Between Art and Commerce: Vagaries of the EU Film Policy

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"Par ailleurs, le cinéma est une industrie."
André Malraux[2]

I. Introduction

It is common knowledge that today European cinema in particular and the whole audiovisual sector in general are suffering from structural weaknesses and are dominated by non-European works, mainly from the USA. In view of both the cultural and economic importance of the sector, it is no wonder that the issue has attracted a great deal of attention at the European Union (EU)[3] level, resulting in the birth of a so-called audiovisual policy. Since the early 1980s, within the framework of this policy, the EU has conceptualised audiovisuals as a means of creating a new space of identity that should coincide with the political and economic space of the Union. The EU actions are manifold and include both negative and positive integration tools: from guidelines for control of state aid to the film sector, to financial support schemes as Media Plus[4] and the European Investment Bank's i2i Audiovisual initiative[5] and a (highly controversial) quota regime as provided by the Television Without Frontiers Directive.[6]

Within the audiovisual sector, the promotion of European feature films has a distinctive importance because of their potential in terms of commercial exploitation and employment. "*Le désir du cinéma*" cannot be explained, however, exclusively by economic reasons. Cinema carries a strong symbolic message and thus has an enormous influence on the development of other means of communication. It represents a diplomatic and political vector on the global geopolitical arena. Participation in prestigious international film festivals and nominations for film awards boost the position of states in the international market and also enhance their self-esteem in terms of cultural impact.

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[2] A. Malraux, *Esquisse d'une psychologie du cinéma* (Paris: Gallimard, 1946).

[3] For the purpose of this paper, I will refer to the term "European Union". "European Union" and "EU" will be used interchangeably, depending on the context. The term "Community" will be used only in connection with reference to the EC Treaty or EC law.

[4] The *MEDIA plus programme* (2001-2005) aims at strengthening the competitiveness of the European audiovisual industry with a series of support measures dealing with the training of professionals, development of production projects, distribution and promotion of cinematographic works and audiovisual programmes.

[5] The European Investment Bank's *Innovation 2000 Initiative - Audiovisual* offers the European film and audiovisual industry a range of financial products and budgetary aid instruments in four crucial areas: training, development, distribution and finance.

[6] *Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities*, OJ 1989 L 298/23, as amended by the European Parliament and Council Directive 97/36/EC of 30 June 1997, OJ 1997 L 202/60.

The many facets involved in film-making explain the rising interest expressed recently by nearly all the EU's institutions: the European Commission[7], the European Parliament[8] and the Council.[9] However, because of its strong cultural implications, the film sector does not lend itself easily to the trends towards uniformity, which are inherent in the process of economic integration. This conflict is clearly seen in the relationship between national cinematographic legislation seeking to protect national, constitutionally grounded cultural, and the values of free market philosophy pursued within the European economic integration process, granted a constitutional rank in the EC Treaty.

In other words, there seems to be a contradiction between national measures, which often seek to correct the workings of the market, on the one hand, and the efforts to establish a free market for audiovisual goods and services on the European level, on the other. This competence conflict between EU and the Member States in their role as promoters of cultural diversity will be referred to below as the "vertical dimension" of constitutional contradictions within the European film policy framework.

The situation has been additionally complicated after Maastricht by the introduction of Article 151 into the EC Treaty, which recognises protection of cultural values as one of the constitutional tasks of the Community. As a result, the policy in the film sector at the European level is characterised by another profound contradiction, that between the economic objectives of market integration and the obligation to preserve cultural diversity, both constitutionalised within the EU legal order. This contradiction will be described below as the "horizontal dimension" of the conflict in question.

The aim of this paper is to investigate these tensions within the constitutional framework of the European Union and its Member States. In order to gain a more comprehensive picture, in Section II of this paper, after a short overview of the development of the EU audiovisual competence, I will investigate the constitutional contradiction within the film policy on the European level itself (horizontal aspect). Subsequently, in Section III, the conflict between the existing EU policy measures and national cultural sovereignty will be examined (vertical aspect). This approach will make it possible to identify the main weaknesses of the existing and envisaged EU film policy framework and draw conclusions (Section IV) for the feasibility of a sustainable film policy in the European constitutional context.

II. EU Film Policy: Market Integration v. Cultural Diversity Promotion

The legal basis for the EU competence on audiovisuals

The EU audiovisual policy attempts to combine the "dual" nature of the sector by improving its competitive capability, while at the same time taking account of its cultural dimension. The legal basis for such a "mixed" policy is not easy to define precisely. It would seem that audiovisual issues have little relevance within the EU context: there are no specific provisions in the European Treaties on audiovisual policy as such; and there was no mention of audiovisual matters until the introduction of a title on culture into the EC Treaty, where the

[7] *Communication on certain legal aspects relating to cinematographic and other audiovisual works*, 26 September 2001, COM (2001) 534 final.

[8] *Resolution on achieving better circulation of European films in the internal market and the candidate countries,* 16 October 2001, 2001/2342 (INI).

[9] *Council resolution on national aid to the film and audiovisual industries,* 12 February 2001, OJ 2001 C 73/02, and *Council resolution on the development of audiovisual sector,* 21 January 2002, OJ 2002 C 32/04.

notion of "audiovisual sector", however, appears in a subordinate, exemplifying role. Among the powers included explicitly within the EU competence, there are no express powers in the audiovisual field.

Yet, the audiovisual sector has been to a great extent affected by the European integration, which led to emergence of an independent policy. The underlying reason for this lies in the very nature of the sector. It is generally acknowledged that audiovisual works, especially feature films, are not just any goods, but intellectual, creative works, requiring at the same time a financial investment. Since it appears virtually impossible to draw a clear dividing line between economy and culture, EU law fully applies to cultural goods and activities, including films and other audiovisual works as well as cinematographic and audiovisual services. What is more, according to the European Court of Justice, as a general rule, the EC Treaty applies without exception to all gainful activities whether of economic, cultural or social nature.[10] As a result, the establishment of the internal market has fully involved the audiovisual sector.

It is therefore argued that, apart from several substantive policy areas, the Community has been, in fact, attributed a number of functional powers,[11] which are defined in terms of an objective to be achieved, which is, in this context, to create a common market for audiovisual goods and services and ensure its smooth operation. The cultural dimension of EC law (evidently relevant in the film sector) has been, hence, primarily about the consequences of the common market freedoms for cultural activities. The EU, however, if it wishes to take any action in the audiovisual sector, has only a fragmentary legal basis at its disposal, giving rise to a selective approach in the field.

The Maastricht Treaty provided, by introducing a title on culture (Article 151 EC Treaty), at least partially, "constitutional" resources to deal with the "dual" phenomenon of the audiovisual sector, and, more generally, to strike the balance between the economic and cultural sphere, between economic integration and cultural specificity. As a result, since Maastricht, the EC Treaty has spelt out constitutionally the responsibility of the EU to safeguard and promote cultural and linguistic diversity. However, the formulation of Article 151 has additionally complicated the situation since it gives rise to many questions, the main one being: how should cultural values be considered when they appear to collide with other, and more immediately compelling, objectives of the European Union, as economic growth or market integration?[12] The inclusion of provisions on culture into the EC Treaty cannot eliminate the tension that exists between the free market approach and the cultural diversity promotion approach towards the audiovisual sector within the EU legal order.[13]

The ambiguity of the Commission action on film policy

i) Policy objectives through the eyes of the Commission Working Paper

The unresolved tensions between trade and culture in the EU context are mirrored in the European Commission initiatives with respect to the film sector. In particular, the recent Commission's Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works indicates that "the aim of the present document is to launch a debate on a number of legal issues related to the European audiovisual sector, and, in particular, to

[10] L. Hancher, T. Ottervanger, P. J. Slot, *EC State Aids* (London: Sweet and Maxwell, 1999), at 78.
[11] B. de Witte, 'The Cultural Dimension of Community Law', in *the Collected Courses of the Academy of European Law*, *EUI Florence* (the Hague: Martins Nijhoff, 1993), 233, at 272.
[12] Ibid., at 292.
[13] Cf. C. Tongue, 'Television and Film production: Europe Fights Back', *13th European TV and Film Forum*, Dublin, 8-10 November 2001.

highlight those aspects which could impact on the development of a competitive cinema industry in Europe. This concerns notably barriers to the circulation of European audiovisual works and barriers to the provision between Member States of filmmaking services, which would hinder the promotion of cultural diversity and prevent the sector from taking full advantage of the benefits of the Internal Market".[14] In this way, the Working Paper, while envisaging as a final objective of the European audiovisual policy "cultural diversity, both within and between the Member States", perceives barriers to the circulation of European audiovisual works and barriers to the provision of filmmaking services between the Member States as the main obstacles to the achievement of such a diversity.

It can be argued that, given the above, the Working Paper creates an amalgam of two objectives: the establishment of an internal market for the audiovisual sector, on the one hand, and the promotion of cultural diversity, on the other. In fact, these objectives are not necessarily compatible with each other. The first of them, the realisation of the common market, is a classical economic objective, achieved usually by such measures as economies of scale, standardisation and industrial normalisation, whereas the other, the promotion of cultural diversity, is an objective of a qualitative nature aiming at the pluralism of supply.[15] In sum, the document seems to overlook the horizontal dimension of the contradiction between art and culture within the film sector.

Furthermore, the position of the Commission in the Working Paper appears to be in contradiction with concepts developed in previous documents, notably in the Communication on principles and guidelines for the Community's audiovisual policy in the digital age. In the Communication, the Commission clearly stated that "preserving Europe's cultural diversity means, amongst other things, promoting the production and circulation of quality audiovisual content which reflects European cultural and linguistic identities. In fact, when it is available, European television audiences show a clear preference for audiovisual content in their own language and which reflects their own cultures and concerns: the challenge is therefore to ensure that programming of this nature – which is usually more expensive than imported material - continues to be available".[16]

One sees, then, that the Commission is well aware of the fact that the creation of a common market for audiovisual products and services will not ensure cultural pluralism within the European market, and it admits that a more proactive policy in favour of production and circulation of quality audiovisual content is necessary in order to achieve the objective of cultural diversity promotion. In the same vein, the Commission has, indeed, declared several times that the ultimate goal of the EU audiovisual policy is to promote cultural diversity, both within and between the Member States.[17]

In conclusion, the Working Paper exemplifies the Commission's rather unbalanced approach to film policy since, in spite of lipservice to the rhetoric of cultural diversity, it underpins market integration without taking into due account the "dual" nature of films.

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[14] *Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works*, 11 April 2001, SEC (2001) 619, at 3.

[15] Cf. *Response of CICCE, EUROCINEMA, FIAD et al. to the Commission Staff Working Paper,* Brussels, 11 July 2001, www.europa.eu.int/comm/avpolicy/regul/cine1_en.htm, at 6.

[16] *Communication: Principles and guidelines for the Community's audiovisual policy in the digital age,* 14 December 1999, COM (1999) 657 final, at 11.

[17] Cf. for example: *Communication: Audiovisual Policy. Next Steps,* 14 July 1998, COM (1998) 446 final, at 2; see also the Working Paper in question, supra, n. 14, at 4.

ii) Continued confusion in the Commission action

The frequent use of the concept of "cultural diversity" notwithstanding, the Commission seems to underestimate in practice the importance of the cultural dimension. In fact, this general "amnesia" appears to be a permanent feature of the Commission's approach to the audiovisual market.

Firstly, the question arises as to the means and instruments – which are not envisaged in more detail by the Commission's documents – which would allow the implementation of cultural diversity and real action in this field. The inertia of the Commission concerning the work on pluralism in the media sector,[18] abandoned since late nineties, clearly demonstrates how ambivalent the Commission is as far as effective promotion of cultural diversity is concerned. This inactivity evidently clashes with the fact that this objective has been given primary attention by many Commission's documents on the matter. At the same time, this position is quite understandable in vie of the lack of Member states' political will to regulate the sensitive issue of media ownership. In this context, it is interesting to look at the recent European Parliament's initiatives on media concentration, urging the Commission to launch consultations on the media pluralism issue.[19]

Secondly, as indicated above, the Commission seems to apply a model of classical economic analysis to the audiovisual sector, which ignores, to some extent, the problematic of culture and artistic creation. This use of a market model as a foundation for EU audiovisual policy can be seen in various recent Commission's documents. To trace the origin of this approach, one should go back to the Bangemann Report on Information Society from 1994,[20] where the Commission purported a spontaneous concept of cultural diversity and affirmed that as long as the products are available to the consumers, the opportunities to express freely the cultural and linguistic diversity within Europe will multiply. In the language of the Bangemann Report: "once products can be easily accessible to consumers, there will be more opportunities for expression of the multiplicity of cultures and languages in which Europe abounds". In this "free flow of information" concept, there seems to be little space left for an intervention on the part of the EU in the audiovisual sector within the internal market. Rather, the Commission contents itself with letting the free marts of trade take their course and realise automatically the goal of cultural diversity.

In truth, the application of such a classical internal market approach to the audiovisual sector poses serious problems. In fact, it is generally acknowledged, also by the Commission itself, that the action of public authorities is necessary to ensure cultural diversity, thus ruling out the option which favours the free market above all. Such action is needed to stimulate film production and, consequently, maintain the pluralism of cultural supply.

As a conclusion, the Commission's perplexed action is comprehensible in the light of the fact that realising cultural diversity, while respecting the fundamental economic integration goal, is, indeed, problematic. It should be acknowledged that these two objectives

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[18] *Green Paper on pluralism and media concentration in the internal market*, 23 December 1992, COM (1992) 480 final and *Communication on the follow-up to the consultation process relating to the Green Paper on 'Pluralism and media concentration in the internal market - an assessment of the need for Community action'* COM(1994) 353.

[19] European Parliament, *Resolution on media concentration*, P5_TA-PROV(2002)0554, texts adopted at the sitting of Wednesday, 20 November 2002.

[20] High-Level Group [chairman, M. Bangemann], *Europe and the Global Information Society: Recommendations to the European Council of 26 May 1994,* Brussels, 1994, at 7.

are, to an extent, incompatible. This contradiction seems to be ignored by the European institutions, and their policy in the field has not spelt out clearly whether there is any hierarchy or relationship between them. As demonstrated above, the existing regulation and support mechanisms attempt to combine, but very often seem to confuse cultural and economic objectives. Therefore, it seems that the EU instruments in the field remain rather poorly adapted to the *problématique* arising in the field of cinema, or, more generally, the audiovisual industries.

III. EU Policy v. National Cultural Sovereignty

The inherent contradiction within the framework of the European film policy itself is additionally exacerbated by the profound constitutional conflict between European policy measures affecting the cinema sector and national cultural policy considerations, both having a constitutional basis. This tension is especially visible in the competition field and clearly demonstrates how controversial the vertical power sharing continues to be within the European Union.

The debate on the relationship between European competition law and national cultural competencies has been inspired by the German *Laender*, which, in the federal system, are entrusted with cultural prerogatives. It is precisely in the field of cultural and media policy, the last bastions of their genuine competence, that the Member States try to defend their positions against the extensive enforcement of European competition law.[21] The film sector represents an ideal case to argue that the EU competition rules and their "sweeping" enforcement by the Commission, which very often gains substantially constitutional significance within the Union, do not fully recognise the peculiar situation of the European film industry and do not do justice to the specific nature of the medium of film.

State aid law and films: EU v. national competence

The friction between the European Commission's competition practice and the Member States' desire to preserve national cultural policies is clearly illustrated by the controversy over the Commission's competence to check film aid schemes.

In general, state aid is incompatible with the EU common market, insofar as it affects trade between Member States and by favouring certain undertakings or productions, distorts or threatens to distort the competition. Therefore, it is, in principle, prohibited by European law, namely by Article 87 (1) EC Treaty.[22] However, given the fact that culture is, and will most probably remain, a matter of competence of the Member States, it is tempting to conclude that the Commission, by checking the compatibility of national film funding systems with EU state aid rules is exceeding the limits of its competence.[23]

On the other hand, since the preservation of undistorted competition seems to be of fundamental significance within the constitutional landscape of the European Union, denying the Commission competence to check the compatibility of film support schemes with EU

[21] Cf. J. Schwarze, 'Medienfreiheit und Medienvielfalt im europaeischen Gemeinschaftsrecht', *Zeitschrift fuer Urheber- und Medienrecht* (2000) 779, at 800.
[22] Cf. in the context of audiovisuals M. Dony, 'Les aides à l'audiovisuel à la lumière du Traité de Maastricht', in C. Doutrelepont (ed.), *L'actualité du droit de l'audiovisuel européen* (Bruxelles: Bruylant, 1996).
[23] So K. Schaefer, J. Kreile, S. Gerlach, 'Nationale Filmfoerderung: Einfluss und Grenzen des europaeischen Rechts', *Zeitschrift fuer Urheber- und Medienrecht* (2002) 182, at 184.

state aid law would run against the aims and constitutional order of the Union. Therefore, it does not seem possible to exclude certain cultural activities *a priori* from the scope of application of Article 87 (1) EC Treaty.[24] This has been confirmed by a number of ECJ judgements concerning cultural aid,[25] and there has been no attempt so far to contest the EU competence on the matter.

Nevertheless, it remains true that the European Commission has two contradictory constitutional tasks in this context: apart from the responsibility of preserving undistorted competition (Article 2 EC Treaty), it is obliged, according to Article 151 EC Treaty, to take into account the cultural diversity of the Member States in all its actions. The Treaty does not spell out in any way what the constitutional status of Article 2 is relative to Article 151 EC Treaty, and whether there is any hierarchy between these two, at least to some extent, contradictory objectives.

It becomes clear then that the aim of Article 151 EC Treaty, which sought to contain the expansion of EU activity in the cultural field and establish the proper division of roles between Member States and the EU in the field of culture, has not been properly achieved. As a consequence, the relationship between the national cultural sovereignty and the EU competition competence remains highly controversial.

i) The case of film aid guidelines

The topicality of this conflict has been shown recently in the controversies arising from the Guidelines established by the Commission on control of state aid granted to the cinema sector, officially announced in the recent Cinema Communication.[26] This has formalised the Commission's practice of gradually putting in place a *de facto* cap on admissible public support for film production. The heated discussion on the potential limitative effect of the Guidelines shows how policy considerations related to trade and competition do affect traditional national cultural priorities and measures in a way which is far beyond cultural policy.

Indicative in this context is the following European Parliament's Report on the Commission Cinema Communication,[27] where it is clearly stated that any re-examination of the Commission's position on film state aid control should lead to increased flexibility rather than a stricter application of EU state aid rules, and genuine consideration of the cultural and industrial needs of the cinematographic and audiovisual sector. The Parliament, on its part, considers that the Commission is refusing to take the specific nature of the sector's industrial dimension into account. It suggests that the Treaty, when putting forward a purely cultural solution, is not flexible enough to deal with the unavoidably "dual" nature of the sector. In the context of the revision of the Commission's Guidelines, it proposes that they ought to be relaxed rather than strengthened in view of the fact that the EU audiovisual industry is far from being competitive internally and externally. This reasoning, based on the premise of industrial justification for national film policy, further exacerbates the existing conflicts

[24] Cf. P. J. Slot, 'State Aids in the Cultural Sector', *Europäisches Wirtschaftsrecht nach Maastricht*, Bonn, 10 January 1994 (Bonn: Rheinische Friedrich-Wilhelms-Universität, 1994).
[25] Cf. Case T-49/93 *SIDE v. Commission*, [1995] ECR, II-2501and the recent case dated 25 February 2002, T-155/98 *SIDE v. Commission,* not yet reported.
[26] Supra, n. 7.
[27] *Report on the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works*, 5 June 2002 [Rapporteur: L. Vander Taelen], COM(2001) 534 – C5-0078/2002 – 2002/2035(COS)

within the EU policy framework.

In view of the above, it will be interesting to see whether the application of the Guidelines will be regarded as taking into consideration sufficiently Member States interests' in preserving their arrangements to support film industries. The actual vertical constitutional conflict between EU policy and national cultural competence remains, however, unresolved and can provoke further controversies in the context of film.

Article 81 v. cultural considerations: UIP case

Another interesting example of the contradiction between competition law and national cultural policies is the infamous UIP case. United International Pictures, a joint venture film distribution company, formed by three American majors, Paramount, Universal and Metro-Goldwyn-Mayer, has been originally (in 1989) granted an exemption from EU competition (Article 81) law, which has been renewed in 1999. The Commission's favourable opinion was largely due to the positive undertakings given by the parent companies, which were supposed to effectively encourage European film production. This decision has been widely criticised on the basis that that the obligations imposed by the Commission on the UIP remained dead letter. It was forcefully argued that the perceived benefits of the agreement were not brought out in practice; neither consumers enjoyed the promised economic advantages nor the production sector in Europe has experienced any increase as a result of it.

This controversy points to a more general problem of the effectiveness of the exemption decisions. The Commission's competition decisions in the media field are particularly delicate since they attempt to reconcile contradictory interests: favouring strengthening of the European film industry groupings in order to allow them to compete with US and Japanese giants, while protecting them from aggressive US domination on the market; all that by preserving fundamental respect for free competition and pluralism. In fact, the UIP's proponents indicated for a number of times that the same critics that call for dismantling of UIP's pan-European distribution network try to emulate it for European films.

Whatever judgements on the merits of this case are, the UIP controversy makes clear how crucial the relationship between competition law and cultural objectives of the national (and to some extent, EU) film policy is. It shows that, on the one hand, the Commission's policy does, indeed, attempt to take into account the needs of EU film industry, and doing so is perfectly in line with the positive policy in the field (like for example Media programme). On the other hand, however, the problem is that competition logic: ensuring diversity of supply does not mean necessarily realising cultural diversity and does not automatically result in a situation favourable for the EU film production. This is why the UIP decision could be seen as having consolidated US dominance on the EU market.

In sum, the UIP debate points, quite similarly to the state aid issue, although in a different setting, to the general problem of accommodating national cultural interests, as embodied by film policy objectives, within the competition law framework.

IV. Conclusion: towards a sustainable film policy in an enlarged Union

The EU film policy evolves between creativity and market, inherently wedged between art and commerce. The action of the European Commission in the field of cinema mediates constantly between the forces of the free market and the values of cultural diversity. As a consequence, it is a source of profound tensions coming to the fore on two levels: horizontal and vertical.

On the horizontal level, the European Commission attempts to pursue in its policy simultaneously the establishment of a common market for films and preservation of cultural pluralism of the audiovisual content, which appear by definition not reconcilable. This compromise satisfies neither the proponents of cultural exception nor the commercial actors. Whereas the first regret the very often hypocritical affirmation of cultural diversity and the excessive impact of the market on the film sector, the others criticise the inconsistent and protectionist character of such a policy. Neither the Treaty provisions nor the EU policy documents provide an appropriate remedy to strike a real balance between cultural specificity and economic integration aims.

As far as the vertical aspect is concerned, the EU power sharing landscape is characterised by a competence conflict between the Commission competition policy and national cultural prerogatives in the field of film policy. Article 151 EC Treaty has had little success in guiding towards a proper division of cultural competence between the Union and the Member States.

The relationship between cultural values (both on the European and national level) and more manifest and compelling EU objectives of market integration and competition remains and will most probably remain highly contentious in the context of film policy. Nevertheless, in order to clarify priorities and establish a clearer basis for the EU film policy, some general suggestions for a future, more sustainable, policy in the field can be put forward.

Paraphrasing the famous statement of André Malraux: "par ailleurs, le cinéma est une industrie",[28] it is a truism to say that cinema is above all a cultural artefact, a means of cultural expression and creation, which dimension cannot be dispensed with when conceiving a global policy strategy in favour of the European cinema. The European Union arguably seems to realise this and admits that the creation of a common market cannot guarantee in itself a pluralism of cultural content. Provided that the more proactive action on the part of the EU is genuinely endorsed, it seems, however, necessary to formulate ways and means which would enable this institution to truly fulfil its constitutional responsibility to safeguard and promote cultural diversity. If this obligation is truly a substantial element of the EU constitutional order, the lack of action on the Commission's part to achieve this constitutionally grounded objective could theoretically lead to failure to act proceedings before the European Court of Justice. Therefore, it seems logical that the Commission should envisage a more precise definition of its own tasks, which it subsequently has to fulfil.

It can be recommended that a more successful European integration of culture through actions favouring cultural industries *lato sensu* would require a revision of the Treaty in a manner which would entail a series of means and instruments non-existent at present and which would permit the perceived "cultural deficit" to be compensated for in the course of EU initiatives. This need becomes even more urgent in view of the EU enlargement. The enlargement can be beneficial for the strengthening of European audiovisual sector, provided, however, that EU audiovisual policy would favour the emergence and the structuring of the new markets. Precise definition of the audiovisual policy at the national level, which can guarantee the preservation of its industry, is essential, but not sufficient. The development of the audiovisual sector can only be fostered by associating different public support instruments to competition rules governing the EU market. Moreover, harmonious development of audiovisual operators in Europe requires a co-ordinated legal framework and its effective implementation.

[28] supra, n. 2.

In the existing framework, it can be therefore suggested that the EU policy ought to be supportive of the national efforts to promote the audiovisual production and should aim at greater consistency between cultural and competition policy objectives and harmony between measures taken on European, national and regional levels. Such an approach would be perfectly in line with the subsidiarity principle. These aims can be facilitated by the fact that the ECJ jurisprudence relevant in this context[29] suggests that it will not take a restrictive view on national cultural policies. The Commission seems so far to have followed an equally lenient attitude in the application of Article 87 EC Treaty;[30] the introduction of specific Guidelines for the sector should be interpreted as an attempt to provide legal certainty rather than to restrict admissible national support to the sector. Pursuing this tolerant approach in its decisions and implementing the EU programmes in the field, the Commission may well remove the worries of proponents of national cultural objectives and really contribute "to the flowering of the cultures of the Member States".

In the long-term perspective, however, an explicit definition of competencies of the EU in the audiovisual field from the constitutional point of view would seem necessary.[31] This would prevent the EU institutions from taking, on the basis of relatively vague and apparently unrelated Treaty provisions, like general competition rules, far-reaching decisions with profound constitutional implications and therefore incising on national cultural policies. In this way, the vertical constitutional problems could be remedied. Furthermore, a clarification of the priorities within the framework of the EU audiovisual and film policy itself and the establishment of their clear hierarchy, in order to alleviate constitutional dilemmas in the horizontal dimension, would lead to its increased legitimacy and efficiency.

[29] Cf. Cases C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, [1991] ECR I-4007, C-353/89 *Commission v. Netherlands*, [1991] ECR I-4069 and C-148/91 *Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR, I-487; as well as C-23/93 *TV10 v. Commisariaat voor de Media*, [1994] ECR I-4795 and C-6/98 *ARD v. PRO Sieben Media AG*, [1999] ECR I-7599, all concerning broadcasting.

[30] Cf. numerous exemptions for the national film support schemes granted by the European Commission: e.g. Decision N 3/98 *France*; Decision NN 49/97 and N 357/99, *Ireland*; Decision N 782/2001 and N 701/2001, *Germany*; decision N 698 /2001, *Spain*.

[31] So Schwarze, supra, n. 21, at 800.