



Strasbourg, 16 January 2001

[PF: CC-Cult/22e réunion/documents/CC CULT(2001)15_E]

CC-CULT (2001) 15

COUNCIL FOR CULTURAL CO-OPERATION

CULTURE COMMITTEE

22nd meeting

Strasbourg, 20 (9.30) – 22 (17.00) February 2001
(room 5)

**TOWARDS A TRANSVERSAL STRATEGY
FOR PROMOTING CULTURAL DIVERSITY**

Draft agenda, item 9.1

Distribution:

- Members of the Culture Committee

Documents are available for consultation on the Internet page of the cultural co-operation:
<http://culture.coe.int>, username and password: decstest.

DRAFT DECISIONS:

The Culture Committee :

1. thanked the Secretariat for preparing document CC-CULT(2001)15;
2. took note of the decision of the CDCC to [pending] and to take the following follow-up action ...;
3. instructed the Secretariat to submit to the next meeting of the Bureau of the CC-CULT an information document on the evolution of the relations between WTO/cultural industries.

The Bureau of the CDCC, when approving the general outline of document CDCC-BU (2000) 9 in May 2000, asked the Culture Committee to prepare a document "with the view to elaborating a strategy which would reconcile the concerns of cultural diversity with those of international trade agreements".

This document continues the awareness raising and clarification of the issues that the Culture Committee began a year ago¹. It attempts to elucidate a very complex set of issues with a view to offering elements to facilitate the development of the CDCC's strategy on cultural diversity and multilateral trade policy.

The document begins with a general description of the situation by articulating the background of the perceived discrepancies between cultural policy measures and multilateral trade policy rules. It then moves on to study more closely the conditions giving rise to the inconsistencies and the concrete issues where the inconsistencies can manifest themselves. Finally, an approach by the CDCC to contribute to the clarification of the situation is proposed.

INTRODUCTION

Developing and implementing measures that promote cultural diversity is a basic task for cultural policy. In fact, all democratic societies, based on the rule of law, **have developed measures to sustain and protect cultural diversity**. In Europe, cultural diversity has always been a dominant characteristic and, in the process of European integration, respect for cultural diversity has evolved into a fundamental political objective.

The commitment of the Council of Europe to cultural diversity has been unequivocally affirmed by e.g. the Second Summit of Heads of State and Government of member States and the recently adopted Council of Europe Declaration on Cultural Diversity. Article 3.2 of the Declaration, which states that "*Member states are urged to pay particular attention to the need to sustain and promote cultural diversity, in line with the relevant Council of Europe instruments, in other international fora where they might be called on to undertake commitments which might prejudice these instruments*", is an illustration of that commitment.

Similarly, the **Treaty establishing the European Community not only puts the emphasis on promotion and respect for the diversity of its cultures but states that the Community shall take cultural aspects into account in its other actions too**. Consequently, the Council of the European Union (General Affairs) stated in its conclusions concerning the preparation of the WTO Ministerial Conference in Seattle that "*During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of preserving their cultural diversity*".

The process of globalisation and the development of a knowledge-based society in the 21st Century are both huge opportunities and challenges for cultural diversity and policies promoting it. On one hand, respect for cultural diversity is needed if globalisation is to

¹ The following documents have been produced on the subject: CDCC (2000) 18, CDCC-BU (2000) 9, CC-Cult (2000) 27, 41 and 42.

become a two-way street reflecting genuine world-wide interaction and, on the other, culture, cultural meanings and cultural diversity assume the role of precious assets in the knowledge economy where information and knowledge are key factors of production.

In response to such historical developments, the Council of Europe, and many of its member States, are in the process of assessing the appropriateness of their policies across the board, cultural and audio-visual policies included, so as to be able to respond more efficiently to the emerging opportunities and challenges.

The magnitude of that challenge notwithstanding, **the increasing interaction between previously more or less separate and independent sectors** and, subsequently, policies, **has lead to an intricate network of mutual influences. As a consequence, "grey areas" have developed;** areas where two or more policies, with potentially quite distinct approaches and objectives, claim to have competence thereby causing implicit or explicit inconsistencies.

In view of the pace of the present transformations and the traditionally sector specific policy development accompanied with very little transversality, the emergence of these grey areas is probably inevitable. But because inconsistencies, whether only perceived or real, between public policies are useful neither to the policies involved nor the sectors concerned, **the member States should very carefully attend to the indications of the existence of any such inconsistencies and assure appropriate co-ordination at all levels.**

One of the premises of this paper is that attempts to apply rules emanating from other sectors to cultural policy measures intended to sustain and promote cultural diversity take place with increasing frequency. **Those rules rarely take into account the specific considerations of the cultural sector but rather only reflect their own innate priorities.** Examples are rules and policies developed in the dynamic fields of international trade, competition and investment.

Here the focus is, however, on articulating, strictly from cultural policy perspective, only the possible inconsistencies resulting from the application of trade policy rules to culture and cultural services and, subsequently, to cultural policy. **The purpose is to highlight,** as clearly as possible, **the open questions, problems and inconsistencies so as to raise the awareness of the CDCC and its specialised committees of all the issues involved and thus improve their preparedness to constructively contribute to national and international discussions on the subject.** That approach may give the text a certain bias but **the text should not be seen as opposing trade policy,** or any other policy, **but rather as an attempt to identify the problematic points as part of a process seeking common ground to reconcile the very distinct approaches so that the general public good can be maximised.**

Over and above these considerations, **the manner in which the open questions and perceived inconsistencies are tackled,** the openness and transparency of the process and the eventual outcomes will all **affect the perceived legitimacy of intergovernmental co-operation.** Although much of the recent unrest surrounding the meetings of the WTO (Seattle being obviously the most prominent example), World Bank and IMF has been organised by actors who do not represent the civil society at large, **the overall legitimacy and, subsequently, the capacity of governments to develop common**

responses to the issues brought about or reinforced by globalisation and technological development, **are at risk**.

THE DESCRIPTION OF THE SITUATION

THE EXPANSION OF THE TRADE POLICY FRAMEWORK

A priori, cultural policies relating to cultural diversity are far removed from any trade, or trade policy, related considerations. Cultural policies attempt to attain their own basic objectives - promotion of cultural creativity, diversity, identity and participation - all being part of the general public good. Trade policies, in their turn, are designed to promote the creation of wealth and prosperity by facilitating cross-boarder economic activities. **It is obvious that there cannot be any contradictions between such objectives; both are equally legitimate and important.**

However, **the development of mass media**, and subsequent technological advancements, **has transformed cultural industries into the most important producers and distributors of cultural products and services** in contemporary society. At the same time, **cultural, and especially audio-visual, industries have developed into major trade areas thus giving, from a trade policy point of view, some cultural policy measures a "trade dimension"**. It is this extension of multilateral trade policy framework to trade in services with all its implications, many of which are still not fully known, that is the main reason for the present discussion on cultural diversity. The discussion is further fuelled because there is a widely held view that the equal legitimacy and importance of the cultural and trade policy objectives is not always fully respected when negotiating on trade liberalisation.

As regards the framework of multilateral trade policy generally, the importance of international trade has long been acknowledged and the present multilateral trading system, in the form of the GATT (General Agreement on Tariffs and Trade), was established already in 1948. International trade has greatly increased since the conclusion of the GATT (in 1997, the total trade was 14-times the level of 1950) and recently especially trade in services has enjoyed rapid growth.

After long negotiations during the Uruguay Round of GATT, which lasted from 1986 until 1994, the World Trade Organisation was set up and two important new agreements adopted: the GATS (General Agreement on Trade in Services) and TRIPS (Trade Related Aspects of Intellectual Property) Agreements. The GATS Agreement extended the scope and coverage of multilateral trade policy to trade in services, including trade in cultural and audio-visual services.

The GATS Agreement is still a relatively young legal instrument with most ambitious objectives and wide scope. While succeeding in establishing the multilateral framework for services sectors, which is what the GATT members set out to achieve, it is still an evolving framework where there are open questions.

Examples of unresolved issues include the absence of clear definitions of even some of the basic concepts, such as "services" and service supplied in the exercise of governmental authority, **and the application of the Agreement's basic principles to**

certain service sectors and especially to totally new sectors, such as e-commerce. In addition, some issues with potentially far reaching implications could not be agreed during the Uruguay Round and they **are only now being scrutinised in the WTO (this is the case with so-called WTO rules work that concerns e.g. subsidies and domestic regulation).**

Following the built-in agenda of the GATS Agreement, trade liberalisation negotiations began officially in January 2000. Because there was no need to obtain a specific mandate, these negotiations are being pursued irrespective of the failure by the Seattle WTO Ministerial Conference to launch a comprehensive new round, often referred to as the Millennium Round.

PRESENT SITUATION

Towards the end of the Uruguay Round, intense discussions developed especially between Europe and the USA on the inclusion of cultural and audio-visual services within the scope of the GATS Agreement. To cut a long story short, most European states were not willing to make any specific commitments in the audio-visual services sectors and some states, especially France, were demanding that cultural and audio-visual sectors should be excluded from the scope of the Agreement altogether (cultural exception). The USA maintained that because it was impossible to define culture and cultural services exactly, they should be included in the GATS and claimed that Europeans basically wanted to exercise industrial policy in support of these industries under the guise of cultural policy. In the end, the parties could just agree to disagree.

The outcome was that the GATS Agreement covers all services sectors, culture and audio-visual included, and there has never been a cultural exception or any other general exception. However, the fact that the majority of European states made no specific commitments pertaining to their audio-visual services left those sectors essentially unaffected by the GATS Agreement and its provisions. In addition, e.g. the European Community and its Member States entered a number of most favoured nation (MFN) exemptions thus retaining the possibility to continue to operate regional audio-visual policy instruments with cultural objectives.

Because the GATS Agreement is built on the logic of progressive liberalisation and because the first post-Uruguay negotiations have just began, it is not at all surprising that discussion on the relations between culture and trade policy has surfaced again. The present debate has centred almost exclusively on the concept of cultural diversity that appears to embody most of the concerns of the involved organisations and the civil society alike.

CONDITIONS GIVING RISE TO THE POSSIBLE INCONSISTENCIES BETWEEN TRADE AND CULTURE POLICIES

At least the following can be identified as key conditions for the present inconsistencies:

- 1) the extremely wide and somewhat unclear scope and coverage of the GATS Agreement,**
- 2) its universal principles, and**

3) the newness and the still evolving nature of the GATS, the WTO and their rules generally.

Even though these conditions are rarely articulated in any detail they also underlie and motivate the present debate.

The first two conditions are outcomes from, and reflect, the precedence given today to world trade generally and trade liberalisation particularly. They are also more like in principle conditions finding, or not, their concrete expressions in the trade negotiations and in the daily implementation of the Agreement. Regarding the 3rd condition, four concrete examples are given highlighting the potential open questions that are of great concern for cultural policy.

The scope and coverage of the GATS Agreement

What makes the **GATS Agreement** so complicated from cultural policy perspective, is the fact that it **does not relate only to trade in services, but actually pertains**, according to article I.1, “...to **measures by Members affecting trade in services**”. Essentially, the GATS sets out to implement the strict trade policy principles to any given services sector with no consideration or discretion as to the objectives of other policies dealing with that sector.

Furthermore, **the key concept of service is defined in the broadest possible manner**. According to article I.3(b) of GATS, **services include any service in any sector** except services supplied in the exercise of governmental authority. As regards a service supplied in the exercise of governmental authority, article I.3(c) states that it means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. No thorough discussion has been held in the WTO on the issue so far. Would e.g. public education, health or social security services be considered as services provided under governmental authority, i.e. neither on a commercial basis, nor in competition with one or more service suppliers? In the absence of an agreement in the WTO there is no legal certainty on the issue. It should facilitate the actual trade negotiations if services supplied under governmental authority were clearly defined.

Measures by a given state intended to promote cultural creativity by way of supporting the production of a national, domestic language audio-visual programme or to promote freedom of expression by way of supporting the publication of national or regional newspapers or magazines obviously fall under the scope and coverage of the GATS whereby trade policy rules would, in the case of a dispute initiated by one or more WTO Members against a measure by another Member in these sectors, take precedence over cultural or media policy objectives which are not similarly regulated at the international level.

The universal nature of trade policy principles

In principle, all measures by Members that can affect trade in any service in any sector² fall under the scope and coverage of the GATS Agreement and its universal trade policy principles of most favoured nation (MFN), national treatment and

² The only exceptions are services provided under governmental authority and the general public health, morals and security exceptions as provided in art. I.3 (b) and (c) and art. XIV of GATS respectively.

market access. It must be noted, though, that in practice the application of these principles can be limited, at least for the time being, by Members entering MFN exemptions and by not making specific commitments concerning national treatment or market access, or by entering limitations or qualifications in their schedules of specific commitments.

According to the MFN rule, a Member must "*accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country*" (art. II.1 of GATS). If a Member has made national treatment or market access commitments, it must treat services and service suppliers of any other Member no less favourably than it treats its own like services and service suppliers under the terms, limitations and conditions specified in its schedule. In other words, **these universal rules preclude specific treatment based on any qualitative or quantitative criteria or, alternatively, allow for specific treatment subject to either MFN exemptions or limitations in the schedule of specific commitments both of which are to be removed or weakened in the spirit of progressive liberalisation.**

The fact that cultures are tied to a given language, place and history thus each being unique - and together forming the cultural diversity - implies that cultural policy measures cannot be all-encompassing or universal like the trade policy principles in the GATS Agreement, but rather target aspects of a specific culture or cultures in order to achieve their objectives of promoting cultural identity, creativity and participation as well as respect for cultural diversity. **Consequently,** and building from the fact that cultural and audio-visual services depend on creative cultural expression and subsequently reflect and reproduce cultural identity and diversity, **applying universal rules such as MFN or national treatment to all cultural and audio-visual services and service providers would not be feasible because cultures are different from each other and also because service providers from different cultures do not enjoy an even playing field in the markets³.**

Application of MFN, national treatment and market access rules would be feasible if all cultures and providers of cultural services were somehow equal. Under such conditions, and only under such conditions, should there be no need for specific cultural policy measures that could be conceived as having trade distortive effects. At least in the foreseeable future, however, nothing suggests that even the minimum range of cultural services, especially in smaller language areas, could survive, let alone develop, without cultural policy action.

Furthermore, the application of MFN with its harmonising effects may bring about a general "freezing effect". For instance, the development of new higher levels of protection in the area of intellectual property may well slow down because the protection should have to be extended to everyone else. **In principle, it can be maintained that MFN is kind of an "antithesis" of diversity.**

³ Concrete examples and an assessment of the implications of WTO rules to the cultural instruments of the Council of Europe are included in the document CDCC-BU (2000) 9.

The evolving nature of the GATS and the WTO

In addition to the issues already referred to, the following specific themes can be identified as topics where there are **important open questions due to the newness of the GATS**:

- MFN and the eventual removal of the present exemptions;
- the requests and offers on national treatment and market access;
- subsidies and the possible development of binding disciplines and
- domestic regulation and proportionality tests.

Concerning the MFN, the present exemptions - which, *inter alia*, enable the Council of Europe to operate three important cultural and audio-visual policy instruments – are to be reviewed. According to article 4 of the Annex on article II exemptions of the GATS, the Council for Trade in Services shall review whether the conditions which created the need for the exemption still prevail and determine the date of any future review. Furthermore, article 6 states that the duration of such exemptions should not, in principle, exceed 10 years.

Over and above the somewhat uncertain future of the present MFN exemptions, **it is not entirely clear if it is possible to extend the coverage of the present exemptions, or to introduce new ones, to possible new multilateral or plurilateral policy measures.** If, however, a Member has not joined an existing exemption in the course of its accession to the WTO, it would be very difficult to join it later and might lead to requests for compensation by other Members. **It is of critical importance to ensure that the European WTO candidate countries enter the same MFN exemptions covering the relevant Council of Europe instruments than the older European Members.** Otherwise their continued operation might be jeopardized.

The problem is less acute for the European Union because it is considered as deep regional economic integration agreement in the sense of article V of GATS. That will allow it to give its members preferential treatment and thus violate the general MFN rule. However, the enlargement of the Union, including the alignment of the legislation of the EU candidate countries with the *acquis communautaire* and the opening up of Community programmes, means that these questions are most relevant also to the EU.

Concerning the requests and offers on specific commitments, one cannot anticipate what kind of requests and offers will be tabled during the negotiations. During the final stages of negotiations different requests and offers from various sectors will probably be mixed in order to have the final "package" where the interests of any specific sector may have to give way to the general balance. Again, **the decision to offer specific commitments in the cultural and audio-visual sector, reactions to requests made by others and decisions on the final package are not within the control of cultural policy makers** but rather in the hands of trade politicians.

As regards subsidies, which obviously play a critical role in cultural policy, it is possible that binding disciplines are to be developed within the WTO also for services. As an example, certain types of subsidies, e.g. export subsidies, are banned in the GATT Agreement while others are allowed under specific conditions. **Any disciplines on subsidies would probably become binding law** in the form of an annex although sector

specific approach to subsidies may also be developed. The latter option does not seem to be very logical as far as cultural and audio-visual services are concerned due to the lack of specific commitments concerning those services.

Domestic regulation is another important domain where WTO rules work is being started. **The point of departure in the negotiations is, automatically, to attempt to assure minimum interference from domestic regulation to trade. Proportionality tests** that are being pursued in the field of domestic regulation **will, most probably, assess the proportionality of a measure with respect to trade liberalisation and not with respect to the objectives of the measure itself.**

Because work on subsidies and domestic regulation is considered as being part of internal WTO rules work, it is basically carried out only by trade policy makers and the impact of cultural, or any other, policy considerations on these negotiations is not known.

CONCLUSIONS ON THE INCONSISTENCIES

The GATS Agreement opens up a whole range of questions and uncertainty when it comes to implementing cultural policies or developing new cultural policy responses to the development of the knowledge society and globalisation. **The fact that no major complications have emerged** in the field of cultural and audio-visual services, thanks to the existing flexibility of the GATS and the slowly commenced WTO rules work in the sensitive areas of subsidies and domestic regulation, **offers neither legal nor political certainty that the encounter between culture and trade policy could not, in the future, escalate into a conflict.**

The emphasis put on maintaining the capacity to define and implement cultural and audio-visual policies by e.g. the EU Member States and urging the member States of the Council of Europe to sustain and promote cultural diversity in other international fora where they might be called on to undertake commitments which might prejudice its cultural diversity instruments are both intended **to avoid a situation where policy measures in the cultural and audio-visual sectors were to become quite blatantly subject to approval by a set of principles completely removed from those of their own.**

In continuing the critical assessment of trade policy from a cultural policy perspective, and going beyond the conditions presented above, **trade policy often seems to take into account only the reality of public policy measures**, such as those of cultural and audio-visual policy, **but not the reality of the sector itself.**

Using the European audio-visual sector as an example, **obviously some cultural and audio-visual policy measures** - such as positive measures in the form of financing or grants, commitment to e.g. national treatment in co-production agreements between governments or preferential treatment in the case of television quotas - **affect trade in services in the sector, but all these measures notwithstanding, the markets are in reality dominated by foreign services and service providers.** In the field of cinematographic films, the US exports command an average of 80% of the audience. In the field of television programmes, according to the European Audiovisual Observatory

the trade deficit of Europe to the USA more than doubled during the 1990s and has now exceeded 6 billion Euros annually.

In the light of that example, **it is legitimate to question how severely the cultural and audio-visual policy measures actually restrict trade and what would the European audio-visual landscape look like without those measures.** The consensus in most smaller European countries is that without proactive cultural policy, national audio-visual production would be seriously threatened, at least as far as culturally and artistically more ambitious productions are concerned. That is not to suggest that all cultural and audio-visual policy measures were perfect or serve their purpose in the best possible way. Neither does it suggest that any trade restricting measures would have value in themselves. **It is quite possible to state that many cultural policy measures are actually intended to correct the existing market failures.**

Following from this simple analysis, **one can ask if trade policy sometimes confuses the means (trade liberalisation) with objectives (creating economic welfare)?** Using the European audio-visual market again as an example, justified claims could be made saying that **straightforward application of only trade policy rules would, instead of opening up the markets, have a clear market disclosure effect** by marginalizing domestic services and service providers because of the actual market domination of foreign services and service providers.

In this vein, it has been noted that **the present trade policy rules of the WTO lack a competition policy component.** It would indeed appear important to complement the trade policy regime with at least appropriate provisions on competition and consumer protection and generally widen the perspective of multilateral trade policy to include broader impact assessment.

FUTURE STEPS BY THE CDCC

The present multilateral trade policy is very much geared towards applying a single set of universal principles in a complex, and diverse, world without any institutionalised follow-up mechanisms concerning its concrete effects. It is difficult to see how that could be either feasible or sustainable in the longer term.

Despite the critical assessment put forward in this document, it must be emphasised that facilitating international trade and the circulation of culture and cultural services can only benefit culture and cultural diversity. **The more culturally diverse products and services circulate, the better cultural diversity is served and promoted.** In an ideal case, no active cultural policy involvement was needed as regards cultural and audio-visual services, but given the commitment by both the EU and Council of Europe member States to cultural diversity, the present market realities dictate otherwise.

In the light of the above, **the identified inconsistencies result almost exclusively from the very independent, if not isolated, manner in which trade policy negotiations are carried out.** Consultation by trade politicians of other sectors, especially prior consultation, has been minimal leading to poor co-ordination between trade and other policies and the development of obvious inconsistencies which are bound to emerge and complicate any future trade policy negotiations.

Because the governments of the WTO Members have entered into more or less conflicting commitments in different sectors and in different fora, only the very same governments can solve the problems. It is unlikely that tenable shortcuts can be found that would somehow clarify the grey areas and inconsistencies between policies. It seems much more likely that **a sustainable solution can only be found through active co-operation within and between the governments.**

The CDCC and its specialised committees could most usefully contribute to that exercise, in particular by ensuring they keep themselves fully informed on what is happening in the trade policy negotiations and how they could affect cultural policies. It could in addition, as requested by the **Declaration on cultural diversity**, “elaborate a catalogue of measures, which may be useful to member States in their quest to sustain and enable cultural diversity”. In this respect, it could be interesting for the CDCC to bring out the different approaches possible:

- that widely described in this document concerning the possible impact of the WTO rules and the GATS negotiations on cultural policy and industries;
- that resulting from the whole process of follow-up to the Declaration, already implemented by the transversal reviews (CC-CULT);
- that resulting from other work on cultural diversity, in particular in the education field (CC-ED and CC-HER) and in the cultural and natural heritage field (CC-PAT).

These different angles, from which the issue of cultural diversity deserves to be dealt with in order to experience its full implications at a time when the process of globalisation is accelerating, should be the subject of analysis, and if possible, suggestions that can lead to concrete proposals from the four specialised committees and in consultation with the other competent Council of Europe committees. It is on this basis that the CDCC could usefully consider setting up a new structure that would allow it to highlight the coherence of these different approaches. In spite of the current difficulties and financial restrictions, the CDCC could, for example, decide to create a Transversal working group on cultural diversity.

In conclusion, the CDCC took a significant step forward in initiating a process that lead to the adoption of the Declaration on cultural diversity and it should pursue this dynamic approach by basing itself on the contributions of its specialised committees who would, in turn, benefit from the “lever” effect that the CDCC could have by ensuring an effective liaison with other relevant international organisations, especially UNESCO, the European Commission and the WTO.