



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1.9.2004
SEC (2004), 1062 final

RECOMMENDATION FROM THE COMMISSION TO THE COUNCIL

to authorise the Commission to participate, on behalf of the Community, in the negotiations within UNESCO on the convention on the protection of the diversity of cultural contents and artistic expressions

1. Introduction

The October 2003 General Conference of UNESCO unanimously called on the Director-General of UNESCO to submit to the 33rd session of the General Conference, in October 2005, a preliminary draft convention on the protection of the diversity of cultural contents and artistic expressions.

Following this decision, the UNESCO Secretariat organised the work in two phases. The first phase involved the Secretariat convening around fifteen independent experts, chosen by the Director-General, in order to prepare a framework for a draft convention. This group of experts met three times between December 2003 and May 2004 and, at the end of its work, produced a text constituting a basis for the preliminary draft convention (hereinafter referred to as the "PDC"). This was transmitted by the Secretariat to the members of UNESCO on 16 July 2004. The transmission of the PDC, accompanied by the Director-General's preliminary report, marked the start of the second phase of work on the convention, i.e. the intergovernmental negotiation phase proper.

The PDC defines a series of complementary objectives concerning the preservation and promotion of cultural diversity, the development of cultural policies and the encouragement of intercultural dialogue and international cooperation. To this end, it defines "culture", "cultural diversity" and "cultural expressions" in a relatively broad way and provides a list of cultural goods and services whose distinctive nature it recognises, and a list of cultural policies.

The PDC defines fundamental principles: for example respect for human rights and fundamental freedoms, complementarity of economic and cultural aspects of development, sustainable cultural development, transparency, and balance, openness and proportionality of cultural policies.

In relation to these principles, the core section of the PDC deals with the rights and obligations of the States Parties both at national level (development of cultural policies, promoting creation and access to culture, respect for intellectual property, protection of vulnerable cultural expressions, information and transparency, education and public awareness-raising, participation of civil society) and at international level (promotion of the principles and objectives of the convention in other international arenas, aid for co-production, establishment of a "Cultural Diversity Observatory", cooperation for development, and preferential treatment for developing countries).

The PDC also sets up three follow-up bodies (General Assembly, Intergovernmental Committee and Advisory Group).

A procedure for the settlement of disputes is envisaged, in order to settle questions of interpretation or application of the convention. Three stages are foreseen: (1) negotiation, (2) mediation or good offices, (3) a choice of arbitration by an ad hoc UNESCO tribunal or by the International Court of Justice, or an ad hoc conciliation procedure as defined by the convention.

The only article which at this stage presents two options covers the relationship between the UNESCO convention and other international instruments. Option B gives systematic primacy to existing international instruments. Option A gives primacy to existing international instruments, in absolute terms as regards instruments relating to intellectual property rights to which members are parties and, for all other instruments, "except where the exercise of those

rights and obligations would cause serious damage or threat to the diversity of cultural expressions".

The intergovernmental negotiations will begin on 20 September 2004, with the convening of the first negotiating session at UNESCO headquarters. A second session is envisaged around February 2005, and a third session will probably have to be scheduled around spring 2005, before the September 2005 Executive Council. The Executive Council is the body which will have to decide to place the preliminary draft convention on the agenda of the September-October 2005 General Conference for adoption.

2. COMMUNITY COMPETENCE

The preliminary draft convention affects internal and external policies at both Member State and Community levels.

2.1. *The scope and logic of the PDC affect fields of Community jurisdiction.*

The scope of the PDC - and in particular of the principles, rights and obligations enshrined in it - refers in particular to a broadly defined concept of "cultural policies"¹

The PDC is thus likely to affect the *acquis communautaire* and Community policies specifically in the cultural field, for example cultural policy (Culture 2000), audiovisual policy ("Television without Frontiers" Directive, MEDIA Programme), freedom of movement for cultural goods and services intellectual property, and cultural aspects of our development policies.

It also follows from the definition of cultural policies that the scope of the affected policies and measures includes those which have an influence on the cultural sector². Thus, in addition to Community measures designed to achieve a specific cultural objective, those taken under other policies which affect cultural expressions and in particular cultural goods and services (e.g. tax policies relating to the internal market, competition, international trade, etc.) are also covered.

Moreover, the PDC affects not only existing instruments, but also the Community's capacity to develop new instruments.

It should be noted in this context that some of the principles which would be applicable to all cultural policy measures as defined by the PDC have an extremely broad scope, in particular the principles of openness and proportionality.

Under the terms of the consistent case law of the Court of Justice, and in particular the EART case law³, *"each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope."*

¹ In accordance with Article 4.7 of the PDC these are "policies, whether at the local, regional, national or international level, which address or affect any aspect of the cultural expressions of an individual, community, or society, including the creation, production, distribution, dissemination of, and access to, cultural goods and services".

² *Idem.*

³ CJEC, 31 March 1971, case 22/70, *Commission v Council*, ECR p. 263.

This rule has even been widened by case law after the EART judgment to include non-exclusive competences.

2.2. *Certain provisions of the PDC urge the Parties to take specific measures which fall within the scope of areas of Community competence.*

By way of example, the following provisions can in particular affect Community competences:

- **Free circulation and mobility of artists and creators⁴**

Obligations in this field are likely to affect various aspects of policies in a broader context than the cultural context alone. This question can indeed affect free movement of persons, and in particular workers within the meaning of the internal market in the EU (Title III, Chapter 1 of the Treaty, and in particular Article 39), immigration issues (Title IV of the Treaty), or negotiations within the World Trade Organisation (WTO) on the opening of European markets to the entry of temporary cultural workers performing specific cultural services⁵ (Article 133 of the Treaty). These fields fall within the Community competence, often exclusively.

- **Facilitation of access to global markets for works from developing countries⁶**

Here, customs policy instruments, such as reduction of the duties on certain cultural products imported into the European Union, as well as the treatment of trade in services and movement of persons, could be involved. The exclusive competence of the Community for trade matters would then in particular be affected (Article 133 of the Treaty).

- **Relationship to other international instruments⁷**

The existence in the PDC of two alternatives as regards relations with other international instruments will entail negotiations likely to affect the Community's exclusive competence in trade matters (Article 133 of the Treaty), particularly concerning the commitments entered into by the European Community and its Member States with regard to the WTO. Option A is also likely to affect Community competences as regards intellectual property.

- **International consultation and coordination⁸**

Consultation and/or coordination obligations in other international fora are likely to affect Community competences and procedures, in particular as regards external trade.

- **Intellectual property⁹**

⁴Cf. Article 12.2.d of the PDC.

⁵This refers to the negotiations on liberalisation within the agreement on services (GATS) relating to the provision of services, Mode 4 (presence of natural persons).

⁶ Cf. Articles 12 and 17 of the PDC.

⁷ Cf. Article 19 of the PDC.

⁸ Cf. Article 13 of the PDC.

⁹ Cf. Articles 4.4.c, 7.2.b, and 19 of the PDC.

The provisions concerning intellectual property in the PDC are likely to affect the *acquis communautaire* in the field, as well as the existing international framework (cf. international treaties under the auspices of the World Intellectual Property Organisation, WIPO).

2.3. Moreover, *the international cooperation dimension* present in numerous provisions of the PDC¹⁰ could create obligations at Community level or affect the development of forthcoming generations of cooperation programmes and projects, particularly within the framework of development cooperation policy. The aspect relating to international cooperation in general has therefore implications on the Community policies and instruments in that field.

The legal impact of the PDC at Community level will depend on the evolution of the text during the negotiations - a matter to which the Community will have to pay particular attention.

2.4. The *absence of a disconnection clause* to preserve the specific relations between the Parties in a single regional integration area would require the PDC to regulate the relationships between Member States of the European Union as regards cultural diversity matters. That would open the way to violations of the *acquis communautaire*, including fundamental principles guaranteed by the EC Treaty such as non-discrimination, freedom of establishment and freedom of movement of goods, services, capital and persons within the Community, and Community competition rules.

A specific clause must therefore aim at guaranteeing the primacy of Community law over the provisions of the convention regarding relationships between Member States.

Moreover, the Community will have to make sure that the provisions concerning the signature and the ratification of the convention enable it to become Party to the convention.

3. CONCLUSION

In conclusion, it ensues from the above that Community policies and instruments are affected by the convention and that it is for the Community to negotiate its participation in the convention, to preserve its *acquis* and competences, and to assert its interests in the context of these negotiations.

The Commission considers that it is important for the Community and its Member States to confirm at international level their commitment to cultural diversity. It considers that a common European Union approach is necessary in order to contribute effectively to the development of a world-wide strategy for the safeguarding and the promotion of cultural diversity.

The Treaty and the consistent case law of the Court of Justice make it compulsory for the European Community to ensure the unity of its representation in international organisations, even where shared competences are involved¹¹.

¹⁰Cf. Articles 2.6., 12, 14, 16, 17 and 18.

¹¹Cf. in particular Article 10 of the Treaty and Opinion 2/91 of the Court of 19 March 1993 on the International Labour Organisation (ILO).

In addition, in view of the above, and in line with its Communication to the Council and the European Parliament of 27 August 2003¹², the Commission considers necessary that the Council decides that the European Community participates in the negotiations in UNESCO on the preliminary draft convention, in order to preserve the Community *acquis* and competences and to assert the interests of the Community in these negotiations.

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In view of the above, the Commission recommends that the Council decide:

that the European Community should take part in the negotiations in UNESCO on the convention on the protection of the diversity of cultural contents and artistic expressions, in order to preserve the Community *acquis* and competences and to assert the interests of the Community;

that the Commission should negotiate on behalf of the European Community on the basis of the attached negotiating directives, in consultation with a special committee appointed by the Council to assist the Commission in this task.

That, insofar as the agreement comes partly under the Member States competence and, partly, under Community competence, the Commission and the Member States should closely cooperate during the negotiations, with a view to achieving unity in the international representation of the Community.

¹² COM (2003) 520 final.

ANNEX

NEGOTIATING DIRECTIVES

- (1) The Commission shall ensure that the provisions of the future UNESCO convention on the protection of the diversity of cultural contents and artistic expressions are consistent with the *acquis communautaire* and with the objectives, procedures and measures of the relevant Community policies, in particular as regards culture, audiovisual, internal market, competition, intellectual property, international trade and cooperation for development. It shall also ensure the safeguarding of the Community's capacity to develop its policies in accordance with the Treaties.
- (2) The Commission shall ensure that the future convention contains appropriate provisions guaranteeing the primacy of Community law over the provisions of the convention with regard to the relationships between Member States of the European Union.
- (3) The Commission shall ensure that the future convention contains appropriate provisions enabling the European Community to become a contracting party to it.
- (4) The Commission shall report regularly to the special committee appointed by the Council on the progress of negotiations and, if necessary, refer to it any difficulty which would appear during the negotiations.