

## **The Implementation by the European Community of the UNESCO Convention on Cultural Diversity**

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### ***Introduction***

On 18 December 2006, the European Community became a Party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter: “the Convention on Cultural Diversity” or “the Convention”). On 18 March 2007, the Convention entered into force. This contribution addresses the legal aspects of the implementation of the Convention on Cultural Diversity within the legal order of the EC. It consists of four sections. First, the specific obligations of the Convention will be briefly lined out. Second, the legal status of the Convention, now ratified by the Community, in the legal order of the EC will be discussed. Third, we will provide a number of examples of the role of the Convention in the external relations of the EC. Fourth, we will discuss some possible consequences of the Convention within the internal legal order of the EC.

### ***1. Obligations in the UNESCO Convention on Cultural Diversity***

Arguably, the obligations laid down in the Convention on Cultural Diversity put the focus on creating an ‘enabling environment’ for cultural interchange and expression. They are not formulated in a very pressing way, but rather constitute commitments to make ‘efforts’. A distinction is made between obligations at the national level and at the international level.

The obligations of the Parties to the Convention at the *national* level concern measures to promote and to protect cultural expressions. The Parties shall endeavour the creation of an environment that encourages individuals and groups (especially women, minorities and indigenous peoples) to produce, disseminate, distribute and have access to their own cultural expressions.<sup>1</sup> The phrasing of the provision (‘shall endeavour the creation of an environment’) is not very pressing and leaves large leeway for the Parties to the Convention. Individuals and groups should also have access to cultural expressions that originate in other countries.<sup>2</sup> Furthermore, cultural diversity must be promoted by recognizing the contribution of creators (artists and others involved in the creative process).<sup>3</sup> Such could be done by ensuring

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<sup>1</sup> Article 7.1 (a) Convention.

<sup>2</sup> *Ibid.* article 7.1 (b).

<sup>3</sup> *Ibid.* article 7.2.

adequate remuneration of their work through, *inter alia*, intellectual property protection. The Convention further also urges the Parties to the Convention to educate their population on the importance of cultural diversity<sup>4</sup>, foster civil society participation<sup>5</sup> and adopt cultural policies in a transparent way.<sup>6</sup>

At the *international* level, the Parties to the Convention further have the obligation to promote international cooperation for the creation of conditions conducive to the promotion of cultural diversity (for example by encouraging co-production and co-distribution agreements)<sup>7</sup> and to give due account to culture in their development policies.<sup>8</sup> Finally, developed countries should endeavour to facilitate cultural exchanges with developing countries by granting preferential treatment to their artists, cultural goods and services.<sup>9</sup>

## **2. Legal status of the Convention in the EC legal order**

In the Decision of the Council of 11 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Council approved the Convention on behalf of the Community. By the adoption of this Decision, the Convention became part of the European legal order. Since the Convention on Cultural Diversity is concluded by the EC through the applicable procedure, it is binding on the institutions of the EC and on the Member States.<sup>10</sup>

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)<sup>11</sup> (thus below Articles 43 and 49 TEC on freedom of establishment and freedom to provide services) but *above* secondary EC law (Regulations, Directives, Decisions, Recommendations or Opinions).<sup>12</sup> Directives, like e.g. the Audiovisual Media Services Directive<sup>13</sup>, thus need to be consistent with the obligations in the Convention.

Since the Convention has become part of the EC legal order, it may also benefit from the specific status that is granted to EC law. To the extent the nature and structure of the Convention allows this<sup>14</sup> and the provisions of the Convention are sufficiently clear, precise

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<sup>4</sup> *Ibid.* article 10.

<sup>5</sup> *Ibid.* article 11.

<sup>6</sup> Article 9 Convention requires Parties to the Convention to designate a contact point responsible for information-sharing.

<sup>7</sup> *Ibid.* article 12.

<sup>8</sup> *Ibid.* articles 13 and 14. This obligation includes strengthening the cultural industries in developing countries, performing capacity-building and technology-transfer and providing financial support (*inter alia* through the establishment of an International Fund for Cultural Diversity (see article 18 Convention)). Partnerships between and within public and private sectors and non-profit organizations with the objective of enhancing the capacities of developing countries to protect and promote cultural diversity should be encouraged (article 15).

<sup>9</sup> Article 16 Convention. The provision states that this should be done 'in accordance with their international obligations.' Preferential treatment will thus have to comply with the relevant obligations in the WTO Agreements.

<sup>10</sup> Article 300 (7) Treaty establishing the European Community (TEC).

<sup>11</sup> This can be derived from the fact that it is possible to ask an Opinion to the European Court of Justice as to whether an agreement envisaged is compatible with the provisions of the EC Treaty. See Article 300 (6) TEC.

<sup>12</sup> See Article 300 (7) TEC.

<sup>13</sup> Directive 2007/65 amending Council Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. 2007, L332/27.

<sup>14</sup> See ECJ, Case 104/81, *Kupferberg*, [1982] ECR 3641, para. 22. and ECJ, Case 21-24/72, *International Fruit Company*, [1972] ECR 1219, para. 20.

and unconditional,<sup>15</sup> they will have direct effect within the European legal order, and thus also within the legal order of EU Member States. Nevertheless, it may be argued that the Convention is not granting rights to individuals and therefore is not amenable to being invoked by individual *citizens* as a legal act that would conflict with European or national measures. Still, EU *Member States* may invoke the Convention to challenge sources of secondary EC law if the nature and structure of the Convention allows this.<sup>16</sup> Even so, as has been noted before, the Convention is not really imposing firm obligations upon the parties. One may therefore wonder whether a direct legal conflict may arise.

### **3. *Role of the Convention in the external relations of the EC***

The EC seems to have firmly embraced the Convention on Cultural Diversity in its external relations. In its Communication of 10 May 2007 on a European agenda for culture in a globalizing world, the European Commission stated that “[t]he rapid entry into force of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions illustrates the new role of cultural diversity at international level: as parties, the Community and its Member States have committed themselves to strengthen a new cultural pillar of global governance and sustainable development, notably through enhancing international cooperation.”<sup>17</sup>

Actions by the EC on the international level to promote cultural diversity seem consistent with other international obligations of the EC. More particularly, in the framework of the World Trade Organization, the EC has made extensive MFN exceptions (e.g. for co-distribution agreements or to react against unfair pricing practices by third country suppliers) and has made no Market Access or National Treatment Commitments for Audiovisual Services.<sup>18</sup>

The EC has indeed included a reference to the Convention on Cultural Diversity in the Protocol on Cultural Cooperation with Cariforum. The Convention is used as a reference for all definitions and concepts in the Protocol on Cultural Cooperation.<sup>19</sup> It is also indicated in the Protocol that the Parties shall collaborate to improve the conditions governing their exchanges of cultural services.<sup>20</sup>

### **4. *Consequences of the Convention within the internal legal order of the EC***

#### **4.1. Creative content online**

The European Community has embarked upon a process to better regulate the online distribution of creative content. In its Communication of 3 January 2008 on this issue, the Commission states three objectives: (i) to ensure European competitiveness and foster the availability and circulation of European content creation; (ii) to update and clarify legal provisions that may unnecessarily hinder online distribution of online content and (iii) to

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<sup>15</sup> See ECJ, Case 12/86, *Demirel*, [1987], ECR 3719, para. 14.

<sup>16</sup> See ECJ, Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, para. 52.

<sup>17</sup> 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, p. 7.

<sup>18</sup> This may be, for instance, contrasted with the Republic of Korea, which has made no limitations on its commitments for Mode 1, 2 and 3 for Motion picture and Video Tape Distribution as well as for Record Production and Distribution. It has no MFN exemption for audiovisual services.

<sup>19</sup> Article 1.3 of the Protocol of Cultural Cooperation with Cariforum.

<sup>20</sup> *Ibid.* article 1.2.

foster the active role of users in the selection, distribution and creation of cultural content.<sup>21</sup> The Communication does not contain any references to the UNESCO Convention on Cultural Diversity. The focus seems to be mainly on removing unnecessary barriers to online distribution of creative content. This is not necessarily in conflict with the Convention. The latter recognizes that diversity-enhancing measures may include “measures which aim at developing and promoting the free exchange and circulation of ideas”.<sup>22</sup> Improving online distribution of creative content would contribute to that. However, a problem would occur when the removal of obstacles to online distribution would lead to a suppression of certain cultural expressions to the advantage of certain other expressions. This would be the case when the Member States would find it difficult to support further some vulnerable cultural expressions.<sup>23</sup> Nonetheless, the Communication states in its objectives that the EC should update or clarify legal provisions that *unnecessarily* hinder online content. It does not state that protective measures will necessarily be prohibited.

Related to online distribution of creative content, on 18 May 2005 the Commission made a Recommendation on online management of copyright and related rights for online music services.<sup>24</sup> The Recommendation, which relates specifically to *music* services, has more detailed proposals on how to ensure copyright protection at the same time as to facilitate the growth of legitimate online services. It is stated by the Commission that free provision of online music services entails right-holders being able to freely chose there collective rights manager for managing the rights across the borders of the European Member States. This may lead to a situation where a number of large collective rights managers are controlling distribution of online music in the whole of Europe. This may clearly improve distribution of cultural content, but may also lead to fewer opportunities for small music creators and producers. Furthermore, it is noted by the Commission that the royalties that are being collected by the collective rights managers should be distributed without discrimination on the grounds of residence, nationality or category of right-holder.<sup>25</sup> Arguably, this may limit the possibility for Member States to adopt policies that make deductions from the royalties in favour of local cultural industries. However, in the Recommendation itself, the Commission only states that the royalties should be distributed in an equitable manner.<sup>26</sup> The focus is mainly on transparency: the contracts and statutory membership rules of the collective rights managers should “specify whether and to what extent, there will be deductions from the royalties to be distributed for purposes *other than for the management services provided*.”<sup>27</sup> Furthermore, upon payment, it should be specified whether deductions were made “*for purposes other than for the management service provided*.”<sup>28</sup> The Commission thus does not recommend a prohibition of deductions in favour of local cultural industries, but this should be made transparent. It should also be noted in this respect, that Article 87.3 (d) of the EC Treaty states that aid to promote culture and heritage conservation may be considered compatible with the common market, where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest. Hence

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<sup>21</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM(2007) 836 final, p. 4.

<sup>22</sup> Article 6.2 (e) Convention.

<sup>23</sup> Note that the Convention on Cultural Diversity indicates that the Parties to the Convention may determine situations where cultural expressions in their territory are at risk of extinction, under serious threat or otherwise in need of urgent safeguarding. If so, they may take appropriate measures to protect in their territory the cultural expressions that are under threat. See Article 8 Convention.

<sup>24</sup> Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, 2005/737.

<sup>25</sup> Commission Recommendation 2005/737, Introductory Paragraph 12.

<sup>26</sup> Commission Recommendation 2005/737, para. 10.

<sup>27</sup> *Ibid.* para. 11 (emphasis added).

<sup>28</sup> *Ibid.* para. 12 (emphasis added).

state aid in favor of cultural industries is already subject to scrutiny under the general rules of the EC Treaty.

#### 4.2. Audiovisual Media Services Directive

On 19 December 2007, the Audiovisual Media Services Directive entered into force.<sup>29</sup> The Directive amends the existing Television without Frontiers Directive to ensure an update in the light of present technological developments in the distribution of audio-visual services. The Audiovisual Media Services Directive needs to be implemented by the Member States by 19 December 2009. It contains an explicit reference to the Convention on Cultural Diversity in the fifth recital of its preamble, reiterating that cultural activities, goods and services have both an economic and cultural nature, and stressing that the Directive respects the principles of the Convention.

Under the Audiovisual Media Services Directive, the scope of the Television without Frontiers Directive has been broadened to any service under the editorial responsibility of a media service provider that has as principal purpose the provision of programmes<sup>30</sup> in order to inform, entertain or educate to the general public by electronic communications networks.<sup>31</sup> The broad definition means that any service with audiovisual content is covered by the Directive, regardless of the technology that is used to deliver the content. The broad definition implies that a large number of services will be governed by the principles in the Directive. The major principle is the 'country of origin'-principle. Under the harmonised rules of the Directive, an audiovisual media service provider from one Member State may provide services into another Member State while remaining regulated by the country of origin.

However, the Directive involves minimum harmonisation. It is indicated that the Member States remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules provided that such rules are in compliance with Community law.<sup>32</sup> It should be noted that these more detailed or stricter rules can only apply to providers that are under the jurisdiction of the Member State. The host Member State may nevertheless also apply stricter rules to the foreign service supplier whose services are wholly or mostly directed to its territory, provided a procedure is followed by which the Commission and the home Member State are notified and the Commission has been given the opportunity to decide whether the measures are compatible with Community Law.<sup>33</sup> The host Member State can thus still apply measures that protect domestic cultural industries, provided that these measures pursue an objective of general public interest and that the measure is objectively necessary, applied in a non-discriminatory way and proportionate to the objective.<sup>34</sup> In the preamble of the Directive, it is indicated that the notion of rules of general public interest includes rules on the protection of cultural policy. This is a codification of the case-law of the European Court of Justice.<sup>35</sup> Thus, these provisions do not seem to exclude appropriate measures to protect cultural diversity, as called for in the Convention on Cultural Diversity. However, the exceptions elaborated in the case-law of the European Court of Justice will be interpreted restrictively. It may be possible, however, that a Member State that defends a national cultural measure before the European Court of Justice invokes the Convention on

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<sup>29</sup> Directive 2007/65 amending Council Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. 2007, L332/27.

<sup>30</sup> Programmes consist of moving images with or without sound. See Article 1.2 (b) Audiovisual Media Services Directive.

<sup>31</sup> Article 1.2 (a) Audiovisual Media Services Directive.

<sup>32</sup> Article 3.

<sup>33</sup> Article 3.4.

<sup>34</sup> Article 3.3 *in fine*.

<sup>35</sup> See recently, e.g. ECJ, Case C-250/06, *United Pan-Europe Communications Belgium and others*, nyr.

Cultural Diversity to support its claim. However, since the provisions in the Convention are not formulated as firm obligations, it seems difficult to argue that the Convention prevails over the obligations in the Audiovisual Media Services Directive. As stated earlier, the Convention does not prevail over Articles 43 and 49 TEC, but nevertheless may be invoked before the European Court of Justice as support of the cultural policy pursued.

There is a possibility to reserve screen quotas to certain European productions or independent productions in case of so-called linear services (television broadcasting).<sup>36</sup> For non-linear services (*i.e.* audiovisual services that are viewed on demand), it is only required for the Member States to ensure that on-demand audiovisual media services provided by providers under their jurisdiction promote the production of and access to European works.<sup>37</sup> It has been suggested that, even though the idea of quotas in favour of certain audiovisual works is conducive to cultural diversity, the definition of ‘European works’ used in the Directive is in fact not ensuring that cultural diversity will follow from such quotas. The definition used in the Directive indicates that ‘European works’ are works originating in European States or in States which are party to a co-distribution agreement.<sup>38</sup> Works originate in a European State when they are mainly made with authors and workers residing in one of more of these States and provided that (i) they are made by one or more producers established in one or more of those States *or* (ii) the production is supervised and actually controlled by one or more producers established in one or more of these States *or* (iii) the contribution of co-producers of those States in the total co-production costs is preponderant and not controlled by one or more producers established outside those States.<sup>39</sup> It has been noted by several authors that this definition is “neither based on originality or quality criteria nor does it require a particular expression of national and European themes.”<sup>40</sup> Effective implementation of the Convention on Cultural Diversity would therefore require an adjustment of this definition.

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<sup>36</sup> Article 5. 10 % of the screen time must be reserved to European works.

<sup>37</sup> Article 3i.

<sup>38</sup> Article 1 (n) (i).

<sup>39</sup> Article 1 (n) (ii).

<sup>40</sup> See M. BURRI-NENOVA, “The New Audiovisual Media Services Directive: Television *without* Frontiers, Television *without* Cultural Diversity”, *Common Market Law Review* (2007), pp. 1689-1725, at p. 1707, with further references.