

European Diversity and Autonomy Papers

EDAP 3/2005

**EU Participation in the UNESCO  
Convention on the Protection and  
Promotion of the Diversity of Cultural  
Expressions:  
Some Constitutional Remarks**

Delia Ferri



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Europäische Akademie Bozen  
Drususallee, 1  
39100 Bozen - Italien  
Tel. +39 0471 055200  
Fax +39 0471 055299  
[edap@eurac.edu](mailto:edap@eurac.edu)  
[www.eurac.edu/edap](http://www.eurac.edu/edap)

Accademia Europea Bolzano  
Viale Druso, 1  
39100 Bolzano - Italia  
Tel. +39 0471 055200  
Fax +39 0471 055299  
[edap@eurac.edu](mailto:edap@eurac.edu)  
[www.eurac.edu/edap](http://www.eurac.edu/edap)

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## Abstract

Culture, in its prescriptive definition, is crucial concept for building a peaceful and open Europe as envisaged in the EC and EU Treaties, as well as in the Constitutional Treaty. For this reason, just after the third phase of intergovernmental negotiations that took place from 25 May to 4 June 2005, and with regard to the complexity and changing dimensions of this issue, it is important to underscore the significance of cultural diversity for European polity. More precisely, it seems useful to consider more deeply what is happening in the UNESCO seat in the context the EU/EC as a “cultural democracy” through analysis of the present juridical status of competence within the European system in the cultural field. First, however, special attention should be paid to this Convention because it seems to represent an important step towards unified international action, also within the sensitive and peculiar field of culture. After a critical overview, this article focuses on the participation of the EU/EC in this negotiation, regarding it as a paradigmatic example of European action in an international forum and, at the same time, as a factor for the restructuring of competences within the European Community/Union system. The paper argues that the substantial re-allocation of competences in the cultural field emerging during these negotiations points towards a more pluralistic shape of the EU/EC, and can easily represent a new trend in cultural action, characterized by the dialectical tension between cultural regulation and freedom of culture.

## Author

Delia Ferri is PhD candidate at the University of Verona, Faculty of Law PhD Programme in Italian and European Constitutional Law. She is developing a research project concerning “The Cultural Constitution of the EU”. By taking into account both the national and the European dimension of (constitutional) law, as well as the pivotal role played by the Courts, the project focuses on the process of constitutionalisation of Europe in the light of the role of culture. She is participating in the research project “Gobernanza y Estado Autonomico” (University of Jaen, University of Madrid Carlos II, University of Barcelona).

The author can be reached at: [delia.ferri@giurisprudenza.univr.it](mailto:delia.ferri@giurisprudenza.univr.it)

## Key words

UNESCO - Cultural Diversity - European Community - Member States - Competences - International Activity

## Table of contents

1. Introduction .....	5
2. EU/EC Competences in the Cultural Field: a General Overview .....	11
3. The Provisional Draft of the Convention: some Brief Considerations....	16
4. Some Considerations on the Role of the Community in the Negotiations	21
5. Concluding Remarks .....	26

# EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks\*

Delia Ferri

*"...the specificity of Europe lies not in the abolition of difference but in the deft management of the cultural heteronomies within the whole, in the assumption of pluralism, in the acceptance (of) a coexistence of non-harmonized rationalities on its territory..."*

*P. Legrand<sup>1</sup>*

## 1. Introduction

In October 2003, on the basis of the Executive Board's recommendation<sup>2</sup>, during the 32nd session of the UNESCO General Conference<sup>3</sup>, the will to adopt a legally binding convention on cultural diversity emerged.<sup>4</sup>

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\* This paper is the first outcome of my participation in the Third Intergovernmental Meeting, joining the Italian Delegation at UNESCO. So my special thanks go to the Permanent Delegation of Italy at UNESCO, in particular to H. E. Mr. Francesco Caruso, Ambassador and Permanent Delegate, to Mr. Patrizio Fondi, First Counsellor, who allowed me to participate in this third phase of negotiations, and to Mrs. Federica Mucci, Legal Expert of the Italian Ministry of Foreign Affairs, for her help and her precious comments. All the views expressed in this paper are strictly personal.

<sup>1</sup> Pierre Legrand, "Public Law, Europeanisation and Convergence", in Patrick Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence & Divergence in European Public Law* (Hart Publishing, Oxford, 2002), 225-256, at 254.

<sup>2</sup> The document 166EX/28 of 12 March 2003 is a working document drawn up by the Secretariat. It highlights the international standard-setting corpus currently applicable or under preparation relating to cultural diversity. It explores the lines of inquiry as to the desirability, nature and scope of a new instrument on cultural diversity (at <http://unesdoc.unesco.org/images/0012/001297/129718e.pdf>).

Here it should be recalled that the Executive Board, composed of 58 Member States, meets twice a year to ensure that decisions taken by the General Conference are implemented. It is also responsible for preparing the work of the General Conference, checking that its decisions are properly carried out and examining the Organization's programme and budget. In a sense, it assures the overall management of UNESCO. The functions and responsibilities of the Executive Board are derived primarily from the Constitution of UNESCO and from rules and directives laid down by the General Conference. Every two years the General Conference assigns specific tasks to the Board. Other functions stem from agreements concluded between UNESCO and the United Nations, the specialized agencies and other intergovernmental organizations. Its fifty-eight members are elected by the General Conference. The choice of these representatives is largely a matter of the diversity of the cultures and their geographical origin.

A standard-setting *corpus* on cultural diversity, largely accepted by the international community, is not really a novelty. As a matter of fact, it has been discussed by various intergovernmental and non-governmental bodies, and seems to be a constant aim of UNESCO's activity.<sup>5</sup>

With the Universal Declaration on Cultural Diversity in November 2001<sup>6</sup>, cultural diversity was recognised, probably for the first time, as affecting human dignity and as a "right" in need of protection.<sup>7</sup> However, this was an inadequate legal response to threats to cultural diversity; there was an urgent

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<sup>3</sup> The General Conference is the primary decision-making body that is composed of the representatives of all Member States. It consists of the representatives of the States Members of the Organization. It meets every two years, and is attended by Member States and Associate Members together with observers from non-Member-States, intergovernmental organizations and non-governmental organizations (NGOs). Each country has a single vote, irregardless of its size or the extent of its contribution to the budget. The General Conference determines the policies and main lines the Organization's work. Its duty is to determine the programmes and budget for UNESCO. It also elects the Members of the Executive Board and appoints the Director-General every four years. The working languages of the General Conference are Arabic, Chinese, English, French, Russian and Spanish.

<sup>4</sup> Cultural diversity as simple acknowledgement of the diversity of cultures found consideration in sociological studies more than in legal doctrine, as a reaction against the globalization process. See Serge Regourd, "Avant-Propos; De l'exception à la diversité culturelle", in *Problèmes politiques et sociaux* (Septembre 2004), 5-9. Generally speaking, only in the last few years, in an international setting sensitive to cultural diversity, we can find a lot of actions and declarations, almost all of them are not binding. We can quote the Council of Europe's Declaration on Cultural Diversity, adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers' Deputies (<https://wcd.coe.int/ViewDoc.jsp?id=389843&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>), the Round Table "Cultural Diversity and Biodiversity for Sustainable Development" within the World Summit on Sustainable Development (adopted in Johannesburg on September 2002).

<sup>5</sup> If culture policy-making has been one of UNESCO's main tasks from the beginning, the basic push on the relaunch of UNESCO activities in this peculiar field was made in 1995 by the World Commission on Culture and development, specifically by its report "Our Creative Diversity". Another important step in this direction was made in 1998 with an Action Plan adopted in Stockholm concerning cultural policies and development. Now two of the main strategic thrusts of UNESCO (see <http://www.unesco.org>) are the development and the promotion of universal principles and norms, based on shared values, in order to meet emerging challenges in education, science, culture and communication, as well as to protect and strengthen the "common public good"; the promotion of pluralism, through recognition and safeguarding of diversity together with the observance of human rights. Moreover, referring to culture, the strategic objectives are the promotion, drafting and implementation of standard-setting instruments in the cultural field; the safeguarding of cultural diversity, encouraging dialogue among cultures and civilizations. See Kishore Singh, "UNESCO and Cultural Rights", in Halina Niec (ed.), *Cultural Rights and Wrongs* (UNESCO Publishing, London, 1998), 146-160.

<sup>6</sup> 31C/Resolution 25, adopted by the 31st session of General Conference of UNESCO (at <http://unesdoc.unesco.org>). This Declaration, despite its undeniable moral authority, is not a binding document.

<sup>7</sup> Analogously, in the "Cotonou Declaration" (adopted on 15 July 2001 at [http://www.francophonie.org/documents/word/declarations/declaration\\_cotonou.doc](http://www.francophonie.org/documents/word/declarations/declaration_cotonou.doc)): "Nous reconnaissons les liens étroits que la diversité culturelle entretient avec la dignité humaine, les libertés fondamentales et les droits de l'homme". Previously, on the contrary, cultural diversity was seen as a social concept and treated and analyzed only from a political perspective, without regard to the subject of human dignity. See also the Preamble of the Declaration of the Council of Europe (adopted on 7 December 2000, at <https://wcd.coe.int/ViewDoc.jsp?id=389843&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>): in this document, cultural diversity is defined as the "essential condition of human society".

necessity for a truly binding international instrument, in order to give to this concept effectiveness and a juridical *status*.<sup>8</sup>

As demonstrated by the discussion on the above-mentioned Declaration, the concept of cultural diversity affects two main complementary issues: one of cultural rights, and the other concerning cultural policies and the links between creativity, commerce and economy. Efforts to define and address these issues coincide with growing pressure to raise protection (and promotion) standards and to assure, first of all at the European level, deeper cultural (and at the same time, legal) integration.

The importance of cultural diversity and the need for its legal (prescriptive) definition in the European context, were recently emphasized in a meeting of the Member States' Ministers of Culture in Paris on 2 and 3 May 2005.<sup>9</sup> On this occasion, the President of the European Commission highlighted that

*la culture européenne, c'est la diversité - une diversité qui constitue notre richesse et qui doit être préservée. Cela se fait au mieux par ceux qui détiennent et représentent cette diversité - dans les Etats membres, dans les*

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<sup>8</sup> See Document 166EX/28 (at <http://unesdoc.unesco.org/images/0012/001297/129718e.pdf>):  
*As regards the legal nature of the instrument, the existence of the Universal Declaration on Cultural Diversity, which despite its undeniable moral authority is non-binding, argues in favour of moving towards a new, more ambitious and, in principle, more effective instrument, in the form of an international convention. As regards the scope of such an instrument, the variety of forms which cultural diversity can take and the difficulty of setting standards for them calls for considerable caution in the normative realm. While the general nature of the Declaration was appropriate to a declaration as such, UNESCO is no longer being asked to lay down a timetable but rather to indicate a frame of reference and a set of rules acceptable to the greatest number of States in the form of a new binding instrument governing specific cultural domains.*

See also the statement of the General Director, (doc. DG/2003/177), during the first experts' meeting: "Although the Declaration was a milestone, it was nonetheless not considered to be sufficiently effective by many Member States in view of the very real threats facing cultural diversity", (at <http://unesdoc.unesco.org>).

<sup>9</sup> Rencontre pour l'Europe de la Culture at <http://www.culture.gouv.fr/culture/actualites/index-rec2.html>. This meeting continues the works started in Berlin last 26-27 November 2004 ("Donner une âme à l'Europe"). On that occasion, the President of European Commission José Manuel Barroso said that "la culture est à ses yeux au premier rang dans la hiérarchie des valeurs, devant l'économie". In Berlin, a Declaration on the Europe of Culture was signed by the Ministers of Culture of seventeen Member States in order to approve a European Chart of Culture:

*L'Union européenne a acquis avec le projet du Traité constitutionnel une nouvelle dimension. Les héritages culturels, religieux et humanistes de l'Europe mentionnés dans le préambule constituent le socle de notre identité commune... Nous souhaitons octroyer un rôle substantiel à la culture dans le processus de réunification européen et souhaitons développer des initiatives qui permettent aux citoyens européens ainsi qu'à nos partenaires des autres régions du monde d'assimiler l'Union Européenne à un espace culturel commun. Dans le respect de la diversité culturelle européenne et en vue de la sauvegarde et du développement du patrimoine culturel européen, comme prévu par le Traité constitutionnel, nous appelons de nos vœux l'élaboration d'une charte pour l'Europe de la culture qui affirmerait solennellement la dimension essentielle de la culture dans la construction européenne, et l'objectif de préserver et promouvoir la diversité culturelle.* This Declaration arrives ten years after the European Declaration on Cultural Objectives, adopted by the 4th Conference of European Ministers responsible for Cultural affairs, in Berlin, in 1984. The Paris meeting will be followed by a Conference, organized by the Hungarian Government, which will be held in Budapest 17-19 November 2005.

*régions, les localités [...] Il faut [...] veiller à ce que la spécificité de la culture soit respectée dans l'ensemble des politiques, internes et externes, de l'Union, comme l'exige d'ailleurs l'article 151 du Traité; cet aspect est particulièrement important, notamment dans le cadre des négociations en cours au sein de l'UNESCO sur la préservation de la diversité culturelle.*<sup>10</sup>

Following two work phases, a project of the Convention will be presented to the General Conference of the UNESCO in October 2005. Pursuant to the 32nd C/Resolution of October 2003, a multi-stage approach has been chosen, consisting of a preliminary phase of drawing up a text project by fifteen experts<sup>11</sup> and a second phase of intergovernmental negotiations. The first intergovernmental session was held from 20 to 24 September 2004, the second in February 2005<sup>12</sup>, and the third from 25 May to 4 June. In this phase in particular, there were 550 participants from 130 Member States as well as Intergovernmental Organizations and NGO's.<sup>13</sup>

In accordance with Article 300 EC, the Commission participated in these negotiations. As a matter of fact, in its Communication to the Council and to the European Parliament of 27 August 2003<sup>14</sup>, and subsequently in the Recommendation to the Council of September 2004<sup>15</sup>, the Commission underlined the necessity for Community participation in the negotiations to preserve its *acquis* and competences as well as to assert its own interests. Therein it should be stressed that the Treaty and the consistent case law of

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<sup>10</sup> Speech by José Manuel Barroso, President of the European Commission, concluding the meeting of the Ministers, at <http://www.culture.gouv.fr/culture/actualites/index-rec2.html>

<sup>11</sup> The UNESCO Director General set up a multidisciplinary international group of 15 experts with a brief to provide him with suggestions and views on the preparation of a preliminary draft convention. At the conclusion of its three meetings (held between December 2003 and May 2004), this group submitted a preliminary draft text. While these independent experts were carrying out their work, the Director-General, in order to provide Member States and governmental and non-governmental organizations with transparent information, ensured broad and regular dissemination of the reports from these three meetings of experts for consultation and consideration among the various parties involved in the project. Following the three meetings of independent experts, and in accordance with 32 C/Resolution 34, consultations with the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO) were held in June 2004 (CLT/CPD/2004/CONF.607/1, Part IV, 23-27, at <http://www.unesco.org>).

<sup>12</sup> This meeting was a follow-up to the first session of the Intergovernmental Meeting, and aimed to examine the work of the drafting Committee, which met in December 2004 and revised the Preliminary Convention draft on the basis of the written comments submitted by UNESCO Member States on the first version distributed in July 2004.

<sup>13</sup> As stated in the Oral Report of the *Rapporteur*, Mr. Artur Wilczynski, at the closing of the third session of the Intergovernmental Meeting ([http://portal.unesco.org/culture/en/file\\_download.php/a7d051acce6c228dfd035691022b207Rapport+oral+-+R3\\_FINAL.pdf](http://portal.unesco.org/culture/en/file_download.php/a7d051acce6c228dfd035691022b207Rapport+oral+-+R3_FINAL.pdf)). See List of participants CLT/2005/CONF.204/CLD4, Paris 25 May-4 June 2005 (limited distribution), distributed at the closing of the third Intergovernmental Meeting.

<sup>14</sup> COM (2003) 520 final, at <http://europa.eu.int/eur-lex>.

<sup>15</sup> Recommendation by the Commission to the Council to authorise the Commission to participate on behalf of the Community in the negotiations within UNESCO, doc. 12063/04 CULT 61, at <http://ue.eu.int>.



the Court of Justice make it compulsory for the European Community to ensure the unity of its representation in international organizations, even where shared competences are involved.<sup>16</sup> Furthermore, for an international convention to affect community law, the relevant criterion is whether the commitments resulting from an international Convention fall within the scope of Community rules or in any event within an area which has already been largely covered by such rules.<sup>17</sup> In particular, the Court formulated a true parallel between internal and external competences—in other words, the Community can conclude an agreement not only where explicitly expected from the EC Treaty, but also in reference to matters for which “common rules” have been adopted. Moreover, the Court of Justice affirmed that in cases in which “mixed agreements” are negotiated, it is necessary to establish a close collaboration between the States and the Community, especially during the negotiations with a view to achieving unity in the international representation of the European Union.<sup>18</sup> This cooperation can be realized through the joint participation (operating also in the fields covered by domestic competences) of the Community and the Member States, in which the principle of unity of international representation is consolidated.

In such a case, the aim of this agreement undoubtedly relates to cultural matters, an area where (in light of Article 151 EC) the Community does not possess harmonisation powers, and which remains primarily within the profile of competence of individual Member States. Instead, the measures related to both the protection and the promotion of cultural diversity fall into the exclusive domain of Community competences. In other words, as underlined by the European Commission from the beginning,<sup>19</sup> many of this Convention’s provisions affect well-established parts of the *acquis communautaire* (as well as competences of the Member States).<sup>20</sup>

In September 2004, the Commission therefore conveyed a proposal to the Council for a decision to adopt a mandate of negotiation, which was examined

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<sup>16</sup> ECJ Opinion 2/91, *ILO*, Opinion of 19 March 1993, ECR, 1993, I-1601.

<sup>17</sup> ECJ case C-471/98, *Commission v. Belgium “Open Skies”*, judgment of 5 November 2002, ECR 2002, I-9681

<sup>18</sup> ECJ Opinion 1/94, *WTO* Opinion of 15 November 1994, ECR I-5967, paragraphs 107-108. According to the Court, “where it is apparent that the subject matter of an agreement or conventions falls in part within the competence of the Community and in part within that of the Member States it is essential to ensure close cooperation between Member State and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into”.

<sup>19</sup> Communication of the Commission to the Council and to the European Parliament of 23 August 2003, COM (2003) 520 final, at <http://europa.eu.int/eur-lex>.

<sup>20</sup> As emphasised by James Tunney in “Potential Judicial Development of Culture in Article 81 and 82”, in Academy of European Law, *Culture and Market: Can Europe Reconcile Unity and Diversity?* - Acts of the ERA Annual Congress, Trier, 3-4 December 2004, culture must be considered as a transversal value that touches every sector of Community activities.

in the session of CoRePer on 27 October and adopted 16 November by the Council. Finally, on 28 January 2005, in the session of CoRePer, a “Code of Conduct between the Council, the Member States and the Commission on the UNESCO negotiations on the draft Convention on the protection of the diversity of cultural contents and artistic expressions” was approved. This Code conferred negotiating directives, taking into account the obligation of unity of the international representation of the European Community and its Member States.<sup>21</sup> It is possible to emphasise that this Code was applied very strictly during the negotiations, and effectively (regarding this third phase) Europe spoke with two voices: one of the Presidency and the other of the Commission.

On one hand, the Convention, in its own content, can be regarded as an instrument towards a European integration process that truly respects diversity. On the other hand (although it is explicitly affirmed in the mandate and in mentioned Code of Conduct that the distribution of tasks during the negotiations cannot be read as affecting the respective competences of the Community and the Member States in any way) the more incisive role played by the EU/EC is undeniable, as is the consequent diminishing of the competences of the Member States.<sup>22</sup> Throughout the third phase of intergovernmental negotiations, the EU/EC acted as a sole subject, both in the formal meeting (Plenary and Working Groups) but also in all informal contacts with the other delegations.

The real impact of the Convention on the European legal framework (or more precisely, on EU and Member States legislation) will only become apparent after its adoption, which should take place (as mentioned above) in October.<sup>23</sup> To consider this impact will entail a more complex inquiry examining the extent to which national laws and practices will have been

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<sup>21</sup> Code of Conduct as agreed by the Permanent Representatives Committee (Part 1) on 28 January 2005 (5518/05 CULT 3-limited distribution).

This strict necessity of close cooperation and connected action is also stressed by the European Parliament, in its recent “Motion for a Resolution” on March 16 2005 (RE/ 562334EN.doc at <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//NONSGML+MOTION+B6-2005-0216+0+DOC+WORD+V0//EN&L=EN&LEVEL=2&NAV=S&LSTDOC=Y>).

<sup>22</sup> In the Code of Conduct (5518/05 CULT 3), mentioned above, it is explicitly specified that “in conformity with Article 5 EC, the following distribution of tasks cannot be read as affecting in any way the respective competences of the Community and the Member States and is without prejudice to the negotiating directives or any other ongoing or future negotiations in other international *fora*”.

<sup>23</sup> Actually, on this text there are again some reservations made in the Plenary by various delegations, and a general reservation by the United States. In fact, the US Delegation (on 3 June 2005) submitted a final statement to the Plenary (a document distributed to all delegates in the room) in which it formally objected to the Convention, in particular stating that this is not a Convention about culture, but rather, about trade. They added that, for this reason, this Convention clearly exceeds the mandate of UNESCO. Moreover, the US delegation expressed its concern that this draft could impair rights and obligations under other international agreements.

adapted, in order to achieve a degree of conformity with those norms. It can be pointed out, at this very preliminary stage, that such implementation, transposition or absorption of conventional norms will necessarily occur in the supranational context, making the shape of competences in the cultural field more and more complex. Nevertheless, with regard to the procedure of the negotiation, the strong impact on the system of competences is easily inferred, and must be introduced into a more sophisticated process of continuous and slow erosion of State sovereignty (if we can speak of sovereignty).

More precisely, if we perceive the Union as an articulated system of management of diversity (complexity), such a Convention can itself be conceived as an emerging term of comparison in the constant search for legal (and institutional) balances in the supranational context.

## 2. EU/EC Competences in the Cultural Field: a General Overview

Before continuing with our critical analysis, we will attempt to outline the division of powers in the cultural field between the Community and the Member States, and to mark out the modalities of the exercise of Community competence in this domain, with a short summary taken over a period of time.

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-standing.<sup>24</sup> Specifically, former Article 36 TEC (now Article 30 EC), which allows for the restriction of the free movement of goods based on the need “to protect national treasures possessing artistic, historic or archaeological value” and Article 131 (now Article 182), which concerns Community association with third countries in order to assist their “cultural development”. These provisions were something of an exception, because the original contracting States probably expected the Community to be fairly marginal in the cultural domain.<sup>25</sup> Nevertheless, from the ‘70s on, a progressive awareness of the requirement to undertake public action in the cultural field became visible.<sup>26</sup>

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<sup>24</sup> Rachel Craufurd Smith, *Culture and European Union Law* (Oxford University Press, New York, 2004), 19-80, 3.

<sup>25</sup> Craufurd Smith, *Culture and European Union Law...*, 3

<sup>26</sup> Maurice Blin, *L'Europe et la Culture* (Sénat, Paris, 2001), 7. See also *Communication on Stronger Community Action in the Cultural Sector*, 12 February 1982 EC Bull. 6/82. See Damian Chalmers and Erika Szyszczak, *European Union Law - vol. II: Towards a European Polity?* (Ashgate, Dartmouth, 1998); Craufurd Smith, *Culture and European Union Law...*, 19-80; Bruno de Witte, “Cultural Policy: The Complementarity of Negative and Positive Integration”, in Jürgen Schwarze and Henry G. Schermers (eds.), *Structure and Dimensions of European Community Policy* (Nomos, Baden Baden,

Progressively, the view of culture as an “isolated” phenomenon was abandoned, and Community law (competition law, tax provisions) profoundly affected the cultural field.

A specific competence in the cultural field was introduced by the Maastricht Treaty in 1992. In particular, Article 3 introduces culture to the scope of application of the Community, to Article 87 (previous Article 92, para. 3, point d), which considers aid destined to promote culture and preservation of property (if they do not alter the conditions of exchange and of competition in the Community) compatible with the European common market, and above all, with Article 151.

Article 151 EC defines the main objectives of Community 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.<sup>27</sup> Particularly relevant is paragraph 4, which establishes that the Community shall take cultural aspects into account in its action under other provisions of the Treaty. This provision can be defined as a general clause of consistency with cultural aspects.<sup>28</sup> The Amsterdam Treaty left the substance of the article unchanged, but added a relevant reference to the respect and promotion of cultural diversity to the text, strengthening what was expressed in the first paragraph, but also reflecting the principle of respect of national identity (Article 6 European Union Treaty).

The article stresses the need to comply with two fundamental concepts: maintenance of cultural diversity while respecting the principle of subsidiarity, supplementing the action of Member States, and promoting common heritage. So the function of such a provision appears to be double.<sup>29</sup> The first, immediately perceptible, concerns the “definition” of Community contribution to the development of culture, within the European context and outside through the cooperation with third countries. The second horizontal

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1988), 195-204; Marilù Marletta, “Art. 151”, in Antonio Tizzano (eds.), *Trattati dell’Unione Europea e della Comunità Europea* (Giuffrè editore, Milano, 2004), 808-811.

<sup>27</sup> On the Council of Europe’s cultural action see Christopher Gordon, “Cultural Policies Reviews: Some General and Methodological Reflections on the Council of Europe’s Programme of Reviews in Member States (1985-99)”, in Christopher Gordon and Simon Mundy, *European Perspectives on Cultural Policy* (UNESCO Publishing, Paris, 2001), 13-48.

<sup>28</sup> Sergio Foa and Walter Santagata, “Eccezione Culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate”, in 2 *Aedon* (2004) at <http://www.aedon.mulino.it/archivio/2004/2/santfoa.htm>.

<sup>29</sup> Marletta, “Art. 151”..., 808.

function, stressed by the use of plural “cultures”, aims to designate the Community as an entity destined to unify cultural pluralism of the Member States with common cultural heritage.

Article 151 EC, conceived as a programmatic rule, does not authorize the Community to develop an autonomous cultural action.<sup>30</sup> It establishes a principle of “complementarity” in such matters,<sup>31</sup> but does not prejudice Community actions under a different legal base.

Community intervention on the basis of Article 151 EC is procedurally binding, because the Council deliberates with unanimity.<sup>32</sup> So every Member State has veto power, even for non-binding acts. For the actions of promotion, to which all harmonization effects on domestic legislation are blocked, the procedure of co-decision, stated in Article 251 EC, is used.<sup>33</sup>

Actually, such procedural rigidity has implied both recourse to different legal bases and, above all, the use of soft law (resolutions and conclusions of the Council)<sup>34</sup>, causing a phenomenon of partitioning of legal sources.

The politics involved in the financing of cultural activities is a really recent development, which before the *Culture 2000* Programme was characterized by interventions by sectors only.<sup>35</sup>

The start of such politics goes back to the '90s, with specific programmes such as, for instance *Kaleidoscope*, *Arianna* and *Raphael*, between 1993 and

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<sup>30</sup> Craufurd Smith, *Culture and European Union Law...*, 19-80; Marletta, “Art. 151”..., 811; Mathias Niedobitek, *The Cultural Dimension in the EC Law* (Kluwer Law International, The Hague, London, Boston, 1998).

<sup>31</sup> Marletta, “Art. 151”..., 809.

<sup>32</sup> Pongy (Mireille Pongy, “Entre modèles nationaux et eurogroupes d’intérêts professionnels: l’action de l’Union dans la culture”, 28 *Culture at conflicts* (1997), 125-145, at 141) underlines: “le coût de négociations longues nécessaires à la formation du consensus, favorisant la pratique du marchandage et aboutissant généralement au dégageant du plus petit dénominateur commun, requises par le vote à l’unanimité, est considerable”.

<sup>33</sup> Blin deals with the “rédaction embarrassée” of the text which “manifeste sans doute la crainte de la plupart des Etats membres de voir la Communauté conduire une politique culturelle à la française, c’est à dire promue et contrôlée par l’Etat” (Blin, *L’Europe et la Culture...*, 10). Pongy (Pongy, “Entre modèles nationaux ...”, 141) stresses that, in this procedure, the role of EU Parliament is central: “Si les clivages nationaux le disputent aux clivages politiques, signe de la double logique à l’oeuvre dans la mise en place d’un espace public européen a travers le Parlement, le Conseil constitue le lieu d’élection de la confrontation entre modèles nationaux d’intervention publique”.

<sup>34</sup> See Linda Senden, *Soft Law in European Community Law* (Hart Publishing, Oxford, 2004).

<sup>35</sup> See Craufurd Smith, *Culture and European Union Law ...*, 19-80; Marletta, “Art. 151”..., 811; Mathias Niedobitek, *The Cultural Dimension in the EC Law...*; Bruno de Witte, “The Cultural Dimension of Community Law”, in 4(1) *Collected Courses of the Academy of European Law* (1995), 229-299. Stefano Laporta, “Verso l’integrazione comunitaria: la cultura nella strategia dell’Unione Europea”, in *Diritto dell’economia* (2001), 237-252; Marie Cornu and Isabelle de Lamberterie, “Les politiques culturelles dans l’Europe communautaire. L’évolution du cadre juridique”, 27(4) *Etudes Internationales* (December 1996), 743-768.

1999.<sup>36</sup> Then, on the sole basis of Article 151 EC, a single framework programme, *Culture 2000*, was adopted in February 2000. All these instruments aimed to encourage creativity and mobility among artists, access to culture for as many people as possible, the dissemination of art and culture, intercultural dialogue, and knowledge of the history of European peoples. Finally, each year since 1985, the EU has appointed one or more European Capitals of Culture, which may receive financial support.

The next step is the pluriennial program *Culture 2007*, to be carried out for the period included between January 2007 and December 2013, aimed at developing transnational cultural cooperation through support for cultural cooperation actions, European organisations active in the field of culture, studies and analyses and information and communication.<sup>37</sup> The general objective of the Community action is the final achievement of a common cultural area through the development of cultural cooperation in Europe, and this action will thus contribute actively to the development of a European identity from grass roots.

Last but not least, having regard to Articles 151 para. 4 and 87 para. 3 point D),<sup>38</sup> the exceptional character of cultural action can be clearly recognized. More precisely it can be interpreted as the so-called “cultural exception”,<sup>39</sup> in which the exclusion of cultural actions from the purely economic sphere is elaborated. As a matter of fact, Article 87 EC declares the compatibility (already discussed by the doctrine)<sup>40</sup> of state aid destined to promote culture within the European common market, by establishing a derogation clause to Treaty competition rules. Even if there is an open-ended reference to “culture”, such a provision has to be interpreted strictly.<sup>41</sup> In the beginning the Court of Justice stated that the protection of cultural

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<sup>36</sup> See Decisions No 719/96/EC of the European Parliament and of the Council of 29 March 1996 OJ L 99, 20.4.1996, No 2085/97/EC of the European Parliament and of the Council of 6 October 1997 OJ L 291, 24.10.1997; and No 2228/97/EC of the European Parliament and of the Council of 13 October 1997 OJ L 305, 8.11.1997, respectively.

<sup>37</sup> Cf. Proposal for a Decision of the European parliament and the Council establishing Culture 2007 programme COM (2004) 469 at <http://europa.eu.int/eur-lex>.

<sup>38</sup> It is a derogation introduced by the Maastricht Treaty too, which gives legal shape to the praxis of the Commission to authorize state aids on the basis of Article 87 para. 3 lett. C). See Antonio Tizzano (ed.), *Trattati dell'Unione Europea e della Comunità Europea* (Giuffrè editore, Milano, 2004), 592-608.

<sup>39</sup> Cultural exception is defined as the “possibilità di mantenere politiche europee e nazionali di quote di programmazione e di aiuti finanziari in alcuni settori di rilievo culturale sottraendole ai negoziati commerciali sui beni e sui servizi”. (Foa and Santagata, *Eccezione Culturale ...*).

<sup>40</sup> See Michael Waelbroek, “Cultura y Proteccionismo en la Unión Europea”, 7 *Revista de Derecho Comunitario Europeo*, 2000, 7-14. See also Lorna Woods, “The Application of Competition Rules to State Aids for Culture”, in Academy of European Law, *Culture and Market: ...*; Patricia Tronquoy, “Culture, État et marché”, 312 *Cahiers français* (2003), 1-99. Serge Regourd, *A proposito dell'eccezione culturale*, available at [http://www.italia.attac.org/spip/stampa.php3?id\\_article=104](http://www.italia.attac.org/spip/stampa.php3?id_article=104).

<sup>41</sup> See Craufurd Smith, *Culture and European Union Law...*, 60.

interest could not be a sufficient reason for derogation. The first case of this was the case of *Groener*,<sup>42</sup> and this was later developed in other cases.<sup>43</sup> More precisely in the *Groener* case the Court seemed aware of the importance of cultural diversity (and protection of minority languages), recognising that cultural protection may constitute an imperative reason which may justify restrictions to the provision of services.

In recent years (taking into account Article 151 EC para. 4) there has been a shift from the idea of cultural exception to a more complex (and inclusive) notion of cultural diversity, on the basis of which a State system of financial aid is created that does not plague the European common market.<sup>44</sup>

While the recognition of diversity is indirectly recognised in the Preamble to the European Union Treaty, it is explicitly confirmed and strengthened in the Charter of Fundamental Rights of the European Union, and now in the Constitutional Treaty. In fact, regarding the Constitutional Treaty it is simple to infer the (positive) protection of cultural diversity as a constitutional value, more precisely, cultural diversity has become a precondition to economic freedom,<sup>45</sup> possessing a very constitutional dimension.<sup>46</sup>

In other words, “cultural diversity is valuable in its own right and is a basic strength of European enterprise, providing a valuable genetic store of cultural

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<sup>42</sup> ECJ Case C-397/87, *Groener v. Minister for Education*, Judgment of 28 November 1989, ECR, 1990, I-3967.

<sup>43</sup> For instance the judgments *Bond van Adverteerders* (ECJ Case C-352/85, Judgment of 26 April 1988, ECR, 1988, 2085); *Vereingte Familiarpres Zeitungsverlags- und Vertriebs GmbH v. Bauer Verlag*, (ECJ Case C-368/95, Judgment of 26 June 1997, ECR, 1997, I-3689).

See Anna Herold, “Between Art and Commerce: Constitutional Contradictions within the Framework of the EU Film Policy”, in Francesco Palermo and Gabriel N. Toggenburg (eds.), *European Constitutional Values and Cultural Diversity*, Working Paper no. 43, (EURAC, Bozen/Bolzano, 2003), 71-86. See also Anna Herold, “EU Film Policy: between Art and Commerce”, 3 *European Diversity and Autonomy Papers - EDAP* (2004), at <http://www.eurac.edu/edap>; Anna Herold, “EU Trade Policy in the Audiovisual Field: from ‘Cultural Exception’ to ‘Cultural Diversity’”, in Academy of European Law, *Culture and Market: ...*

<sup>44</sup> A confirmation of this trend can be found in President Chirac’s speech at the last “Rencontre de l’Europe” (previously quoted), which took place last May (<http://www.culture.gouv.fr/culture/actualites/index-rec2.html>):

*Grâce à la Constitution pour l’Europe, le principe de l’exception culturelle, auquel nous sommes tous profondément attachés, sera définitivement consacré. Par dérogation à la règle commune, le Traité constitutionnel exige en effet l’unanimité des États pour négocier et conduire des accords commerciaux en matière de services culturels et audiovisuels. L’Union, comme la France, ne transigeront jamais avec la défense de l’exception culturelle. ... La même ambition doit inspirer les travaux en cours au sein de l’UNESCO en vue de l’élaboration d’une convention internationale sur la diversité culturelle.... La convention devra consacrer la spécificité des biens culturels. Elle confortera la légitimité des politiques en faveur de la diversité culturelle. Elle devra fournir un cadre de référence pour les États et les organisations internationales. Ce seront des avancées essentielles. La France pèsera de tout son poids pour que cette convention soit signée dès l’automne prochain. et nous comptons sur l’appui de tous pour y parvenir.*

<sup>45</sup> Foa and Santagata, *Eccezione Culturale ...*

<sup>46</sup> Patrizia Bilancia and Franco Pizzetti, *Aspetti e problemi del costituzionalismo multilivello* (Giuffrè Editore, Milano, 2004), 41.

experience, essential as a foundation for constitutional and legal experiment”.<sup>47</sup> With Articles 1-8, which introduces “Unity in Diversity” as a *motto* of the Union, diversity has definitively become a symbol of the EU itself.<sup>48</sup>

### 3. The Provisional Draft of the Convention: some Brief Considerations

As the procedure draws near to its conclusion, it appears helpful to examine the present version<sup>49</sup> briefly, just after the end of the third intergovernmental phase of negotiations.<sup>50</sup>

The preliminary draft, approved by the Plenary, will be transmitted to the General Conference of the UNESCO.<sup>51</sup> It is composed of a Preamble, 35 articles and an Annex concerning Conciliation Procedure, and can be considered complex in its form and contents: its purposes are the protection and promotion of cultural diversity, by facilitating development and adoption of cultural policies and appropriate measures, as well as encouraging wider international cultural exchanges. After a complex work of amending and rebalancing, this text appears to be rather consistent and coherent and even somewhat redundant.<sup>52</sup> In any event, the effort to transform conceptual and

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<sup>47</sup> Carol Harlow, “Voices of Difference in a Plural Community”, in Patrick Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence & Divergence in European Public Law* (Hart Publishing, Oxford, 2002), 199.

<sup>48</sup> Gabriel N. Toggenburg., “‘Unity in Diversity’: Searching for the Regional Dimension in the Context of a Somewhat Foggy Constitutional Credo”, in Roberto Toniatti, Marco Dani, Francesco Palermo (eds.), *An Ever More Complex Union - the Regional Variable as a Missing Link in the European Constitution* (Nomos, Baden-Baden, 2004), 27-56. This Author also states that “addressing diversity as a ‘motto’ and as a ‘symbol’ of the Union does, in legal terms, boil down to not much more than a prominently declared political acceptance of diversity as a positive fact. Politically speaking, diversity might though draw from this its new label the capability of becoming a political marker of the EU level of governance allowing thereby for additional identification with the European Union”.

<sup>49</sup> All the documents noted in this paper have been distributed in the Plenary (and available on the web site <http://www.unesco.org>).

We do not want to discuss cultural diversity *per se*. In order to deepen the concept of cultural diversity see Will Kymlicka, *Liberalism, Community and Culture* (Oxford University Press, New York, 1989); John Martin, *Multicultural societies: a comparative reader* (Sable Publishing, Sydney, 1987); Jan Raz, “Multiculturalism: a liberal perspective”, *Dissent* (Winter 1994), 67-79; Charles Taylor, *Multiculturalismo* (Anabasi, Milano, 1994).

<sup>50</sup> The representatives of 72 States, who met in Madrid on 11 and 12 June 2005, stated their full support of this new draft, considering cultural diversity a “factor de pluralismo, de democracia, de cohesión social y empleo, de crecimiento sostenible”. (<http://www.estrelladigital.es/articulo.asp?sec=cul&fech=13/06/05&name=cumbre>).

<sup>51</sup> After the Second Intergovernmental Meeting, the Chairman of the Plenary received the task of preparing a consolidated text. This text (called “Cape Town”) was examined during the third phase of negotiation. The other composite text (resulting of the previous second phase) was a working document. In fact, these two documents were considered in the third phase as complementary.

<sup>52</sup> In the third phase of intergovernmental negotiations, as stated by the *Rapporteur* Arthur Wilczynski, in his oral report at the closing of this meeting ([http://portal.unesco.org/culture/en/file\\_download.php/a7d051accef6c228dfd035691022b207Rapport+oral++R3\\_FINAL.pdf](http://portal.unesco.org/culture/en/file_download.php/a7d051accef6c228dfd035691022b207Rapport+oral++R3_FINAL.pdf)), more than 160 amendments (technical or substantial) were presented by



political commitment into a suitable legal framework capable of ensuring the flourishing of cultural diversity was clearly visible during the third phase of negotiations.

The Preamble of the consolidated text was considered quite satisfactory, but was nevertheless amended in order to insert an explicit reference to the importance of traditional knowledge (para. 8)<sup>53</sup>, to the “diversity of media” (para. 12)<sup>54</sup>, to the fundamental role of education (para. 14), and also to the “risks of imbalances between rich and poor countries”.

The first part of the Convention contains Objectives (Article 1) and Guiding Principles (Article 2). More precisely, Article 1 lists nine objectives concerning (generally speaking) protection and promotion, development of cultural policies, the link between culture and development and “interculturality”;<sup>55</sup> meanwhile, Article 2 establishes various guiding principles, particularly the principle of respect for human rights and fundamental freedoms (provided in paragraph 1).<sup>56</sup> In some ways, this provision seems to recognize that taking cultural differences into account, consequently protecting and promoting them does not jeopardise the concept of human rights itself. To the extent that cultural identities are structured through collective interaction amongst socially and culturally defined individuals, it is clear that the respect for the individual rights of members of minorities must go in the same direction as the protection of their respective groups’ diversity.<sup>57</sup>

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35 delegations. Many proposed amendments were submitted earlier to the informal working group and then discussed in the Plenary.

<sup>53</sup> This amendment was proposed by the African Group.

<sup>54</sup> This addition was proposed by the European Union. Originally, the EU had submitted an amendment to this paragraph using the phrase “pluralism of media”. This formulation was opposed, particularly by China, and an agreement could only be found using the term “diversity”, which recalls the title (and the purpose) of the Convention.

<sup>55</sup> The Plenary reviewed the objectives of this Convention in the third session, and primarily agreed to maintain the text as presented in the consolidated text of Cape Town, maintaining paragraphs h) and i), added in February. A number of amendments were examined, but it was decided to lightly modify only one paragraph, as suggested by the Haitian Delegation. It is worth mentioning that the US delegation formally objected to the acceptance of paragraph g) concerning the recognition of the distinctive nature of cultural activities, good and services.

<sup>56</sup> Art. 2, para. 1:

*Cultural diversity can be protected and promoted only if fundamental freedoms such as freedom of expression, information and communication as well as the ability of individuals to choose cultural expressions are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights as enshrined in the Universal Declaration of Human Rights or guaranteed by international law or to limit the scope thereof.*

The reference to the Universal Declaration of Human Rights was added by the Plenary (more precisely, it was accepted by *consensus*) in the last Intergovernmental Meeting.

<sup>57</sup> See Rodolfo Stavenhagen, “Cultural Rights: a Social Science Perspective”, in Niec, *Cultural Rights ...*, 1-20; Lyndel Prott, “Understanding another on Cultural Rights”, in Niec, *Cultural Rights ...*, 146-161; Daniele Archibugi and David Beetham, *Diritti umani e democrazia cosmopolitica* (Feltrinelli Editore, Milano, 1998).

Paragraph 2 establishes the principle of sovereignty added in the second phase of intergovernmental negotiations: it stresses the power of each State to adopt measures and policies to protect and promote cultural diversity within its territory. An additional relevant point is the principle of equal dignity and of respect for all culture, which (significantly) states the equal right to be different. Equality and difference are not contradictory principles, but rather must be considered complementary.

The “Principle of the complementarity of economic and cultural aspects of development” is clearly affirmed: it seems to represent the definitive bypass of the traditional theory that opposed economy (market) and culture. In this version, the principles of solidarity and cooperation, of sustainable development, and of equal access, openness and balance have also been codified.

The scope of the Convention is very wide, because, accordingly to Article 3, 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”.

One of the most positive remarks is that the Convention attempts to define cultural diversity (Article 4).<sup>58</sup> It is indeed crucial that it is not left to scholars to infer such a notion,<sup>59</sup> even if, by its very nature, a legal instrument on cultural diversity will require constant rebalancing in order to take into account the strongly dynamic social (and, more generally, factual) context, this attempt of a definition can be considered productive. Actually, the draft does not contain (like the first one did) any definition of “culture”,<sup>60</sup> which

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<sup>58</sup> The text in the version approved by the Plenary in the last meeting establishes that “Cultural diversity” refers to the manifold ways in which the cultures of social groups and societies find expression. These expressions are passed on within and among 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 diverse modes of creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used”. It is interesting to compare the present provision with the definition contained in the Declaration of November 2001 (at <http://www.unesco.org>): “Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature... ”.

<sup>59</sup> Gabriel N. Toggenburg, “Enlarged as Unification via Diversification - What does it mean to be ‘United in Diversity?’”, in *EUMAP features* (1 May 2004), writes: “the notion of diversity remains vague, if not ambiguous. It seems almost impossible to establish an overarching “principle” that could convincingly cover all the different forms of diversity in EU law; diversity is a wild and chameleonic animal with thousands of heads that hardly can be kept imprisoned in the cage of one legal principle”. See also Gabriel N. Toggenburg, “The Debate on European Values and the Case of Cultural Diversity”, 1 *European Diversity and Autonomy Papers - EDAP* (2004), at <http://www.eurac.edu/edap>.

<sup>60</sup> In the text of July 2004 (CLT/CPD/2004/CONF.201/2 at <http://www.unesco.org/>) there was this definition: “‘Culture’ refers to the set of distinctive spiritual, material, intellectual and emotional

remains, again, using Kelsen's words, an indeterminate legal term ("unbestimmter Rechtsbegriff").<sup>61</sup>

The text provides a definition for the term "cultural content": which is identified as referring to "symbolic meaning, the artistic dimension, and cultural values that originate from express cultural identities", "cultural expressions", "cultural activities goods and services", "cultural industries",<sup>62</sup> "cultural policies" and "interculturality". This definition is among the chief objectives of the above -mentioned *Culture 2007* Community program.

Interestingly, in particular with regard to the European context,<sup>63</sup> the definition of cultural policies is quite wide: it includes all policies and measures related to culture, whether at the local, regional, national or international levels, either focused on culture or designed to have a direct effect on cultural expressions.

The concept of "protection" has been defined as "the adoption of measures aimed at preservation, safeguarding and enhancement of the diversity of cultural expressions". Such a definition was introduced in order to make it clear that not every measure taken in order to preserve diversity can be perceived as "protectionist".

Part III is dedicated to Rights and Obligations: there is a general provision in Article 5 stating rules on rights and obligations and affirming the sovereign right of the States to formulate and implement their cultural policies and adopt measures to protect and promote diversity of cultural expressions. Articles 7 and 8 are devoted respectively to measures to promote and to protect cultural expressions. The provision contained in Article 11 concerning the participation of civil society also seems very interesting: it was a new proposal discussed and accepted by the Plenary. This text aimed to give full

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features of society or a social group and encompasses in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".

<sup>61</sup> It is difficult to truly define the word "culture", as every scholar who deals with issues concerning cultural domain will confirm. The potentially open-ended nature of the word thus necessitates careful examination. See Craufurd Smith, *Culture and European Union Law...*, 10.

Legrand underlines that: "Critics of a definition of 'culture' claims that the idea suggests homogeneity, stability, coherence, and boundedness in a context a context where social interaction is characterized by conflict, change discontinuity an open-endedness. Not unlike the notion of 'race', 'culture' would tend to 'freeze' difference". Legrand, "Public Law, ... ", 245.

<sup>62</sup> The definition contained in the draft can be compared with others formulations made by the doctrine. Rostam J. Neuwirth, "The Cultural Industries: A Clash of Basic Values?", in Palermo and Toggenburg (eds.), *European Constitutional Values and Cultural Diversity...*, 87-106.

<sup>63</sup> As a matter of fact, after the adoption and ratification of this Convention, this definition will directly affect Community action and imply a deeper and wider action at the supranational level. See below para. 4.

recognition to the role played by civil society, and really tried to accept the demands of the various NGO's.<sup>64</sup>

In the new text, the provision concerning the establishment of a Cultural diversity Observatory as a monitoring body is no longer present. Very few States were in favour of the creation of such a body because of the cost it implied, though they wished to preserve its function. It may be useful to stress that the European Parliament welcomed the proposal for this Observatory, which would have cooperated with professional organizations. Nevertheless, both the role and the tasks of this organ (at the European level) would have been quite problematic, first of all because the Observatory would have been obliged to coordinate its activities with the future European Agency on human rights.

A significant discussion about Articles 16 and 18 took place at the last intergovernmental meeting. These provisions are devoted to preferential treatment for developing countries and to an International Fund for Cultural Diversity, established in accordance with the financial regulations of UNESCO.<sup>65</sup> In Article 18 of the new draft, a proposal from the so-called African Group to include a new subparagraph calling on parties to provide voluntary contributions on a regular basis was accepted.

Article 20, one of the most controversial, provides for the regulation of the relationship to other instruments. At this stage, there is a version (despite the US request to have two texts to submit to the General Conference) endorsed by the Plenary, but to which many states expressed reservations.<sup>66</sup> Such a version should avoid establishing a hierarchy among international instruments and should, on the contrary, emphasize the complementarity among those instruments.

Articles 22-24 are devoted to the organs of the Convention: notably, Article 22 provides for a Conference of Parties, as renamed in the third Intergovernmental Meeting, which would be “the supreme body”<sup>67</sup> of the Convention and meet at the same time as the General Conference of UNESCO.

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<sup>64</sup> In the third Meeting, various NGOs spoke in the Plenary expressing their point of view and stressing the importance of the participation of different civil subjects in the global action of protection and promotion.

<sup>65</sup> On general financial rules see Rudiger Wolfrum and Christiane Philipp (eds.), *UN: Law, Policies and Practice*, vol. II, (C. H. Beck Verlag, München; Martinus Nijhoff Publishers, Dordrecht, 1995), 1310.

<sup>66</sup> Notably Japan, Israel, Argentina, Chile, New Zealand, Australia and Turkey expressed their right to propose amendments to this text in October.

<sup>67</sup> The word supreme has been preferred to “sovereign”.

An Intergovernmental Committee is foreseen in Article 23. It would be composed of representatives from 18 Parties (but could be increased to 24 once the number of Parties to the Convention reaches 50) and elected by the General Assembly. This Committee would operate on the basis of two explicitly expressed principles: equitable geographical distribution and the principle of rotation. The Committee would function under the authority and guidance of, and be accountable to the Conference of Parties. Article 24 provides the assistance of the UNESCO Secretariat.

A specific settlement of disputes is provided: the procedures in order to settle a dispute are negotiation, “good offices” or mediation by a third party. Only if those tools have no success may a Party have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention.

The final part of this preliminary draft is entirely devoted to clauses concerning ratification, accession to the Convention, enactment, denunciation, amendments, and a particular provision related to federal or non-unitary constitutional systems (Art. 30).<sup>68</sup>

Article 27 (Accession) seems especially relevant. The Convention will be open to accession by all States which are not members of UNESCO but are members of the United Nations or one of its agencies, by territories which enjoy full internal self-government recognized as such by UN, and to regional economic integration organizations (para. 3). Notably, this provision was “constructed” for the EU (and by the EU itself),<sup>69</sup> even if it is formulated in a general manner: it states that these organizations must be constituted by sovereign States, members of the UN, “to which those States have transferred competence in respect of matters governed by this Convention”.

#### 4. Some Considerations on the Role of the Community in the Negotiations

With regard to the negotiations, and especially to the third phase, as anticipated above, the EU appeared clearly as a single unit speaking with two voices, that of the Commission and that of the Presidency. If this double external representation, which can be provided in order to ensure coherence to European action, generally speaking, is not exceptional, but can surely be seen as “unusual” in the cultural field and a true novelty in the UNESCO seat.

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<sup>68</sup> This Article has been drafted by Switzerland and Canada and states that international agreements are equally binding on Parties regardless of their constitutional systems, which would include their internal sharing of powers.

<sup>69</sup> During the last Intergovernmental meeting a working group in which there were EU, Canada and Japan formulated a new text, which was submitted and approved by the Plenary.

If the Commission formally should have acted within its competences in order to preserve the *aquis*, in practice it expressed Community positions in any negotiation or discussion forum (official or informal) on a lot of the Convention provisions, working in parallel to the Presidency.

Pursuant to the negotiating directives, the Commission should have spoken during the discussion of those provisions affecting common rules on competition, aid granted by states (Art. 87 EC), internal market (Art. 94-97 EC), common commercial policy, free movement of goods, development cooperation (Art. 177 to 181 EC) and, in other articles which could affect any other matters falling exclusively or primarily within Community competence. Under the latest Code of Conduct, the Presidency should have negotiated and expressed common positions reached in the coordination process on behalf of the Member States, in particular concerning international cooperation in the field of culture and in the issues related to human rights, but, in general, in any other matters falling exclusively or primarily within the competence of the Member States.<sup>70</sup>

As seen before, this draft includes a number of provisions affecting important Community competences (along with matters falling within the competence of Member States), specifically the free movement of people (in particular workers), of goods and common commercial policy (Title III, Title IX and Article 133 EC),<sup>71</sup> and immigration policy (Title IV EC). This Convention also affects (and this is a very important aspect) international commitments taken on by the Community itself regarding the World Intellectual Property Organization (WIPO) as well the World Trade Organization (WTO).<sup>72</sup>

Taking into account this broad character of the Convention, the Commission, in some way “puzzling” the cultural field, took on strong decision making powers itself. Nevertheless, despite their intrinsic transversal content, their wide formulation and “interconnection”, this Convention should remain, consistently with the UNESCO mandate and the UNESCO Constitution, a cultural agreement. On this basis, the strong interaction between commerce

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<sup>70</sup> Code of Conduct as agreed by the Permanent Representatives Committee (Part 1) on 28 January 2005 (5518/05 CULT 3-limited distribution).

<sup>71</sup> Concerning artists and workers in the cultural sector, it is possible to quote the ECC Regulation of 14 June 1971, completed by another Regulation of 2 June 1983, aiming to coordinate domestic regulations. Equal provisions regarding free circulation and mobility of artists and creators can be found in (ECC) Council Regulation N. 1030/2002 of 13 June 2002.

<sup>72</sup> See James Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer Law International, The Hague, 2001). Guy Tritton, *Intellectual Property in Europe* (Sweet & Maxwell, London, 2002).

and culture<sup>73</sup> is evident, as well as the real necessity to coordinate economic policies in general (particularly competition) as well as cultural ones.<sup>74</sup>

Turning again to the text of the Code of Conduct, para. 5, which establishes that “exceptionally, and after due coordination, a Member State other than the one holding the Presidency or representing it may take the floor during the negotiations in so far as its contribution is limited to supporting the agreed common position”, seems to be at least unusual.<sup>75</sup>

Another notable point is that the Code required the use of a coordinating procedure within the Council in the absence of an agreement on some conventional provision.<sup>76</sup> Also in this case, as an exception and only when necessary, after having followed the procedures provided for in the same Code of Conduct, the Member States could, in relation to those issues which are exclusively or primarily within the competence of the Member States themselves, express their point of view.<sup>77</sup> Neither of those possibilities was ever used during the negotiations. They were considered from the beginning, first of all by the Commission, to be exceptional and inadvisable.<sup>78</sup>

On the other hand, this text contained a statement from the UK, Greek and Irish delegations, stating that “the procedure envisaged in the first subparagraph of paragraph 7 of the Code of Conduct, and in particular the circumstances in which matters will be referred to the appropriate Council body for consideration, must be applied with regard to what is practicable in the context of the negotiations and ensuring that the Community and Member States are best able to promote and defend their interests in those negotiations”. The political nature of this statement is quite evident, as well as the persistent different approach to cultural policies among the member States. However, this statement is also the evidence that Community action must always consider and constantly compose these differences.

Before the third negotiation phase, in the previously mentioned resolution adopted by a large majority, the EU Parliament set out its expectations for

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<sup>73</sup> Tunney, “Potential Judicial Development ...”.

<sup>74</sup> See *ibid.* and also Pongy, “Entre modèles nationaux...”, 145. The Author observes the possibility of including cultural policies in the wider range of Welfare actions, and of not only industrial but also in so-called high policies. National sovereignty is strictly connected to the development of these policies, and this is the main problematic issue.

<sup>75</sup> Code of Conduct as agreed by the Permanent Representatives Committee (Part 1) on 28 January 2005 (5518/05 CULT 3-limited distribution).

<sup>76</sup> “The Commission and the Member States will use all best endeavours in coordination meetings on the spot to agree a common position. If no agreement can be reached, the matter will be referred without undue delay to the relevant Council bodies, pursuant to para. 4 of the negotiating directives”.

<sup>77</sup> Paragraph 7 of the above mentioned Code.

<sup>78</sup> Annex II of the above mentioned Code.

the EU's position on the subject and for the Convention itself.<sup>79</sup> Such resolution again stated (as a sort of *motto*) the necessity for coordinating positions between the Member States and the Community,<sup>80</sup> but emphasized both the role of Parliament (which must be kept informed) and that of the States (despite their effective weight).<sup>81</sup> From these words of Parliament, it seems to be argued that cultural policies are becoming a key factor in the consolidation (and deepening) of democratic European governance and a new occasion to strengthen the role of the Parliament. We hardly believe that better information from the Parliament will change any institutional balance between the Member States and the Community, which results factually, however maybe it will make the procedure more transparent.

Indeed, the way in which the negotiations took place showed a very deep coordination at EU level, consistent with the purposes expressed in the Code of Conduct and with the views of the Parliament. However, at the same time, it is the evidence of a (perilously) belied mechanism of absorption of national competences by the Community. Moreover, this widening Community competence causes extended interference into the national democratic prerogative over internal affairs, also because any legislation on cultural diversity in the Community will be a new law to create deeper external Community competence.

Under this perspective, future conventional instruments in this domain will be even more a European prerogative. It cannot be denied that Community policies are strongly affected by this text and, moreover, that the Convention itself can be seen, at least potentially, as a flexible but poignant instrument into the evolutionary supranational framework. More precisely, this Convention shows (and also engenders or will do so) an even more problematic relationship between national sovereignty (if it exists) in the cultural field (as designed in the Treaty) and Community *primauté* in commercial issues. This problematic relationship is reflected (and not resolved) in Article 27 of the provisional draft, in which it is stated that “the organizations and such Member State or States shall decide on their responsibility for the performance of their obligation under the Convention”.

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<sup>79</sup> RE/ 562334EN.doc in <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//NONSGML+MOTION+B6-2005-0216+0+DOC+WORD+V0//EN&L=EN&LEVEL=2&NAV=S&LSTDOC=Y>

<sup>80</sup> The Parliament “believes that Member States must make every effort to coordinate their positions, between them and with the community; 3. Expresses its concern that any lack of unity will undermine the Community's position and credibility in the negotiations and stresses the importance of EU unity and the need for Parliament to be fully involved in defining a clear mandate, as well as taking into account the views expressed by civil society”.

<sup>81</sup> Para. 5: “Believes that the proposed UNESCO Convention must very clearly underline the right of States Parties to develop, maintain and implement policies and laws designed to promote and protect cultural diversity and media pluralism; considers that any attempts to dilute or weaken these rights in any way through the Convention must be resisted”.



Furthermore, such distribution must be notified to other Parties and “specifically declared”.

It will be interesting to see how the sharing of competences will turn out at the moment of accession, in particular with regard to the predominant Community role during the negotiations. This declaration actually seems to be a structural necessity in order to strike an effective and efficient balance between supranational and domestic instruments.

This role must be read as the definitive evidence of the transition to an idea of positive cultural action at the European level, which should be confirmed at the moment of accession.<sup>82</sup>

Regarding the European internal framework, it must be pointed out that many articles in the Convention end up having a different juridical base where the Community has a concurrent competence: consequently, all decisions that are taken in order to realize the purposes of this Convention will need (at least from a formal point of view) a qualified majority and not unanimity. The trend to bypass the structural and procedural limit provided by Article 151 EC (more or less justified or justifiable) seems in this way to be consolidated, but this appears to be prejudicial to the provided (normative) division of competences between the Community and the Member States. More precisely, it factually imposes a different sharing of competences.

From a strictly procedural point of view, the factual overlapping of unanimity seems to have a double meaning. If, on the one hand, unanimity might be considered a guarantee for democracy in the sense that it mirrors the preferences of all member states, on the other hand, in practice (and for technical reasons) as a rule it is detrimental to decision making in the European Union. Instead, absolute majority decision would be the core feature of democratic decision taking, allowing for decisions by the greatest possible number in the process of dynamic law making. Paradoxically, the majority vote, which is the practical consequence of other norms as legal foundations, which “exclude” different (minority) opinions in law making, appears (or might be) the best way to develop policies aimed at protecting cultural diversity.

From the substantive (or political) point of view, this seems to imply a former extension of those policies which are not cultural but which affect

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<sup>82</sup> From the perspective of European Cultural policies see Livio Missir di Lusignano, “Le défi d’une politique culturelle européenne: mythe ou réalité?”, in Enrique Banus and Beatriz Elio (eds.), *Actas del VI Congreso “Cultura Europea” - Pamplona, 25-28 octubre 2000* (Thomson Aranzadi, Pamplona, 2001), 19-23.

cultural domain, at least in progress, also as a consequence of the true application of Article 2 para. 5 of the Convention, which states the principle of complementarity between economic and cultural aspects.

## 5. Concluding Remarks

The analysis of EU participation in the UNESCO negotiations for the elaboration of a convention on cultural diversity helps make apparent several intriguing aspects of the interface between European and national law and politics, as well as of the process of European integration, from a particular cornerstone.<sup>83</sup>

It is of course too early to analyse the feasibility and the implications of such a draft (considering the almost definite accession of this convention by all the member states together with the EC). Essentially, from the institutional point of view, it can represent an additional step towards an irregular process of incremental change of the Community structure itself.

The specific impact of this supranational negotiating practice is thus a way to de-structure (re-structure) the form of cultural competences in order to respond to a transnational (and supranational) imperative of protection of cultural diversity. The substantial re-allocation of competences in the cultural field emerging during these negotiations goes in the direction of a more pluralistic shape of the EU/EC. It shows that pluralism may be conceived as a pivotal value in the European legal framework and must be re-interpreted under the light of cultural diversity, or better, re-conceptualised as multicultural.<sup>84</sup> More precisely, (the promotion and protection of) cultural diversity (between Member States and within Member States) can be seen as a precondition for a balanced and mutually enforcing relationship between European competence and local sovereignty.

Moreover, the presence of the Community/Union as the sole subject in the international scene seems to represent a new stage in the process of a legal construction of its subjectivity,<sup>85</sup> which is (or rather, must be)<sup>86</sup> characterized and conceived by diversity. In this sense, the EC/EU can be seen as a real

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<sup>83</sup> See Renee Barents, *The Autonomy of Community Law* (Kluwer Law International, The Hague, 2004), 66.

<sup>84</sup> See Cinzia Piciocchi, "La prescrittività culturale degli ordinamenti giuridici tra ordinamenti statali e Unione Europea", in Francesco Palermo, Roberto Toniatti (eds.), *Il processo di costituzionalizzazione dell'Unione Europea* (Università degli Studi di Trento, Trento, 2004), 211-236.

<sup>85</sup> Alijs Vignudelli, "Il ruolo dello Stato tra Regioni e Unione Europea (Lo Stato nazionale da categoria giuridica a tipologia storiografica?)", available at <http://www.forumcostituzionale.it/contributi/titoloV4.htm>.

<sup>86</sup> See first of all Art. 151 EC, but also the Preamble and the Article 22 of the Nice Chart.

“entrepreneur politique ou d’animateur”<sup>87</sup> in the cultural field: the respect of conventional obligations will imply *de facto* a positive harmonization process of national legislation in this domain, representing a new step towards a more uniform cultural system.

Indeed, this legally binding instrument should imply a more systematic evaluation of cultural action, to be intended on the one hand as a preliminary verification process of consistency to convention provisions, and on the other hand as an assumption of new economic and normative obligations. What is the necessary premise for such a transformation? Assuming that the normative background cannot be entirely reformed, it is a continuous work of re-interpretation within a complex play of check and balances. Overall, a wide conception of cultural competences emerges, and which can easily represent the idea of a new trend in cultural activity, characterized by dialectical tension between cultural regulation and freedom of culture.

At the same time, it is possible to identify a clear interaction between the national state and the European context. EU intervention in the cultural field, though legally “minimalist”, is potentially (and factually) “maximalist”, deriving from the constant erosion of the use of Article 151 EC and other legal bases. The cross-cultural conventional criteria (and the way to negotiate them) can be seen as a limit to distinguish a progressive policy from a conservative one and, at the same time, they can be seen as a tool to impose the empowering of Community legislative instruments.

Specifically, the process of this negotiation can be seen as a horizontal dynamic towards legal convergence from the member States to the EU.

In this context a sort of “pre-emption” seems to emerge: through an international agreement the sovereignty of the States is limited. One could argue that such a “pre-emption” also leads one to consider the same Article 300 EC as a sort of integrating norm of the so-called *primauté* of community law.<sup>88</sup> In other words, in the case that such a “pre-emption” passes through international action, this means it is in some way implied by it. Moreover, pre-emption is a typical issue of legislative power, but if the EC pre-empts the States in this field of law through international obligations, that action

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<sup>87</sup> Pongy, “Entre modèles nationaux ...”, 130.

<sup>88</sup> This can be seen as further evidence of a particular phenomenon highlighted by Francesco Palermo: “... il sistema costituzionale dell’integrazione europea tend[e] a riprodurre, per imitazione, taluni elementi caratteristici degli ordinamenti federali, pur venendo questi ad operare, in un contesto estraneo alle dinamiche federali, in modo evidentemente diverso, funzionale non già alla logica dell’uniformità federale quanto a quella propria dell’integrazione...”. See Francesco Palermo, *La Forma di Stato dell’Unione Europea* (CEDAM, Padova, 2005), 183.

effectively would expand also the jurisdiction of the Court of Justice to the detriment of the States' Courts.

Meanwhile, the expression of shared values and principles in the Convention text allows a certain foreseeability that it will be not only up to the Member States but above all to the EU to transform and develop a keen "differences policy". In other words, with the UNESCO Convention, Europe will stand under the obligation to essentially assure structural congruency and to preserve the basic value of diversity.

From this perspective, it appears difficult to understand the choice to reproduce (at least *de jure*) the provision of article 151 in article III-280 of the Constitutional Treaty, although it does introduce one important amendment: the requirement of unanimity is replaced by majority voting. As a matter of fact, to counterbalance this provision, the prohibition on introducing harmonizing measures remains. In this new Article, cultural competence is again subsidiary: the European legislator should have a merely accessory role, being able to intervene only to sustain, to coordinate or to complete a Member State's action. It has been suggested that a move to majority voting in the Council could result in Member States making greater use of the principle of subsidiarity in order to block unwelcome measures. This would be possible, but the constant process towards an even deeper role of the Community/Union in the cultural field, which is well demonstrated by participation in this UNESCO Convention, will not cease.

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