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EU Film Policy: between Art and Commerce

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Abstract

The establishment of the European internal market has involved the cinematographic sector as a result of its economic nature. However, film, as a cultural medium, does not lend itself easily to the trends towards uniformity, inherent in the process of economic integration.

This becomes visible in the relationship between national cinematographic legislation, reflecting cultural values, and the free market philosophy pursued within the European integration process. There seems to be a contradiction between national measures, which seek to correct the workings of the market, and the efforts to establish a European common market for audiovisual goods and services. This situation has been further complicated by the introduction of Article 151 into the EU legal order by the Maastricht Treaty, which recognised protection of cultural values as one of the EU constitutional tasks. However, it happened without calling into question the *acquis communautaire* on cultural matters. As a result, the audiovisual policy at the EU level is characterised by a contradiction between the economic logic of market integration and the goal of preservation of cultural diversity.

The inherent conflict between these two objectives becomes very clear when looking at the development of the European film policy. This policy agenda creates an amalgam of two not easily reconcilable aims: promotion of cultural diversity and establishment of an internal film market. This *horizontal* tension is exacerbated by the clash between the European competition policy measures affecting the film sector and the national cultural policy considerations, which demonstrates how controversial remains the *vertical* power sharing within the EU.

The aim of this paper is to investigate, on the basis of the European Commission policy documents and practice, these two-level tensions within the framework of the European film policy and draw conclusions for its future sustainability.

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Key words

Audiovisual Policy - Audiovisual Industry - Cultural Diversity - European Cinema - European Commission - EU Film Industry - Film Policy - State Aid.

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EU Film Policy: between Art and Commerce¹

Anna Herold

“Par ailleurs, le cinéma est une industrie.”

André Malraux²

1. Introduction

It is common knowledge that the contemporary European audiovisual industry, in particular cinema, is suffering from structural weaknesses and is dominated by non-European works, mainly of the US origin. In view of both the cultural and economic importance of the sector, it is no wonder that the issue of its competitiveness has attracted a great deal of attention at the European Union (EU)³ level, being one of the main concerns of the EU 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 in the cinema field are manifold and range from the ‘positive’ financial support schemes as Media Plus⁴ and the European Investment Bank’s i2i initiative⁵ and ‘negative’ support in form of a quota regime⁶ to specific guidelines for control of state aid to the film sector.⁷

¹ An earlier version of this paper has been published in Francesco Palermo and Gabriel N. Toggenburg (eds.), *European Constitutional Values and Cultural Diversity* (EURAC Research, Bolzano/Bozen, 2003, out of print).

² André Malraux, *Esquisse d'une psychologie du cinéma* (Gallimard, Paris, 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 As provided by Articles 4 and 5 of the Television Without Frontiers Directive, cf. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action 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.

⁷ Announced by the Commission in the recent Communication on certain legal aspects relating to cinematographic and other audiovisual works, 26 September 2001, COM (2001) 534 final (Cinema Communication).

The promotion of European feature films has a distinctive importance within the audiovisual sector because of the potential of cinematographic works 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.

These factors explain the rising interest in the cinema sector expressed in the recent years by the EU institutions: the European Commission,⁸ the European Parliament⁹ and the Council.¹⁰

At the same time, 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 European economic integration. This conflict is clearly seen in the relationship between national cinema laws seeking to protect national cultural identities and the value of free market philosophy pursued within the EU economic integration process.

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 conflict between the 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.

⁸ Commission, Cinema Communication.

⁹ Resolution on achieving better circulation of European films in the internal market and the candidate countries, 2001/2342 (INI), adopted on 13 November.

¹⁰ 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.

The aim of this paper is to investigate these tensions within the constitutional framework of the European Union and of its Member States, taking as a basis the European Commission policy documents and practice. In order to gain a comprehensive picture, in section 2 of this paper, after a short overview of the development of the EU audiovisual competence, the constitutional contradictions within the film policy at the EU level will be investigated (horizontal aspect). Subsequently, in section 3, 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 EU audiovisual policy and draw conclusions (section 4) for the feasibility of a sustainable future film policy in the European context.

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

2.1 The Legal Basis for the EU Competence on Audiovisuals

The EU audiovisual policy attempts to combine the 'dual' (cultural and industrial) 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 (Article 151) into the EC Treaty, where the notion of "audiovisual sector" appears, however, in a subordinate, exemplifying role. Among the powers included explicitly within the EU competence, there are no express powers in the audiovisual field. No change to this *status quo* is brought by the draft constitutional treaty, which in its catalogue of EU competences classifies culture as a field of merely "supporting action".¹¹

Yet, the audiovisual sector has been to a great extent affected by the process of European integration, which led to the emergence of an independent audiovisual policy. The 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, as confirmed by the European Court of Justice (ECJ), as a general rule,

¹¹ Cf. Article III-181, CONV 850/03, Draft Treaty establishing a Constitution for Europe, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>.

the EC Treaty applies without exception to all gainful activities whether of economic, cultural or social nature.¹² As a result, the establishment of the internal market has fully involved the audiovisual sector.

Consequently, it is argued that, apart from several substantive policy areas, the EU has been, in fact, attributed a number of functional powers,¹³ 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 EU 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 a fragmentary and 'indirect' legal basis at its disposal (e.g. internal market or industrial policy provisions), which gives 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. In practice, however, the formulation of Article 151 has not solved these tensions but instead additionally complicated the situation by raising cultural diversity to a constitutional objective of the EU, without specifying though how cultural values should be considered when they collide with other, and more immediately compelling, EU objectives, as economic growth or market integration.¹⁴ The inclusion of provisions on culture into the EC Treaty was not able to eliminate the tension between the free market approach and the cultural diversity promotion approach towards the audiovisual sector within the EU legal order.¹⁵

2.2. The Vagaries of the Commission Action on Film Policy

2.2.1. Policy Objectives Through the Eyes of the Commission Official Documents

The unresolved tensions between trade and culture in the EU context are mirrored in the European Commission initiatives with respect to the film sector, evidenced in the published policy documents, in particular the 2001

¹² Leigh Hancher, Tom Ottervanger and Piet Jan Slot, *EC State Aids* (Sweet and Maxwell, London 1999), at 78.

¹³ Bruno de Witte, "The Cultural Dimension of Community Law", in *Collected Courses of the Academy of European Law*, EUI Florence (Martinus Nijhoff Publishers, The Hague, 1993), 229-299, at 272.

¹⁴ *Ibid.*, at 292.

¹⁵ Cf. Carole Tongue, "Television and Film production: Europe Fights Back", 13th European TV and Film Forum (Dublin, 8-10 November 2001).

Cinema Communication. Already in the preparatory Working Paper, which preceded that Communication, the Commission indicated its intention to

*launch a debate on a number of legal issues related to the European audiovisual sector, and, in particular, to 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.*¹⁶

In this way, the Working Paper, while envisaging as a final objective of the EU 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 diversity. Similarly, in the Cinema Communication itself, the Commission underlined that “the key European instruments specifically developed in this area, the Television without Frontier Directive, for regulatory aspects, and the Media Plus programme for support mechanisms, have as their main objective to allow European companies in this sector to benefit fully from the European Single Market.” At the same time, it agreed that the EU support initiatives like the i2i Audiovisual Initiative and the Media plus programme focus on “both industrial goals of competitiveness together with the promotion of cultural diversity inherent in the promotion of the development of European audiovisual content.”¹⁷ In its most recent Communication on the future of the European regulatory audiovisual policy, the Commission explicitly stated that the EU audiovisual policy is aimed at “promoting the development of the audiovisual sector in the Union, notably through the completion of the internal market for this sector, while supporting paramount objectives of general interest, such as cultural and linguistic diversity ...”¹⁸

It can be argued that, given the above, the Commission policy 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 reality, 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

¹⁶ Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, 11 April 2001, SEC (2001) 619, at 3.

¹⁷ Commission, Cinema Communication, at 18.

¹⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Future of European Regulatory Audiovisual Policy, COM (2003) 784 final, at 3.

of scale, standardisation and industrial normalisation, often leading to a homogenisation of the offer on the market, whereas the other, the promotion of cultural diversity, is an objective of a qualitative nature aiming at the pluralism of supply and preserving a multiplicity of expressions, including the marginal voices in the society.¹⁹ In its policy formulations, the Commission seems to overlook the horizontal dimension of the contradictions between commercial and cultural concerns within the film sector.

Furthermore, the position of the Commission in the recent cinema papers appears to be somewhat inconsistent with the concepts developed in previous general policy documents, notably in the Communication on principles and guidelines for the Community's audiovisual policy in the digital age. In this 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.*²⁰

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 automatically 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. 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.²¹

In conclusion, the analysis of the Commission policy documents would point to a rather unbalanced EU approach to film policy since, in spite of paying lipservice to the rhetoric of cultural diversity, it underpins market integration in the sector without taking into due account the 'dual' nature of films and the real consequences of such integration on the quality of audiovisual offer on the envisaged single market for provision of audiovisual goods and services.

¹⁹ Cf. Response of CICCE, EUROCINEMA, FIAD et al. to the Commission Staff Working Paper, Brussels, 11 July 2001, http://www.europa.eu.int/comm/avpolicy/regul/cine1_en.htm, at 6.

²⁰ Communication: Principles and guidelines for the Community's audiovisual policy in the digital age, 14 December 1999, COM (1999) 657 final, at 11.

²¹ Cf. for example: Communication: Audiovisual Policy. Next Steps, 14 July 1998, COM (1998) 446 final, at 2; see also the Commission Staff Working Paper, at 4.

2.2.2. Continued Confusion in the Commission Action: Tracing the Origins

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 actual implementation of cultural diversity in the audiovisual field. The inertia of the Commission concerning the work on pluralism in the media sector,²² abandoned since late nineties, clearly demonstrates the Commission's ambivalence as far as the 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. Yet, this position is quite understandable in view of the lack of the Member States' political will to regulate the sensitive issue of media pluralism or more actively promote cultural diversity. In this context emblematic are the recent European Parliament's initiatives on media concentration, urging the Commission to launch consultations on the media pluralism issue,²³ as well as on circulation of European films in the internal market, calling for "an ambitious, efficient and integrated multiannual plan to render the European film industry competitive and the choice of films pluralist".²⁴

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 1994,²⁵ 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

²² Cf. Green Paper on pluralism and media concentration in the internal market, 23 December 1992, COM (1992) 480 final; 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. For an overview of the directive proposals see Alison Harcourt, "EU Media Ownership Regulation: Conflict Over The Definition Of Alternatives", 36(3) *Journal of Common Market Studies* (1998), 369-389; Gilian Doyle, "Regulation of Media Ownership and Pluralism in Europe: Can the European Union Take Us Forward?", 16 *Cardozo Arts & Entertainment Law Journal* (1998), 451-473.

²³ European Parliament, Resolution on media concentration, P5_TA-PROV(2002)0554, adopted on 20 November 2002.

²⁴ Resolution on achieving better circulation of European films in the internal market and the candidate countries.

²⁵ 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.

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 would seem 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 would content itself with letting the free markets of trade take their course and realise automatically the goal of cultural diversity.

In truth, the application of such a classical 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 an action is needed to stimulate film production and, consequently, maintain the pluralism of cultural supply, and is implemented at the EU level both through the financial support instruments like the Media programme or the i2i Audiovisual initiative and the quota mechanism of the Television without Frontiers Directive.²⁶

In 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 are, to some extent, incompatible. This contradiction seems to be rather ignored by the European institutions,²⁷ and the EU policy in the field has not spelt out clearly whether there is any hierarchy or relationship between these aims. As demonstrated above, the existing regulation and support mechanisms attempt to combine, but very often rather confuse cultural and economic objectives. Therefore, it seems that the EU instruments and policy approach in the field remain imperfectly adapted to the *problématique* arising in the field of the European cinema, or, more generally, the European audiovisual industries.

3. 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

²⁶ Supra, n. 4, 5 and 6.

²⁷ However, the European Parliament in its report on the Commission Cinema Communication has wondered whether the Treaty, when putting forward a purely cultural solution for exemption of cultural aid from the EU state aid regime, provides enough flexibility, which it deems necessary when dealing with the unavoidably dual nature of this sector, and criticised the Commission Communication for refusing to take the specific nature of the sector’s industrial dimension into account, cf. Report on the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (COM (2001) 534 - C5-0078/2002 - 2002/2035(COS)), A5-0222/2002 final.

cultural policy considerations. This tension is especially visible in the competition field and clearly demonstrates how controversial the vertical power sharing continues to be within the EU.

The debate on the relationship between European competition law and national cultural competencies has been inspired by the German *Länder*, which, in the federal system, are entrusted with the cultural prerogatives. It is particularly 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.²⁸ The film sector represents an ideal case to argue that the EU competition rules and their 'sweeping' enforcement by the Commission, which very often gain substantially constitutional significance for the Member States, 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.

3.1. State Aid Law and Cinema: 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 the cinema aid schemes implemented by all states across the EU.

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.²⁹ However, given the fact that culture is, and most probably will 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.³⁰

On the other hand, since the preservation of undistorted competition is of such fundamental significance within the EU constitutional landscape, denying the Commission competence to check the compatibility of the film support schemes with EU state aid law would run against the aims and constitutional order of the Union. Therefore, it does not seem possible to exclude certain

²⁸ Cf. Jürgen Schwarze, "Medienfreiheit und Medienvielfalt im europäischen Gemeinschaftsrecht", 10 *Zeitschrift für Urheber- und Medienrecht* (2000), 779-800, at 800.

²⁹ Cf. in the context of audiovisuals Marianne Dony, "Les aides à l'audiovisuel à la lumière du Traité de Maastricht", in Carine Doutrelepont (ed.), *L'actualité du droit de l'audiovisuel européen* (Bruylant, Bruxelles, 1996).

³⁰ So Klaus Schaefer, Johannes Kreile and Sascha Gerlach, "Nationale Filmförderung: Einfluss und Grenzen des europäischen Rechts", 3 *Zeitschrift für Urheber- und Medienrecht* (2002), 182-194, at 184.

cultural activities *a priori* from the scope of application of Article 87 (1) EC Treaty.³¹ There is no general exception for cultural support from the rules of the EC Treaty.³² As mentioned above, the EU competition provisions apply without exception to all gainful activities whether of economic, cultural or social nature.³³ This has been confirmed by a number of ECJ judgements concerning cultural aids,³⁴ and there has been no attempt so far to contest the EU competence on the matter. Furthermore, the introduction of a special exception clause on cultural aid in Article 87 (3) d) by the Maastricht Treaty would not have been logical if this type of aid was not within the scope of the Treaty.³⁵

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 of the 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, including competition law enforcement. The Treaty does not spell out in any way what the constitutional status of Article 2 is in relation 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, at least not as far as the cinema aid is concerned. As a consequence, the relationship between the national cultural sovereignty and the EU competition competence in this sensitive field remains highly controversial.

3.2. *The Case Of Film Aid Schemes*

The topicality of this conflict has been shown recently in the controversies arising from the criteria established by the Commission on control of state aid granted to the cinema sector, officially announced in the recent Cinema Communication.³⁶ This has formalised the Commission's practice of gradually

³¹ Cf. Piet Jan Slot, "State Aids in the Cultural Sector", 40 *Europäisches Wirtschaftsrecht nach Maastricht* (10 January 1994).

³² Georg Röss, "Die Zulässigkeit von Kulturbeteiligungen in der Europäischen Union", in Albrecht Randelzhofer, Rupert Scholz and Dieter Wilke (eds.), *Gedächtnisschrift für Eberhard Grabitz*, (Beck, München, 1995), 595-630, at 607.

³³ Hancher, Ottervanger and Slot, *EC State Aids ...*, at 78.

³⁴ Cf. e.g. cases T-49/93 *SIDE v. Commission*, [1995] ECR, II-2501 and T-155/98 *SIDE v. Commission*, ECR [2002], II-1179.

³⁵ Christian König and Jürgen Kühling, "Mitgliedstaatliche Kulturförderung und gemeinschaftliche Beihilfekontrolle durch die EG-Kommission", 7 *Europäische Zeitschrift für Wirtschaftsrecht* (2000), 197-202, at 197.

³⁶ Commission, Cinema Communication.

putting in place a *de facto* cap on admissible public support for European film production. The heated discussion on the potential limitative effect of the Commission 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 Communication,³⁷ where it was clearly stated that any re-examination of the Commission's position on film state aid control should lead to an 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, considered the Commission's position as ignoring the specific nature of the sector's industrial dimension. It suggested that the EC Treaty, when putting forward a purely cultural solution for state aid to cultural activities, 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 proposed that they ought to be relaxed rather than tightened in view of the EU audiovisual industry being far from competitive internally and externally. This reasoning, based on the premise of industrial justification for national film policies, further exacerbates the existing conflicts within the EU policy framework.

Most obviously, the Commission criteria have been heavily criticised by the EU film industry chiefs, who regarded them as interfering with the Member States interests' in preserving their arrangements to support film industries. They indicated to the fact that the status of national films within their own markets is very fragile and the competition that exists on national markets from other EU countries is marginal compared to the competition from non-European, mainly US, films.³⁸ Consequently, despite the Commission concerns over anticompetitive effects of some aid schemes existing in the Member States and the announced revision of the 2001 criteria, as a result of a huge consultation exercise, both the Member States and the EU cinema professionals opposed any further tightening of the guidelines. Given such a unanimous support for the existing rules, the Commission has adopted a decision to renew the 2001 communication until June 2007, extending thus the validity of the guidelines criteria for another three years.³⁹

³⁷ European Parliament, Report on the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works.

³⁸ This seems to be a compromise position between the free competition proponents and the French position according to which European films do not compete with each other at all and thus the national film aids do not create any distortion of competition, the latter view appearing to be too far-fetched, cf. Centre National de Cinématographie, *Rapport du groupe de travail sur le cinéma face au droit de la concurrence* (Paris, January 2003).

³⁹ Follow-up communication to the 2001 Cinema Communication, supra n. 18.

Although consolidating the status quo and marking an apparent compromise, the Commission's decision is provisional and the criteria may well be revised in the future, particularly with respect to the effect of aid schemes on the functioning of the common market. Thus, the 'saga' of the Commission criteria on control of national cinema aid demonstrates with full clarity the persisting vertical constitutional conflict between the EU policy and the national cultural competence over film issues, which remains unresolved, and can provoke further controversies in the nearest future.

4. Conclusion: Towards a Sustainable EU Film Policy

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 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 easily reconcilable. The resulting compromise satisfies neither the proponents of 'cultural exception' nor the proponents of free market. Whereas the first regret the often hypocritical affirmation of cultural diversity and the excessive impact of the forces of free 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 and practice provide an appropriate remedy to strike an effective balance between cultural specificity and economic integration aims.

As far as the vertical aspect of the contradictions within the EU audiovisual policy is concerned, the EU power sharing landscape is characterised by a competence conflict between the Commission's competition policy and national cultural prerogatives in the field of film policy. Neither Article 151 of the EC Treaty nor the EU institutions practice had much success in guiding towards a proper division of competences touching upon the cultural field between the Union and the Member States.

The relationship between cultural values (both at the European and national level) and the more manifest and compelling EU objectives of market integration 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”,⁴⁰ 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 ignored when conceiving a global policy strategy in favour of the European cinema. The European Union arguably realises this and admits that the creation of a common market for films 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 appears necessary to formulate ways and means which would enable this supranational organisation to 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 EU should envisage a more precise definition of its own tasks in the cultural field, which it subsequently would have to fulfil.

In order to compensate for the perceived ‘cultural deficit’ in the course of EU initiatives, with a goal of a successful integration of European cultures through actions favouring cultural industries *lato sensu*, a revision of the Treaty in a manner entailing a series of instruments non-existent at present would seem necessary.

Realising a hypothetical character of such a scenario, in the existing framework it can be suggested that the EU policy should be fully supportive of the national efforts to promote the audiovisual production, while aiming at a greater consistency between cultural and competition policy objectives and more harmony between measures taken at 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 context⁴¹ suggests that it will not take a restrictive view on national cultural policies. The Commission seems so far to have followed a rather lenient attitude in the application of Article 87 EC Treaty;⁴² the introduction of the specific guidelines for control of national cinema aids should be interpreted as an attempt to provide legal certainty rather than to restrict admissible national support to the film industry. Pursuing this tolerant

⁴⁰ Malraux, *Esquisse d'une psychologie ...* .

⁴¹ 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. Commissariaat voor de Media*, [1994] ECR I-4795 and C-6/98 *ARD v. PRO Sieben Media AG*, [1999] ECR I-7599, all concerning broadcasting.

⁴² 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.

approach in its decisions and implementing the EU programmes in the field, the Commission may well remove the worries of the proponents of national cultural policies and really contribute "to the flowering of the cultures of the Member States".⁴³

In the long-term perspective, however, an explicit definition of competencies of the EU in the audiovisual field would seem recommendable from the constitutional point of view.⁴⁴ This would prevent the EU institutions from taking, on the basis of relatively vague in terms of cultural concerns and apparently unrelated Treaty provisions, like general competition rules, far-reaching decisions with profound constitutional implications and therefore interfering with the national cultural policies. In this way, the vertical constitutional problems in the field of film policy 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.

⁴³ Article 151 of the EC Treaty.

⁴⁴ So Schwarze, "Medienfreiheit und Medienvielfalt ...", at 800.

Bibliography

Centre National de Cinématographie, *Rapport du groupe de travail sur le cinéma face au droit de la concurrence* (Paris, January 2003).

De Witte Bruno, "The Cultural Dimension of Community Law", in *The Collected Courses of the Academy of European Law*, EUI Florence (Martinus Nijhoff Publishers, The Hague, 1993), 229-299.

Dony Marianne, "Les aides à l'audiovisuel à la lumière du Traité de Maastricht", in Doutrelepon Carine (ed.), *L'actualité du droit de l'audiovisuel européen* (Bruylant, Bruxelles, 1996).

Doyle Gilian, "Regulation of Media Ownership and Pluralism in Europe: Can the European Union Take Us Forward?", 16 *Cardozo Arts & Entertainment Law Journal* (1998), 451-473.

Hancher Leigh, Ottervanger Tom and Slot Piet Jan, *EC State Aids* (Sweet and Maxwell, London, 1999).

Harcourt Alison, "EU Media Ownership Regulation: Conflict Over the Definition of Alternatives", 36(3) *Journal of Common Market Studies* (1998), 369-389.

König Christian and Kühling Jürgen, "Mitgliedstaatliche Kulturförderung und gemeinschaftliche Beihilfekontrolle durch die EG-Kommission", 7 *Europäische Zeitschrift für Wirtschaftsrecht* (2000), 197-203.

Malraux André, *Esquisse d'une psychologie du cinéma* (Gallimard, Paris, 1946).

Ress Georg, "Die Zulässigkeit von Kulturbeihilfen in der Europäischen Union", in Randelzhofer Albert, Scholz Rupert and Wilke Dieter (eds.), *Gedächtnisschrift für Eberhard Grabitz* (Beck, München, 1995), 595-630.

Schaefer Klaus, Kreile Johannes and Gerlach Sascha, "Nationale Filmförderung: Einfluss und Grenzen des europäischen Rechts", 3 *Zeitschrift für Urheber- und Medienrecht* (2002), 182-194.

Schwarze Jürgen, "Medienfreiheit und Medienvielfalt im europäischen Gemeinschaftsrecht", 10 *Zeitschrift für Urheber- und Medienrecht* (2000), 779-800.

Slot Piet Jan, "State Aids in the Cultural Sector", 40 *Europäisches Wirtschaftsrecht nach Maastricht* (10 January 1994).

Tongue Carole, "Television and Film production: Europe Fights Back", 13th European TV and Film Forum (Dublin, 8-10 November 2001).

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