Art. 7 states that Parties “shall endeavour to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples”. Additionally, Art. 7 states that parties must encourage both individuals and groups to have access to diverse cultural expressions.

Other provisions deserve to be mentioned in this Section: namely, Arts. 9 and 10. Art. 9 of the UNESCO Convention states that Parties provide appropriate information in their reports to UNESCO every four years, designate a point of contact responsible for information sharing in relation to this Convention and share and exchange information relating to the protection and promotion of the diversity of cultural expressions. According to Art. 10, Parties should encourage understanding of the importance of the protection and promotion of the diversity of cultural expressions, *inter alia* through educational and greater public awareness programmes. In addition, Parties should encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries.

This overview does not cover all the norms and their meaning, however it tries to highlight that the obligations stemming from these provisions are quite weak, and it is not specified what must be done to implement Arts. 5 *et seq.* The non-self executing character of the Convention and the broad margin of appreciation enjoyed by Parties leave compliance with these Articles entirely to the Parties themselves.

4.3. Culture and Cultural Diversity in the EU Legal Framework

As in the previous section, before answering the two core questions: “What has been done in terms of implementation within the EU?” and “What could the EU do to implement the Convention?”, it is important to set out the pertinent legal framework. In particular, before continuing with our analysis, we attempt to mark out the modalities of the exercise of EU competence in the cultural domain.

The original Treaty did not recognize any legal area for actions in favour of culture, but the interaction between culture and European Union law is of course more long-standing⁵⁶¹. Former Art. 30 EC only allowed for the restriction of the free movement of goods based on the need “to protect national treasures possessing artistic, historic or archaeological value” and Art. 182 EC provided for Community association with third countries in order to assist their “cultural development”. A specific competence in the cultural field was introduced by the Maastricht Treaty in 1992. With the entry into force of the Treaty of Lisbon, culture is expressly included in Art. 6 among the “supporting competences” and it is mainly governed by Art. 167 TFEU (which reproduces Art. 151 EC). Art. 167 TFEU defines the main objectives of EU action in the cultural field: to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity, and at the same time to bring common cultural heritage to the fore; to encourage cooperation between Member States and, if necessary, to support and to supplement their action; to foster cooperation with third Countries and international organizations acting in the sphere of culture, especially with the Council of Europe.

Art. 167(4) TFEU establishes that the EU must take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote

⁵⁶¹ R. Craufurd Smith (2004), *Culture and European Union Law*, Oxford, p. 3.

the diversity of its cultures. This provision can be defined as a general clause of consistency with cultural aspects, and it is compulsory for the EU.⁵⁶²

Other provisions directly mention culture. Art. 107 TFEU (ex Art. 87 EC) declares the compatibility of state aid that promotes culture within the European common market by establishing a derogation from the Treaty's state aid rules. Art. 13 TFEU states that in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States must (since animals are sentient beings) have full regard to the welfare requirements of animals, while respecting religious rites, cultural traditions and regional heritage.

The EU Charter of Fundamental Rights contains norms concerning cultural rights (e.g. freedom of expression, arts, religion) and, crucially, there is an explicit reference to cultural diversity in the Preamble and in Art. 22. The latter Article reads as follows: "The Union shall respect cultural, religious and linguistic diversity". Art. 22 can be conceived of as a specification of the principle of non-discrimination provided in Art. 21 and as a positive obligation to protect minorities, stressing their cultural diversity.

Culture interacts with many other areas of EC competence. Art. 167 TFEU is a programmatic rule that establishes a principle of "complementarity" in cultural matters, but EU actions under a different legal base should also take cultural aspects into account. This is clearly shown by a European Commission Inventory of Community Actions in the Field of Culture, which refers to several fields touching upon cultural issues. These include e.g. communications, the information society, the internal market, competition, regional policy and cohesion policy, agriculture, and sustainable development⁵⁶³. Thus, other Treaty provisions should be considered relevant.

In this brief overview we cannot specify all the EU competences which touch upon cultural matters. It suffices to recall the Commission Inventory of Community Actions in the Field of Culture. We would also refer to Burri's analysis⁵⁶⁴. In addition, we need to underline that the UNESCO Convention itself has a wide scope and a cross-cutting nature, affecting several fields of EU competences, including the common commercial policy, the free movement of goods, persons, services and capital, competition, state aid, the internal market and taxation.

Concluding, even if it is simple to infer the positive protection of cultural diversity as a constitutional value, the EU competence in the cultural domain is still legally limited. However, the EU intervention for the purpose of implementing the Convention, though legally "minimalist", can be potentially and factually "maximalist" if due regard is had to Art. 167(4) TFEU and to the UNESCO Convention itself, together with other legal bases.

⁵⁶² See D. Ferri (2008), *La costituzione culturale dell'Unione europea*, Padova. Extensive bibliography on the issue is provided in the book. See also J. Smiers (2002), *The Role of The European Community Concerning the Cultural Article 151 in the Treaty of Amsterdam*. See also the *Briefing paper on the implementation of Treaty Article 151.4*, at <http://www.europarl.europa.eu/studies>. This paper highlights that "Despite the rhetoric at European level about the importance of culture and the strong evidence that the cultural and creative industries are contributing significantly to the Lisbon agenda, culture remains relatively low in the hierarchy of Commission concerns" (p. iii). It is also stressed that: "The failure to observe 151.4 has proved especially problematic in relation to regulatory actions to achieve laudable objectives in areas such as employment conditions" (p. iii).

⁵⁶³ European Commission, *Inventory of Community Actions in the Field of Culture*, Accompanying Document to the Communication on a European Agenda for Culture in a Globalizing World, SEC(2007) 570, 10 May 2007. See also http://ec.europa.eu/culture/our-policy-development/doc405_en.htm.

⁵⁶⁴ M. Burri (2010), *Study on the Implementation of the UNESCO Convention in the EU's Internal Policies*, at <http://www.europarl.europa.eu/studies>. In this respect, see D. Ferri (2008), *La costituzione culturale dell'Unione europea*, Padova.

4.4. The Implementation of the UNESCO Convention in EU Internal Policies from 2007 to 2009

This Section presents a brief assessment of EU internal action between 2007 and 2009. Considering that sectoral overviews are provided in other papers and that an extensive overview has been provided also by Burri⁵⁶⁵, we offer the reader only a concise outline.

4.4.1. The Impact of the UNESCO Convention on the European “Political discourses”

In the last ten years, cultural diversity has been a “hot” topic in the EU and a priority in its internal policies. This is probably due to the fact that cultural diversity is an important value of the EU, as it emerges from the TFEU and from Art. 22 of the Nice Charter. However the UNESCO Convention *per se* has not deeply affected the “political discourses”.

It is well known that the most important “policy” statement, i.e. the Commission Communication on “*A European Agenda for culture in a globalizing world*” of May 2007, refers to the Convention in the context of the EU’s external action. In the meantime, this Communication, which is the first comprehensive policy document on culture at EU level, includes among its strategic objectives “cultural diversity and intercultural dialogue”. The Agenda also focusses on two soft law tools: the OMC and dialogue with civil society through unregulated platforms. These references to cultural diversity and dialogue with civil society seem to link the Communication with the UNESCO Convention, even in the absence of an explicit citation.

There are also several soft law documents which mention cultural diversity and could be in line with the UNESCO Convention’s rationale. We focus on just a few. First, there is the 2005 Recommendation 2005/737/EC on collective cross-border management of copyright and related rights for legitimate online music services, advocating multi-territorial licensing for the online environment⁵⁶⁶. The Recommendation, a typical soft law act, advocated a multi-territorial licensing in order to promote the development of pan-European digital music services. It provided that right holders should enjoy the right to entrust the management of online rights, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of nationality and residence considerations⁵⁶⁷. In addition, the Recommendations invited the Member States, *inter alia*, to ensure equitable royalty collection and distribution without discrimination, and increased accountability of collective rights managers; and fair representation of right holders in the collective rights managers’ internal decision-making. This Recommendation, though never translated in a binding document, is extremely relevant for the creation of an accessible and differentiated cultural market that is respectful of copyright. Secondly, the 2008 Commission Communication ‘Creative Content Online in the Single Market’⁵⁶⁸ drew attention to the need to improve existing licensing mechanisms for different types of creative content, including music, so as to allow for the development of multi-territory rights clearance methods. Furthermore, in 2009 a new reflection document of the Commission was prepared⁵⁶⁹. Its aim was to start a broad debate about the possible European responses to the challenges of digital “dematerialization” of contents. The overall objectives of the EU Digital Agenda are: “creating a favourable environment in the digital world for creators and right holders,

⁵⁶⁵ See *supra*, ft. 143.

⁵⁶⁶ OJ L 276, 21/10/2005, p. 54.

⁵⁶⁷ Para. 3 of the Recommendation.

⁵⁶⁸ COM(2007) 836, 3/1/2008.

⁵⁶⁹ http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf.

by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market"; "encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content [...]"; "promoting a level playing field for new business models and innovative solutions for the distribution of creative content". All these documents make reference to or reflect the importance of cultural diversity, and the need for cultural creativity and access to cultural content⁵⁷⁰.

All these initiatives aim at contributing to the creation of a more accessible, open and diverse cultural market, which is also an objective of the UNESCO Convention. However, the weakness of these documents relies on their own "non binding nature", which hampers their effectiveness.

It is significant that 2008 was proclaimed the year of intercultural dialogue⁵⁷¹, to put across a clear message that Europe's great cultural diversity represents a unique advantage. Information and promotion campaigns were set forth to disseminate the key messages of the Year, and European-wide flagship projects were co-financed by the Commission.⁵⁷²

Moreover, in 2009, the Commission issued the Communication on State aid to cinema. The Communication does not quote or cite the UNESCO Convention, but it is of great importance, having regard of Art. 6(2)(d) of the UNESCO Convention. Through this Communication, the Commission has decided to continue to apply the current criteria until such time as new rules on State aid to cinematographic and other audiovisual works come into effect, or, at the latest, until 31 December 2012.

Finally, in April 2010, the European Commission published the Green Paper "*Unlocking the potential of cultural and creative industries*".⁵⁷³ This document is intended to stimulate debate and launch a process of consultation at European level. It is likely to involve critical reflection, elaboration and general involvement with regard to new policy strategies, financial and economic tools to foster cultural and creative industries and to create a more stimulating environment for growth and cultural diversity. The Green Paper recognises the contribution cultural and creative industries make to sustainable and inclusive growth.

These initiatives and soft law instruments indicate that, in the period between 2007 and 2009, the UNESCO Convention *per se* has not deeply affected the European "political discourses". At the same time, they demonstrate the existence of a "cultural-diversity oriented" EU policy. They also show that the achievement of a inter-cultural, open and tolerant society is at the core of the Commission's concerns, side-by-side next to the creation of a competitive and diverse cultural market.

4.4.2. The Impact of the Convention on EU Legislation

Cultural Diversity has been mentioned in several pieces of hard legislation (from 2007 onwards, and even before)⁵⁷⁴. However, between the 2007 and the 2009, there has only been one binding EU legislative act that expressly refers to the Convention: Directive 2007/65/EC⁵⁷⁵. This Directive, which amended Directive 89/552/EEC, is known as the Audiovisual Media Services Directive. The new Directive covers all audiovisual media services (i.e. traditional television and video-on-demand). It maintains pre-existing measures for European and independent productions in traditional TV broadcasting and

⁵⁷⁰ For a critical overview see the EP Study IP/B/CULT/IC/2008_136.

⁵⁷¹ See at http://ec.europa.eu/culture/our-programmes-and-actions/doc415_en.htm.

⁵⁷² See at http://ec.europa.eu/culture/key-documents/doc/eyid-highlights_2008_en.pdf.

⁵⁷³ COM(2010) 183.

⁵⁷⁴ See *inter alia* D. Ferri (2008), *La costituzione culturale dell'Unione europea*, Padova.

⁵⁷⁵ OJ L 332 18 December 2007, pp. 27-45.

requires Member States to ensure that production of and access to European works is also promoted in on-demand services (Art. 13). For example, on-demand media service providers can be obliged to invest a certain percentage of turnover in European audiovisual production, to reserve a certain share of the catalogue for European works, and to present European works prominently in catalogues.⁵⁷⁶

At present, the EU's main culture programme is Culture 2007-2013⁵⁷⁷. This Culture programme aims to achieve three main objectives: to promote cross-border mobility of those working in the cultural sector; to encourage the transnational circulation of cultural and artistic output; and to foster intercultural dialogue. No other specific programmes or legislative acts have been adopted in order to implement the Convention.

Although the idea of mainstreaming culture may clearly be found in other legislative fields, we can conclude this synopsis by highlighting that there are no binding regulations implementing the Convention. Between 2007 and 2009, the UNESCO Convention did not have a significant impact on the EU legislative making process. No reference to the Convention can be found in recent EU hard law, and there has been no specific implementing act.

4.5. Further Implementation of the UNESCO Convention in EU Internal Policies

4.5.1. General Remarks

Before focusing on the role of the EU institutions, we provide some cross-cutting new ideas in what the EU could do in order to implement the Convention in its internal policies.⁵⁷⁸ Bearing in mind Art. 167(4) TFEU and taking into account that cultural diversity is a constitutional value of the EU, there is great potential, in the area of EU internal policies, to mainstream the principles of the Convention.

First, explicit references to the Convention should be included in new legislation. Directive 2007/65/EC is a good example in this respect. A reference to the UNESCO Convention could be a means to reinforce the interpretation/application of the provisions contained in the act in light of the Convention obligations. This could be important in order to implement (and comply with) Art. 5 of the UNESCO Convention. Such a reference would also be important to ensure a judicial implementation of the Convention: it could draw the attention of the ECJ and the General Court to the obligations and principles of the Convention, and it would oblige the judiciary to interpret legislation in the light of the UNESCO Convention commitments.

Coming to more substantive issues, first we briefly consider the possibility of creating a new specific programme for implementing the Convention. Then, we refer to three main fields of action (other than cultural policy as such) in which the Convention should be implemented: sustainable development, environmental action and state aid.

⁵⁷⁶ See European Commission's survey, published in the section "Regional Organizations' Surveys" at www.diversitystudy.eu. An extensive discussion on the directive can be found in M. Burri (2010), *Study on the Implementation of the UNESCO Convention in the EU's Internal Policies*, at <http://www.europarl.europa.eu/studies>. See also M. Burri (2009), *Cultural Diversity and the EC Audiovisual Media Services Directive: Beyond the Handsome Rhetoric*, NCCR Trade Regulation Working Paper No. 2009/09, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1370439.

⁵⁷⁷ It was established by Decision 1855/2006/EC in OJ L 372 of 27 December 2006. This decision has been amended by Decision n° 1352/2008/EC in OJ L 345.

⁵⁷⁸ For a more comprehensive overview, see the short version of the Study at www.diversitystudy.eu. See also other Study Papers at www.diversitystudy.eu.

4.5.2. A “Cultural Diversity Programme” under Art. 167 TFEU

In order to implement the UNESCO Convention, the EU could adopt a new programme to supplement the general programme referred to above, Culture 2000-2013. This new programme would be specifically devoted to cultural diversity. It could be a horizontal instrument to respond to the obligations of the Convention (in particular, those laid down in Art. 6(2)(a), (b), (d), and (e) of the UNESCO Convention), and it would provide a legal framework for expenditures in support of cultural diversity actions specifically designed to implement the UNESCO Convention.

The objective of the Programme should be pursued through support actions (i.e. multi-annual cooperation projects, cooperation measures and special actions) that increase the diversity of cultural expressions and stimulate the creation and distribution of cultural goods and services. The program should also provide financial support to National Coalitions for Diversity, which often do not receive funding. Additionally, support for analyses and the collection and dissemination of information on the implementation of the UNESCO Convention should be provided. Specific contact points should be provided. In particular, these “Cultural Diversity Contact Points” should serve to spread practical information about the Programme, and to collect and disseminate data regarding the requirements of the Convention in their respective Member states.

Culture 2007-2013 is a very successful programme. Nevertheless, the full implementation of the Convention will require additional, specific actions and programmes (in addition to mainstreaming).

Table 5: A “Cultural Diversity Programme”

	Cultural diversity Program
Legal feasibility / legal base	This instrument should be based on Art. 167 TFEU It should be an “incentive measure” to be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions (Art. 167(5) TFEU)
Rationale	This instrument would be the legal framework for expenditure in support of cultural diversity actions, specifically designed to implement the UNESCO Convention
Contents	The programme should provide for: -support actions to increase the diversity of cultural expressions - support for coalitions for diversity or bodies/institutions active at the European level working to achieve the goals of the Convention.
Other features	“Cultural Diversity Contact Points”
Advantages/strengths	The new thematic programme should provide a number of advantages: • It would improve funding to implement the Convention. In particular, it would provide new/additional budgetary resources allocated exclusively to cultural diversity (and/or special

allocations of time limited funds)

- It would create a new legislative framework for promoting cultural diversity and for sharing good practice through contact points
- It would also contribute to improving the data collection and analysis relating to the implementation of the Convention.

4.5.3. The Implementation of the Convention in the Fields of Sustainable Development and Environmental Action

The development of the Strategy EU 2020, recently presented by the Commission⁵⁷⁹, should be the point of departure for re-thinking the link between culture and development in Europe. This Strategy deals with a "smart, inclusive and sustainable growth" and could be an occasion to fully implement the UNESCO Convention within European boundaries. We would suggest that the EU encourages the development of links among sustainable development, cultural diversity and biodiversity within its territory.

It would be advisable for the EU to adopt Throsby's "checklist"⁵⁸⁰ for its internal policies and economic strategy. Throsby elaborated the principles as a checklist against which particular policy measures can be judged in order to ensure their "cultural sustainability". This checklist can be very useful for EU policy makers. Throsby's principles (derived from environmental law) are as follows⁵⁸¹:

"intergenerational equity: development must take a long-term view and not be such as to compromise the capacities of future generations to access cultural resources".

"intragenerational equity: development must provide equity in access to cultural production, participation and enjoyment to all members of the community on a fair and non-discriminatory basis"

"importance of diversity: just as sustainable development requires the protection of biodiversity, so also should account be taken of the value of cultural diversity to the processes of economic, social and cultural development".

"precautionary principle: when facing decisions with irreversible consequences such as the destruction of cultural heritage or the extinction of valued cultural practices, a risk averse position must be adopted"

"interconnectedness: economic, social, cultural and environmental systems should not be seen in isolation; rather, a holistic approach is required, i.e. one that recognizes interconnectedness, particularly between economic and cultural development".

4.5.4. State Aid

The framework of the EU State aid rules may offer an important opportunity to implement the UNESCO Convention.

We will not analyse in detail the complex substantive and procedural regime set forth in the Treaty, nor will we examine the wide range of legislation and soft law regarding State aid. In a more abbreviated fashion we focus on the potentialities and the opportunities to implement the Convention in this field.

⁵⁷⁹ Communication of the Commission 3 March 2010. See at <http://ec.europa.eu/eu2020/>.

⁵⁸⁰ [Http://www.cdc-ccd.org/main_pages_en/Publications_en/Paper_DavidThrosby_Culture&SustainableDvlt_en.pdf](http://www.cdc-ccd.org/main_pages_en/Publications_en/Paper_DavidThrosby_Culture&SustainableDvlt_en.pdf).

⁵⁸¹ [Http://www.cdc-ccd.org/main_pages_en/Publications_en/Paper_DavidThrosby_Culture&SustainableDvlt_en.pdf](http://www.cdc-ccd.org/main_pages_en/Publications_en/Paper_DavidThrosby_Culture&SustainableDvlt_en.pdf).

The Commission, in the exercise of its discretionary powers and control of State aid, enjoys wide discretion in the field of state aid. Furthermore, where the Commission is called on to determine whether state aid is compatible with the Treaty, it takes account of cultural considerations by virtue of Art. 107(3)(d) TFEU. The Commission has significant capacity to find ways to reconcile free competition and culture, whilst complying with the principle of proportionality. In light of the UNESCO Convention, the Commission should pay even more attention to State measures that foster cultural diversity, and it is required to consider international obligations when it carries out its assessment. Indeed, there are “best practices” in this respect: e.g. the Commission recently approved, under the state aid rules, a €576 million Spanish film support scheme until 31 December 2015⁵⁸². The decision covers Spain’s national film support measures, including film production and distribution⁵⁸³.

Moreover, the *General Block Exemption Regulation (GBER)*⁵⁸⁴ could be amended to expressly make notification unnecessary for aid targeted at small- and medium-sized enterprises (SMEs) operating in the field of culture. The GBER should encourage Member States to sustain small cultural enterprises. In particular, State Aid policy and regulations should be a tool to revitalize SMEs with local economic and cultural development as a principal focus. The GBER could be used to provide new opportunities for domestic cultural activities: new categories of aid could be exempted from notification (following the example of environment-friendly aid). This could be easily done by amending the GBER. However, even without a specific amendment, the Commission should use the GBER as a key instrument to implement Art. 6(c)(d) of the Convention.

4.6. The Role of EU Institutions and Bodies in the Implementation of the Convention

Having discussed some cross-cutting substantive ideas on what the EU could do in order to implement the Convention in its internal policies, we now focus on the role of the EU institutions (excluding the judiciary, which will be discussed in a separate section).

4.6.1. General Remarks

As seen above in the Introduction, the Convention is binding upon all the EU institutions. This means that all the institutions and bodies of the EU should contribute to the implementation of the UNESCO Convention, and should mainstream cultural diversity and the principles of the Convention in their actions/activities.

The Council and the Commission can play an important role. Indeed, the Commission already is a key actor in cultural policy, as demonstrated by the 2007 Communication. Education and culture are dealt with by the same Directorate General in the Commission (DG EAC). DG EAC’s mission is to reinforce and promote lifelong learning, linguistic and cultural diversity, mobility, and the engagement of European citizens. An inter-services group (GIS) on culture, which gathers all Directorates General within the Commission for which culture has direct or indirect relevance, has been set up, and it has been meeting

⁵⁸² The scheme is a package of complementary selective and automatic measures which the Spanish authorities believe are necessary to achieve their objective of preserving linguistic and cultural diversity among the films available to Spanish and European audiences. See at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/57&format=HTML&aged=0&language=FR&uiLanguage=en>.

⁵⁸³ Italian digital cinema tax credit is under discussion. (http://ec.europa.eu/competition/consultations/2009_digital_cinema/index.html).

⁵⁸⁴ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty - General block exemption Regulation, [2008] OJ L 214.

regularly since 2007. This group succeeded the inter-services group on cultural diversity established internally for the preparation, conduct and conclusion of the negotiations on the UNESCO Convention.

The European Parliament can also significantly contribute to the implementation process. The full legislative and budgetary parity attributed to the Parliament by the Lisbon Treaty, together with the postponement of the qualified majority reform in the Council until 2014-2017, reinforces the decisive role of the Parliament in the EU decision-making process.

Other EU bodies can also contribute to the implementation. Agencies which have relevant technical or scientific expertise could assist the Commission and the Member States as they implement the Convention. In particular, the implementation of the Convention could benefit from the thorough involvement of independent decentralised bodies (*i.e.* Agencies). Existing EU agencies will be reformed and developed: in its Communication "European agencies – the way forward" of March 2008, the European Commission called upon the European Parliament and Council to give new momentum to the development of a clear and coherent vision on the role of EU agencies in European governance.⁵⁸⁵ Current discussions on the inter-institutional dialogue on the future governance of the EU Agencies should involve an evaluation of existing Agencies, reflections on their possible role in implementing the UNESCO Convention, and the possibility of creating a new *ad hoc* body.

This Section investigates the role which could be played by the European Parliament and by two existing agencies: the European Training Foundation (ETF) and the Fundamental Rights Agency (FRA). In addition, we explore the possibility of creating a *new* agency for the purpose of implementing the Convention.

4.6.2. The Role of the Parliament in the Implementation of the Convention

As mentioned above, the European Parliament is called on to play an instrumental role in the implementation of the UNESCO Convention. The Lisbon Treaty widened the scope of application of the "co-decision procedure", which is now called "ordinary legislative procedure". As a consequence, the European Parliament's capacity to influence and participate in the preparation, adoption, implementation and control of binding legislative acts and policy-making has increased. This procedure provides a framework for a deliberative dialogue on the content of legislation between the European Parliament, Council and Commission.

Article 167(5) of the TFEU expressly refers to the "ordinary legislative procedure", stating "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States".

Under the ordinary legislative procedure (previously, "codecision"), the Parliament votes by majority while the Council votes by qualified majority. This procedure is applied for the adoption of a vast majority of EU laws. Accordingly, the Parliament can deal with many core issues in the implementation of the UNESCO Convention in compliance with the division of competences. The TFEU grants to the Parliament considerable powers *vis-à-vis* the Council of Ministers and the European Commission. The Commission retained its exclusive right of legislative initiative, while the Parliament and the Council exercise legislative and budgetary functions jointly (Art. 14 TEU).

⁵⁸⁵ [Http://www.efsa.europa.eu/en/euagencies/doc/euabrochure.pdf](http://www.efsa.europa.eu/en/euagencies/doc/euabrochure.pdf).

Under the ordinary legislative procedure, the Parliament can contribute to the making of laws and policies implementing Arts. 5 and 6 of the UNESCO Convention under the following headings: Free movement of persons and services (Arts. 45 et seq. and Art. 56 TFEU); Harmonisation of law in the areas of self-employment, and training and access to the professions (Art. 53 TFEU); "Approximation of laws" (Art. 114 TFEU; however, Article 167 TFEU excludes harmonisation for cultural matters); and Structural and cohesion funds to provide funding for projects and activities designed to protect and promote the diversity of cultural expressions (see Art. 174 TFEU).⁵⁸⁶ The "ordinary procedure" also applies in the area of intellectual property legislation (Art. 118 TFEU). In contrast, the European Parliament only has a right to be consulted in matters relating to taxation and competition law, including state aid.

The Parliament can also play a vital role in the adoption of non-legislative acts according to Art. 290 TFEU in fields that are relevant for the implementation of the UNESCO Convention.⁵⁸⁷ Pursuant to Art. 295 TFEU, the Parliament, Council and Commission first consult each other and then by common agreement they make arrangements for their cooperation. To that end, in compliance with the Treaties, they may conclude inter-institutional agreements that may be of a binding nature.

Finally, the Parliament can play only a limited and purely political role in the OMC processes. However, the Parliament could make efforts, by cooperating with the Council, to participate in framing and debating OMC objectives and procedures, in monitoring progress made toward agreed goals, and in revising the process in light of the results achieved.

4.6.3. The Role of the ETF in the Implementation of the Convention

The European Training Foundation (ETF)⁵⁸⁸ is one of the EU agencies involved in the field of external relations. It may prove particularly relevant for the implementation of the UNESCO Convention.

The ETF was established by Council Regulation No. 1360 in 1990, recast as No. 1339 in 2008. It is devoted to assisting third countries in the field of human capital development. In particular, it is called on: to provide information, policy analyses and advice on human capital development issues in the partner countries; and to promote knowledge and analysis of the need for skills in national and local labour markets. The ETF's activities are structured around a series of projects that take place in the partner countries. These projects facilitate the reform of vocational education and training and employment systems⁵⁸⁹. Thus, the ETF could contribute to enhance public sector strategic and management capacities in cultural public sector institutions through professional sharing of best practices. It could also carry out projects and activities, in EU partner countries, to encourage non-profit organizations, public and private institutions, and to foster the promotion of cultural diversity. In addition, the ETF could help developing countries to promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities.

⁵⁸⁶ Immigration (Art. 77 et seq. TFEU), a matter relevant in the context of Cultural Cooperation Protocols and the mobility of artists and cultural practitioners is also governed by ordinary procedure.

⁵⁸⁷ A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The European Parliament and the Council can revoke under specified conditions such delegation. In addition the European Parliament can preserve the right to veto a delegated act.

⁵⁸⁸ [Http://www.etf.europa.eu/web.nsf?Open](http://www.etf.europa.eu/web.nsf?Open).

⁵⁸⁹ [Http://www.etf.europa.eu/Web.nsf/pages/Projects_EN?OpenDocument](http://www.etf.europa.eu/Web.nsf/pages/Projects_EN?OpenDocument).

The ETF could play an important role in implementing Art. 10 of the UNESCO Convention, and could encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions through educational programmes in partner countries. In particular, the ETF could support projects that promote cultural diversity (including projects incorporated within educational programmes). It could also hold projects aimed at nurturing and supporting artists and others involved in the creation of cultural expressions. Moreover, the ETF could support professional seminars to foster dialogue between national institutions and stakeholders, and to promote the exchange of their information and creation of networks. In the Balkans, the ETF already supports projects on social inclusion which promote the rights of minorities in the region⁵⁹⁰. It would be important for these projects (and similar projects⁵⁹¹) to address cultural diversity, for the purpose of implementing Art. 10 of the UNESCO Convention. These projects could also help to ensure the participation of local communities in the implementation of the Convention (as envisaged by Art. 11 UNESCO Convention).⁵⁹²

By sharing expertise in vocational education and training across regions and cultures, the ETF could furnish advice and project cycle support to various Directorates General of the Commission (namely, DG Education and Culture, DG External Relations, Enlargement, Employment, Enterprise and the Europe Aid Cooperation Office) in order to promote the implementation of the UNESCO Convention.

4.6.4. The Role of the FRA in the Implementation of the Convention

The Fundamental rights Agency (FRA) was established in 2007 by Council Regulation (EC) No 168/2007 of 15 February 2007 (and is based on ex-Art. 308 EC, now Art. 352 TFEU)⁵⁹³. Generally speaking, the FRA aims to provide the EU institutions and Member States, when implementing Community law, with assistance and expertise relating to fundamental rights (Art. 2 Reg. 168/07/EC). The FRA supports these entities when they adopt measures or formulate courses of action within their respective spheres of competence, granting them assistance to ensure that they fully respect fundamental rights. Its powers are primarily information-based; it is not a powerful decision-making body.

The scope of its action refers to a broad notion of “fundamental rights”. Since the founding Regulation clearly refers to the EU Charter of Fundamental Rights, which protects cultural diversity, we could argue that the protection of cultural diversity is fully within the scope of action of the FRA

The FRA could play an important role in implementing the UNESCO Convention, in particular by encouraging dialogue among cultures, fostering interculturality in order to develop cultural interaction in the spirit of building bridges among peoples, and promoting

⁵⁹⁰ http://www.etf.europa.eu/web.nsf/pages/Project_Social_Inclusion_EN?opendocument.

⁵⁹¹ http://www.etf.europa.eu/Web.nsf/pages/Projects_EN?OpenDocument.

⁵⁹² In December 2009, a Regional Meeting “Policies and Practices for the Preparation of Teachers for Inclusive Education in Contexts of Social and Cultural Diversity: Research and Actions” was organized by ETF. The purpose of the meeting was to raise awareness and to promote mutual understanding among key stakeholders from the Western Balkans and Turkey of existing policies and practices for the preparation of teachers for inclusive education by means of discussing the findings of a recent ETF study. This event and the ETF study linked to this can offer a sample of similar events, in view of the implementation of Art. 10 UNESCO Convention. In particular the ETF could identify proper follow-up actions to set out educational programme for promoting and understanding the importance of cultural diversity.

⁵⁹³ http://www.fra.europa.eu/fraWebsite/home/home_en.htm. On the long path leading to the creation of an EU agency dealing with human rights, see *inter alia* E. Howard (2006), *The European Agency for Fundamental Rights*, in *European Human Rights Law Review*, 4/2006, 445 ss.

respect for the diversity of cultural expressions and raising awareness of its value (see Art. 1(c), (d) and (e) UNESCO Convention).⁵⁹⁴

Before a new *ad hoc* body is established, the FRA could contribute to the implementation of Arts. 9 and 10 of the UNESCO Convention by: collecting, analysing and disseminating objective, reliable and comparable information on the protection of cultural diversity; carrying out and encouraging scientific research and surveys on the implementation of the Convention; and raising public awareness of cultural diversity and promoting dialogue with civil society.

In addition, it would be advisable to launch a survey focusing on cultural rights with the purpose of fostering intercultural dialogue. Here the experience with EU-MIDIS⁵⁹⁵ could serve as an example.

The FRA could also play a relevant role in implementing Art. 10(a), and could encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions through greater public awareness programmes. Initiatives such as the "S'cool Agenda 2010" and the "Vienna Film Festival" can be a source of inspiration for similar new initiatives supporting cultural diversity and intercultural dialogue. In addition, the "Diversity Day"⁵⁹⁶ provides an example of a specific initiative which could be used to implement Art. 10 of the Convention.

4.6.5. A New "European Institute for Cultural Diversity"

Considering that there are several agencies at the EU level, and since unjustified proliferation of bodies is generally detrimental to the efficiency of a system, we recall that an important actor at the Community level already exists since 2006, namely the Education, Audiovisual and Culture Executive Agency (EACEA).⁵⁹⁷ Nevertheless, we consider that it is useful to contemplate the creation of an *ad hoc* body which could manage a new specific programme on cultural diversity and carry out other activities related to the implementation of the Convention. It could be named the "European Institute for Cultural Diversity" (on the model of the European Institute on Gender Equality). The new body would be created through a binding act on the basis of Art. 167 TFEU: a decision to create this body would thus need to be taken by the Council and the European Parliament.⁵⁹⁸

This new body should assist the EU institutions and the Member States in the implementation of the Convention (i.e. in the protection and promotion of cultural diversity) and should collaborate and support the DG EAC of the Commission, which is the Convention Contact Point under Art. 9(b) UNESCO Convention, but also other Directorate Generals. The new body could also collaborate with the inter-services group (GIS) on culture, which, as

⁵⁹⁴ This can be done mentioning the UNESCO Convention in the Annual Work Programme. The European Parliament could request the FRA to carry out specific tasks relating to the Convention.

⁵⁹⁵ In 2008, the FRA launched [EU-MIDIS](#) (European Union Minorities and Discrimination Survey), the first and largest EU-wide survey of its kind to collect comparable data on selected immigrant and minority groups' experiences of discrimination in access to goods and services, including experiences of criminal victimisation.

⁵⁹⁶ [Http://www.diversityday.eu/](http://www.diversityday.eu/).

⁵⁹⁷ [Http://eacea.ec.europa.eu/index.html](http://eacea.ec.europa.eu/index.html). The Agency was created in 2005, in compliance with Art. 3 of Regulation (EC) No 58/2003, laying down the statute for executive agencies. On 20 April 2009, the Commission replaced the old Decision 2005/56/EC with a new decision (Commission Decision 2009/336/EC). Decision 2009/336/EC setting up the Education, Audiovisual and Culture Executive Agency for the management of Community action in the fields of education, audiovisual and culture in application of Council Regulation (EC) No 58/2003 (2009/336/EC), repealing Decision 2005/56/EC. The Agency operates under the supervision of its three parent Directorates-General of the European Commission, DG EAC, DG INFSO and DG Europe Aid Cooperation (DG AIDCO). EACEA is an executive Agency.

⁵⁹⁸ The body could also be created as executive agency on the basis of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes. In this case, the powers/functions of the new body would be more limited. This Institute could also be created through a regulation on participation.

noted above, gathers all Directorates General within the Commission for which culture has direct or indirect relevance⁵⁹⁹.

This technical body could partially replace the Agenda working methods, in particular the work undertaken by the expert working groups chaired by EU Member States, linked to the five priority areas agreed by the Council. The advantage would be to have a permanent technical body, operating in full transparency, which could support the EU institutions and Member States in the formulation, conduct and development cultural policies in compliance with the Convention. The new body would practically ensure the mainstreaming of cultural diversity in all the relevant EU legislation and policies. It would also support a Culture OMC (and would contribute to ensure transparency of the OMC processes) by spreading relevant information.

The new body would permanently collect, record, analyse and disseminate information on the implementation of cultural diversity. It would also develop methods to improve the objectivity, comparability and reliability of data at European level. It would replace the ESSnet (network of national statistical offices) on Cultural statistics, set up in September 2009 for a period of two years.

The Institute could also have a website with an electronic database accessible to the public. In this respect, the "Århus Clearinghouse Mechanism" could be a source of inspiration.⁶⁰⁰ This body should organise activities to foster the exchange of experience and the development of best practices at the European level.

Table 6: "European Institute for Cultural Diversity"

"European Institute for Cultural Diversity" Tasks	UNESCO Convention provision implemented
Assist the EU institutions and the Member States in the implementation of the Convention	[Support in the implementation of] Art. 6(2)(a)(b)(c) Art. 6(2)(f)
Manage the cultural diversity programme	Art. 6(2)(b)
Collect, record, analyse and disseminate information on the implementation of cultural diversity	[Contribute to the implementation of] Art. 9(c)
Raise awareness on cultural diversity issues	Art. 10

⁵⁹⁹ It succeeded to the inter-services group on cultural diversity set up internally for the preparation, conduct and conclusion of the negotiations on the UNESCO Convention.

⁶⁰⁰ <http://aarhusclearinghouse.unecce.org/>. See C. Larssen's contribution.

4.7. The EU judiciary and the implementation of the UNESCO Convention

4.7.1. General Remarks

The role of the EU judiciary (the European Court of Justice and the General Court)⁶⁰¹ in the implementation of the Convention is crucial.

The ECJ usually plays a central role in determining the effects of international law within the EU legal system. As mentioned above, the UNESCO Convention obligations do not have direct effect, and the ECJ can ultimately refuse to review the validity of EU measures in light of these provisions. However, the UNESCO provisions are in any event relevant for the *interpretation* of national and EU law. If the wording of secondary EU law is open to more than one interpretation, preference should be given, as far as possible, to the interpretation which may render the provision consistent with the Convention.

Indeed, between 2007 and 2009, there was only one case in which the UNESCO Convention was taken into consideration. This was the *UTECA* case⁶⁰². According to the preliminary ruling of the ECJ, a measure adopted by a Member State which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for works of which the original language is one of the official languages of that Member State, does not infringe Community law. Advocate General Kokott cited a number of provisions from the UNESCO Convention and stated that “the Community and the Member States that are Contracting States to the UNESCO Convention have undertaken to take that convention into account when interpreting and applying other treaties, that is to say *inter alia* when interpreting and applying the EC Treaty.” The ECJ only mentioned the Convention when referring to the importance of linguistic diversity.

The ECJ did not mention the UNESCO Convention in other relevant cases, e.g. the *Fachverband der Buch* case⁶⁰³. Although the *Fachverband der Buch* case provided the Court with a new opportunity to clarify the scope of the principle of cultural diversity, the judgment clearly shows a negative attitude of the ECJ towards (cultural) derogations to internal market rules. According to the ECJ, the principle of cultural diversity cannot be used to justify measures having equivalent effect to a restriction of imports within the meaning of ex-Art. 28 EC, now Art. 34 TFEU (such as the Austrian legislation in question). In particular, cultural diversity is unable to provide a sound normative foundation for the regulation by a Member State of markets for cultural products.

⁶⁰¹ Indeed, it must be recalled that, properly understood, there are three types of ‘EU Courts’: the ECJ, the General Court (former Court of First Instance) and the national courts. The ‘third dimension’ of the national courts is an important component of the structure of the Community judicial system. With regard to the enforcement of the UNESCO Convention as EU law, it is important not to exclude national courts from the list of relevant actors, since they are enforcers of EU law in their own right, as the ECJ emphasised in the *UPA* case (ECJ, 25 July 2002, Case C-50/00 P, *Union de Pequeños Agricultores v Council*, [2002] ECR I-6677. The ECJ stated that, in accordance with the principle of sincere, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relating to the application to them of a Community act of general application, by pleading the invalidity of such an act). Nonetheless, we will mainly address the role which could be played by the ECJ and the CFI.

⁶⁰² ECJ 5 march 2009, C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) c. Administración General del Estado*. See also at <http://merlin.obs.coe.int/iris/2009/4/article2.en.html>

⁶⁰³ ECJ, 30 April 2009, Case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*.

4.7.2. Enforcing the Convention at the EU level

The UNESCO Convention has been criticised for its toothless monitoring mechanism and for the absence of judicial enforceability. However, in the EU, the ECJ and the General Court could effectively ensure the respect of the principles of the Convention through their judgments.

The concrete possibility that the Courts could enforce the UNESCO Convention faces three main constraints. First, as noted above, a fundamental problem is the absence of direct effect of the UNESCO Convention, which implies that the Convention cannot be invoked by individuals before the EU courts. Secondly, there are limitations of standing before the EU Courts under Art. 263 TFEU. Additionally and more generally, it could be argued that an acknowledgement by the ECJ and General Court of the importance of the UNESCO Convention is not in itself an absolute guarantee that the Court's rulings will be in line with the UNESCO Convention's goals. As seen in other cases (e.g. *Fachverband der Buch*), the balancing of competing interests may lead to different outcomes in different cases.

Despite these "structural" constraints, the role that can be played by the EU Courts is important, both in deciding individual cases and in building legal principles that could have a more general impact.

It would be important for litigating parties themselves to cite the Convention in their pleas. For example, applicants could plead, before a national court, the invalidity of a general EU measure⁶⁰⁴ on the ground that it is contrary to the UNESCO Convention, following which the national court could request a preliminary ruling from the ECJ under Art. 267 TFEU. Although national courts have no jurisdiction under EU law to declare any EU act to be invalid, they may (or, in some cases, must) make a reference to the ECJ for a preliminary ruling on the invalidity of the contested measure.⁶⁰⁵ Despite the general requirement of direct effect, in *Kingdom of the Netherlands v European Parliament and Council*, the Court did not consider the requirement of direct effect to be necessary as a condition for a preliminary reference concerning the lawfulness of the *Rio de Janeiro Convention on Biological Diversity* of 5 June 1992, which was expressly cited in the Directive *sub judice*.⁶⁰⁶ Advocate General Jacobs stated that, generally, "it might be thought that it is in any event desirable as a matter of policy for the Court to be able to review the legality of Community

⁶⁰⁴ This usually happens when a national measure purportedly based on a EU act, is challenged in a national court on the ground that the EU act is invalid.

⁶⁰⁵ The reference for a preliminary ruling is thus a reference "from one judge to another". Although a referral to the Court of Justice may be requested by one of the parties involved in the dispute, the decision to do so rests with the national court.

⁶⁰⁶ ECJ, 9 October 2001, Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, [2001] ECR I-7079. In this case, the Netherlands brought an action under Art. 230 TEC seeking annulment of Directive 98/44 on the legal protection of biotechnological inventions. The Directive requires Member States to protect biotechnological inventions under national patent law. Although the Directive contained no definition of biotechnological inventions, it was clear that the concept essentially comprised inventions concerning a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used, or inventions concerning a microbiological or other technical process or a product obtained by means of such a process. Among the grounds invoked for the annulment of the Directive were that it was incompatible with international obligations. The international obligations invoked by the Netherlands arose under the TRIPs Agreement, the Agreement on Technical Barriers to Trade, the European Patent Convention and the Convention on Biological Diversity. The Council argued that the provisions of the TRIPs Agreement, the Agreement on Technical Barriers to Trade and the Convention on Biological Diversity by their nature did not have direct effect. According to the Council, therefore, the alleged infringement of the relevant international obligations could not be invoked as a ground for reviewing the legality of the Directive. Art. 1(2) of the Directive provided: "This Directive shall be without prejudice to the obligations of the Member States pursuant to international agreements, and in particular the TRIPs Agreement and the Convention on Biological Diversity. The Convention on Biological Diversity, signed by the Community and all the Member States on 5 June 1992 and approved by the Community on 25 October 1993, seeks to ensure the sustainable conservation and use of biological diversity."

legislation in the light of treaties binding the Community. There is no other court which is in a position to review Community legislation; thus if this Court is denied competence, Member States may be subject to conflicting obligations with no means of resolving them".⁶⁰⁷ According to the Court, even if the Rio de Janeiro Convention contained provisions which did not have direct effect, that fact did not preclude review by the courts with respect to the issue of compliance with the obligations incumbent on the Community as a party to the agreement. The Court considered that, unlike the TRIPs Agreement, the Rio de Janeiro Convention was not strictly based on reciprocal and mutually advantageous arrangements. This case law leaves the door open to the review of an EU measure in light of the UNESCO Convention (despite the fact that, as already noted, the provisions of the Convention do not have direct effect) where the EU intends to implement a particular obligation entered into within the framework of international rules, or if the EU act expressly refers to specific provisions of the Convention.⁶⁰⁸

Finally, there would also be the possibility to challenge *national* measures (that appear to be contrary to the UNESCO Convention) before national courts and ask the national courts to make a reference to the ECJ for a preliminary ruling on the proper interpretation of the UNESCO Convention under Art. 267 TFEU.⁶⁰⁹ In any case, national judges referring a question under Art. 267 should mention the UNESCO Convention. This would lead the ECJ to consider UNESCO Convention provisions and obligations, i.e. to interpret EU law provisions in light of the obligations set forth in the Convention.

4.8. Concluding Remarks

On the basis of the foregoing analysis, it appears that the EU has timidly started the process of implementation of the UNESCO Convention in its internal policies. However, the EU should improve its efforts to attain the overall goals of the Convention.

It is obvious that the Convention has had more of an impact on the "political discourse" than it has had on the legislative process. This is also due, in part, to the fact that the EU has only a supporting competence in the field of culture.

All the institutions and bodies of the EU should contribute to the implementation of the UNESCO Convention, and they should mainstream cultural diversity and the principles of the Convention in their actions/activities. The EU should intensify its efforts to mainstream the principles of the Convention in its legislation, and it should increase the visibility of the Convention in its binding acts. A new specific cultural diversity programme could be elaborated and managed by a new body.

Concluding, the EU certainly has much room for manoeuvre, and it could secure the protection and promotion of cultural diversity in the long run.

⁶⁰⁷ See Opinion of Mr Advocate General Jacobs delivered on 14 June 2001, Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, [2001] ECR I-7079.

⁶⁰⁸ In the case described above, *Netherlands v Parliament and Council*, the Court stated that, "as regards the possibility that the Directive might represent an obstacle in the context of the international cooperation necessary to achieve the objectives of the CBD, it should be borne in mind that, under Art. 1(2) of the Directive, the Member States are required to apply it in accordance with the obligations they have undertaken as regards *inter alia* biological diversity". This explicit reference in the Directive was used to reject the plea.

⁶⁰⁹ See ECJ, 16 June 1981, Case 126/80, *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio*, [1981] ECR 1563.

Conclusions

Despite the fact that the UNESCO Convention is a legally binding instrument on the contracting parties, the framework nature of its principles, the programme-type provisions and their weak formulation leave considerable discretion to the parties, especially to the EU, in adopting implementing measures. Indeed, it is clear to all observers that the programmatic provisions and the values embedded in the text of the Convention *must be "internalized" and put into practice* in our societies.

While the EU already has an advanced package of internal and external actions aimed at protecting and promoting cultural diversity, the need to implement the Convention should be seen as an opportunity for a significant improvement of efforts in this field. It is an important opportunity to create a binding regulatory framework that can generate a fair, open and diverse market while protecting cultural rights and fostering intercultural dialogue.

We have provided a set of recommendations and ideas to implement the Convention tailored to realise its full potential. We have verified their legal feasibility. However, we recognise that the process of implementing the Convention is a long-term policy project that requires the mutual involvement of supranational and national institutions. It is also a matter for both the EU courts, which may ensure the effectiveness of the Convention. Through their authoritative and binding pronouncements, the Courts will have a substantial impact on the implementation of the Convention, and on the protection and promotion of cultural diversity.

The implementation of the UNESCO Convention is thus to be understood as an ongoing process, one in which EU government structures, courts and civil society all have a role to play.

Annex

The Implementation of the UNESCO Convention and EU competences

UNESCO Provisions	EU Competences (TFEU/TEU provisions)	Other references/notes
Art. 5 <i>“General rule regarding rights and obligations”</i>	Art. 167 TFEU Art. 207 TFEU Art. 211 TFEU Art. 212 TFEU	Cultural diversity can be linked to bio-diversity (as envisaged by the UNESCO) ⁶¹⁰ . This would also make it possible to use Art. 192 TFEU.
<p>Art 6(2)(a)(b)(c)</p> <p><i>“regulatory measures aimed at protecting and promoting diversity of cultural expressions”</i></p> <p><i>“measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services</i></p> <p><i>“measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services”</i></p> <p>Art. 7 <i>“Measures to promote cultural expressions”</i></p>	<p>Art. 167 TFEU</p> <p>These measures can also be included in legislative acts relating to freedom of movement or based on other articles, <i>inter alia</i>:</p> <p>Art. 53 (which relates to the harmonisation of law in the areas of self-employment and training and access to the professions)</p> <p>Art. 109 TFEU (which deals with EU competence to monitor and control aid granted by Member States)</p> <p>Art. 113 TFEU (taxation)</p> <p>Art. 114 TFEU (harmonisation – this provision enables the Community to adopt harmonising measures which have as their object the establishment and functioning of the internal market. Given that the internal market is an extremely broad notion that encompasses the removal of all kinds of barriers to trade, it is not surprising to find that Art. 114 TFEU (ex-Article 95) has been the legal base for instruments addressing many different areas, including e.g. telecommunications</p> <p>+ in the areas where the EU only has supporting competence, the OMC can provide a political forum and format for the implementation</p>	

⁶¹⁰ <http://www.reterurale.it/flex/cm/pages/ServeBLOB.php/L/EN/IDPagina/1627>

	of the Convention [namely of Arts. 6(2)(e)(f)(g)]	
Art. 6(d) "public financial assistance"	The EU can do much in this area within the framework of its State aid policy (arts. 107 et seq. TFEU)	
Art. 6(h) "measures aimed at enhancing diversity of the media, including through public service broadcasting"	<p>The EU can do much in this area within the framework of its State aid policy (arts. 107 et seq. TFEU)</p> <p>The EU can also regulate this field under Art. 53 TFEU (see legal base for e.g. Directive 2007/65/EC)</p>	<p>In Recommendation 1878/2009⁶¹¹-Funding of public service broadcasting, the Parliamentary assembly of the COE, representing national parliaments in Europe, emphasised "the power and responsibility of national legislators to decide on the specific mission, structure and funding of their public service broadcasters in accordance with national or regional circumstances and requirements.</p> <p>The Assembly is concerned by tendencies within the European Union to restrict those national powers under internal market regulations and the growing number of complaints against European Union member states brought by private operators before the European Commission. The application of European Union law should not restrict member states' powers to adapt the public service broadcasting remit to their own national needs. In this respect, the Assembly recalls that the 1997 Amsterdam Protocol to the Treaty establishing the European Union clearly favours subsidiarity and national competencies for European Union member states in this field".</p> <p>The Assembly also recalled the UNESCO Convention.</p>
Art. 10 "Education and public awareness"	Art. 165 TFEU [and Art. 11 TEU]	
Art. 11 "Participation of civil society"	Art. 11 TEU Art. 15 TFEU	
Art. 12 "Promotion of international cooperation"	Art. 207 TFEU Arts. 208 et seq. TFEU	Art. 207 TFEU (ex Art. 133 TEC) confers on the EU the power to adopt acts and to conclude treaties in the field of commercial policy

⁶¹¹ <http://assembly.coe.int/Documents/AdoptedText/ta09/EREC1878.htm>

	Arts. 212 et seq. TFEU	<p>(exclusive competence). An EU measure falls within the competence in the field of the common commercial policy provided for in Art. 207 TFEU only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned (see, <i>inter alia</i>, Case C-347/03 <i>Regione autonoma Friuli-Venezia Giulia and ERSA</i>⁶¹²)</p> <p>When Art. 207 TFEU is a legal base of a trade agreement, there are no obstacles under EU law to the inclusion of ancillary clauses in the agreement (such as human rights clauses) to protect and promote cultural diversity, since these clauses do not affect the characterisation of the agreement.</p>
Art. 12(d)	Art. 186 TFEU	
<p>Art. 13 “<i>Integration of culture in sustainable development</i>” Art. 14 “<i>Cooperation for development</i>” Art. 16 “<i>Preferential treatment for developing countries</i>”</p>	Arts. 208 et seq.	

⁶¹² ECJ, Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, paragraph 75.

Study Paper 4B: The UNESCO Convention in EU's internal policies

Annick Schramme and Sigrid Van der Auwera

Executive summary

- Following the Treaty of Maastricht (1992), the EU created a juridical basis for cultural action in Europe in the field of culture for the first time. With the approval of article 128 (the later article 151 of the Treaty of Amsterdam, 1997 and article 167 of the Lisbon Treaty, 2009), the EU recognised 'cultural diversity' within its borders, or so-called 'Unity Through Diversity'. Since then 'cultural diversity' has been an essential feature of the European project. Investigating the implementation of the UNESCO Convention on Cultural Diversity in the European Union's internal policy therefore implies an evaluation of the cultural paragraph of the European Treaty.
- The definition of culture used by the EC has broadened in recent years. Not only arts and culture, but also the cultural and creative industries are part of EU policy. This more economic approach is new and gives a more legitimised basis for European action. This broad definition of culture also requires greater coordination across Commission Directorates.
- The 'European Agenda for Culture in a Globalising world', adopted in May 2007, is the overarching framework for implementing the UNESCO Convention in the European Union's internal policies.
- Although the implementation of the Convention at EU level is launched with the Open Method of Coordination, the installation of the Culture Forum and cooperation between the relevant DGs, there is still considerable need for horizontal coordination between all these forums (and interaction with Civil Society) and for more vertical coordination (e.g. multilevel coordination between EU and Member States and between Member States, regions and local authorities).
- Despite the existence of a number of temporary policy measures that support the implementation of the Convention (such as the Culture 2007-2013 Programme and the European Year of Intercultural Dialogue in 2008), there is still a lack of a long-term, integrated, overarching EU interpretation of the meaning of culture and cultural diversity.
- Although culture is partly monitored by ESSnet (European Statistical System) on cultural statistics (September 2009-2011), cultural diversity is not one of the thematic Task Forces. An Observatory of European cultural policy could be established that evaluates all measures that favour cultural diversity, as referred to in the cultural paragraph, no. 167, of the European Treaty and in the UNESCO Convention of 2005. This Observatory would also systematically monitor the impact of Community regulation and legislation on culture and cultural diversity. The elaboration of benchmarks could also provide insight into the implementation process by setting goals and using indicators and timelines.
- Although the European Union claims to promote linguistic diversity, policies on linguistic diversity are overshadowed by policies on multilingualism. It is not clear whether these contribute to the protection and promotion of linguistic diversity.

4.1. Introduction

The adoption of the Convention on Cultural Diversity in 2005 by the European Union and the various Member States can be regarded as an historical fact since 'cultural diversity', or to put it more correctly, 'diversity of cultural expressions', has been embraced as a political concept by all parties to the negotiations. To understand the history of the Convention, one must be aware of the two rationales for the adoption of the Convention by the various states. The first is grounded in existing international cultural rights, including the human rights instruments. From this perspective, many states saw the Convention as the next step in the long battle to promote cultural development and intercultural dialogue. The second rationale is that of trade, which provided the real urgency for developing the Convention. In order to understand this dichotomy it is important to understand not only the history but also the way the EU and the various countries deal with the Convention.⁶¹³

The Convention chooses a broad definition of cultural diversity. According to Article 4 *'cultural diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions but also through divers modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.'*

There is still no consensus about the interpretation of the definition⁶¹⁴, but in general we can distinguish between two approaches to 'cultural diversity', which also reflect the two rationales behind the Convention. The first one looks primarily at issues concerning cultural diversity 'within' a particular society. It focuses on basic human rights, promotion of cultural democracy and equal participation of minorities. This approach is often referred to as 'multiculturalism'. The second approach that has been widely debated, especially in the past two decades, is the issue of cultural diversity 'among' nation states, societies and/or cultures. Within this approach we can distinguish between a more political intercultural dialogue approach to obtain a more harmonious society on the one hand and a more economic approach, which is characterised by the development of links between culture and trade and the ability of nation states to 'intervene' in cultural markets in order to sustain 'local' or 'national' production, on the other.⁶¹⁵

When the UNESCO Convention on Cultural Diversity was passed by UNESCO's General Assembly in December 2005, the European Union was one of the first parties that ratified the Convention. Until then the European Union had not been very interested in cultural matters because culture was, according to the subsidiarity principle, the competence of the nation states or regions. With the approval of the Convention, the EC agreed to play a more active role in cultural affairs. Ratification of the Convention by the EU was proof that the EC understood that culture is not only a public good and an end in itself, fulfilling individuals and benefiting society, but at the same time fosters economic growth, employment and social cohesion, and regional and local development.⁶¹⁶ In fact, it was not surprising that the EU supported UNESCO in the debate about the place of culture in the WTO. The unification process of the European Union itself is an example of the difficult balance between economic integration and cultural diversity.

⁶¹³ Obuljen, N. (2006), 'UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expression', John Benjamins Publishing Company, Amsterdam/Philadelphia, p.19

⁶¹⁴ Bernier, I. (2009), 'Les expressions culturelles menaces dans la convention sur la diversité des expressions culturelles de l'Unesco', retrieved at http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/Expressions_culturelles_menacees.pdf

⁶¹⁵ Obuljen, 2006, p. 22

⁶¹⁶ KEA European Affairs (2008), 'Study on the economy of culture in Europe'. and Kea European Affairs (2009), 'Study on the impact of culture on creativity'.

In this paper we will investigate the implementation of the Convention within the European Union. What are the results 3 years after the Convention came into force (17 March 2007)? What measures have been taken by the European Union? And what have been undertaken by the Member States? To this end we questioned a number of EU Member States, namely Bulgaria, Denmark, France, Germany, Hungary and Spain. First we will take a look at the situation at EU level. We will then discuss the role of the Member States and the interaction between the Member States and the Community. After this, we will focus more specifically on linguistic diversity, since cultural diversity and linguistic diversity are inextricably linked. Finally, we will end with conclusions and recommendations.

4.2. Implementation at EU level

4.2.1. A brief historical overview: from the Maastricht EU Treaty to the European Agenda for Culture in a Globalising World

With article 128 of the EC Treaty of Maastricht (signed on 7 February 1992, came into force on 1 November 1993) the EU created a basis for EC action in the field of culture for the first time. The later Article 151, paragraph 1 of the EC Treaty of Amsterdam (1997) stipulated that 'the Community shall contribute to the flowering of the cultures of the Member States, while respecting national and regional diversity and, at the same time, bringing the common heritage to the fore'. Although this article was written in an imperative way ('shall' contribute and not 'can' or 'may'), for a long time EC intervention in the field of culture was limited because it was governed by the principles of subsidiarity and complementarity. The subsidiarity principle was established in EU law by the Treaty of Maastricht and is contained in Article 5 of the EU Treaty of Lisbon:

'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

Also the reach of clause 4 of Article 151 has been underestimated in European cultural policy making. Firstly, there is an obligation: the Community 'shall' take cultural aspects into account in all its actions so as to foster intercultural respect and promote diversity. Nevertheless, this task has been systematically neglected. Instead, all existing regulations should be evaluated regarding their cultural consequences. Furthermore, we are of the opinion that a set of procedures should be developed which guarantee that, in the future, the cultural aspects of new Community regulations will be systematically taken into account.

Furthermore, article 13 of the Charter of Fundamental Rights stipulates that 'The arts and scientific research shall be free of constraint'. Article 22 stipulates that 'the EU shall respect cultural, religious and linguistic diversity'. With the approval of the Lisbon Treaty, article 151 of the Treaty of Amsterdam was changed in article 167. The content remained the same with only one important improvement: decisions on cultural matters must no longer be taken unanimously but by Qualified Majority Voting (QMV).

Following the negative referenda on the Lisbon Treaty in the Netherlands, Ireland and Denmark, the EC realised that the gap between the EC and its citizens was very wide and that action had to be taken. In 2004 the EC organised a large conference in Berlin, called 'A Soul for Europe'. Participants were all the stakeholders involved in Culture, political representatives and Civil Society partners. The matter became urgent when the populations of Ireland and the Netherlands voted against the implementation of the Lisbon Treaty. The Berlin Conference was to form the basis for the subsequent Working Plan for Culture (2007).

The call for a more active role in culture by the EC was not in vain. In May 2007 the Commission adopted an important communication on culture, namely '**a European agenda for culture in a globalising world**'.⁶¹⁷ According to Xavier Troussard (Head of Unit, Cultural Policy and Intercultural Dialogue) the Agenda is the overarching framework for the implementation of the UNESCO Convention.⁶¹⁸ The promotion of cultural diversity and intercultural dialogue became one of the main objectives of this document or, as it says in the introduction, '*through the unity in diversity, respect for cultural and linguistic diversity and promotion of a common cultural heritage lie at the very heart of the European project.*' A second main objective of the Agenda for Culture is '*culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs*' by which cultural industries were highlighted as '*essential assets for Europe's economy and competitiveness in a context of globalisation*'. And finally, the Agenda for Culture also aims at integrating '*culture in external relations*'. The view that culture and cultural diversity could also contribute to the Lisbon Strategy for growth and jobs was new and was clearly inspired by the UNESCO Convention.

The objectives of the Commissions' 'Agenda for Culture' had to be achieved using new methods. The 'Open Coordination Method' was proposed by the Commission to establish cooperation between the EU institutions and the Member States in order to define common objectives and translate them into national policies.

Moreover, the Commission proposed integrating the cultural sector and Civil Society more closely in EU activities by setting up a Cultural Forum and various platforms.

The European Parliament endorsed the objectives of the new Agenda for Culture in a resolution.⁶¹⁹ Among other things, the Parliament decided that the European Agenda will be implemented through triennial work plans covering a limited number of priority areas.

On 16 November 2007, the EU Ministers for Culture welcomed the objectives and methods and defined five priority areas for action for the period 2008-2010. In a first triennial Work Plan for Culture 2008-2010 the Council listed specific measures to be taken in the Member States, in working groups and by the Commission over the next few years.⁶²⁰ The specific measures were clustered in five priority areas. Maximising the potential of cultural and creative industries and promoting and implementing the UNESCO Convention on the Protection of the Diversity of Cultural Expressions were two of them. The European Year of Intercultural Dialogue was also an objective of the Work Plan. Implementation of the

⁶¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda for Culture in a Globalising World, Brussels 10/05/2007, COM(2007) 242 final.

⁶¹⁸ Xavier Troussard as respondent to our questionnaire for the EC.

⁶¹⁹ Resolution of the Council of 16 November 2007 on a European Agenda for Culture, 2007/C 287/01.

⁶²⁰ Conclusions of the Council and the Representatives of the Governments of the Member States, meeting within the Council, on the Work Plan for Culture 2008-2010, 2008/C 143/06.

Convention and inclusion of its objectives in relevant national policies were foreseen during this period too.

2010 will be a crucial year for the evaluation of the European Agenda for Culture and thus for the implementation of the Convention. In June 2010 the OMC expert working groups have to report on their work. Furthermore, Member States are expected to deliver a report on the implementation of the Convention at national level. A Communication that will evaluate the European Agenda for Culture 2007 is planned for the end of 2010. This will lead to a new Work Plan for Culture as of 2011.⁶²¹

In the following chapters we will give a critical overview of the recent actions/programmes/initiatives that have been taken by the European Community to enhance cultural diversity.

4.2.2. Cultural diversity and intercultural dialogue

Although the juridical framework for a European cultural policy is limited, some action was taken at Community level. In the 1990s the European Union already started several programmes, such as the MEDIA programme for the media sector and Rafael, Ariane and Caleidoscoop for the arts sector in order to preserve and promote cultural diversity within the European Union. In 2000 the three specific programmes on Culture were clustered in one programme, called 'Culture 2000'. With a budget of €400m for 4 years it was the first overarching programme in the field of culture. In 2004 the EU decided to extend the programme for another two years (2004-2006).

Since ratification of the UNESCO Convention on Cultural Diversity (18 December 2006), the European Union took additional action to implement the objectives of the Convention. The European Agenda for Culture in a globalising world was an important step in the development of an integrated approach to culture.

Here we will discuss some of these measures. Although they contribute to the protection and promotion of the diversity of cultural expressions, not all of them refer to the Convention as such or have the promotion of cultural diversity as their main objective.

The first objective of the European Agenda for Culture is to promote cultural diversity and intercultural dialogue. Enlargement and freedom of movement in a borderless Union has greatly facilitated cultural exchanges and dialogue within the European continent. At the same time, old and new migratory flows have woven diversity into the fabric of European societies. Cultural diversity needs to be nurtured in a context of openness, respect and exchange between different cultures. However, in increasingly multicultural societies, this diversity requires greater efforts to achieve mutual understanding and respect in order to avoid fear and tension.

Programmes for the promotion of Cultural Diversity

The actual 'Culture 2007-2013' programme, the 'Media Programme' and the 'Europe for Citizens' programme all refer to the promotion of cultural diversity as one of their main objectives.

As Culture 2000 was a success, in 2004 the Commission submitted a proposal to establish the Culture 2007 programme for the period 2007-2013. The European Parliament and the

⁶²¹ Interview with Alison Crabb, Deputy Head of Unit, Cultural Policy and Intercultural Dialogue, 02/03/2010.

Council established the new Programme on 12 December 2006.⁶²² The budget was set at €400 million. The programme aims to promote the transnational mobility of people working in the cultural sector, encourage the transnational circulation of artistic and cultural works and products and encourage intercultural dialogue.

MEDIA is the EU support programme for the European audiovisual industry. It co-finances training initiatives for professionals from the audiovisual industry, the development of production projects and the promotion of European audiovisual works. The MEDIA 2007 programme focuses on training professionals, developing production projects, distributing and promoting films and audiovisual programmes and supporting film festivals. The MEDIA programme is a joint initiative of the Information Society and Media Directorate General and the Education, Audiovisual and Culture Executive Agency.

The EU audio-visual regulatory framework was recently revisited with the adoption of the Audiovisual Media Services Directive⁶²³. The Directive maintains pre-existing promotion measures for European and independent productions in traditional TV broadcasting and requires Member States to ensure that production of and access to European works is also promoted in on-demand services, while the means are left to the EU Member States' discretion. For example, on-demand media service providers can be obliged to invest a certain percentage of turnover in European audiovisual production, reserve a certain share of the catalogue for European works and present European works prominently in catalogues. These measures foster cultural diversity by strengthening the economic basis of Europe's production industries and encouraging the circulation of European works.⁶²⁴

Although less explicit, the Europe for Citizens programme also aims to encourage cultural diversity through intercultural dialogue. The Europe for Citizens programme's main priorities include encouraging citizens to become actively involved in the process of European integration, empowering them to develop a sense of European identity and enhancing mutual understanding between Europeans. In more concrete terms, the programme's priority areas are: promoting participation and democracy at EU level; the future of the Union and its basic values; intercultural dialogue; employment, social cohesion and sustainable development; and boosting awareness of the societal impact of EU policies. In addition to these overarching priorities, the programme sets a number of shorter-term annual priorities to address changing circumstances. Since 2008 the focus has shifted *inter alia* to intercultural dialogue.

The Youth in Action programme wants to contribute to cultural diversity and intercultural dialogue by supporting international activities and exchanges among young people.

The Education, Audiovisual and Culture Executive Agency (EACEA, operational since 1 January 2006) is the Executive Agency that aims to implement a number of strands of more than 15 Community-funded programmes and actions in the fields of education and training, active citizenship, youth, audiovisual and culture. The Agency also manages the programmes that are relevant for the implementation of the Convention, namely Media, Culture and Europe for Citizens. Bringing these programmes under a single banner may

⁶²² Decision No 1855/2006/EC of the European Parliament and the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013).

⁶²³ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance).

⁶²⁴ Xavier Troussard as respondent to our questionnaire for the EC.

help to coordinate management and provide programme beneficiaries with a fully comprehensive service. The agency is in charge of most management aspects of the programmes, including drawing up calls for proposals, selecting projects and signing project agreements, financial management, monitoring of projects (intermediate reports, final reports); communication with beneficiaries and on-the-spot controls.

A European Observatory on Culture and Cultural Diversity

These programmes are the main concrete actions the EU has taken in the field of culture until now. Nevertheless, the question remains as to whether they really stimulate cultural diversity. Also the relationship between the content of the cultural paragraph (art. 151/167) and the European and national policy in this field is not always clear and must be further elaborated.

Although all the programmes mention that they aim to contribute to cultural diversity, in practice nothing is known about the impact of these programmes on cultural diversity. Therefore, there is an urgent need for data on culture and cultural diversity in the European Union. Not only data, but also clear research questions and the development of benchmark research based on common indicators.

An ESSnet (network of national statistical offices) on cultural statistics was set up in September 2009 for a period of 2 years under the auspices of Eurostat⁶²⁵. It will work to refine statistical methodologies in the following four fields:

- Framework and definitions of cultural economy;
- Cultural financing and expenditures;
- Cultural industries and
- Cultural practices and social aspects.

The fact that the EESnet on Cultural Statistics was established is an important step in the monitoring of cultural affairs within the EU. Unfortunately, there is no Task Force for data about cultural diversity.

Although statistics on Culture have now been established, benchmarks to reach in the area of culture have not. The Communication of the Commission of 20 November 2002 on European Benchmarks in Education and Training⁶²⁶ set such benchmarks for Education. The term benchmark is used here to refer to concrete, measurable targets. The communication established benchmarks that should be reached by the end of 2010. This system of benchmarks could serve as an example for implementing the Convention on the Diversity of Cultural Expression. However, caution is required here since cultural indicators are difficult to install and culture and therefore cultural diversity is not easy to measure. Xavier Troussard refers to the complexity of this: *'Many different parameters have to be taken into account; an in-depth reflection on methodology prior to any work is necessary and complex as such. This is because the objective of statistical work in this area should be to capture key data regarding the conditions of creation, production, distribution and dissemination, including consumption and use for a wide range of cultural goods, services and activities. In sectors affected by the digital shift, the traditional concepts of users and producers are being challenged by new functionalities and business models, and the frontier between the*

⁶²⁵ Xavier Troussard as respondent to our questionnaire for the EC.

⁶²⁶ Communication from the Commission – European benchmarks in education and training: follow-up to the Lisbon European Council, COM(2002)629 final.

*two is increasingly blurred, which is an additional complexity to capture in statistical methodology.*⁶²⁷

We therefore suggest the establishment of an Observatory on European cultural policy with an independent status. It would not only collect relevant data but can also evaluate all measures taken by the Community to stimulate cultural diversity. It can establish benchmarks on the basis of common indicators. The Observatory could also coordinate the work of existing research centres and study questions that are important for artistic creation and artistic diversity in Europe. One such theme is the matter of copyright and the consequences of digitalisation. The Observatory could also investigate whether the system of intellectual property rights is still adequate. Or could there be other, more suitable ways of remunerating artists? Another issue could be the relationship between artistic culture and the digital domain. The cultural Observatory could also collect and disseminate examples of good practice in matters of cultural collaboration among cities, regions and countries.⁶²⁸

Intercultural dialogue

As already stated, the concept of cultural diversity can have different meanings. We saw that the UNESCO Convention of 2005 used a broad definition that also refers to the intercultural dialogue between people: *'cultural diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.'* Cultural diversity is important but what is even more urgent is that people from many different cultural backgrounds are able to communicate with each other. Looking at the social map of Europe, one must recognise that there are people with different cultural backgrounds and artistic desires. This can be a source of wealth, but can also be a source of conflicts. Even more important than an intercultural dialogue is intercultural praxis. This can be stimulating by supporting the development of the intercultural competence of citizens.⁶²⁹ Therefore, the EC claims in the document 'Intercultural Dialogue – support through EU programmes' that educational programmes such as Comenius, Erasmus, Grundtvig, Jean Monnet, Erasmus Mundus and Tempus and the Leonardo da Vinci programme on professional experience in another country, also contribute to intercultural dialogue and cultural diversity, since these programmes increase the knowledge and understanding of the diversity of European cultures and languages.

On 18 December 2006 the European Parliament and the Council decided to establish a **European Year of Intercultural Dialogue** in 2008. Through a number of diverse programmes (such as a photo competition, an interreligious dialogue in the European Parliament and a number of festivals) this Year aimed to encourage Civil Society to engage in dialogue to promote cultural diversity within Europe. But it turned out to be a missed

⁶²⁷ Xavier Troussard as respondent to our questionnaire for the EC.

⁶²⁸ Smiers, J. (2002) *The role of the European Community concerning cultural article 151 in the Treaty of Amsterdam. Sustaining the development of intercultural competence within Europe*. Centre for Research, Utrecht School of the Arts, the Netherlands, p. 11; ECOTEC, *A Feasibility Study Concerning the Creation of A European Observatory of Cultural Co-operation. A Final Report to the European Commission*, 18th August 2003.

⁶²⁹ Smiers, J. (2002), *'The role of the European community concerning the cultural article 151 in the Treaty of Amsterdam. Sustaining the development of intercultural competence within Europe'*. Centre for Research, Utrecht Schools of the Arts, The Netherlands, p. 6.

opportunity because there was no overarching policy approach to interculturality and the budget was only €10 euro for the whole Year.⁶³⁰

The European Commission is also cooperating with the Council of Europe on a number of programmes that contribute to the promotion of cultural diversity, namely the Intercultural Cities Programme and the European Heritage Days.

The European Heritage Label should also contribute to 'increasing knowledge and appreciation among citizens of their history and their shared yet diverse cultural heritage' and to 'stepping up intercultural dialogue'.⁶³¹ However, it seems that the core objective of this label still is the establishment of a common European identity.

Artists' Mobility

The transnational mobility of artists and cultural professionals seems to be of major importance for the EU. It should help to make a common "European cultural area" a reality, and contribute to cultural diversity and intercultural dialogue. Therefore the mobility of artists and culture professionals has been a priority of the Culture programme since 2000. The 'European Agenda for Culture' defined removing obstacles to the mobility of artists and cultural professionals as one of the five priorities for action, like different taxation, safety and social regulation. As part of the Open Method of Coordination, an Expert Group on Improving the Conditions for the Mobility of Artists and other Professionals in the culture field was set up in March 2008. As an accompanying measure, the European Commission launched a study funded by the Culture Programme to provide an overview and typology of the mobility schemes that already exist in Europe, to identify any gaps and to propose recommendations for possible action at EU level. (ERICarts Institute, November 2008).

One of the conclusions was the unequal balance between Western and Eastern EU Member States. Dragan Klaić already expressed the following hope on 26 November 2002 in the European Parliament about the enlargement of the European Union: 'that EU membership will provide additional development opportunities, broaden diversity instead of imposing uniformity, that it will encourage institutional and cultural infrastructural modernisation and create new opportunities for international mobility and collaboration'.⁶³² Lidia Varbonova was also critical about the enlargement of the European Union and the impact on artists' mobility. She pointed out that Central and Eastern European countries already feared that the opening up of the market would lead to the migration of talented artists to the West⁶³³, and this movement would be stimulated even more by the promotion of artists' mobility.

⁶³⁰ Decision No 1983/2006/EC of the European Parliament and the Council of 18 December 2006 concerning the European Year of Intercultural Dialogue (2008). Other Programmes also pay attention to intercultural dialogue and cultural diversity: the Seventh Framework Programme (FP7) has focused since 1994 on eight areas of which 'major trends in society' is one. These major trends are trends such as 'tolerance and cultural diversity' and 'religion and secularism across Europe'. The European Instruments for Democracy and Human Rights Programme (EIDHR) can contribute since the diversity of cultural expression is a fundamental right.⁶³⁰ Structural programmes, like Interreg, stimulate the development of specific regions. Finally, the European Social Fund stimulates activities in socially vulnerable areas. In 2008 the Commission commissioned a study entitled 'Sharing diversity: National Approaches to Intercultural Dialogue in Europe'. The European Institute for Comparative Cultural Research (ERICarts Institute) worked together with a group of 12 key experts / special advisors and 37 national correspondents to investigate concepts of intercultural dialogue.

⁶³¹ Council conclusions on the creation of a European heritage label by the European Union, 2008/C 319/04

⁶³² Smiers, 2002, p. 7

⁶³³ Varbonova, L. (2007), 'The European Union Enlargement Process: Culture in between National Policies and European Priorities' in *The Journal of Arts Management, Law and Society*, vol. 37, no.1, p. 60. At the end of 2007, the European Parliament voted for an additional line (1.5 million euro) on the 2008 budget dedicated to supporting the environment for the mobility of artists through a new pilot project. As part of this, two

1. Therefore, a special effort should be made by the Community and by the Western Member States. The Community should establish special funds – like the mobility Fund ‘Step Beyond’ of the European Cultural Foundation (Amsterdam) - or resources in cooperation with the Western Member States in order to ensure that cultural collaboration and artists’ mobility between Western and Eastern Europe is possible on a broad scale.
2. Clause 2 of Article 167/151 states that action by the Community shall be aimed at encouraging co-operation between Member States and, if necessary, supporting and supplementing their action. Member States should therefore be encouraged to spend part of their subventions on artistic projects in which artists co-operate Europe-wide.⁶³⁴
3. Opportunities should be supported where cultural mediators can meet each other. Many of these networks exist already. Nevertheless, cultural networks should be further extended, strengthened and digitalised by the European Community.

Cohesion Policy 2007-2013: Culture

In addition to the Programmes related specifically to Culture, there are also the Structural Funds, such as Interreg and the European Social Fund, which also contribute to culture and cultural diversity in an indirect way. Cultural infrastructures, cultural activities and creative industries can make a major contribution to a region’s attractiveness and approach to its economic development. The production of content matters more and more, and this often depends on the existence of a cultural environment. Cohesion Policy for 2007-13 aims at fully mobilising culture and creativity for regional development and job creation.

The development of cultural activity is not in itself one of the objectives of the Structural Funds, the actual aim of which is regional development and cohesion using various means. Nevertheless, the structural funds can provide suitable conditions for mobilising cultural and creative industries, for example by encouraging cultural heritage for business use and supporting the restructuring of urban areas in crisis. Culture, creative businesses and related branches can be valuable sectors in this respect, as they are a source of common identity and shared values, two notions that are typically closely linked with the regional and local dimension.

Between 2007 and 2013, planned EU expenditure for culture under the Cohesion policy amounts to more than EUR 6 billion, representing 1.7% of the total budget. EUR 3 billion is allocated for the protection and preservation of cultural heritage, EUR 2.2 billion for the development of cultural infrastructure, and EUR 775 million to support cultural services. In addition, support for creative industries can be provided under other headings, such as research and innovation, promotion of small and medium-size enterprises, information society and human capital. The type of cultural projects supported by the Structural Funds and the European Social Fund may vary from one Member State to another and represent

initiatives were launched in 2008, namely a feasibility study for a Europe-wide system of information and the networking of existing structures supporting mobility in different cultural sectors.

At the end of 2008 a new budget line was voted for. The objective of this new appropriation is to enable contributions to the operational costs of mobility funds, programmes or schemes on a matching basis, in the sense that European Union support will free up or elicit new funding to be used exclusively to achieve concrete mobility, and/or is used to open access to a new target group, geographical area, expressed need or other similar improvement/development (added value) and/or is used to generate new programmes, formats or structured experiences of mobility.

⁶³⁴ Smiers, 2002, o.c.

differing amounts. A survey of the period 1994-1999 has shown that Member States make very different choices as to the use of the Structural Funds.⁶³⁵

The Member States, and certainly the new ones, could be stimulated to include cultural projects in their Structural Funds Programmes. A list of examples of good practices in national, regional and local cultural policies should be drawn up. Not as a competition but as inspiring demonstration of how cultural policies can contribute to the flourishing of cultural diversities.⁶³⁶

4.2.3. The Creative and Cultural industries and Cultural Diversity

Although the UNESCO convention opts for a broad definition of cultural diversity, or to put it more correctly, the diversity of cultural expressions, one of the important reasons for the adoption of the Convention Cultural Diversity (2005) was also the discussion within the WTO about the place of cultural products and services. Many supporters of the Convention feared the negative effects of economic globalisation on culture. The definition used in the Convention also refers to this more economic approach of culture: *'Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions but also through divers modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.'*

It was no coincidence that the European Union was a party to the Convention. The more economic approach to culture also provides the EU with a basis for action. Although the aim of the Convention is not only to ensure special treatment of culture in trade negotiations or to confirm the sovereign right of states to adopt cultural policies, it cannot be denied that policy attention to the cultural and creative industries has grown since then. The second set of objectives of the 'European Agenda for Culture' therefore focuses on the promotion of culture as a catalyst for creativity in the framework of the Lisbon Treaty on growth and jobs and its follow-up "EU 2020". There is a growing realisation that, for Europe, the rapid roll-out of new technologies and increased globalisation has meant a striking shift away from traditional manufacturing towards services and innovation. Many recent studies have shown that the cultural and creative industries represent highly innovative companies with large economic potential, contributing around 2.6% to the EU GDP and providing quality jobs to around 5 million people across EU 27. Cultural industries are an asset to Europe's economy and competitiveness. Creativity generates both social and technological innovation and stimulates growth and jobs in the EU.⁶³⁷

On 16 December 2008 the European Parliament and the Council decided to establish The European Year of Creativity and Innovation in 2009.⁶³⁸ Cultural diversity was named as 'a source of creativity and innovation' and was addressed as a related theme for the Year. This was also the case for cultural and creative industries, which were promoted during the Year.

The Council also contributes to shaping the EU approach to cultural policies through conclusions dedicated to specific objectives, such as the Council Conclusions on the

⁶³⁵ Commission working document, Application of Article 151 (4) of the EC Treaty: use of the Structural Funds in the field of culture during the period 1994-1999, 2002

⁶³⁶ Smiers, 2002, o.c.

⁶³⁷ Study on the economy of culture in Europe, conducted by KEA for the European commission, 2006, UNCTAD (2008) report on 'Creative Economy – the Challenge of Assessing the Creative Economy – towards informed policy making'.

⁶³⁸ Decision No 1350/2008/EC of the European Parliament and the Council of 18 December 2006 concerning the European Year of Creativity and Innovation (2009)

contribution of the cultural and creative sector to the Lisbon Strategy of May 2007, and the Council's Conclusions on culture as a catalyst for creativity and innovation of May 2009⁶³⁹.

In April 2010 the Commission adopted the **Green Paper** 'Unlocking the potential of cultural and creative industries'. It is a synopsis of the former papers and think tanks about cultural and creative industries. In this Green Paper the flourishing of the cultural and creative industries is clearly linked to cultural diversity. 'This Green Paper, referring to CCIs, aims at capturing the various connotations ascribed to the terms 'cultural' and 'creative' throughout the EU, reflecting Europe's cultural diversity.' (Green Paper, Brussels, COM (2010) 183) The paper also emphasises that there is a strong and distinctive regional dimension to a policy concerning CCIs. Supporting the CCIs is a stimulant for regional economic development. And, finally, the paper sees an important interrelation between a policy for CCIs and the mobility of artists and cultural works. 'The circulation of works also benefits European audiences by offering them access to a more diverse cultural landscape. At another level, circulation beyond national borders within the European Union helps European citizens to better know and understand each other's cultures, to appreciate the richness of cultural diversity and to see for themselves what they have in common. Finally the mobility of artists, cultural practitioners and works are also essential for the circulation of ideas across linguistic and national borders and giving to all a wider access to cultural diversity.'⁶⁴⁰ (Green Paper, 2010: 15)

Despite the rhetoric at European Level about the importance of culture and the strong evidence that the cultural and creative industries contribute significantly to the Lisbon Agenda, culture remains relatively low in the hierarchy of Commission concerns. The fact that there is no reference to the cultural and creative industries nor to culture in general in the EU2020 agenda is symptomatic for the place the EC gave to culture. The cultural sector is often disadvantaged in the negotiation process because it does not carry sufficient political clout.⁶⁴¹

With the broadening of the cultural concept to include the cultural and creative industries, European legislation, policies and programmes in a wide range of areas potentially impacts on culture. For that reason the implementation of paragraph 4 of article 167 is urgently required. As the study 'The Economy of Culture in Europe' recommended, there is a need for more horizontal coordination across the Commission's Directorates such as Culture, Economy and Education. With the implementation of the European Agenda for Culture, the EC made a start on more cooperation across the Commission Directorates. Hopefully it will be organised in a more structured way. The failure to comply with article 167, § 4 has proved especially problematic in relation to areas such as employment conditions or Intellectual Property Rights. These issues never appear on the Culture Council's agendas but have considerable impact on culture issues and on cultural diversity.⁶⁴²

Recommendation

In order to ensure horizontal coordination interservice procedures for the automatic cultural impact assessment of all prospective EU actions must be addressed. The notion of a Creative Task Force, as suggested in The Economy of Culture in Europe study (2006), could provide a platform and higher profile for the consideration of cultural and creative sector interests.

⁶³⁹ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/educ/94291.pdf

http://ec.europa.eu/culture/our-policy-development/doc/CONS_NATIVE_CS_2009_08749_1_EN.pdf

⁶⁴⁰ European Commission (2010), 'Green Paper: Unlocking the potential of cultural and creative industries', <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0183:FIN:EN:PDF>, p. 15

⁶⁴¹ Briefing paper on the implementation of article 151.4 of the EC Treaty, 18 June 2007

⁶⁴² KEA, European Affairs (2006), The Economy of Culture in Europe, European Commission.

4.3. Coordination between Member States and within the European Commission

4.3.1. Coordination between Member States: Open Method of Coordination (OMC)

As stated above, the objectives of the 'Agenda for Culture' were to be achieved through the Open Method of Coordination (OMC), a 'soft' policy instrument which has already demonstrated its merits in other EU policy areas. It has been defined as an instrument of the Lisbon Strategy (2000). However, the method was influenced by the experiences of the European Employment Strategy (EES), which can be traced back to the early 1990s to the Commission's 1993 White Paper, the conclusions of the December 1994 Essen European Council, the Cardiff process (June 1998) and the Cologne process (June 1999). Several of these processes provided elements of soft coordination in the form of non-binding prescriptions for national policies and reporting at EU level.⁶⁴³ With direct national policies towards common objectives the OMC provided a new framework for coordination between the Member States.

Under this intergovernmental method, each of the Member States is evaluated by its "peers" (peer pressure), with the Commission's role being limited to surveillance. The OMC is a method of so-called "soft governance": it is devoted, through a formal and institutional process of *information sharing* and monitoring, to implementing norms. The OMC pushes Member States into coordinating their national public actions within a collectively decided framework. Thus, the OMC is a means of voluntary cooperation between the Member States.

Generally, the OMC works in stages. Firstly, the Council of Ministers agrees on policy goals. Secondly, Member States transpose guidelines into national and regional policies. Thirdly, specific benchmarks and indicators to measure best practice are agreed upon. Finally, results are monitored and evaluated. However, the OMC differs significantly across the various policy areas to which it has been applied.

The OMC seems to be an ideal method for the implementation of the UNESCO Convention, since it covers many competences which are the object of the subsidiarity principle. The Convention is ratified by the Union as a whole, so the coordination of national policies towards common objectives is a necessity and can be achieved through this method.

However, since the baptism of the method in Lisbon, much has been written about it. Luc Tholoniati, assistant to the Secretary-General of the Commission Directory, is quite positive in his evaluation of the method. Firstly, the OMC has proven a useful tool for actors to 'agree to disagree' on European political priorities, because it offers flexible institutional tools and techniques to export, publicise or confront interests at EU level. When actors have contradictory views, a little alteration sometimes suffices and when there is consensus, OMC provides a launch pad for more radical actions.⁶⁴⁴ Furthermore, the OMC has increased the capacity of the EU system to take policy initiatives in areas previously untouched at EU level, so the capacity to act in new domains has increased.⁶⁴⁵ Also the ability to 'speak with one voice' on symbolic issues of importance to citizens, has increased. Now the EU can respond more effectively to changing circumstances.⁶⁴⁶

However, Tholoniati also ascertains some weaknesses: *'The review of the OMC processes reveals a paradox for EU actions in the form of a 'soft-law dilemma'. On the one hand, there is a wish to establish transparent and predictable European frameworks conducive to*

⁶⁴³ Tholoniati, L. (2010), 'The Career of the Open Method of Coordination: Lessons from a 'Soft' EU Instrument' in *West European Politics*, vol. 13, 1, p. 95-96.

⁶⁴⁴ Tholoniati, 2010, p. 111.

⁶⁴⁵ Tholoniati, 2010, p. 95.

⁶⁴⁶ Tholoniati, 2010, p. 111.

*structural reforms at national level: this is essential to ensure delivery over time, as well as to mobilise stakeholders. On the other hand, there is a tendency to add to the EU agenda with new initiatives: policy activism is necessary to keep the political momentum of the EU agenda, secure ownership and interests of political actors, and avoid the bureaucratisation of OMC processes. ...It creates a tension which is difficult to resolve in practice, and which risks combining the worst of both worlds. On the one hand, political activism may lead to volatile policy priorities and an endless multiplication of priorities, initiatives or processes blurring the sense of direction of EU action ('all-out policy agenda'). On the other hand, institutional predictability may turn into a complex administrative routine of reporting reserved to the national civil service elite ('bureaucratisation trap').*⁶⁴⁷

Despite these constraints, Tholoniati concludes that the right balance between activism and predictability is a challenge inherent to many 'soft law' instruments. However, the OMC offers enough tools and techniques to overcome these barriers. *'Importantly, the OMC has extended the EU's 'tool kit'. While the use of the instruments is in the hands of political and administrative actors, the OMC has put a conceptual, knowledge and organisational infrastructure at the EU's disposal.'*⁶⁴⁸

Sandra Kröger, from the Centre for European Studies at the University of Bremen, expresses more doubts on the legitimacy of the OMC. Whether authors do or do not believe in OMC depends *inter alia* on their appreciation of soft law more generally. OMC is then evaluated as positive only when authors believe that soft law can contribute to democratisation and participation. She also points out that there is no consensus on the fact that OMC would lead to policy change. However, most critical accounts in the literature focus on procedure. From this perspective, the intended learning processes do not take place. This is associated with the choice of 'good practices' and indicators, too much information and documents, with too little time for discussion, language barriers, reports rather than strategic plans, institutional differences between states, etc. A lack of incorporation in existing policy procedures and a lack of political will to implement the OMCs is also ascertained.⁶⁴⁹ Moreover, although the OMC was introduced to help cure the democratic deficit of the EU, its legitimacy is questioned. Authors who question the legitimacy focus their criticism on a lack of direct participation instead of representation. Many scholars perceive a lack of openness in the OMC process which resembles deliberation between elites for elites in which parliaments, social partners and NGOs are hardly involved and political alternatives are not discussed. This lack of transparency leads to a real democratic deficit. Thus, the ambition of OMC to be more democratic than 'hard' governance processes is an illusion.⁶⁵⁰

However, in order to evaluate the method of implementation of the UNESCO Convention, we have to evaluate how the OMC has been used in the field of culture and, in particular, in order to achieve the objectives of the European Agenda for Culture.

The idea of cooperation between Member States in the field of culture was already established in the second paragraph of article 151 EC, since the Community should aim at 'encouraging cooperation between Member States' and, if necessary, act to support and supplement the Member States' actions in specific areas. Though, for an instrument to organise this coordination, we had to wait for the Agenda for Culture and the Open Method of Coordination.⁶⁵¹

⁶⁴⁷ Tholoniati, 2010, p. 111.

⁶⁴⁸ Tholoniati, 2010, p. 113.

⁶⁴⁹ Kröger, S. (2009), 'The Open Method of Coordination: Underconceptualisation, overdetermination, depolitisation and beyond' in Kröger, S. (ed.), 'What we have learnt: Advance, pitfalls and remaining questions in OMC research', *European Integration Online Papers (EIoP)*, Special Issue 1, Vol. 13, Art. 5, <http://eiop.or.at/eiop/texte/2009-005a.htm>, p. 5.

⁶⁵⁰ Kröger, 2009, p. 5-6.

⁶⁵¹ Craufurd Smith, R. (2007), 'A new EU Agenda for Culture?' on <http://www.efah.org/components/docs/Agenda%20For%20Culture%20EN.Pdf>, p. 3.

In practice the OMC is used in four expert working groups in order that Member States move ahead in the five priority areas that were articulated by the Council around the three main objectives of the Agenda for Culture:

- Expert group on mobility of artists and other cultural professionals
- Expert group on cultural and creative industries
- Expert group on synergies between education and culture
- Expert group on mobility of collections

Participation of the Member States in the working groups is voluntary and they can join at any time. Each Member State can nominate an expert. Ideally, an expert has operational as well as policy experience in the relevant field of the working group. This results in working groups ranging from 20 to 25 members. Moreover, each working group can decide to invite other experts from other fields when deemed necessary. The working groups are responsible for deciding which Member State or States will be chairing the group. These chairs will report regularly (once per Presidency) to the Cultural Affairs Committee on the group's progress. The Cultural Affairs Committee will be given an opportunity to provide guidance to the working groups in order to guarantee the desired outcome and the coordination of the groups' work. Furthermore, the Commission must support the work of the working groups by launching studies relevant to their field of work and it will provide logistical and secretarial support.⁶⁵² These Expert Working Groups have to report on their work in June 2010. The results will lead to policy debate in the European Parliament's Committee on Cultural Affairs. This process could also influence the new Work Plan on Culture that will be drawn by the end of 2010.⁶⁵³

According to Smith, this development is important because it may help to raise the profile of cultural issues at domestic level, leading to improvements in domestic policies in areas that would normally fall outside the reach of community law or where the Member States would not welcome Community direction.⁶⁵⁴

However, a common criticism of the OMC in general is that national parliaments and the European Parliament tend to be excluded from the process. To overcome this, the Communication states that the 'European Parliament, the Economic and Social Committee and the Committee of the Regions should be involved in the process'.⁶⁵⁵ Alison Crabb, Deputy Head of Unit, Cultural Policy and Intercultural Dialogue, however, points to the fact that the OMC is aimed at coordinating national practices and not at mainstreaming between European Institutions. Moreover, the OMC is a tool that will result in recommendations and not a law-making process. So it is normal that the Parliament is excluded from the process as such. However, the Parliament will ultimately be informed of the results.⁶⁵⁶

The OMC is a tool that is Member State driven and therefore grants ownership to them. Furthermore, peer-learning makes it a powerful learning tool.⁶⁵⁷ Within the OMC, other learning tools such as peer learning visits can be introduced.

⁶⁵² Conclusion of the Council and the Representatives of the Governments of the Member States, meeting within the Council, on the Work Plan for Culture 2008-2009, 2008/C 143/06.

⁶⁵³ Interview with Alison Crabb, Deputy Head of Unit, Cultural Policy and Intercultural Dialogue, 02/03/2010.

⁶⁵⁴ Craufurd Smith, 2007, p. 3.

⁶⁵⁵ Craufurd Smith, 2007, p. 4.

⁶⁵⁶ Interview with Alison Crabb, Deputy Head of Unit, Cultural Policy and Intercultural Dialogue, 02/03/2010.

⁶⁵⁷ Interview with Alison Crabb, Deputy Head of Unit, Cultural Policy and Intercultural Dialogue, 02/03/2010.

Coordination with Civil Society or the Culture Forum / Platforms

The 'Agenda for Culture' initiated the idea of a **Culture Forum** in order to integrate the cultural sector more closely into the activities of the EU in the field of culture. The first European Culture Forum took place in Lisbon in September 2007. On 19 February 2008 an information session was organised in Brussels. Following these two events, a call for expressions of interest was published in which two new thematic Civil Society platforms (on access to culture and on potential of culture and creative industries) were initiated. These two newly established platforms complemented the existing platform on intercultural dialogue which was created ahead of the 2008 European Year on Intercultural Dialogue.⁶⁵⁸

Together the platforms are expected to produce policy recommendations to be discussed with the broader cultural sector during large-scale Cultural Forums such as the one organised on 29 and 30 September 2009 in Brussels. More than 900 people came to Brussels for a broad political debate.⁶⁵⁹

The platforms act as the channel for cultural stakeholders to provide concrete input and recommendations and actively contribute to the implementation and further development of the European Agenda for Culture.⁶⁶⁰

Since Civil Society is not the objective of this section of the research, we will not elaborate further on the working and results of the Culture Forum here. Of interest here is how the Platforms and the OMC expert groups interact. According to Craufurd, there is a lack of opportunities for cultural organisations to gradually feed the OMC, but for such a process to be effective, adequate time must be given for consultation and relevant information and reports need to be readily accessible.⁶⁶¹ However, interaction between the OMC expert groups and the Platforms does exist: the Platforms report on their work by giving presentations to OMC expert groups on a regular basis, meetings between the chair of an expert group and the chair of a platform are organised, the OMC expert groups report on their work during the latest Culture Forum, etc. Nevertheless, a structural interaction process does not exist.⁶⁶² A more structured interaction process between the OMC expert groups and the Platforms needs to be established in the future.

4.3.2. Coordination within the European Commission

The Commission should enhance systematic interdepartmental/interservices consultation and coordination. Within the framework of the European Agenda for Culture, this coordination has been strengthened and forms an integral part of one of the priorities of the Agenda, which is the mainstreaming of culture in other EC policies, based on the Treaty obligation (Article 151, paragraph 4) for the Union to take culture into account in all its actions so as to foster intercultural respect and promote diversity.

An interservices group (GIS) on culture, which gathers together all Directorate Generals within the Commission for which culture has a direct or indirect relevance, was set up and has met regularly since 2007. It succeeded the interservices group on cultural diversity set up internally for the preparation, conduct and conclusion of the negotiations on the UNESCO Convention.

⁶⁵⁸ European Commission Culture (2010), on <http://ec.europa.eu/culture>.

⁶⁵⁹ Platform for Intercultural Europe (2010), on <http://www.intercultural-europe.org>.

⁶⁶⁰ European Commission Culture, 2010.

⁶⁶¹ Craufurd Smith, 2007, p. 4.

⁶⁶² Interview with Alison Crabb, Deputy Head of Unit, Cultural Policy and Intercultural Dialogue, 02/03/2010.

As far as culture and trade are concerned, the main Directorate Generals involved (i.e. DG TRADE, DG EAC and DG INFSO) are included in all trade negotiations where cultural issues might be discussed.⁶⁶³

Moreover, bilateral contacts with other Directorate Generals were set up in order to solve more specific problems. Cooperation with the DG Regional Policy can serve as an example here, namely the Cohesion Policy 2007-2013: Culture. (see annex I) These structural funds can provide suitable conditions for mobilising cultural and creative industries, for example by encouraging heritage for business use. Culture, creative businesses and related branches can be valuable sectors in this respect, as they are sources of common identity, a notion that is closely linked with the regional and local dimension.

4.3.3. Conclusion

The Open Method of Coordination, the Culture Forum and coordination between the EC Directorates Generals provided space for coordinating the actions concerning the implementation of the European Agenda for Culture and thus the UNESCO Convention. Since the European Agenda for Culture was adopted, coordination within the European Commission, between the Member States and with Civil Society seems to have increased significantly in the area of culture. Nevertheless, coordination between the different forums will remain an important action point, since each actor tends to work separately and towards its own targets, without looking back or considering the view of others. In addition to the OMC, the CAC and the Civil Society Culture Forum, there are still other interest groups looking at culture and cultural diversity, such as the network of Eurocities, which has also created a Cultural Forum that reflects on the role of cities and cultural diversity. As an interest group it is an important partner for the European Union, but it is not always clear how the European Commission deals with the results of its work.

4.4. Implementation at Member State level

Although the European Union has ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, not all Member States have as yet ratified it individually.⁶⁶⁴

In order to evaluate the implementation of the UNESCO Convention at EU Member State level, 8 countries were selected to serve as case studies for this research. The selected countries were Bulgaria, Denmark, France, Germany, Hungary, Ireland, Italy and Portugal. The UNESCO Commissions of these countries received a questionnaire on the implementation of the Convention in their country. However, Ireland, Italy and Portugal did not respond. Instead, we used a completed questionnaire from Spain. In all the Member States we analysed, the Convention has already entered into force.

⁶⁶³ Xavier Troussard as respondent to our questionnaire for the EC.

⁶⁶⁴ The following Member States have ratified it: Romania (20/07/2006), Finland (18/12/2006), Austria (18/12/2006), France (18/12/2006), Spain (18/12/2006), Sweden (18/12/2006), Denmark (18/12/2006), Slovenia (18/12/2006), Estonia (18/12/2006), Slovakia (18/12/2006), Luxembourg (18/12/2006), Lithuania (18/12/2006), Malta (18/12/2006), Bulgaria (18/12/2006), Cyprus (19/12/2006), Ireland (22/12/2006), Greece (03/01/2007), Italy (19/02/2007), Germany (12/03/2007), Portugal (16/03/2007), Latvia (06/07/2007), Poland (17/08/2007), United Kingdom of Great Britain and Northern Ireland (07/12/2007), Hungary (09/05/2008) and The Netherlands (09/10/2009). In the remaining EU Member States, Belgium and the Czech Republic, the ratification process is still ongoing.

Furthermore we obtained additional information on the implementation in our respondent's countries via the website of ERICarts, a network with a Europe-wide focus which works with the Council of Europe on the 'Compendium. Cultural Policies and Trends in Europe'.⁶⁶⁵

4.4.1. Definition of Cultural Diversity or 'the diversity of cultural expressions'

Although not a huge amount of information was obtained from the questionnaires, it seems that the notion of cultural diversity is interpreted differently in our selected countries. Bulgaria, for example, seems to systematically link cultural diversity and the implementation of the Convention with the protection of minorities and minority law. Denmark sees cultural diversity as an integral part of cultural policies as a whole, while France and certainly Spain mainly focus on action taken in the field of cultural industries and international relations and development aid. Hungary tends to be the most concrete and seems to apply a rather holistic definition. Measures relating, for example, to the mobility of artists and collections as well as minority and linguistic issues or broadcasting are mentioned. It is important that the various Member States be made aware of the broad definition of cultural diversity within the Convention and what the opportunities of the Convention are. The exchange between states of information on good practices would be useful.

4.4.2. Coordination between the different ministries

Almost every Member State emphasised the importance of coordination between the various Member States' ministries involved in order to implement the Convention.

Some countries point to structural coordination. In **Denmark** systematic coordination takes place between the relevant ministries (Foreign Affairs, Economic and Business Affairs, Education and Refugee, Immigration and Integration Affairs).⁶⁶⁶

In **Bulgaria** coordination takes place between the Ministry of Culture and the Ministry of Foreign Affairs. Furthermore, there are a number of interministerial commissions where cultural competencies form the entire activity and there is a Consultative Council on Cultural Affairs and a National Council for Cooperation on Ethnic and Demographic Affairs (NCCEDA). The NCCEDA covers 11 ministries.⁶⁶⁷

To facilitate dialogue and coordinate action between culture and other governments **Spain** has created a platform, namely "Plan Anual de Cooperación Internacional" (Annual International Co-operation Plan, PACI). It is coordinated by the Ministry of Foreign Affairs and Co-operation (MAEC is its Spanish acronym). Representatives of Civil Society are on it too. Furthermore, the "Alliance of Civilisations" was a project on which the various ministries cooperated. It has materialised into a National Plan that includes among its goals the encouragement of "intercultural dialogue". Finally, at the end of 2009, an Agreement was signed between the Ministry of Foreign Affairs and Co-operation and the Ministry of Culture with the aim, among other things, of strengthening the ties between Spanish society and the international sphere.⁶⁶⁸

⁶⁶⁵ ERICarts (2010), Compendium. Cultural Policies and Trends in Europe, at <http://www.culturalpolicies.net/web/index.php>.

⁶⁶⁶ Bodil Mørkøv Ullerup from the Danish National UNESCO Commission as respondent to our legal questionnaire for Denmark, Q7.

⁶⁶⁷ Deyana Danailova from the Bulgarian National UNESCO Commission as respondent to our legal questionnaire for Bulgaria, Q7.

⁶⁶⁸ Josefina López from the Spanish Ministry of Culture as respondent to our legal questionnaire for Spain, Q7.

In **Germany** coordination of the implementation of the Convention happens by means of periodical consultations at the invitation of the Ministry of Foreign Affairs which is the lead ministry for this UNESCO Convention.⁶⁶⁹

In **France** the document 'Communication de la France pour une nouvelle stratégie culturelle extérieure de l'Union Européenne' was prepared by an interministerial working group. Although, according to our respondent, structural coordination between the different ministries has not yet been established, interministerial cooperation is described as best practice.⁶⁷⁰

In spite of these efforts, most of our respondents still describe coordination as an action point. Moreover, **Spain**, for example, points to the need for more coordination between central government and the regions (which, in the future, will be established by the Contact Point).

There is, therefore, not a lack of cooperation. However, in most Member States the installation of a structural interministerial and multilevel body to implement the Convention would be appropriate.

Coordination with Civil Society

Coordination with Civil Society seems to be established via the Coalitions for Cultural Diversity. Other action to communicate with Civil Society is also taken. The **Danish** Ministry for Culture, for example, has regularly informed stakeholders and Civil Society since the Convention came into force. Open public hearings/meetings, at which the status of the Convention, initiatives and activities are discussed, are organised on a yearly basis.⁶⁷¹

In **Bulgaria**, NGOs participate inter alia in the NCCEDA. Furthermore, a public council on cultural diversity has been established at the Ministry of Culture. In 2006, the Ministry of Culture's Department for Cultural Integration organised several regional workshops for governments and non-governmental experts working in the field of culture on issues related to the cultural integration of ethnic minorities.⁶⁷²

4.4.3. Measures at national level

Most of our respondents point to the fact that their country already complied with the provisions of the Convention before it entered into force. Therefore, their governments decided that no further implementation measures were strictly needed. Denmark concluded during the administrative process that led to ratification that it was already complying with the provisions. Moreover, implementation forms an integral part of Danish and Bulgarian Cultural Policy.⁶⁷³

⁶⁶⁹ Christine M. Merkel from the German UNESCO Commission as respondent to our legal questionnaire.

⁶⁷⁰ Jean-Pierre Régnier from the French UNESCO Commission as respondent to our legal questionnaire for France, Q7.

⁶⁷¹ Bodil Mørkøv Ullerup from the Danish National UNESCO Commission as respondent to our legal questionnaire for Denmark, Q7.

⁶⁷² Deyana Danailova from the Bulgarian National UNESCO Commission as respondent to our legal questionnaire for Bulgaria, Q7.

⁶⁷³ Bodil Mørkøv Ullerup from the Danish National UNESCO Commission as respondent to our legal questionnaire for Denmark, Q4.

Although most of them were already established before the Convention came into force, **Bulgaria** mentioned some of its measures taken:

Bulgaria is, for instance, very active when it comes to its policies in the region of South-Eastern Europe and annually takes part in the "Cultural Heritage - A Bridge Towards A Shared Future" ministerial conference on cultural heritage in South-Eastern Europe. 'The Convention stimulates us to speak of the value of our cultural heritage, not merely in terms of its cultural, historical and aesthetic properties but to consider its social significance and try to identify the link between heritage and society, and between heritage and every individual. We are convinced that, if the common cultural heritage is well protected and managed, it could be used as a significant resource for sustainable development of the regions.'⁶⁷⁴

In 2008, within the Framework of the European Year of Intercultural Dialogue, the Ministry of Culture developed a national project called "House". The project stimulated the public-private partnership. During the implementation of the activities within the framework of the Year of Intercultural Dialogue, the promotion of the initiative occurred through inclusion of regional and municipality experts on ethnic and demographic issues and representatives from scientific circles and NGOs with a range of activities, linked to cultural diversity and intercultural dialogue and traditional cultural-educational centres in the country, such as "chitalishta"/cultural clubs/community centres and houses of culture, and, in particular, from ethnic minorities and the media, as well as famous cultural activists from different ethnic groups.⁶⁷⁵

In spite of the limited budget, the Ministry of Culture provides financial support for cultural projects organised by minority communities ("Roma Cultural and Information Center", "Roma Music Theatre", various ethnic groups' festivals such as the 'ethnos festival').

An internet portal regarding ethnic minorities was also created with the support of the Council.⁶⁷⁶

A National Council of Ethnic and Demographic Issues (NCEDI) was established in 1997. In 2004 it became the National Council for Interethnic Interaction. The Council works in cooperation with different governmental agencies and NGOs. An internet portal on ethnic minorities was created with the support of the Council.⁶⁷⁷

In 2004, a governmental "Action Plan" was adopted to implement the "Decade of Roma inclusion" (2005-2015).⁶⁷⁸

Hungary also took concrete action:

In 2009 ten European heritage institutions took the initiative to develop the project 'Lending for Europe/ Collection Mobility 2.0'. The goal of the project is to introduce into everyday museum practice the most recent concepts, standards and procedures on lending and borrowing museum collections. Within the framework of the CM 2.0 project, three

⁶⁷⁴ Deyana Danailova from the Bulgarian National UNESCO Commission as respondent to our legal questionnaire for Bulgaria, Q4.4.

⁶⁷⁵ Deyana Danailova from the Bulgarian National UNESCO Commission as respondent to our legal questionnaire for Bulgaria, Q4.3.

⁶⁷⁶ Ericarts, 2010, Bulgaria.

⁶⁷⁷ ERICarts, 2010, Bulgaria.

⁶⁷⁸ ERICarts, 2010, Bulgaria.

successive EU presidencies, namely Spain, Belgium and Hungary decided to develop an innovative collections mobility expert training package. The training will be organised in three different venues. The choices for the venues have been made on the basis of the EU chair list (Madrid, Prado: May 2010, Antwerp: December 2010, Budapest, Museum of Fine Arts: February 2011). As one of the priorities of the Hungarian EU presidency is collections' mobility, Hungary will place special emphasis on the theme of collections' mobility.

Based on the priorities of the Culture Plan 2008-2010 the European Union set up OMC (Open Method of Coordination) sub-working groups dealing with the promotion of collections' mobility. Hungary participates in two of the EU's OMC sub-working groups dealing with the promotion of collection mobility, focusing on immunity from seizure and state indemnity/insurance/non-insurance. In this latter group Hungary holds the post of the co-chair together with the representative from the Netherlands.⁶⁷⁹

4.4.4. Stumbling blocks in the implementation process

We received only a few responses to this question.

Bulgaria identified the following major problems relating to the implementation of the Convention:

- Insufficient funds
- Lack of sufficient coordination between institutions
- There is a lack of awareness of the process of the implementation of the Convention in small and medium-sized cultural industries and NGOs (not in "major companies"). Therefore alliances with them have to be established and these organisations and entrepreneurs made aware of the benefits to them.⁶⁸⁰

Spain points to coordination as an action point.⁶⁸¹

It is clear that there is a lack of information and coordination regarding the measures and actions that the various Member States take to implement the UNESCO Convention on Cultural Diversity. Our former recommendation for a European Observatory on cultural policy could coordinate this work. It would also bring together good practices, so that the Member States can learn from each other. In fact, the German ERICarts, the European Institute for Comparative Cultural Research in Bonn, has already done much work with their Compendium on 'Cultural Policies and Trends in Europe'. In March 2008 the Institute published the report 'Sharing Diversity' on **National Approaches to Intercultural Dialogue in Europe**. Funded by the EU DG Education and Culture, the study was undertaken with a team of European experts specialising in the fields of culture, education, youth and sports.

⁶⁷⁹ Hungary's Department of Cultural Heritage and Cooperation as respondent to our legal questionnaire for Hungary, Q8

⁶⁸⁰ Deyana Danailova from the Bulgarian National UNESCO Commission as respondent to our questionnaire for Bulgaria, Q9

⁶⁸¹ Josefina López from the Spanish Ministry of Culture as respondent to our legal questionnaire for Spain, Q9

4.5. Linguistic diversity

4.5.1. The UNESCO Convention and linguistic diversity

The Convention on Cultural Diversity recalls in its preamble that '**linguistic diversity is a fundamental element of cultural diversity**'. Although language is one of the main features of the cultural identity of an individual or a community, the Convention only mentions linguistic diversity in the preamble and in Article 6 (2)(b).⁶⁸² Moreover, only in its preamble does it seem to refer to language as an inherent feature of cultural identity. Linguistic diversity can, in the sense of the broad UNESCO definition, also be regarded as a cultural 'expression'. In article 6 (2)(b) languages are only mentioned as components of cultural activities, goods and services: '*languages used for such activities, goods and services*'.

Critical voices remark that in the text of the Convention - compared with the UNESCO Declaration on Cultural Diversity of 2002 - there is no longer an explicit article on linguistic diversity. Article 5 of the Declaration of 2001 clearly mentioned that '... all persons have ... the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue.' Also in the action plan of the Declaration, Article 6 was dedicated entirely to linguistic diversity: 'Encouraging linguistic diversity - while respecting the mother tongue - at all levels of education.'

At first glance, it is surprising that such a relevant dimension of cultural diversity as the languages of cultural expression should merit just these two references in the entire text of the Convention. Nevertheless, other Convention provisions that do not mention 'language' may also be relevant because they imply protection of the use of language in a particular context. Three of the eight 'guiding principles' set out in article 2 are of particular interest:

1. Principle of respect for Human rights and fundamental freedoms
3. Principle of equal dignity of and respect for all cultures
6. Principle of sustainable development

These Convention principles refer to more 'instrumental language rights'.

Also Article 7 concerning the measures to promote cultural expressions and article 8 concerning the measures to protect cultural expressions can be relevant for linguistic diversity. These articles refer to the rights of (members of) minorities to have their own cultural expressions.

4.5.2. Freedom of expression

Among the general human rights that are available to everybody but have special relevance for minority language groups is 'freedom of expression'. (Also guaranteed by Article 10 of the European Convention on Human Rights, Article 22 of the EU's Charter of Fundamental Rights, adopted in 2000, that requires the EU to respect linguistic diversity and Article 21 that prohibits discrimination based on language and Principle 1 of Article 2 of the UNESCO

⁶⁸² Article 6 Rights of parties at national level: (2) such measures may include the following (b) 'measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services'.

Convention). According to Bruno De Witte⁶⁸³ there is no doubt that restrictions on the use of a particular language (like Kurdish in Turkey) in private broadcasting or print media would be considered as restrictions of 'freedom of expression'. The same is true for restrictions on the diffusion of songs in a particular minority language on private or public radio and TV. The reason for this is that 'freedom of expression' does not only protect the content of what is being expressed but also the indispensable linguistic form that many expressions take. This interpretation of 'freedom of expression' has been adopted, among others, by the Swiss and Canadian Supreme Courts, and by the UN Rights Committee in 'the Ballantyne case'.⁶⁸⁴

With regard to the potential significance of the protection of language, consider the Fun Radio decision of 8 April 1998 by the highest French administrative court, the Conseil d'Etat. The case involved the compatibility with European Community law of the French radio quota regulation, according to which at least 40% of songs broadcast on French radio stations must be 'chansons d'expression française'. These restrictions on intra-community trade were justified for reasons of national cultural policy. If the issue had been placed in a freedom of expression framework, the balancing of values (free speech vs. cultural policy) would not have been so easy.

The European Court of Human Rights' most remarkable ruling on the implied linguistic dimension of general fundamental rights occurred in relation to the right to education: in *Cyprus vs. Turkey*, the Grand Chamber held that the fact that the Northern Cyprus government provided Greek-language primary schooling for the Greek minority living in Northern Cyprus, but did not provide any follow-up at secondary school level amounted to a breach of the right to education. In other words, the right to education implies, in certain circumstances, a right to mother tongue education.

The Convention therefore provides meaningful protection for language rights that are ancillary to more general human rights.

4.5.3. Multilingualism and linguistic diversity

The following is a general assessment of EU policies on multilingualism and linguistic diversity since the adoption of the UNESCO Convention in order to analyse the extent to which these policies can contribute to the preservation and promotion of linguistic diversity in Europe and to determine what role the UNESCO Convention can play in strengthening EU policies on linguistic diversity.

From the very beginning the European Union has stressed the linguistic diversity of Europe. With regulation No 1 of the Council of Ministers, the 4 official and working languages were determined. From then on, the official languages of all Member states were seen as equal and had the status of official European Union language. After the enlargement of the EU, the European Commission had installed a commissioner specifically dedicated to multilingualism. This new Commissioner's mission was to foster and promote language learning and to promote multilingualism to preserve linguistic diversity in Europe⁶⁸⁵. As of the last enlargement of the European Union, the Union has more than 60 indigenous

⁶⁸³ De Witte, B. (2008), 'The protection of linguistic diversity through provisions of the EU Charter other than Article 22' in Arzoz, Xavier (ed.) (2008), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company: Amsterdam/Philadelphia, p.185

⁶⁸⁴ De Varennes, F. (1996), *Language, Minorities and Human Rights*. The Hague & Boston: Martinus Nijhoff, ch. 3

⁶⁸⁵ European Commission Multilingualism, 2010

regional or minority language communities.⁶⁸⁶ Only 23 languages are recognised as official languages of the European Union (the 'Treaty Languages'). Globalisation and immigration flows further and will increasingly contribute to the wide palette of languages in daily use by Europeans. Furthermore, the European languages display a great heterogeneity of situations and internal legal statutes.⁶⁸⁷ Some of the minority languages are threatened. Since language and identity are closely intertwined and linguistic diversity is one of the defining characteristics of the European Union, the European Union has to play a role in the protection of its linguistic diversity.⁶⁸⁸

In 2007 the EU developed a new strategy on multilingualism to stimulate the intercultural dialogue and praxis and vice versa. "Multilingualism is much more than pure language learning and providing legal texts in all official languages. ... I want to take a kind of helicopter view of what language knowledge means for the European Union, its citizens, business relations, cultural identity and the much needed dialogue across communities."⁶⁸⁹ According to Orban, "language learning is also a crucial vector for intercultural awareness and understanding. Therefore a contribution of multilingualism to intercultural dialogue must be guaranteed. Indeed, it is only by learning languages that one can move from a multi-cultural society to a truly inter-cultural one."⁶⁹⁰ Indeed, during the European Year of Intercultural Dialogue in 2008 multilingualism through education was one of the main themes. But the question remains whether EU policy on multilingualism really stimulates linguistic diversity. Some argued that current EU policy on multilingualism is just a mask to cover the fact that the use of English is increasing and less widely used languages are in a vulnerable position.⁶⁹¹

Although the European Union seems to invest in a policy on linguistic diversity, this policy entails a number of contradictions.

There is, for instance, no official lingua franca in the EU. However, there is an inconsistency between the declared equality of languages and the linguistic hegemony of English, sustained by global economic processes. The free market leads to a strengthening of the economic pressure to learn English.⁶⁹² Moreover, the creed of a pronounced multilingualism does not correspond with the practice in the EU institutions, in which, in practice, internal communication happens predominantly in English or, although to a lesser extent, in French.

Furthermore, the New Framework Strategy for Multilingualism⁶⁹³ stipulates that everyone should have access to legislation, procedures and information in their own language, but later in the text access is limited to national languages.⁶⁹⁴ The communication

⁶⁸⁶ 40 million people regularly speak regional or minority languages.

⁶⁸⁷ Urrutia, I., Lasagabaster, I. (2008), 'Language rights and community law' in *European Intergration Online Papers*, Vol. 12, 4, <http://eiop.or.at/eiop/texte/2008-004a.htm>, p. 2

⁶⁸⁸ The Linguistic Society of America estimates that, unless preventive activities occur, a century from now the number of languages spoken globally will fall from 5-6,000 to only a few hundred. More than ever communities find themselves under pressure to integrate with more powerful neighbours. This leads to the loss of their languages and even their cultural identities. The communities affected are mostly minorities who are the bearers of most of the linguistic diversity. (The Linguistic Society of America, 2010)

⁶⁸⁹ Orban, L. (2007), Multilingualism is in the genetic code of the Union. Meeting with the Culture Committee, Brussels, 27 February 2007

⁶⁹⁰ Orban, 2007, p. 4

⁶⁹¹ Tender, T., Vihalemm, T. (2009), 'Two languages in addition to mother tongue – will this policy preserve linguistic diversity in Europe?' in *Trames*, 13 (63/58), 1, p. 41-63, p. 42

⁶⁹² Tender & Vihalemm, 2009, p. 45

⁶⁹³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. A New Framework Strategy for Multilingualism, Brussels 22/11/2005, COM(2005) 596 final

⁶⁹⁴ Tender & Vihalemm, 2009, p. 45

'Multilingualism: an asset for Europe and a shared commitment'⁶⁹⁵ also refers to 'valuing all languages'. However, afterwards, only the official languages are mentioned. Urrutia and Lasagabaster state the following with regard to this: '*The building of political and economic Europe based on the 'state language' concept affects the European linguistic diversity itself*'.⁶⁹⁶ Furthermore, it is rather odd that the language arrangements of a supranational policy are based on national interests, without taking into account the relative size of the languages and the communication needs of the citizens.⁶⁹⁷ On the other hand, the increase in the number of official languages, which was caused by the extension of the EU, has affected the internal working of the institutions (increased technical complexity, cost of translation). Moreover, some authors argue⁶⁹⁸ that the use of English as a lingua franca – like in South Africa – seems to contribute to the preservation and even stimulation of the local languages. If we do not want multilingualism to shift towards linguistic substitution, we should – according to the sociolinguist Albert Bastardas – introduce, along with the principle of subsidiarity, a new principle, that of the "**functional sufficiency of local languages**". In order to ensure that a language does not become functionally unnecessary or redundant and hence dispensable for its own speakers, it is necessary to guarantee its use in a solid and significant nucleus of social functions that all the members of a local language should perform in the local language. These functions reserved for the local language cannot be hierarchically secondary. On the contrary, it must involve prestigious and innovative functions so that the psychosocial assessments associated with them favour and justify the maintenance of the local language, its transmission to new generations and its acquisition by new members joining the local society.⁶⁹⁹ However, others argue that a lingua franca leads to the reduction of linguistic diversity. As most native speakers of a given language become competent in the same non-native language, this expands the possibility of borrowing and other forms of influence. The language they all learn will tend to exert a lasting influence on their native tongue. Such influences bring languages not only closer to the lingua franca, but also closer to each other. When all members of a linguistic community have learned the same non-native languages, it is even regarded by some authors as the stage before the local languages starts withering away.⁷⁰⁰ When entering this stage art. 8 of the Convention seems to be applicable and the EU must determine '*the existence of a special situation where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding*'. Furthermore, the EU must take all appropriate measures to protect and preserve the language at risk.

There seems to be a risk of unequal treatment in language funding by the European Union. In some cases, extra funds are allocated to fund projects promoting the use of minority or lesser used languages. A "European Bureau for Lesser Used Languages" and an information network, "Mercator", receive financial support, while specific projects are geared to the promotion of regional and minority languages, including conferences, cultural events and networking. Therefore priority is given to lesser used languages in several EU action programmes in the broadly defined cultural field. Thus, one of the objectives of Media

⁶⁹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Multilingualism: an asset for Europe and a shared commitment, Brussels, 18/09/2008, COM(2008) 566 final

⁶⁹⁶ Urrutia & Lagabaster, 2008, p. 1

⁶⁹⁷ Arzoz, Xavier (ed.) (2008), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company: Amsterdam/Philadelphia, 269 p., p. 6

⁶⁹⁸ E.g. De Swaan, Abram (2001), *Words of the World. The Global Language System*, Cambridge

⁶⁹⁹ Mari, I. (2006), 'Globalisation and linguistic rights. Towards a framework of linguistic sustainability' in *Transfer Journal of Contemporary Culture*, No. 1, p. 77-90

⁷⁰⁰ Van Parijs, P. (2008), 'Linguistic diversity as curse and by-product' in Arzoz, Xavier (ed.) (2008), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company: Amsterdam/Philadelphia, 269 p., p. 17-46, p. 21-23

2007, is to 'preserve and enhance European cultural and linguistic diversity'. The Culture 2000 Programme had among his goals that of 'supporting the translation of literary, dramatic and reference works, especially those in the lesser used European languages and the languages of Central and Eastern European countries'. This priority criterion has disappeared from the Cultural Programme 2007-2013, although, in practice, not much may change because the priority criteria did not play an effective role anyway. However, this raises a question of principle, namely whether it is compatible with the prohibition of non-discrimination on grounds of language to give priority to lesser used languages in Europe.⁷⁰¹

In other cases, those 'weaker languages' are actually treated less favourably, in budgetary terms, than the stronger languages. An illustration was provided by the Socrates Programme in the field of education. The objective of the Lingua part of the Socrates programme was 'to promote a quantitative and qualitative improvement of the knowledge of languages of the European Union ... so as to ... the intercultural dimension of education'. Only the official languages were covered, together with Irish and Luxemburgish. There was an obvious double standard here and, arguably, discrimination on grounds of language. This has been corrected in the new EC action programme in the field of education, which has retained the objective 'to promote language learning and to support linguistic diversity in the Member States'. It remains to be seen which percentage of EC funding for language learning will effectively be spent on the non-official languages.⁷⁰²

4.5.4. Linguistic diversity as a criterion for accession

The fact that the protection of minority languages and linguistic diversity is an important criterion for accession to the EU is also striking. Measures to protect minorities and therefore also their languages are considered to be a 'structural principle' or a 'political principle' for accession. In regard to Central and Eastern European states and the Balkans, the existence of a legal framework for the protection of national or linguistic minorities was and remains crucial for accession. The joint report known as the 'composite papers' summarises the steps requested of all countries that joined in May 2004. It listed the progress made and gives recommendations in regard to the expression of linguistic rights. Also for the expansion in 2007 the protection of minorities was of particular importance. For example, for future expansion towards the Balkans and Turkey the problem of linguistic diversity is also at stake. In regard to Turkey, the Council Decision of 23 January 2006 entitled 'The principles, priorities and conditions contained in the accession partnership with Turkey' notes progress but lists numerous improvements which Turkey is required to complete prior to accession. In regard to rights of linguistic minorities, requirements to guarantee cultural diversity and promote respect for and protection of minorities in accordance with the Framework Agreement; to guarantee the property rights of minorities, the presence of languages other than Turkish on TV and radio, and the adoption of measures to support the teaching of those languages, etc. are listed.⁷⁰³ Hence, the criteria for accession in the regard of minority languages and linguistic diversity seems to meet the aims of article 7 of the Convention, which states that '*parties shall endeavour to create in their territory an environment which encourages individuals and groups [...] to have access to their own cultural expressions, paying due attention to [...] various social groups, including persons belonging to minorities and indigenous peoples*'.

⁷⁰¹ De Witte, 2008, p. 183

⁷⁰² De Witte, 2008, p. 184

⁷⁰³ Urrutia & Lagabaster, 2008, p. 12-13

Also the idea that language learning will contribute to the safeguarding of linguistic diversity or the policy of 'Two languages in addition to mother tongue' can be questioned.⁷⁰⁴ If people have to learn foreign languages, it seems unlikely that they would prefer minority languages. Widely spoken languages, which have a greater market value, will probably be preferred.

We could therefore conclude that the EU has not yet established any real linguistic diversity policy aimed at encouraging linguistic diversity. Minority languages are still not being 'promoted'. However, real policies tend to focus increasingly on language learning (multilingualism) rather than on linguistic diversity.

4.5.5. The Member State Level

Arzoz points to a double standard at Member States level too. Linguistic diversity is supported within the EU institutions in order to grant equal status to national languages of all Member States. On the other hand, concern for cultural and linguistic homogeneity within their nation state and the preservation of the privileged status of national languages is often lacking (see annex III on linguistic policy and five state types in EU). Moreover, the concept of the limits of costs, efficiency, workability, etc. is often used at state level but not at EU level.⁷⁰⁵

The fact that Member States apply other criteria to designate official status to languages, directly affects the policy of the EC, since the official languages of the EU are the official languages of the Member States. Hence, all official languages of Member States that are bi- or multilingual are official languages of the EU, but not all co-official languages of a specific territory in a Member State with just one official language for the entire territory are official languages of the EU (e.g. Irish is an official language of the EU and Catalan is not). This is a striking contradiction with accession policies mentioned above. Therefore, while protection of minority languages is an important criterion for accession to the EU, this policy entails a paradox since it is not possible to require candidate states to respect linguistic diversity rights when those rights are not respected within all existing Member States.⁷⁰⁶ So in regard of accession criteria relating to linguistic diversity policies the EU is complying with article 7 of the Convention but not in regard to its internal policies on linguistic diversity.

Because of the subsidiarity principle it is very difficult to intervene in the internal policies of the Member States. However, if the diversity of cultural expressions really is the aim of the UNESCO Convention and UNESCO in general, they should reinforce the commitments of each state in order to protect its internal diversity. Equal treatment for all cultural

⁷⁰⁴ See 'Multilingualism: an asset for Europe and a shared commitment'. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Multilingualism: an asset for Europe and a shared commitment, Brussels, 18/09/2008, COM(2008) 566 final. The communication states that languages help citizens to enter into dialogue with people from different cultural backgrounds and to realise their potential by making the most of opportunities for mobility and business openings. The Commission proposes an approach which advocates including multilingualism across a whole series of EU policy areas, with the objective 'to raise awareness of the value and opportunities of the EU's linguistic diversity and encourage the removal of barriers to intercultural dialogue'. A key instrument to accomplish this goal is still the 'mother tongue plus two languages' approach.

⁷⁰⁵ Arzoz, 2008, p. 7-8

⁷⁰⁶ Urratia & Lasagabaster, 2008, p. 11

communities would require that the Convention establishes official hearing mechanisms through which public institutions or Civil Society organisations could demand protection.⁷⁰⁷

One of the tasks of the worldwide mobilisation of linguistic diversity should be the dissemination of a correct interpretation or representation of the linguistic consequences of globalisation. All too often, simplistic and stereotyped conceptions regarding linguistic diversity and its supposedly inexorable evolution towards monolingualism constitute the fictitious basis for a massive abandonment of options and demands for linguistic equality.

We are of the opinion that the UNESCO Convention on Cultural Diversity can be interpreted as an instrument for the protection and promotion of linguistic diversity. Language is not only the main feature of cultural identity but is also the bearer of cultural expressions. For that reason we cannot separate cultural diversity from linguistic diversity. If the EC wishes to concern itself with and ensure real cultural diversity, there is also a need for more knowledge and insight into the policy of the various Member States regarding linguistic diversity. A benchmark based on certain criteria would be a useful instrument for measuring and comparing the effect of the measures taken by the various Member States.

4.6 Recommendations

4.6.1. In general

- Compared with in the nineties, the European Union is now becoming more aware of the importance of culture for the success of the European project. Culture can be a binding instrument for European citizens. In recent years, EU initiatives in the field of culture increased, promoting cultural diversity in a broad sense while respecting the subsidiarity principle. With the Agenda for Culture, the Commission wanted to set out strategic objectives on culture and cultural diversity within its competences for the first time. That was an improvement but there is still a lack of **a long term coordinated strategic view**, strategic and operational goals and SMART formulated results. For that reason, it is unfortunate that culture and cultural diversity are not an integral part of the **EU2020 Agenda (2014-2020)**, which was approved on 3 March 2010. It is also debatable whether a three-year Working Plan is not too short to achieve strategic goals. A five- or six- year programme would be preferable, such as, from 2014 onwards, the year of renewal of the Programme for Culture 2007-2013.
- 'The Open Coordination Method' and the Culture Forum are precise initiatives to establish cooperation between the EU institutions and the Member States, and define common cultural objectives and translate them into national policies. But the **communication and the coordination** between those different processes remain too weak and the management too loose. The risk of becoming talking shops is real. Clear common communication strategies and results must be put forward.
- **A cultural Cardiff process?** The protection and promotion of cultural diversity is not only the responsibility of the DG Culture and national ministers for Culture. Culture affects several other policy domains, such as economy (cultural industries), science (innovation and creativity), education, tourism, foreign policy, etc. Therefore, it is important that there is also a more structural cultural dimension in other policymaking fields. There are not only good reasons but there is also a juridical base (clause 4 of

⁷⁰⁷ Mari, 2004.

article 167) to advocate for the integration of a cultural dimension in all other policy domains, by analogy with the Cardiff process at the end of the nineties. In 1998 the Council started a process, the so-called 'Cardiff integration process', whereby all the different policy sectors had to take environment considerations into account in their decision-making. 'The Cardiff process had positive influences on the workings of the Commission and of the Member States. They relate particularly to the establishment of new integration units, committees and procedures which appear to be directly associated with the Cardiff process, and sometimes in areas where integration was previously very weak'.⁷⁰⁸ Only an integration of the cultural dimension in the whole policy of the EU can guarantee the protection and further development of cultural diversity. This horizontal integration requires a strategy comparable to that of the environment sector. Only then can the European Council invoke all other policy domains to develop strategies concerning the integration of the cultural dimension. The European Council must monitor and evaluate this process on a regular basis. The installation of a permanent expert group on cultural diversity could monitor the coordination and results of the process.

- **The need for clear indicators and comparable data at European level to measure cultural diversity.** The development of the EESnet on Cultural Statistics is an important step forwards in the collecting of data and the monitoring of culture within the EU. But the need for benchmarks remains. Research and relevant indicators for culture and cultural diversity in the EU are therefore required. 'What do we want to know' and 'why', remain the most important questions. There have already been various attempts organised by UNESCO, UNCTAD (world report 2008), the EC⁷⁰⁹, various states (such as the United Kingdom, Australia and Canada) and numerous cities (such as Liverpool with impact8, Amsterdam, Antwerp, Dortmund, and the local authorities' 21agenda for Culture), but all of them have different interests, methodologies and indicators. Moreover, there are too many differences regarding the conceptual framework (What does creativity mean? Innovation? Cultural diversity?) and the way in which the data is collected. It will also be necessary for the various Member States and regions within the EU to cooperate and provide their data. They have to agree to exchange information and to share expertise concerning data collection and statistics on the diversity of cultural expressions and on best practices for its protection and promotion (cf. Article 19.1 of the Convention).

With regard to education, the Communication of the Commission of 20 November 2002 on European Benchmarks in Education and Training⁷¹⁰ set benchmarks for education. The term benchmark is used here to refer to concrete, measurable targets. The Communication established benchmarks that have to be reached by the end of 2010. This system of benchmarks could serve as an example with regard to implementing the Convention on the Diversity of Cultural Expressions. Cultural diversity benchmarks could be set. However, a certain amount of caution is required, since cultural indicators are difficult to install and culture is not easily measurable.

Establishment of a **European Culture Observatory** could fulfil this task. It could monitor the implementation of the Community's role with regard to article 151, and the collection of data on market concentrations in collaboration with Eurostat. It could also

⁷⁰⁸ Fergusson e.a. 2001: 29; Vos, 2003: 143.

⁷⁰⁹ Kern, P., Runge, J. (2010) *KEA briefing: towards a European creativity index*.

⁷¹⁰ Communication from the Commission – European benchmarks in education and training: follow-up to the Lisbon European Council, COM(2002)629 final

coordinate interesting research in the field of culture already carried out by national research institutes.

Nonetheless, genuine monitoring within the structure of the state is still possible so long as there are mechanisms for political control of government action. This type of monitoring – control by Parliament – should not be neglected, since it can prove very useful if there is extensive support for the Convention among legislators.⁷¹¹

- However, there is another challenge faced by national and regional governments within Europe as a consequence of the UNESCO Convention. The 'welfare state' in the industrialised countries, which was important for the creation of the modern cultural policy system, has been in crisis for some time. There is a need to design new ways to give adequate support to contemporary cultural creations at all stages of the process, including production, distribution, consumption and preservation of cultural goods and services. According to Nina Obuljen, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions should be more than just a battle to preserve existing cultural policies. It should be inspiration to create space to look for alternative policy solutions.⁷¹² The responses to our questionnaires prove that some states are more creative in finding solutions to deal with cultural diversity. At European level we should collect these good practices in a central contact point so that the various European states can share their knowledge and experiences in this field. It is also an opportunity to work together more closely with the Council of Europe, since the latter has already done a great deal of work in this field (in cooperation with ERICarts).

4.6.2. Cultural and creative industries

- **The definition of 'cultural diversity' or the 'diversity of cultural expressions'.** Our questionnaires reveal that different countries deal with cultural diversity in different ways. Some place the emphasis on the rights of minorities, while other states are more interested in the development of cultural industries. In that case culture is seen more as a motor for creativity and innovation.⁷¹³ Some authors find that the UNESCO Convention on Cultural Diversity deals, in the first instance, with an economic view on cultural diversity.⁷¹⁴ According to them the Convention is about the 'diversity of cultural expressions' and this in the different stages of the economic value chain. Until now the European Union has focused too much on the diversity of cultural production and too little on the protection and stimulation of creation (the artist) and distribution (accessibility) of cultural goods and services. In particular, the effects of the vertical and horizontal integration of large cultural concerns (cf. the music sector, as a consequence of the free market) on the **accessibility of cultural goods** have not been investigated sufficiently. More research should be carried out on this subject. On the other hand, intercultural dialogue between and within states is also an important cornerstone of 'cultural diversity'. The European Union must take the different aspects of this broad definition of 'cultural diversity' into account.
- The relationship between **culture and trade** is probably the most difficult factor of the Convention and therefore an obstacle to the implementation of the Convention. In order to overcome this stumbling block, a **sustainable cooperation** mechanism between the

⁷¹¹ Fabri and Bernier, 2009.

⁷¹² Obuljen; 2006, p. 20.

⁷¹³ KEA, 2009.

⁷¹⁴ Bernier, 2009.

DG Culture and DG Trade at both European level and at national level, has to be established. This should also include collaboration with the different ministries of the Member States in order to find solutions to subjects that affect mixed competences, such as the matter of Intellectual Property Rights. The responses on our questionnaires show that in many European countries the various ministries of Culture, Trade and Foreign policy are trying to develop a common policy. Sometimes the Minister of Foreign policy takes the lead, sometimes the Minister of Culture or Trade.

- The UNESCO Convention (2005) recognised the importance of cultural and creative industries for cultural diversity. The EU Lisbon strategy and the Green Paper “Unlocking the potential of cultural and creative industries” also recognised this but for more economic reasons. According to the 2006 EC Study on the economy of culture in Europe, the cultural and creative sector employed nearly 6 million people in 2004, had a turnover of 654 billion and already contributed 2.6 % of EU GDP. So there is therefore a growing realisation that culture is an essential asset for Europe’s future. Nevertheless, cultural and creative industries cannot find a place in the traditional scheme of subsidies but require support measures and incentives adapted to their needs. The EU should pay more attention to and **spend more money on culture-based creativity**. (Council conclusions on Culture as a Catalyst for Creativity and Innovation, http://ec.europa.eu/culture/our-policy-development/doc431_en.htm; Platform on the Potential of Cultural and Creative Industries, 2009)
- The European Union should encourage the development of partnerships between and within the public and private sectors and non-profit organisations, in order to stimulate the creative industries within Europe.

4.6.3. Intercultural dialogue and cultural diversity

- With initiatives such as An Agenda for Culture 2007, the European Year of Intercultural Dialogue 2008, the European Year of Creativity and Innovation 2009, the topic of diversity of cultural expressions is introduced into the European Union’s cultural policies. Nevertheless, sustainability and continuity have not yet been dealt with. The European Union should therefore develop **a more comprehensive and sustainable policy** on the diversity of cultural expressions. The **working conditions** of authors, artists and cultural entrepreneurs should be improved as artistic practice is a key element of a larger system that creates public value in cultural, economic and social terms.
- The **circulation of artists, works and productions** across Europe must be facilitated as it is fundamental for cultural exchange and diversity. It is one of the goals of the Cultural Programme 2007-2013 but the implementation of the Programme still requires too much administration (too bureaucratic). Only large organisations have the time and the money to participate (the so-called ‘Matthew effect’). Also collection mobility (‘Collections on the move’) should be made easier at European level. Other obstacles are different tax systems, differences in social security law, etc.
- **‘Some countries are more equal than others’**. There still is a big difference between Eastern and Western Europe in spending on culture. This also has consequences for artists’ mobility. There is an unequal balance between the Eastern and Western Member States. The financial crisis has reinforced this situation. The next Programme for Culture, from 2014 onwards, could take these differences into account in their criteria and their projects. Finally, Member States should be encouraged by the EC (article

167/151, clause 2) to spend part of their subventions on artistic projects in which artists co-operate Europe-wide. A list of interesting examples of cultural co-operation should be created.

- Despite the fact that linguistic diversity is not the main focus of the UNESCO Convention, linguistic diversity is incontestably one of the most characteristic features of the EU, affecting the social, cultural and professional lives of its citizens as well as the economic and political activities of its Member States.

The establishment of an EU Agency for linguistic diversity would be appropriate. It should concentrate on an overview of all linguistic needs and incongruities in EU policies in this field in order to ensure language policy becomes a more congruent, rational policy.

- The importance of **the intertwining and complementarity of the various UNESCO Conventions dealing with cultural diversity**. The UNESCO Convention concerning the safeguarding of intangible cultural heritage from 2003 is as important for the flourishing of cultural diversity as the Convention on Cultural Diversity itself. Cooperation with the Council of Europe is also necessary in this field.

4.7 Conclusion

As we can see, most of these recommendations represent behaviour-based obligations that require genuine effort to be made in order to meet the objectives of the UNESCO Convention. Hard to enforce from a legal perspective, they require political follow-up, especially as the Parties themselves are responsible for determining a course of action at domestic and international level on the basis of their own situation. A distinction can be made between commitments requiring action at domestic level, at European level and at international level. However, in reality, many of these commitments involve action in national, European and international spheres.⁷¹⁵ Therefore, it is important that the European Union and the Member States keep each other regularly informed about their measures and policies regarding culture and cultural diversity. There is also a need for benchmark research into cultural diversity and creativity based on the same definitions, data and methodology (similar indicators). Only then can policy priorities be established and the rather vague discourse on cultural diversity make way for a knowledge-based European policy on cultural diversity.

⁷¹⁵ Fabri and Bernier, 2009

Annex I

EU policy measures on multilingualism and linguistic diversity

New Framework Strategy for Multilingualism⁷¹⁶

The New Framework Strategy for Multilingualism, adopted in November 2005, was the first communication of the European Commission on Multilingualism. It complemented the action plan 'Promoting Language Learning and Linguistic Diversity'. The communication installed three basic strands to the EU policy on multilingualism:

- Ensuring that citizens have access to EU legislation, procedures and information in their own language.
- Underlining the major role that languages and multilingualism play in the European Economy, and finding ways to develop this further.
- Encouraging all citizens to learn and speak more languages, in order to improve mutual understanding and communication.

Member States are also invited to implement measures to promote linguistic diversity.

Consultation meeting for High Representatives of Member States

On 17 January 2008 the Commission consulted High Representatives of Member States in order to gather the views and concerns of those involved in decision making on language policies at national level. The meeting addressed, in particular, the views of national administrations on promoting their national language(s) abroad and the teaching of their national language(s) as second language(s) to minorities and immigrant communities.

Ministerial Conference on Multilingualism

On 15 February 2008 a Ministerial Conference on Multilingualism was organised. This was the first occasion on which Ministers of Education and other portfolios came together specifically to discuss the challenges and opportunities related to the 23 official languages of the EU.

Council Conclusion of 22 May 2008 on multilingualism

On 22 May 2008 the Council adopted a conclusion on multilingualism.

Multilingualism: an asset for Europe and a shared commitment

On 18 September 2008 the Commission adopted a new communication on Multilingualism, namely 'Multilingualism: an asset for Europe and a shared commitment'.⁷¹⁷

Languages help citizens to enter into dialogue with people from different cultural backgrounds and to realise their potential by making the most of opportunities for mobility

⁷¹⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. A New Framework Strategy for Multilingualism, Brussels 22/11/2005, COM(2005) 596 final

⁷¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Multilingualism: an asset for Europe and a shared commitment, Brussels, 18/09/2008, COM(2008) 566 final

and business openings. The Commission invites EU Member States and the other EU institutions to join efforts to encourage and assist citizens in acquiring language skills and removing communication barriers. It proposes an approach which advocates including multilingualism across a whole series of EU policy areas. The main objective of the communication is therefore 'to raise awareness of the value and opportunities of the EU's linguistic diversity and encourage the removal of barriers to intercultural dialogue'. A key instrument to accomplish this goal is still the 'mother tongue plus two languages' approach. The communication refers to valuing all languages, but further reading makes clear that this covers only official languages.

Council Resolution of 21 November 2008 on a European strategy for multilingualism⁷¹⁸

This resolution stresses the importance of multilingualism and the promotion of linguistic diversity. The promotion of less widely used languages is also mentioned. The Council invites with this resolution the Commission and the Member States to promote multilingualism, strengthen lifelong learning, promote linguistic diversity and intercultural dialogue and promote EU languages across the world.

Accession to the EU

The fact that the protection of minority languages and linguistic diversity is an important criterion for accession to the EU is striking. Measures to protect minorities and so also their languages is considered as a 'structural principle' or a 'political principle' for accession. In regard to Central and Eastern European states and the Balkans, the existence of a legal framework for the protection of national or linguistic minorities was/is crucial for their accession. The joint report known as the 'composite papers' summarises the steps requested of all countries that joined in May 2004. It listed the progress made and gives recommendations in regard to the expression of linguistic rights. Also for the expansion in 2007 the protection of minorities was of particular importance. And for future expansion towards the Balkans and Turkey the problem of linguistic diversity is also at stake. For Turkey, for instance, the Council Decision of 23 January 2006 entitled 'The principles, priorities and conditions contained in the accession partnership with Turkey' notes progress but lists numerous improvements which Turkey is required to complete prior to accession. In regard to rights of linguistic minorities, requirements to guarantee cultural diversity and promote respect for and protection of minorities in accordance with the Framework Agreement; to guarantee the property rights of minorities, the presence of languages other than Turkish on TV and radio, and the adoption of measures to support the teaching of those languages, etc. are listed.⁷¹⁹

⁷¹⁸ Council Resolution of 21 November 2008 on a European strategy for multilingualism, official Journal C320, 16/12/2008 P.0001-0003.

⁷¹⁹ Urrutia & Lasagabaster, 2008:12-13.

Annex II

Linguistic policy of EU Member States: five state types

With regard to language policies we observe major differences in the Member States. First of all not all states give the same status to all languages spoken on the territory. According to Juaristi, Reagan and Tonkin, five types of states can be distinguished between:

- Member States with a single official language (Bulgaria, France, Estonia, Latvia, Greece and Poland). These states follow a policy based on the belief that the use of just one language facilitates the cohesion and progress of the state.
- Member States with a single official language, but in which other languages enjoy certain state support in some parts of the country or official recognition is given to some languages, but limited to particular municipalities (Austria, the Czech Republic, Germany, Hungary, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom).
- Member States that recognise co-official languages in certain geographic areas (Spain, Denmark, the Netherlands and Italy). These states have opted for one official language for the entire state. However, official status is granted to some languages in a specific territory of which Basque and Catalan will be the most famous examples.
- Member States that are language federations (Belgium). In Belgium three languages are official and, at the same time, the country is divided into three communities. However, outside their own region the languages have relatively little standing.

Bilingual and multilingual states (Cyprus, Finland, Ireland, Luxembourg, Malta). In these countries there is more than one official language and they are all protected by law.⁷²⁰

⁷²⁰ Juaristi, P., Reagan, T., Tonkin, H. (2008), 'Language diversity in the European Union. An overview.' in Arzo, Xavier (ed.) (2008), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company: Amsterdam/Philadelphia, p. 65-67.

Annex III

SWOT implementation at EU Level

Strengths	Weaknesses
<ul style="list-style-type: none"> - A juridical base for cultural action: article 167 of the Lisbon Treaty and other articles - Coordination <ul style="list-style-type: none"> - OMC (democratic, bottom-up) - Culture Forum - Within the EC - Statistic ESSnet 	<ul style="list-style-type: none"> - Lack of structural cooperation between OMC, working groups and Platforms - Lack of an integrated view on cultural diversity and structural measures - Low budget of Programmes and application process - Lack of knowledge about and benchmarks for cultural diversity - No real policy on linguistic diversity
Opportunities	Threats
<ul style="list-style-type: none"> - Enhancing policies on cultural diversity on the basis of the reports of the OMC working groups and the Platforms - Establishing structural measures <ul style="list-style-type: none"> - Establishing a European cultural Observatorium that also can develop benchmarks on cultural diversity - Facilitating opportunities for Central and Eastern European Countries to promote artists mobility - Establishing a real policy on linguistic diversity 	<ul style="list-style-type: none"> - Coordination methods risk becoming talking shops - Establishing benchmarks that do not take into account the multiplicity and complexity of the notion of cultural diversity - Risk of enlarging the gap between East and West due to the application process of Programmes - Linguistic diversity policies risk being overshadowed even more by multilingualism policies

Need for transversal cooperation between Directorate Generals and Agencies

The EACEA is responsible for most management aspects of the Culture, Media and Europe for Citizens Programmes. This executive agency is therefore indirectly involved in the process of the implementation of the UNESCO Convention. However, other agencies, namely some Community Agencies, can also contribute. The European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) is a European Union body set up in 1975 to contribute to the planning and establishment of better living and working conditions in Europe. Managing diversity is one of the areas of expertise of the agency.⁷²¹ The European Union Agency for Fundamental Rights (FRA) is an EU Agency that was established in 2005 and aims at providing the EU Institutions and Member States with assistance and expertise relating to fundamental rights. Since the protection of cultural diversity is a fundamental right, it falls fully within the scope of the FRA.

⁷²¹ European Foundation for the Improvement of Living and Working Conditions (2010), on <http://www.eurofound.europa.eu/index.htm>.

PART FIVE. OVERALL CONCLUSIONS AND RECOMMENDATIONS

Christophe Germann

A third way to overcome state censorship and marketing diktat

In recent decades, the quest for a new balance concerning patent protection increasingly integrated the protection and promotion of public health in other relevant policies on the international, regional and national stages. Civil society, generics producers and governments of various developing countries materialized “mainstreaming” of public health concerns by politically and legally challenging arguable overprotection caused by the TRIPS Agreement and bilateral trade treaties.

In May 2010, the governments of Brazil and India requested formal consultations at the WTO concerning the seizure of generic drugs in transit in the Netherlands and other EU Member States. As Reuters reported, “India and Brazil launched a trade dispute against the European Union and the Netherlands (...), saying their seizures of generic drugs were hurting healthcare in poor countries and disrupting international trade. The row turns on one of the most sensitive issues dividing rich and poor nations - the intellectual property rights of corporations such as makers of pharmaceuticals versus access to affordable medicine for people in developing countries.”⁷²² This case exemplifies “mainstreaming” of public health concerns par excellence: It mobilizes all relevant EU institutions and ministries in the Member States across policy specializations, NGOs and industry in Europe and worldwide.

A recent article in the Financial Times reported that for pharmaceutical majors some of the most profitable medicines will be going off patent soon. The newspaper quoted the chief executive of GlaxoSmithKline who gave a sense of how the UK’s biggest drugmaker – and the industry more generally – is responding to structural pressures: “diversify to survive.”⁷²³

⁷²² Reuters, India, Brazil challenge EU at WTO over drugs, 12 May 2010: “India said the repeated seizures were based on allegations of the infringement of intellectual property rights in the country of transit, even though the generic drugs in question were legal in their countries of origin and destination. (...) The risk of seizures meant generics producers in developing countries were avoiding shipping goods via Europe, driving up transport costs and so undermining the purpose of using cheap generics, he said. ‘The actions by the EU have widespread consequences including the work and the cost of health programmes in the developing countries,’ he said.” See also Request for consultations by Brasil, WTO Document, WT/DS409/1 IP/D/29 G/L/922, 19 May 2010.

⁷²³ Andrew Jack, Big pharma aims for reinvention, in: Financial Times, 12 May 2010 (consulted in the on-line edition). This pharmaceutical major’s planned new strategy reads as a best case scenario by analogy for the promotion of the diversity of cultural expressions: “For his company, he says, this means a shift away from ‘white pills in western markets’, with the proportion of traditionally core patent-protected, chemically based drugs, which are sold mainly in North America and western Europe, falling to just more than a quarter of total sales. (...) For many years, large companies such as GSK have relied on a handful of typically high-priced, mass-market “blockbusters” that generate billions of dollars a year in sales. But as patents expire on drugs such as Lipitor, Pfizer’s anti-cholesterol medicine that is the biggest selling medication in history, big pharma is having to rethink its business model. Most large pharmaceutical companies have adopted four principal strategies to diversify. First, expand the range of products in the research and development pipeline and the use of external as well as in-house scientists to discover them. Second, expand geographically, especially into emerging markets. Third, increase sales of products other than patented prescription medicines. Fourth, experiment with greater flexibility in pricing in different countries and with ways to

The analogy between blockbuster pills and blockbuster films, and bestseller books and music seems obvious: these business contexts share a prevailing business model regarding the role of patent and copyright to secure marketing investments in the goods and services of market dominating players. Equally obvious is the causal link between lower standards of intellectual property protection and a higher degree of diversity.

State aid in the form of direct payments is commonly the alternative or the complement to revenues from intellectual property rights which finance both research and development for healthcare and creation in culture. However, so-called "selective" state aid granting mechanisms are not suitable to meet the objectives of the UNESCO Convention if states shall guarantee full compliance with freedom of expression. Accordingly, a well-balanced intellectual property system applied to the cultural sector represents an increasingly crucial contribution. Well functioning copyright and related rights insure creative independence through financial autonomy of authors vis-à-vis the state and private power.

In the preface to the White paper "Shaping Cultural Diversity", the President of the German Commission for UNESCO considers the implementation of the Convention essentially as a "public responsibility for creating favourable conditions for the development of cultural diversity, which can only be achieved through the joint efforts of the government, industry and civil society."

There is such a "public responsibility" to implement intellectual property rights in way that does not allow corporations dominating the relevant market to cannibalize state aided creation and dissemination of diversified cultural expressions. Simultaneously, however, the same responsibility requires that states implement intellectual property rights that shield the right holders from potentially illegitimate state interference. We perceive a "double moral" when the European Union neglects to act against overprotection by intellectual property and at the same seeks to partially correct this overprotection by selective state aid that the Union and the Member States grant via experts on their payroll. This system keeps writers, film makers, musicians and other artists dependant on state appointed experts' non-justiciable and arbitrary discretion.

The Hollywood oligopoly's marketing power and the EU Member States' control via selective aid produce a combined effect that largely "duopolizes" Europe's various cultural sectors. The rights of artists and of the audiences who refuse these powers must be safeguarded. Responsible policy makers should elaborate new rules for a level playing field for creators of cultural expressions who are currently excluded from the prevailing system. We consider the States' selective aid mechanism, its "expertocracy," and its inflating business of intermediaries as a threat to this freedom in Europe. We perceive a remedy to this risk in a reformed intellectual property system combined with competition law and cultural non-discrimination principles "Cultural Treatment" and "Most Favoured Culture".

State aid for the creation and communication of cultural goods and services fails to work both for economically weak countries that lack the resources to publicly assist their cultural sector, and for authoritarian regimes that oppress freedom of expression in their territory. Does this fact challenge the practice of rich and democratic jurisdictions, particularly the EU and her Member States, to grant such aid? The European public shall enjoy sustainable diversity of cultural expressions through access to films, music and books in the sense of article 7 in combination with article 6 of the UNESCO Convention. Development and cooperation and in particular the international fund under article 14 to 18 will remain weak and wasteful palliatives without a radical change in the Global North's current mainstream

ensure drugs provide value for money."

cultural policies.⁷²⁴ New media, in particular the internet, allow for the creation and communication of cultural contents at much lower costs.

Both selective state aid and intellectual property provide immense power to states and to corporations. In the worst case scenario, the abuse of this power enables states and corporations to impose censorship, propaganda, consumerism and cultural uniformity. Hence, this power must stay under strict democratic control. Private and public stakeholders are called to mobilize and elaborate new checks and balances insuring a separation between state and culture as well as independence of culture from corporate power.

We submit that the combination of overt “marketing diktat” and potential covert “state censorship” infringes article 7 of the UNESCO Convention in combination with article 10 of the European Convention on Human Rights and like provisions in national constitutions. Based on the doctrine of “horizontal application”, a state genuinely respectful of the diversity of cultural expressions must guarantee in its jurisdiction a third way between a rock and a hard place; that is, between the state's own *de facto* discretionary power to interfere with the creation and communication of cultural expressions on one side, and, on the other, the *de iure* arbitrary power of private corporation dominating the market of cultural industries to distort trade and competition in favour of their own decision makers' favoured cultural expressions. As a consequence, a new legal framework that guarantees a clear separation between state power and trade related culture and corporate power and trade related culture, will require a new balance in the areas of intellectual property and competition law, which must be specifically designed for cultural activities, goods and services.

There is an urgent need today to elaborate new legal safeguards against the prevailing copyright and state aid rules that omit “paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples” (art. 7.1 let. a). Without such desirable checks and balances, the EU's and her Member States' sovereign right to formulate and implement cultural policies to achieve the purposes of the UNESCO Convention will remain inconsistent with the principles of equitable access, openness and balance (art. 2.7 and 2.8), “universally recognized human rights instruments” (art. 5.1), and more extensive human rights obligations under European law.

Litigation at the WTO without discussion on the UNESCO Convention

In contrast to the UNESCO and UNCTAD, the WTO Secretariat refused to reply to the questionnaire that we sent to international organisations. It explained that it is not in a position to pronounce the interpretation or implementation of articles 20 and 21 of the Convention since this matter has not been raised by WTO Members. Accordingly, the WTO does not have recorded views of Member governments in regard to these issues.⁷²⁵

⁷²⁴ The situations currently prevailing in Tunisia and Senegal provide concrete examples in support of our arguments. Senegal qualifies as a “least developed country” according to the United Nations classification at www.unohrrls.org/en/ldc/related/62/. For violations of freedom of expression in Tunisia, see for instance Tunisia: Internet Censorship - A Rearguard Battle in: Observatory of Freedom of Press, Publishing and Creation (OLPEC), 2009, at: www.olpec-marsed.org/fr/media/files/Rapport_OLPEC_censure_Internet_09En.pdf and www.olpec-marsed.org/fr/Content-pid-5.html. The NGO OLPEC is member of the the International Freedom of Expression Exchange (www.ifex.org). Freedom of expression is essential to denounce the violation of core human rights such as the prohibition of torture as the recent US history demonstrates.

⁷²⁵ See letter of 2 March 2010 under the Section “International Organizations Survey” at www.diversitystudy.eu

We question whether avoidance of discussions on the UNESCO Convention at the WTO is a good strategy to implement this instrument. The EU should take leadership and address the implications of articles 20 and 21 of the UNESCO Convention at the WTO, following the example of formal discussions on other non-trade concerns such as public health and the protection of the environment.

China ratified the UNESCO Convention at the end of December 2006. Culture Minister Sun Jiazheng stated that ratification would allow China to protect its cultures and promote the development of a cultural industry, and so reverse an imbalance in cultural trade.⁷²⁶ In March 2008, the Dalai Lama alerted the world community to the fact that “the language, customs and traditions of Tibet, which reflect the true nature and identity of the Tibetan people are gradually fading away.”⁷²⁷ At a subsequent press conference, he denounced this situation stating that a kind of cultural genocide was taking place.⁷²⁸

After China's ratification of the UNESCO Convention the US initiated at the WTO two dispute settlement procedures against China regarding cultural industries, based on the GATS and TRIPS agreements. Lobbyists from the Motion Picture Association of America, which represent the oligopoly of the Hollywood film majors, successfully pressured the US administration to take this action. In both procedures the EU formally supported the US without substantive debate in the cultural sector of Europe, even though China invoked the UNESCO Convention in the GATS case. Both the *China-Publications and AV Products* case and *China-IPRs* case were settled by the WTO Dispute Settlement Body (“DSB”) and involved the protection and promotion of non-trade concerns. Both cases refer to cultural diversity.

The markets of cultural industries are particularly affected by distortions shaped at the international level via horizontal and vertical concentrations and oligopolies.⁷²⁹ In neither case did the EU offer statements in support of cultural diversity. Such statements would have furthered the implementation of the UNESCO Convention, and strengthened its role in the interpretation of existing international agreements and negotiations regarding their future development.

Both cases also reveal some of the inherent weakness of the UNESCO Convention, specifically regarding its weak cooperative procedures in comparison with the WTO's robust dispute settlement system. This weakness makes it particularly difficult for the Convention to counter an emerging trend within the WTO DSB of an unwillingness to allow “cultural issues” to prevail over trade issues.

In the TRIPS case, neither Europe nor China seemed to be aware of the implications of intellectual property protection of the diversity of cultural expressions. In the GATS case, in which China quoted the UNESCO Convention, Europe again supported the position of the United States. It is not clear whether human rights concerns in compliance with the UNESCO Convention, or mere economic interests against the text and spirit of this instrument, were decisive for this backing. The EU must expect that China will do the same

⁷²⁶ People's Daily Online, China ratifies UNESCO convention on protecting cultural diversity, 29 December 2006.

⁷²⁷ Statement of His Holiness the Dalai Lama on the 49th Anniversary of the Tibetan National Uprising Day, 10 March 2008.

⁷²⁸ European Union-China diplomatic relations reached a historical low point after the visit of the Dalai Lama to the European Parliament at the end of 2008. Additionally, China cancelled the EU-China Summit that was to be held in Lyon in December 2008, thereby postponing the signing of cultural agreements such as the French-Chinese co-production agreement.

⁷²⁹ We understand in this Study that “concentrations” also include collective market power exercised by oligopolies.

in the future, if the United States files a claim against the EU in a matter related to cultural industries and to the disadvantage of the cultural sector in Europe.

China invoked the UNESCO Convention to justify censorship of cultural goods and services. The European Union failed to react in a coherent manner that is consistent with the UNESCO Convention. In both cases, by omitting consultation with civil society the European Commission arguably missed the opportunity for a serious debate on the interpretation of the UNESCO Convention, which imposes limits on the principle of sovereignty in order to respect human rights and fundamental freedoms. In the TRIPS case, the European Commission further missed the opportunity to critically discuss the necessity of balanced intellectual property protection in the absence of substantive rules on competition law in the multilateral trading system. If cultural diversity shall matter in the future, private and public stakeholders in the EU must take appropriate action. Blind support of any fight against piracy in favour of reinforcing intellectual property protection will hardly contribute to meeting the objectives of the UNESCO Convention.

China and Europe share a common objective of protecting and promoting their local film industries against the oligopoly of the Hollywood majors. This concern arguably contributes to the diversity of cultural expressions. Europe and the United States, in turn, share a common aim of protecting human rights and fundamental freedoms, including the diversity of religious and political expressions. Structured dialogue with representatives of civil society can assist the European Commission in adopting a more nuanced and more clearly articulated approach in future dispute settlement procedures at the WTO.

Harmonising cultural diversity and international trade concerns within the WTO and UNESCO

We assess two main scenarios to bridge differences between culture and trade concerns on the international level.

The first scenario consists of reintroducing the concept of cultural exception, and thus carving out cultural policies from the multilateral trading system. We consider this scenario not only unrealistic, but also potentially detrimental to the cause of cultural diversity. Over time such a scenario would remove healthy pressure on wealthy and democratic states to address the situation of developing economies and authoritarian regimes. In turn, these privileged jurisdictions would lose the benefits resulting from the cultural expressions of the Global South and artists oppressed by dictatorships.

The second scenario consists of taking full advantage of the positive contribution of WTO law to the second and third generations of discourses on cultural diversity. Without the Marrakech agreements of 1995, we doubt that a majority of cultural stakeholders in the Global North would have adhered a decade later to the principles of equitable access, openness and balance in the UNESCO Convention, as a binding instrument.

There is no cultural diversity without trade, provided trade is fair. The UNESCO Convention limits the principle of sovereignty as a "free pass" for state regulation on cultural policies and measures, by requiring compliance with human rights and fundamental freedoms, equitable access, openness and balance. In contrast, the WTO agreements removed state sovereignty for many trade concerns without balancing this removal with commensurate international competition law. The WTO agreements thus provide a "free pass" for corporate power dominating cultural industries. Most States in the world are, for the time being, unable or unwilling to duly restrain such corporate power via their national or regional competition law.

The UNESCO Convention is legally toothless in terms of dispute settlement. Therefore, it has little bargaining value vis-à-vis the dynamics of GATT, GATS, TRIPS and other relevant multilateral trade agreements. This explains the absence of cultural diversity as a non-trade concern from discussions and litigation in the WTO, as we analysed in the previous sections. A contribution to overcoming these shortcomings would consist of elaborating and negotiating a plurilateral culture and trade agreement based on the UNESCO Convention and desirable international competition law. Such an instrument would include minimum standards for cooperation and development in matters of cultural diversity and international trade. It would initially complement and eventually replace the EU's current bilateral piecemeal approach via Protocols on Cultural Cooperation. As a reference agreement, it would provide legal safeguards against selling-off cultural diversity by trade.⁷³⁰ Last but not least, it would actively promote "fair trade" as articulated by the principles of equitable access, openness and balance.

Civil society as driving force for the implementation of the UNESCO Convention

In reference to a quote by Georges Clemenceau, we recall that culture is a matter too important to leave to policy makers alone. Indeed, civil society is called to play a major role in the implementation of the UNESCO Convention, in order to enable this instrument to materialise its full potential.

In this context, we must duly account for the public and private players' varying economic power and influence. Poorly funded NGOs face wealthy lobbies that are able to purchase support for their initiatives. Small and medium-sized enterprises are in competition with large multinational corporations. Indeed, there are markedly diverging interests at play in the elaboration and enforcement of laws and policies affecting culture and trade. On the international level, these interests operate in countries that represent great diversity in terms of political regimes, social traditions and economic welfare. These countries range from liberal to authoritarian states, relatively progressive to more conservative societies, and from developed to developing and least developed economies. There is also a wide variety of life-styles within these countries, particularly in the considerable differences between urban and rural ways of life. The context is therefore very complex, and the identification of the various constraints and interests at stake accordingly difficult. Indeed, the diversity of cultural expressions has complex and subtle ramifications.

In her replies to questions 8 and 17 of our survey, the Commonwealth Foundation states that "[m]any Commonwealth Member States, particularly its smaller, developing states,

⁷³⁰ In an emblematic case that pre-dates the entry into force of the GATS, the airline company "Swissair" asked the Swiss government to negotiate additional landing licences for their flights to Atlanta in view of the Olympic Games. The US administration replied that the competent authorities would be willing to grant such additional landing permissions in exchange for a removal of the Swiss quota system restricting distribution of Hollywood films in Switzerland. The Swiss government, driven by Swissair, concluded this bilateral deal without informing and consulting the local film sector. It replaced the quota system by subsidies in form of direct payments based on selective aid granting procedures. Today, "Swissair" does no longer exist since the company went bankrupt due to several factors. If we compare the current market shares for local films in Switzerland and South Korea that kept her quota system, we observe that quotas arguably work substantially better than selective state aid for the purpose of achieving diversity of cultural expressions in this sector. For a more detailed discussion of the Swissair-deal, read Ivan Bernier, *La bataille de la diversité culturelle*, in *Tiré à part SSA*, Lausanne 2004, at: www.ssa.ch/library/de/documents/publications/tireapart/no3_0704.pdf (German version) or www.ssa.ch/library/documents/publications/tireapart/no3_0704.pdf (French version).

have limited capacity for engagement with the Convention, as reflected in low levels of ratification and implementation. International co-ordination is poor and processes in Paris often seem to be dominated by voices of larger countries. There would seem to be a need for active development of government capacity and the active promotion of voices that can speak on behalf of smaller countries.” Accordingly, this regional organisation evaluates the degree of the cultural stakeholders' interest in her jurisdiction in contributing to the implementation of the UNESCO Convention as low, and concludes that it is thus far “not satisfactory”.⁷³¹

We understand that the objectives of the UNESCO Convention cannot be appropriately met if public actors only hear the voices of well organised, powerful and accordingly loud players among the cultural stakeholders. This is particularly relevant for the implementation of article 11 regarding the participation of civil society. Furthermore, article 7 requires “due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.” In order to fully comply with this provision, responsible policy makers must involve civil society in the process of implementing the Convention without silencing those individuals and groups who are currently marginalised or excluded from the system.

We are well aware that policy makers who question the status quo will face fierce pressure both from corporate power and from well established beneficiaries of the current selective state aid regimes. Good governance, however, requires that public interest prevail over private interest in cases of conflict. Policy makers should not simply equate dominant private interests with the public interest, without critical assessment and due consideration of the situation of the weaker parties. If the policy makers only listen to the politically and economically strongest actors, they will fail in materialising those features of the Convention that we consider the most valuable.

Recommendations

We recommend taking the following actions as a “maximum” programme for policy makers to implement the UNESCO Convention:

AREAS OF LAW AND POLICY ACTION	CONTRIBUTION BY THE EUROPEAN UNION	CONTRIBUTION BY THE MEMBER STATES
<p>Promotion of dialogue among cultures (Article 1 let. c), human rights and freedom of communication (Article 2.1), and early prevention of genocide and mass atrocities (Articles 8 and 17).</p>	<p>Elaborating the transposition of the Convention into new conventions on the protection and promotion of the diversity of religious, political, and national expressions on experts', law and policy makers' levels. Sponsoring corresponding grassroots level initiatives taken by civil society.</p> <p>Establishing an observatory on public and private practices of censorship, and on cultural expressions that violate human rights and fundamental</p>	<p>Elaborating the transposition of the Convention into new conventions on the protection and promotion of the diversity of religious, political and national expressions at the grassroots level.</p>

⁷³¹ See section “Regional Organisations Survey” at www.diversitystudy.eu We observe that the Organisation Internationale de la Francophonie and certain other relevant regional organizations did not reply to our questionnaire despite an invitation to do so followed by several reminders.

	<p>freedoms. Transatlantic Legislators' Dialogue between the European Union and United States. Contributing to new operational guidelines on human rights, fundamental freedoms and cultural diversity at the UNESCO and on the EU level. Including a reference to the UNESCO Convention in human rights clauses. Using the Human Rights Dialogue: 1) To promote the ratification of the Convention 2) To promote the implementation of the Convention 3) To monitor the implementation of the Convention within the framework of human rights. 4) To strengthen, in particular, protection and promotion of freedom of expression, information and communication as a complementary strategy of the implementation of the Convention. 5) To support and encourage the work of relevant national and international NGOs or coalitions for cultural diversity</p>	
<p>Measures, rights and obligations on the domestic level (Articles 5 and 6)</p>	<p>Further developing the Open Method of Coordination for the cultural sector. Creating a permanent technical body for cultural diversity (on the model of the European Institute on Gender Equality or the Intergovernmental Panel on Climate Change IPCC) to support the EU institutions and Member States in the formulation, conduct, and development of cultural policies in compliance with the Convention.</p>	<p>Introducing the position of so-called "Visiting Cultural Diversity Ministers" on the level of MS. Each MS' government would have such a minister from another MS in its cabinet. They shall meet on a regular basis in an EU visiting cultural diversity ministers' conference and inform civil society, their national governments and parliaments, the European Parliament and the European Commission on the progress of the actions aimed at protecting and promoting the diversity of cultural expression in Europe.</p>
<p>Rights of access to diverse cultural expressions for all</p>	<p>Elaborating and adopting variable geometry for the</p>	<p>Introducing a progressive marketing tax on</p>

<p>social groups and from all cultural origins, and recognition of artists' contributions, in particular intellectual property rights, competition law, tax legislation and "free culture" principles (Article 7)</p>	<p>duration of copyright protection: the higher the investments in marketing, the shorter the terms of protection. No export of higher intellectual property standards of protection ("TRIPS +") without export of appropriate competition law in regional and bilateral agreements. Defining the relevant market for cultural activities, goods and services on the basis of marketing investments to assess dominant market positions. Using the "essential facilities" doctrine in the area of cultural industries by referring to a definition of the relevant market based on marketing power. Civil society: Provoking ECJ and ECHR judgements on the Convention. Civil society: Provoking judgements in non-state courts on the Convention. Requiring a pooling of intellectual property assets financed by state aid to serve as collaterals for private investments.</p>	<p>"blockbusters", "hits" and "bestsellers". Defining the relevant market for cultural activities, goods and services on the basis of marketing investments. Using the "essential facilities" doctrine in the area of cultural industries by referring to a definition of the relevant market based on marketing power. Provoking ECJ and ECHR judgements on the Convention. Civil society: Provoking judgements in non-state courts on the Convention.</p>
<p>Information sharing, transparency, accountability and reporting (Articles 9, 19)</p>	<p>Structured dialogue between civil society, law and policy makers.</p>	<p>Monitoring of implementation of the Convention and its compliance as effective as that for trade rules (WTO peer review mechanism) and anti-bribery treaties</p>
<p>Education and public awareness (Article 10).</p>	<p>Elaborating and sponsoring a European school teaching kit to educate children on the UNESCO Convention. Discussing and interpreting the Convention on experts', law and policy makers' levels. Creating chairs for social science studies on human diversity and the diversity of cultural, religious, political and national expressions.</p>	<p>Introducing a European school teaching programme to educate children kit on the UNESCO Convention. Discussing and interpreting the Convention at the grassroots level.</p>
<p>Involvement of civil society (Article 11).</p>	<p>Elaborating and implementing structured stakeholders' dialogue. Adopting a new legislative act</p>	<p>Creating the positions of national "Cultural diversity ombuds(wo)man" and "Cultural diversity advocate".</p>

	<p>(regulation) implementing Article 11 and inspired by the Aarhus convention.</p> <p>Using “virtual platforms” through specific websites to foster participation of European civil society (for example the online opinion poll management system “Interactive Policy Making” or “IPM”).</p> <p>Protecting the interests of weak players in the cultural sector, in particular new entrants, against strong private and public actors including cultural bureaucracies via a more balanced intellectual property system and “automatic” state aid.</p>	<p>Transposing the Aarhus Convention into the cultural sector.</p> <p>Encouraging the establishment of non-state tribunals to hear cases on cultural discrimination in order to develop case law that further develops the rules of the Convention and the principles of “Cultural Treatment” and “Most Favoured Culture”.</p> <p>Protecting the interests of weak players in the cultural sector, in particular new entrants, against strong private and public actors including cultural bureaucracies via a more balanced intellectual property system and “automatic” state aid.</p>
<p>Sustainable development, international solidarity and cooperation (Articles 12 to 16, 18).</p>	<p>Preferential treatment, special and differential treatment as a “new deal” to materialise balanced exchanges of cultural goods and services in exchange of implementing intellectual property law.</p> <p>Negotiating a framework agreement for cultural cooperation with MS containing minimum standards applicable to all bilateral trade agreements.</p> <p>Including cultural cooperation protocols to trade and partnership agreements with countries that have ratified the Convention.</p> <p>Establishing conditionality ex ante (clauses that condition the conclusion, or the entry into force, of new agreements to the previous ratification of the UNESCO Convention by the Partner country).</p> <p>Establishing conditionality ex post (“suspension clauses”-clauses that make the UNESCO Convention observance an “essential element” and a condition of trade terms and development aid).</p>	<p>Re-balancing intellectual property and competition law.</p>

<p>Relation to other treaties (Articles 20 and 21).</p>	<p>Elaborating and testing cultural non-discrimination principles of "Cultural Treatment" and "Most Favoured Culture" against trade related non-discrimination principles to bring "cultural liberalisation" and "free culture" on a level playing field with "trade liberalisation" and "free trade" laws and policies. Elaborating a framework agreement to overcome fragmentation and achieving more coherence regarding the interface between cultural diversity, human rights and fundamental rights.</p>	
<p>Promotion of ratification and involvement in administrating the Convention (Articles 22 to 24).</p>	<p>Transatlantic Legislators' Dialogue between the European Union and United States.</p>	<p>Legislators' dialogue between Member States and non-EU States.</p>
<p>Further development of law (implementing legislation and judicial and administrative case law; Article 25 and Annex).</p>	<p>Encouraging the establishment of non-state tribunals on the European level to hear cases on cultural discrimination in order to develop case law that further develops the rules of the UNESCO Convention and the principles of "Cultural Treatment" and "Most Favoured Culture".</p>	<p>Encouraging the establishment of non-state tribunals on the national level to hear cases on cultural discrimination in order to develop case law that further develops the rules of the UNESCO Convention and the principles of "Cultural Treatment" and "Most Favoured Culture".</p>

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