Communication of the European Community and its Member States[1] to UNESCO
on the preliminary draft UNESCO Convention
on the protection of the diversity of cultural contents and artistic expressions
Paris, 15 November 2004

This document presents a first set of comments by the European Community and its Member States on the Preliminary Draft Convention on the protection of the diversity of cultural contents and artistic expressions (PDC) released by the UNESCO Secretariat in July 2004.

These initial comments may be further developed and new ones may be introduced, including draft amendments, in the course of the negotiation.

General evaluation

The PDC constitutes a good working basis to develop a relevant and effective tool to promote cultural diversity and cultural exchanges, to which the European Community and its Member States attach utmost importance. It should also contribute to mutual respect and understanding among cultures at global level. The draft Convention reflects the scope given by the General Conference which has decided to concentrate on cultural content and artistic expression and not to cover other aspects of cultural diversity. This approach should be supported and the scope should not be widened.

Among the broad principles on which the draft Convention is established, the following ones are particularly welcome:

- The overarching role of compliance with human rights and fundamental freedoms guaranteed by international law; the Convention shall in no way weaken human rights and fundamental freedoms in the name of culture or tradition;
- The recognition of the specific and dual (cultural and economic) nature of cultural goods and services;
- The recognition of the role of public policies in safeguarding and promoting cultural diversity and the sovereign right of States and other relevant public authorities in this respect;
- The importance of international cooperation to face cultural vulnerabilities, in particular vis-à-vis developing countries;
- The need for an adequate articulation with other international instruments and bodies allowing for a fully effective implementation of the Convention while preserving legal certainty as regards international obligations, under the Convention as well as under other international agreements.

As a general comment, the expression “State Parties” should be replaced by “Contracting Parties” throughout the text.

[1] Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom of Great Britain and Northern Ireland.

Other comments are presented on the basis of the structure of the draft Convention

Title

The current title should be simplified and focused on "cultural expressions" and its objective of promoting cultural diversity should be underlined.

Preamble

The Preamble will need to be re-examined at a later stage to reflect the contents of the final text of the Convention.

New elements will be necessary in order to:

- Refer to existing legal instruments, in particular within the UNESCO framework, such as the Florence Agreement and the protocol of Nairobi on the free circulation of cultural goods;
- Refer to the different forms of cultural vulnerabilities;
- Stress the importance of promoting the dialogue among cultures;
- Stress the importance of languages as a vehicle of cultural diversity;
- Stress the contribution of the protection of intellectual property rights to cultural flowering;
- Stress the crucial role of education and of the media in the promotion of cultural diversity.

Section I -Objectives and Principles

The legal nature of "principles" in the overall structure of the Convention has to be clarified and their articulation with the objectives and the preamble has to be thoroughly reviewed in due time to avoid repetitions and ensure overall consistency.

In substance, the general thrust expressed in these objectives and principles can be supported.

As advocated at the first meeting of the intergovernmental experts, a reference to the recognition of the link between social cohesion and cultural diversity can be supported.

Article 1 (c) should be redrafted to improve compatibility with article 5. The objective is not only to facilitate the adoption of cultural policies, it is also, and more fundamentally, to recognise the rights of Contracting Parties to elaborate and implement cultural policies.

Article 2.1 and 2.2 concerning respect for human rights and fundamental freedoms should be merged into one single article. The wording of the new article could build on the existing

references to human rights and fundamental freedoms embodied in the Universal Declaration on Cultural Diversity.

Article 2.3 should be reformulated: the expressions “free access” and “right of access of all people” should be reviewed as they can lead to misunderstandings. The importance for people to have access and keep ownership of their own culture and to have access to reciprocal knowledge of other cultures as a basis for an equitable dialogue should be stressed without giving rise to interpretations implying the recognition of new rights for individuals or groups.

Article 2.4 should be reviewed.

Article 2.5 and 2.6 have to be reviewed in order to distinguish between the general objectives of international cooperation and the specific needs of developing countries, in line with the subsequent comments concerning article 12, 16 and 18 of the PDC.

The legal dimension of the objectives and principles results from the obligation on Contracting Parties that measures taken to encourage cultural diversity must be in conformity with the Convention (art.5.2). Principle 8 (balance, openness and proportionality) and Principle 9 (transparency) will require particular attention as they can be read as “operational principles”. The legal effect of such principles should be clarified. In particular, given their current general wording, they should not constitute a basis for challenging policy measures, including in the framework of dispute settlement procedures.

Depending on their legal value, it may be necessary to clarify some of the key concepts referred to in these principles, in particular those of “balance” and “openness”. At this stage, the term “proportionality” should be reconsidered since there is no reference to any benchmarks against which such “proportionality” could be measured (for example, does “proportional” mean “not more burdensome than necessary” or “not affecting specific provisions of the Convention or of other International Agreements” – and if so, which ones –, or something else altogether ?) .

The concrete implications of Principle 9 (transparency) will also need to be clarified in relation to Article 9. While adequate transparency is always a desirable objective, it should not be overly burdensome for the Parties to the Convention, in order to ensure effective application of this principle.

Section II - Scope and Definitions

The scope of the Convention should be defined more clearly. The Convention should apply to the policies and measures adopted by the Contracting Parties that address or affect the diversity of cultural expressions.

In addition, definitions should be limited to those which are indispensable to the understanding of the legal text: e.g. the expression “cultural capital”, defined in article 4.6, is only used in article 2.7.

The definitions should be thoroughly reviewed in order to ensure consistency both within each definition and within the entire article 4. For example, the reference to "cultural activities" and its relationship to cultural goods and services should be reviewed.

The current draft definitions of cultural goods and services and the related illustrative list in Annex 1 are too vague and broad. In art. 4.4, criterion (b) is the only one to have a limitative effect as criterion (a) is applicable to most human activities. Criterion (c) is confusing, since intellectual property rights apply to a number of activities, goods and services that are not "cultural", and conversely, there are cultural activities, goods and services that are not subject to intellectual property rights. This criterion is therefore inappropriate to define cultural goods and services and should be removed. The definition should therefore be further refined around criterion (b) and Annex I should be deleted in its entirety.

The definition of cultural industries (art. 4.5) should be reconsidered on the basis of a revised definition of cultural goods and services.

The definition of cultural policies should be reconsidered in the light of a clarified scope: whereas policies affecting cultural expressions may come under the scope of the Convention, they do not necessarily constitute cultural policies as such. The need for Annex II should also be reconsidered.

Section III - Rights and obligations - generalities

In this section, the provisions should be formulated in such a way as to ensure the attainment of the objectives of the Convention in an effective and legally certain manner, making the Convention clear, coherent, practicable and workable.

The Convention should address the rights and obligations of the Contracting Parties and should not create rights for individuals or groups.

Rights and obligations at the national level

Art. 5.1: In the current wording, the emphasis is put on "measures". It would be better to frame such measures within the context of cultural policies. This could be reflected by introducing after "Sovereign right" the following wording: "to formulate and implement their cultural policies to protect and promote …"

Art. 5.2: The scope of a Convention does not constitute a benchmark against which the conformity of national measures could be assessed. The words "and scope" should be deleted.

Article 6: The inconsistency between the French version of the article which foresees that each party "adopts" measures and the English version which states that it "may adopt" should be reviewed.

Article 7: The Convention should not create rights for individuals or groups. The obligation to "provide all individuals with opportunities…" foreseen in this article should be reformulated. The expressions "various social groups" and "social status of artists" should be discussed and clarified.

Article 8: The need, function and content of this article should be reassessed. Redrafting should provide clarity and avoid the risk of extraterritorial application.

Article 9: To ensure their effective application, the obligations should be clarified and should not be overly burdensome for the Parties to the Convention.

Article 10: The reference to media should encompass all forms of media, in particular electronic communication media. Paragraph (c) could be strengthened in referring both to the strengthening of existing programmes as well as to the development of new initiatives.

Rights and obligations relating to international cooperation

The European Community and its Member States consider that international cooperation is a major component of the PDC. However, questions of international co-operation in general and of co-operation for development in particular should be better identified and articulated in the PDC.

The objectives and means of international cooperation should address all forms and situations of structural vulnerability or weakness of cultural expressions (e.g. limited linguistic area, limited production and distribution capacity for certain cultural goods and services, minority cultures in a majority culture, etc) and consider all frameworks for cooperation (including regional frameworks and frameworks based on cultural, linguistic, or historical links). The Convention should also recognise that a structural cultural vulnerability or weakness is further aggravated by poverty, underdevelopment and reconstruction or transition processes and, accordingly, design specific tools to tackle cultural vulnerability in countries in such situations.

In this light, Articles 12, 16 and 18 should be reviewed. Article 12 could establish the general scope for international and regional cooperation to contribute to cultural diversity in general and support vulnerable cultural expressions, in particular. Article 16 should, within the objectives of article 12, and taking into account article 18, be dedicated specifically to cooperation in favour of vulnerable cultural expressions in developing countries.

The fundamental principle stated in the first sentence of Article 13 can be supported. However, the mechanism foreseen in the second and third sentences to implement this principle should be more flexible. In particular, UNESCO should not be the unique framework in which such coordination could occur. Parties, which so wish, should be able to consult each other within the frameworks and according to the methods which are appropriate for them. The second and third sentences should be redrafted accordingly.

In Article 14, a broad cooperation concept should be encouraged in order to cover the entirety of cultural cooperation rather than the currently limited reference to co-production or co-distribution agreements in the audiovisual sector. It should at least cover co-operation in all cultural industries.

Article 15: the importance of developing comparable and reliable data for the operation of the Convention should be stressed. Instead of establishing new bodies, existing organizations or networks should be relied on, and their activities developed as appropriate.

Article 16 and 18: This article should be reviewed together with article 12 (see supra).

Article 17: the idea of preferential treatment should be carefully reviewed to take into consideration all vulnerable cultural expressions and all forms of international and regional cooperation.

Section IV - Relationship to other instruments

The articulation between the UNESCO Convention and other international instruments needs to be further clarified.

In accordance with Article 151 of the EC Treaty, the EC takes cultural aspects into account in its actions and its policies, in particular in order to respect and to promote the diversity of its cultures. The EC could therefore not accept a principle according to which rights and obligations deriving from other international agreements would prevail over the UNESCO Convention on Cultural Diversity. Neither should the UNESCO Convention prevail over rights and obligations deriving from other international agreements. What is essential is to secure that the Convention and other international instruments are mutually supportive and do not undermine each other, and that an effective implementation of the UNESCO Convention to safeguard and promote cultural diversity is ensured.

This goal is coherent with the spirit of international agreements, such as the ones of the WTO. In our view, a cultural policy, for instance with the aim of safeguarding and promoting the freedom of expression, may constitute an overriding requirement relating to the general interest.

Both options proposed in the draft Convention on articulation between the Convention and other agreements are unsatisfactory. The distinction established between agreements relating to intellectual property rights and other agreements in one option would need to be discussed. Furthermore, the draft Convention tackles the relationship with existing agreements but not with future ones, nor with future obligations or instruments under existing agreements. Precise wording is needed to accentuate the coherence and mutual supportiveness between the Convention and other international agreements and ensure an effective implementation of the Convention.

The complementarity of the Convention with other international agreements will also be improved by clarifying and reducing the scope of the definition of cultural goods and services and better defining the measures foreseen under this Convention.

Section V – Follow-up bodies and mechanisms

Follow-up bodies and mechanisms should guarantee the effective implementation of the Convention and avoid creating unnecessary administrative and financial burdens.

The proposed distribution of power between the General Assembly (GA) and the Intergovernmental Committee (IGC) should be reviewed. Any new initiative or action taken pursuant to the Convention should require a decision by the GA on – where necessary – a proposal made by the IGC.

The need for external advice should be recognized by the Convention and could be strengthened in article 21.3 (i). However, the need for the creation of a specific and permanent advisory body has not yet been demonstrated. Therefore, no permanent body of this kind should be established by the Convention, hence article 22 should be deleted, as well as references to the advisory body in other provisions of the PDC.

A specific clause should be added to the articles on the General Assembly and the IGC to allow the European Community to participate as a Contracting Party.

Dispute settlement mechanisms

Effective implementation of the Convention will have to be ensured. However, the need for, and form of, dispute settlement mechanisms will have to be assessed in due time on the basis of the final formulation of the rights and obligations provided for under the Convention.

Section VI Final clauses

The final provisions of the Convention need to be adapted to make it possible for the Community to accede to it and to ensure, where appropriate, the application of European Community law in the relations between the Member States of the European Union.

Annexes

Annex I and II should be deleted.