IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Application of EC Competition Policy regarding Agreements and State Aid in the Audiovisual Field

On 20 October 2005 the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted. Recital 18 expresses the conviction that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value".

The adoption of the UNESCO Convention underlines the desire to support cultural values, yet EC competition rules remain an important yard stick for how much support seems acceptable in a free market.

The purpose of this IRIS plus article is to analyse the legal status of agreements and State aid concerning the audiovisual sector in Community law in accordance with the principle of free competition. The author, Laurence Mayer-Robitaille, comes to the conclusion that these agreements and State aid are treated with ambivalence – although they are subject to the principle of free competition, they receive special treatment under certain provisions of the Treaty establishing the European Community.

This IRIS plus links up to the earlier IRIS plus 2003-6 on "European Public Film Support within the WTO Framework" in that both articles examine the double nature of audiovisual goods and services and its impact on supranational regulation.

Strasbourg, November 2005

Susanne Nikoltchev
IRIS Coordinator
Head of the Legal Information Department
European Audiovisual Observatory

IRIS *plus* is a supplement to **IRIS,** *Legal Observations of the European Audiovisual Observatory,* **Issue 2005-10**

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

76 ALLEE DE LA ROBERTSAU • F-67000 STRASBOURG
TEL. +33 (0)3 88 14 44 00 • FAX +33 (0)3 88 14 44 19
http://www.obs.coe.int
e-mail: obs@obs.coe.int

IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Application of EC Competition Policy regarding Agreements and State Aid in the Audiovisual Field*

Laurence Mayer-Robitaille**

Since the European Union is based on a market economy, the principle of free competition allows much freedom to economic operators where the rules are not distorted. According to Article 3.1 (g) (formerly Article 3 (g) EC), the European Community's activities are to include "a system ensuring that competition in the internal market is not distorted". Elsewhere in the Treaty, Article 10 (formerly Article 5 EC) lays down that the Member States "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". To ensure free competition, Articles 81 and 82 (formerly Articles 85 and 86 EC) prohibit all agreements and abuses of a dominant position, while Article 87 (formerly Article 92 EC) prohibits certain types of State aid. However, these prohibitions are not applicable in certain specific cases because of certain provisions of the EC Treaty, particularly Articles 81(3) (formerly Article 85(3) EC) and 87(3) (formerly Article 92(3) EC). How are these provisions applied to agreements and State aid in the audiovisual field?

In addition to these general exemptions, Article 128 (now Article 151 EC) requires the European institutions to take account of the cultural aspects in their actions in respect of the other provisions of the Treaty. Indeed the Council recalled in this respect "the need for cultural aspects to be taken into account by the Community in its action under other provisions of the Treaty, for example in the areas of *competition policy*, the internal market and the common commercial policy".[1] That is why, as regards the audiovisual sector, the Council invited the Commission "to continue and to make more effective its contribution to the development of the audiovisual sector based on an approach that integrates the cultural, competitive and industrial dimensions of the sector".[2] For its part, the Commission stressed that "several European Union policies are connected with European audiovisual policy", and referred specifically to competition policy as an example of this.[3]

How does the European Union manage to reconcile these two policies that at first sight are contradictory – on the one hand ensuring the play of free competition and on the other allowing the development of audiovisual industries and audiovisual policies in the Member States? To be able to understand this situation, we shall first take a look at the application of the principle of free competition and the prohibitions contained in Articles 81(1), 82 and 87(1) (formerly Articles 85(1), 86 and 92(1) EC) to the agreements and behaviour of the audiovisual undertakings, and at the State aid directed at the audiovisual sector. We shall then analyse the exceptions to these principles – Article 81(3) (formerly Article 85(3) EC), Article 87(3)(d) (formerly Article 92(3)(d) EC) and Article 86(2) (formerly Article 90(2) EC) – and the general provisions that grant a specific status to culture (more particularly Article 151, formerly Article 128 EC).[4]

1. The Subordination both of Agreements and the Behaviour of Audiovisual Undertakings and State Aid directed at the Audiovisual Sector to the Rules governing Competition

Articles 81(1) and 82 EC concern the competition rules applicable to these undertakings and prohibit all agreements and any kind of business behaviour likely to affect trade among the Member States or distort competition within the Common Market. Article 87(1) EC, which prohibits certain types of State aid, is the other aspect of Community competition policy that applies to the Member States.

1.1. The Provisions applicable to Undertakings

The rules on competition apply to the behaviour among undertakings. Rather late in the day, the Court of Justice defined the concept of an undertaking in its case law – " (…) the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed".[5] This is a very broad definition, which could even include public bodies, since the essential condition is that the undertaking is engaged in an economic activity. To give a specific example, the Commission holds that opera singers are engaged in an economic activity.[6]

1.1.1. The Application of Article 81(1) EC to Agreements between Audiovisual Undertakings

The Commission has on a number of occasions had an opportunity to consider agreements reached among undertakings producing, distributing or commercialising cultural goods and services. As early as 1972 it delivered a decision on a procedure for applying Article 81 EC that sanctioned an agreement made by a supplier of records and its main customers in France.[7] Recording undertakings, like audiovisual undertakings, are required to comply with the prohibition contained in Article 81(1) EC.

In the late 1980s and early 1990s, the Commission delivered a number of decisions on various agreements between undertakings in the audiovisual sector. Some of these decisions concern agreements on the conditions for awarding operating licences for the use, distribution and commercialisation of television or cinema productions. This was the case in the decisions on *UIP*,[8] *Film purchases by German television stations*,[9] and those concerning more specifically the rights for broadcasting sports programmes such as *Screensport/Members of the EBU*,[10] *EBU/Eurovision System*[11] and the EUFA.[12]

The Commission has had to examine agreements concerning the pay television sector.[13] In each case the Commission held that agreements had been concluded between the undertakings and that these constituted agreements within the meaning of Article 81(1) EC. Thus audiovisual undertakings that exercise economic activities are included in the definition of undertaking and are covered by the prohibition contained in Article 81(1) EC. They should not conclude an agreement that has the effect of affecting trade among Member States and distorting the play of competition. In certain specific cases, however, the prohibition contained in Article 81(1) EC will not be applied as we shall see later, such that some of the agreements concerned by the decisions quoted previously have been exempted under Article 81(3) EC.

1.1.2. Application of Article 82 EC – Prohibition of Abuse of Dominant Position

Broadcasting undertakings, despite the monopoly some of them enjoy, are subject to the provisions of Article 82 EC and must not abusively exploit a dominant position in the Community mar-

ket.[14] A decision on "telemarketing", defined as the process whereby an advertiser achieves sales as a result of giving its telephone number in a television commercial, has enabled the Court of Justice to confirm that broadcasting undertakings must not abusively exploit a dominant position in the market.[15]

The Commission also delivered a decision that refers more specifically to copyright.[16] The abuse of a dominant position noted by the Commission concerned broadcasters in Ireland. In addition to carrying out their prime role of broadcasting television programmes, they also undertook other activities, including the production of a TV guide informing viewers of the programmes to be broadcast by the channel. As they were the owners of the copyright in respect of these programme schedules, and recognised as such by national legislation, the broadcasters had taken to court a company publishing a TV programme guide. This company complained to the Commission on the grounds of abuse of a dominant position following the injunctions it received from the national court.

The Commission recalled that the broadcasters were undertakings within the meaning of Article 82 EC and that, according to the *Sacchi* decision, the rules on competition applied to them. Since the broadcasters were the only parties with the power to be the first to produce and publish the weekly programmes of the television programmes they were to broadcast, the Commission noted that there was a de facto monopoly which was backed by a statutory monopoly, namely copyright. As there was no competition on the markets in question, the Commission found that these bodies each occupied a dominant position within the meaning of Article 82 EC. As for the abuse, the Commission noted that these undertakings in a dominant position limited production and outlets for consumers, to the latter's disadvantage. Thus, by cornering the market for TV programme guides because of the copyright they held, the broadcasters had abused that right.[17]

The most recent developments have shown that the companies producing, distributing and commercialising audiovisual products are subject to the rules governing competition. It should be mentioned that public sector undertakings must also abide by the rules governing competition. Article 86(1) EC in fact provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules governing competition. This detail having been stated, we shall now look at the way in which the Member States must also abide by these rules when they grant aid to audiovisual undertakings.

1.2. A Provision applicable to Member States – Article 87(1) EC

Certain types of State aid granted to undertakings active in the fields of cinema and television have been the subject of Commission decisions. This was the case for aid granted by Greece to its cinematographic industry for the production of Greek films.[18] The aid in question provided for automatic grants, selective aid for production, rewards for quality films, and loans or financing from banks. The Commission held that these types of aid were incompatible with the Treaty since they were conditional on nationality. As this discriminated against nationals of other Community countries, the Commission had no alternative but to declare the aid contrary to Articles 7, 48, 52 and 59 EC, and that as a result, by reason of their nature, they could not be compatible with Article 87 EC .

Further to a complaint, the Commission also looked into aid granted by France to the *Société de Production Audiovisuelle* (SFP).[19] It began by noting that the aid at issue was illegal since it had been decided and paid without prior notification. The Commission then stated that the aid favoured production by the SFP over its competitors and that it constituted operational aid that could not be authorised. It also found that trade among Member States had been affected by this aid. In consequence, the Commission held that the aid was indeed covered by Article 87 EC and specified that "no public service obligation relating to the promotion of culture and conservation of cultural heritage, which might possibly have justified State support, can be adduced in respect of the services provided by SFP".[20]

During the 1990s, the Commission received a number of complaints from private broadcasters established in a number of Member States (France, Spain, Italy and Portugal) denouncing the aid paid by the States to the public sector broadcasters. They maintained that this public aid placed the broadcasters in a position of unfair competition and was incompatible with Article 87 EC. As the Commission dragged its heels over delivering a decision on the matter, private broadcasters in Spain and France took turns in instigating proceedings before the CFI in order to show that the Commission was failing in its obligations, and the Court found that this was so.[21] The CFI considered that the Commission ought to have been in a position to deliver a decision in the time between the complaints being lodged in the early 1990s and the date of delivery of the judgments in 1998 and 1999. Concerning the complaints brought by private broadcasters in Portugal, the Commission delivered a decision on 7 November 1996 in which it held that the Portuguese measures on financing public sector channels did not constitute State aid. An appeal to have this decision cancelled was lodged with the CFI in March 1997 and the Court cancelled the Commission's decision in its judgment of 10 May 2000.[22]

Early in 1999, the Commission asked France, Spain and Italy to provide information on the financing systems set up for their broadcasters. The Commission then instigated formal proceedings against France (July 1999), Italy (July 1999) and Portugal (November 2001) in respect of certain aid paid to public sector broadcasters. We should emphasise that this is a very complex area, as a number of national measures in favour of public sector broadcasters is involved – in addition to aids in respect of the television licence fee, there are *ad hoc* aids that mainly consist of increases in capital, grants, tax exemptions and loans.

A particular study has been made of how the television licence fee is made over to the public sector television channels, the purpose being to determine firstly the nature of these aids, ie if they may be considered as "existing aid" because the public financing systems pre-date signature of the Treaty (France and Italy) or membership of the European Community (Spain and Portugal). The Commission analysed the systems in Italy, Portugal, Spain and France and concluded that the aid concerning the television licence fee constituted existing aid and was therefore covered by Article 87 EC. Having determined the nature of the aid, the Commission then turned to consideration of their compatibility with the Treaty; we will see later that certain *ad hoc* aid and aid in respect of the television licence fee were declared compatible with the Treaty on condition that a number of changes were made to the schemes.

The Commission asked for additional information in the context of its enquiries into the systems for financing public service broadcasters in the Netherlands, Germany and Ireland; these countries appeared to have ceased to abide by the provisions of Article 87 EC.[23] It also instigated two enquiries, one on the public financing on the transitional cost of a digital terrestrial television project in Germany and the other concerning Sweden.[24]

We have seen that agreements between audiovisual undertakings and State aid in the audiovisual sector are subject to the principle of competition. We shall now see, however, that the Treaty only authorises these agreements and this aid in certain

specific cases and subject to many conditions, thereby limiting the scope of exemptions.

2. The Exemption of certain Agreements between Audiovisual Undertakings and of certain State Aid in the Audiovisual Sector from the Rules on Competition

There are two kinds of provisions in the Treaty that grant a specific status to agreements between audiovisual undertakings and to State aid in the audiovisual field. Firstly, there are the exceptions specific to the principle of competition contained in Article 81(3), Article 87(3)(d) and Article 86(2) of the EC Treaty. Secondly, there are the provisions specific to culture, with Article 151 EC and the Protocol on the system of public broadcasting in the Member States.

2.1. The Exceptions specific to the Principle of Competition

The exceptions referred to in Article 81(3), Article 87(3) and Article 86(2) of the EC Treaty organise a specific status, under certain circumstances, for certain agreements concluded between audiovisual undertakings and for certain types of State aid granted in this sector. In order to balance the Community's numerous objectives, a number of circumstances are described in the Treaty under which the rules of competition are not applicable, but these circumstances are limited. This means that the principle of prohibiting agreements and arrangements between undertakings and aid granted by the States will not apply. Abuse of a dominant position is, however, strictly prohibited – the Treaty does not contain any provision that would allow this principle to be waived.

2.1.1. The Exceptions applicable to Undertakings (Article 81(3) EC)

Article 81(3) EC enables the Commission to declare that agreements concluded between undertakings are not incompatible with the Common Market. Under this article, the provisions of Article 81(1) are not applicable to certain agreements that meet four cumulative conditions. If they do not, the Commission may not grant exemption from the agreement for which application has been made. The provisions refer to any agreement:

> "(…) which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

In a number of decisions, the Commission has granted exemptions under Article 81(3) to agreements between companies in the audiovisual field. We may recall that these have included agreements specifically concerning operating rights for films on television and in cinema theatres. In its decision in 1989,[25] the Commission granted an exemption limited in time and subject to a number of conditions to the agreements made by UIP, a subsidiary of three American and Japanese majors, which included an agreement granting a licence for exclusive distribution in cinema theatres in the Community for films produced and distributed by the parent companies. The Commission renewed the exemption in 1999.[26] In a similar vein, it also granted an exemption for the agreements on purchases of films by German stations.[27] It also exempted the centralised sale of commercial rights in respect of the EUFA Champions League until 2009.[28]

Further to complaints from some commercial television channels, the Commission looked into the Eurovision System, which allows the exchange of television broadcasts – mainly in the field of sport – set up by the EBU for its members, essentially public sector television channels. In its Decision in 1993 it approved the application for exemption, subject to certain conditions, under Article 81(3), further to changes the EBU had made to its statutes.[29] A CFI judgment nevertheless cancelled the decision adopted by the Commission in 1993 on the conditions for access to the Eurovision System set up by the EBU, further to a complaint brought by *Métropole Télévision*, better known as M6.[30] In this decision, the CFI recalled that agreements had to meet the four cumulative conditions contained in Article 81(3) and that if they did not do so the European Commission would be obliged to refuse to grant exemption.

After this judgment was delivered, M6 again applied – for the sixth time – to the EBU and was again refused admission on the grounds that the television channel did not meet the criteria for admission. M6 then lodged a complaint with the Commission in 1997, referring to the EBU's repeated refusals; the Commission rejected the complaint in 1999. A decision by the CFI cancelled this rejection, on the grounds that the Commission had not given its reasons for such rejection.[31] Meanwhile, the Commission adopted a further decision granting exemption to the EBU agreements;[32] this decision was also cancelled by the CFI on the grounds of manifest error in appreciation on the part of the Commission.[33]

The Commission also granted three exemptions in respect of company agreements in the pay television sector – the first concerning the creation of TPS,[34] in France, the second concerning television channels in the United Kingdom,[35] and the third concerning an agreement between Telenor and Canal+ on the distribution by satellite of pay television channels in Scandinavia.[36]

2.1.2. The Exceptions applicable to Member States (Article 87(2) and (3) EC and Article 86(2) EC)

Article 87(2) and (3) EC place a limit on the prohibition of State aid, as some types of aid may be authorised, including those concerning culture. The aids referred to in these paragraphs may be divided into two categories – aid that is compatible with the Common Market (paragraph 2) and aid that may be considered compatible with the Common Market (paragraph 3). Since the advent of the Treaty on European Union, this last category includes "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest" (article 87(3)(d) EC).

This provision was introduced at the request of the Netherlands, supported by Denmark, France and Belgium.[37] The insertion of Article 87(3)(d) has given rise to a quantity of literature that tends to affirm that culture is henceforth on a par with the principles of competition. Some writers believe that the inclusion of this article enables them to state that "culture thus becomes a higher imperative than the notion of competition".[38] Another believes that "this important provision establishes the necessary balance between the demands of the promotion of culture and heritage on the one hand and of the development of trade and competition in a single market on the other".[39]

There have been a number of cases in which the Commission has raised no objections and has authorised State aid for financing a television channel, producing programmes in a particular language, or running a radio station.[40] The examples of France and certain other Member States are particularly interesting as regards State aid, and much may be learned from them.

When we were looking at the principle of prohibiting State aid, we saw that the Commission had declared the aid granted by the

French Government to *Société Française de Production* (SFP) illegal and incompatible. However, further to a case brought in 1997,[41] the Commission delivered a decision concerning a new type of aid that France intended granting to SFP.[42] This aid was declared compatible with the common market within the meaning of Article 87(3)(c) and a number of conditions were laid down. The Commission felt that this new aid, directed at the industrial and financial restructuring of the company, should be considered as constituting State aid within the meaning of Article 87(1). It therefore considered the possibility of an exemption.

It may seem surprising that the aid in question was legitimised by sub-paragraph c) of Article 87(3), which authorises "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest", rather than by sub-paragraph d), which refers to aid to promote culture. As the French Government had not supplied any elements indicating that the aid was intended to promote culture, the Commission had no choice but to exempt it under Article 87(3)(c) EC. Thus SFP's catastrophic financial situation apparently made it more likely for France to win its case rather than venturing into the cultural sector. The Commission authorised the aid, but it stated very clearly that this would be the last time, save in exceptional circumstances. Despite this warning, the Commission raised no objections when France informed it of another plan for aid to SFP in 2001, given that, according to the Commission, the project at issue did not constitute State aid under Article 87(1).[43] The Commission also qualified as compatible under Article 87(3)(c) the changes made to a scheme of aid for French-language radio allocated by France for a period of ten years.[44]

In 1998, the Commission approved the French programme of support for cinematographic production aimed at granting automatic aid for all films made in France.[45] This decision on the part of the Commission is an important one since it threw open the discussion on State aid for the cinema and audiovisual sectors. Thus the Council adopted a Resolution on national aid to the film and audiovisual industries that affirms that such aid is compatible with the common market, referring to the provisions of Article 87(3)(d).[46] The Council also invited the Commission and the Member States "to pursue their multilateral dialogue on relevant issues relating to State aid for cinematographic and television production".[47] The Commission has since clarified its approach to State aid in the audiovisual sector in a communication in which it explained how the Commission had handled such issues up to June 2004.[48] Two sets of criteria must be respected – firstly the criterion of the principle of 'general legality', meaning that the aid must not be incompatible with other provisions of the Treaty, and secondly the criteria specific to schemes of aid for film and television production. These specific criteria refer more particularly to the cultural link and the amount of aid provided. On these specific criteria, the Commission has stated that:

> (…) the aid should benefit cultural products, cinematographic or audiovisual works, taking into account the fact that the definition of the concept of *cultural product* is left to the appreciation of Member States, that the producer must be free to spend at least 20% of the total production budget in other Member States without forfeiting the entitlement to receive the aid in full, that the amount of the aid must not exceed a ceiling of 50% of the total cost of the project in terms of aid intensity per film (except in the case of difficult or low-budget films), and that any additional aid in respect of certain specific technical production services is prohibited.[49]

The Commission has applied the principles arising out of this communication. Thus it approved the schemes for aid intended to provide support for the cinema and the audiovisual sector in a number of Member States, namely Germany,[50] Austria,[51] Belgium,[52] Denmark,[53] Spain,[54] Finland,[55] the Netherlands[56] and the United Kingdom (Wales).[57] In the same way, the Commission, on the basis of the rules on supervision of State aid contained in the Treaty, has authorised aid for the promotion of cultural products and the Irish language.[58]

On the other hand, the Commission did not allow an exemption under Article 87(3)(d) in a decision on aid for local television stations in the French-speaking Community of Belgium as it considered the criterion of a cultural link was not met.[59] In its decision, it stated that:

> (…) it should be borne in mind that, according to established case law at the Court, any exemption from the prohibition on State aids must be applied restrictively. In the present case, the local television stations must produce full-time news, animation, cultural development and education programmes. These activities may not be considered as being directed entirely or specifically at the promotion of culture within the meaning of Article 87(3)(d).[60]

This reasoning on the part of the Commission is in keeping with the principles enunciated in another communication.[61] In this communication the Commission indicated that the notion of culture within the meaning of Article 87(3)(d) must be interpreted restrictively. As stated by the Commission in its *Kinderkanal and Phoenix* decision in 1999, "the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture".[62] The Commission considered that the State aid provided to public service broadcasters did not draw any distinction between these three requirements, and affirmed that:

> "Unless a Member State provides for the separate definition and the separate funding of State aid to promote culture alone, such aid cannot generally be approved under Article 87(3)(d). It can normally be assessed, however, on the basis of Article 86(2) concerning services of general economic interest".[63]

As the Commission recalled, "the application of the provisions of the Treaty to the granting of State aid to public service broadcasting must take account of the provisions of Article 86(2) (…)",[64] which constitutes a derogation to the prohibition of State aid.[65]

The Commission declared the Belgian aid compatible with the EC Treaty on the basis of Article 86(2) EC, on the grounds that the local television stations carried out a public service mission. It was under this same article that the Commission finally delivered a decision on the State aid granted by Italy, Portugal, Spain and France to their public service broadcasters. As regards *ad hoc* aid,[66] the Commission has judged a number of these as complying with Article 86(2) EC.[67] Concerning the television licence fee, the Commission has asked for greater transparency for these aids and required certain modifications before declaring them compatible under Article 86(2).[68]

The Commission also looked into the system for financing public service broadcasters in Denmark. While it declared the aid in respect of the television licence fee and a number of other measures compatible with Article 86(2), it judged that there was overcompensation in favour of the Danish broadcaster and called for recovery of this amount (EUR 84.3 million).[69] The Commission accepted the recapitalisation plan proposed by the government and the broadcaster in order to avoid the latter's bankruptcy in October 2004, considering this to be compatible with Article 86(2).[70] The Danish broadcasters, however, entered an appeal against the Commission's decision.[71]

The Commission also approved other public financing for broadcasters under Article 86(2) – one concerning public sector television channels in Germany,[72] the financing of a news television channel in the United Kingdom,[73] the public financing of the BBC's digital television channels,[74] and the financing of the creation of an international news channel in French.[75]

2.2. Provisions specific to Culture[76]

Despite being officially excluded from the founding texts, culture has nevertheless received specific attention in a number of initiatives undertaken by the European institutions and in Court of Justice case law. It was only in the early 1990s that culture became sufficiently important to be given a place among the other objectives – more frequently of an economic nature – of European construction. The signature of the Treaty on the European Union, also called the Treaty of Maastricht, raised an enormous number of problems for Member States in political terms, and these left little room for real public debate on the introduction of provisions concerning culture.[77] Nevertheless, according to some writers, a number of Member States, including Germany, were extremely reticent about including an article on culture, and its adoption was not an easy matter. Despite this, Title XII (ex Title IX EC) and its Article 151 EC,[78] to which the Treaty of Amsterdam added a number of details, acknowledging explicitly that the Community has competences in the field of culture. This treaty also made innovations as regards broadcasting – one of the annexes to the EC Treaty is a Protocol on the system of public broadcasting in the Member States.

2.2.1. Article 151 EC

According to Article 151(1) EC, the European Community "shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity". Article 151(2) EC states that "action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action". The European Community should also foster international cooperation in the sphere of culture (Article 151(3) EC). According to Article 151(4) EC, the European Community "shall take cultural aspects into account in its action under other provisions of this Treaty". This means that when competition policy is being devised, for example, the European Community's action must take the cultural variable into account. The Treaty of Amsterdam also added an important phrase to this provision, as a result of which the European Community is required to take cultural aspects into account in its action, "in particular in order to respect and to promote the diversity of its cultures".

Article 151(5) EC specifies the ways in which the Community's institutions can contribute to the achievement of the objectives referred to. Firstly, the Council, acting unanimously, may adopt "incentive measures" after consulting the Committee of the Regions, and must act in accordance with the procedure referred to in Article 251 EC (the European Parliament therefore has an essential role to play in the joint decision-making process). The Council may not, however, harmonise the provisions contained in the legislation and regulations of the Member States, as they "were very reticent about giving the Community these new areas of responsibility in education and culture".[79] Secondly, the Council, again acting unanimously, may adopt "recommendations" on a proposal from the Commission. Thus all the Community institutions are involved in implementation of Article 151 EC.

It is however regrettable that the Council is obliged to rule unanimously on these issues. Some action in particularly sensitive areas may never be adopted, as it will never obtain the assent of all the Member States because of the divergences that persist among them in the cultural field. This condition was included at the request of the *Länder* because of their exclusive responsibility in this area, "but above all because in Germany audiovisual matters are part of cultural policy".[80] This decision-making procedure could perhaps have been relaxed, as the European Parliament had asked for decision-making to be not by a unanimous vote but by a majority vote.[81] During the preparatory work for the intergovernmental conference in 2000, France also gave its opinion on the matter – it agreed with the approach favoured by the Parliament.[82] However, by the end of the conference – concluded in Nice –no change had been made to the procedure for decision-making under Article 151. If we look at the Treaty of Nice, concluded when the Council met in December 2000 and signed in February 2001, we can see that no amendment has been made concerning the method of decision-making referred to in Article 151.[83]

The insertion of Article 151(4) is important; as the European Parliament pointed out, "the Community will have to take account of cultural aspects in implementing its various policies since, on the basis of its new responsibilities, the Community now has the possibility – for the first time in its history – of laying down guidelines in favour of culture in the policies it operates in other areas".[84] The Commission analysed Article 151 EC in a communication; its analysis covers a number of points, including the objectives of the European Community's cultural action, its areas of action and means of achieving its aims, and the joint decision-making process.[85] Concerning more specifically application of Article 151(4), the Commission stated in the introduction to a report that "this is an essential provision included in the Treaty by the High Contracting Parties and it reflects their desire to place culture among the Union's objectives. This provision in fact expresses the obligation incumbent on the European Community to take the cultural objective into consideration in all its activities".[86] The Commission went on to add that Article 151(4) was based on the requirement that the Community legislator must manage to reconcile the various objectives of the Treaty. The Commission emphasised that this had been the case in earlier texts, but stated more forcefully that the Treaty on European Union henceforth made this requirement compulsory and systematic for both legislation texts and common policies.

Although the Commission considers that Article 151(4) introduces a binding obligation, some writers have made the point that, on the contrary, "it is not a binding clause because it does not impose an obligation of result. It merely requires the possible cultural implications of a measure to be taken into consideration".[87] This affirmation, generally admitted in doctrine, is nevertheless disregarded by another writer. Thus G.S. Karydis considers Article 151(4) to "be part of the "block of Community legality" and could thus facilitate the cancellation of Community acts infringing the obligation to protect and respect national cultural diversity".[88] This writer goes as far as to affirm that Article 151(4) "could also constitute a highly useful source of inspiration for a less severe treatment by the Community judge of State measures pursuing the preservation of cultural diversity and the defence of cultural values in the face of the play of market forces".[89]

Finally, mention should also be made of the fact that the Council invited the Commission and the Member States to "cooperate in order to enable the Commission to update the assessment of the implementation of Article 151(4) of the Treaty and to report back to the Council".[90] In the same resolution, the Council also considered it was "important to start work, particularly on the basis of that assessment, on improving the implementation of Article 151(2) and (4) of the Treaty", and invited "future Presidencies to draw up a work programme and a timetable for that purpose".[91]

2.2.2. *Protocol* (32) *on the System of Public Broadcasting in the Member States* (1997)

The insertion of the Protocol on the system of public broadcasting in the Member States, appended to the EC Treaty by the Treaty of Amsterdam, marks the European Community's desire to consecrate public service broadcasting as an instrument of democracy. The Protocol reads as follows:

> "The provisions of the [Treaty instituting the European Community] shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the [Union] to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."

By stating that the Member States are allowed to finance public service broadcasters, this Protocol takes into consideration the cultural role played by the latter through their mission of public service. It also mentions that financing is only possible if it does not hamper conditions for trade and competition. The Protocol is thus an attempt to reconcile the economic and cultural interests of the broadcasters, particularly by allowing their financing out of public funds. In a Resolution adopted on 25 January 1999, the Council took up the provisions set out in the Protocol, thereby confirming that the European Community recognises the major role public service broadcasting plays in society.[92]

CONCLUSION

This article has highlighted the limited and precarious legal status both of agreements between audiovisual undertakings and State aid in the audiovisual field. Although the principles of free competition apply, the Treaty contains a number of general exceptions that, in certain cases, authorise the conclusion of agreements between audiovisual undertakings and the granting of State aid in the audiovisual field. These exceptions are nevertheless subject to restrictive conditions that allow little leeway. Furthermore, the exemptions granted by the Commission, whether under Article 87(3)(d) or under Article 81(3), are temporary as they are generally of limited duration, and application may be made to the CFI for their cancellation – which is often the case, as we have seen.

Moreover, the Commission has announced firstly that it is to undertake consultations with a view to reforming State aids for film and television production, and secondly that the specific criteria required for the aids in question will only remain valid until 30 June 2007.[93] It is in this context of reform that Article 151 EC is important, inasmuch as it requires the Community institutions to take cultural aspects into account in their actions under other Community policies. It is therefore essential that, in applying the principles of free competition, the Community institutions take into consideration the cultural variable when it is a matter of agreements between audiovisual undertakings and State aid in the audiovisual field. This means they must put Article 151 EC into practice in order to achieve one of the objectives of this provision – the preservation of the cultural diversity of the Member States. It is therefore desirable for the Commission to take this objective fully into account in its comprehensive reform of State aids.[94]

---

*) This article is a modified and updated version of part of an article entitled *Le statut ambivalent au regard de la politique communautaire de concurrence des accords de nature culturelle et des aides d'État relatives à la culture* [the ambivalent status in Community competition policy of agreements of a cultural nature and State aid for culture], which appeared in *Revue trimestrielle de droit européen*, July - September 2004, 40 (3), pp.477-503.

**) Doctor in Law Sciences, University of Social Sciences, Toulouse; Doctor in Law (LL.D.), Laval University (Quebec); Associate Expert, UNESCO - Division of Cultural Policies and Intercultural Dialogue, Paris. The opinions expressed in this article are those of the author and do not necessarily reflect the point of view of either UNESCO or the European Audiovisual Observatory.

1) Council Resolution of 21 January 2002 on the role of culture in the development of the European Union, Official Journal of the European Communities (OJ) C 32 of 5 February 2002, p.2, (paragraph 2) (author's italics). See also Council Resolution of 26 May 2003 on the horizontal aspects of culture: increasing synergies with other sectors and Community actions and exchanging good practices in relation to the social and economic dimensions of culture, OJ C 136 of 11 June 2003, p.1 (paragraph 1).
2) Council Resolution of 21 January 2002 on the development of the audiovisual sector, OJ C 32 of 5 February 2002, p.5 (paragraph (a)).
3) Fourth Report by the Commission on the application of Directive 89/552/EEC "Television Without Frontiers", COM(2002) 778 final of 6 January 2003, p.26 (annex).
4) The numbering of the articles in the EC Treaty used hereinafter shall be that of the current version of the Treaty.
5) Court of Justice of the European Communities (ECJ), judgment of 23 April 1991, case C-41/90, Höfner, ECR I-1979, confirmed by ECJ judgment of 17 February 1993, cases C-159/91 and 160/91, Poucet, ECR I-637; ECJ judgment of 19 January 1994, case C-364/92, SAT/Eurocontrol, ECR I-43; ECJ judgment of 16 November 1995, case C-244/94, Fédération Française des Sociétés d'Assurance, ECR I-4013; ECJ judgment of 11 December 1997, case C-55/96, Job Centre, ECR I-7119, at 21.
6) Decision of 26 May 1978, RAI-Unitel, OJ L 157 of 15 June 1978, p.39.
7) Commission Decision 72/480/EEC of 22 December 1972, WEA-Filipacchi Music S.A., OJ L 303 of 31 December 1972, p.52.
8) Commission Decision 89/467/EEC of 12 July 1989, UIP, OJ L 226 of 3 August 1989, p.25.
9) Commission Decision 89/536/EEC of 15 September 1989, Film purchases by German television stations, OJ L 284 of 3 October 1989, p.36.
10) Commission Decision 91/130/EEC of 19 February 1991, Screensport/Members of the EBU, OJ L 63 of 9 March 1991, p.32.
11) Commission Decision 93/403/EEC of 11 June 1993, EBU/Eurovision System, OJ L 179 of 22 July 1993, p.23.
12) Commission Decision of 23 July 2003, OJ L 291 of 8 November 2003, p.25.
13) Commission Decision 1999/242/CE of 3 March 1999, OJ L 90 of 2 April 1999, p.6; Commission Decision 1999/781/CE of 15 September 1999, OJ L 312 of 6 December 1999; Commission Decision of 29 December 2003, C(2003) 5192 final.
14) ECJ judgment of 30 April 1974, case 155/73, Sacchi, ECR 409, paragraph 7, p.428.
15) ECJ judgment of 3 October 1985, case 311/84, S.A. Centre Belge d'Études de Marché - Télémarketing (CBEM) v. S.A. Compagnie Luxembourgeoise de Télédiffusion (CLT) and S.A. Information Publicité Benelux (IPB), ECR 3261.
16) Commission Decision 89/205/EEC of 21 December 1988, Magill TV Guide/ITP, BBC and RTE, OJ L 78 of 21 March 1989, p.43.
17) Judgment confirmed by CFI judgment of 10 July 1991, case T-69/89, Radio Telefis Eireann v. Commission, ECR II-485; CFI judgment of 10 July 1991, case T-70/89, The British Broadcasting Corporation and BBC Enterprises Limited v. Commission, ECR II-535; CFI judgment of 10 July 1991, case T-76/89, Independent Television Publications Ltd (ITP) v. Commission, ECR II-575; confirmed by ECJ judgment of 6 April 1995, joined cases C-241/91 and C-242/91, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission, ECR I-743.
18) Commission Decision 89/441/EEC of 21 December 1988 on aid granted by the Greek government to the film industry for the production of Greek films, OJ L 208 of 20 July 1989, p.8.
19) Commission Decision 97/238/EC of 2 October 1996 concerning aid granted by the French state to the audiovisual production company Société Française de Production, OJ L 95 of 10 April 1997, p.19.
20) *Ibid*. The Commission also called for the repayment of the aid paid to SFP (1 110 million French francs), plus interest.
21) CFI judgment of 15 September 1998, case T-95/96, Gestevision Telecinco S.A., ECR II-3407; CFI judgment of 3 June 1999, case T-17/96, Télévision Française 1 S.A. (TF1) v. Commission, ECR II-1757.
22) CFI judgment of 10 May 2000, case T-46/97, SIC - Sociedade Independente de Comunicaçao S.A. v. Commission of the European Communities, ECR II-2125.
23) European Commission, "State aid: Commission requests Germany, Ireland and the Netherlands to clarify role and financing of public service broadcasters", press release IP/05/250 of 3 March 2005.
24) European Commission, "Commission enquiry on financing of digital terrestrial television in Sweden", press release IP/04/912 of 14 July 2004. For Germany, see IP/04/911 of 14 July 2004.
25) Commission Decision 89/467/EEC of 12 July 1989, UIP, OJ L 226 of 3 August 1989, p.25.
26) OJ C 205 of 20 July 1999, p.6.
27) The inapplicability referred to in Article 81(1) was granted for a period of ten years, which ended in February 1999.
28) Commission Decision of 23 July 2003, OJ L 291 of 8 November 2003, p.25.
29) Commission Decision of 11 June 1993, EBU v. Eurovision System, OJ L 179 of 22 July 1993.
30) CFI judgment of 11 July 1996, joined cases T-528/93, T-542/93, T-543/93, T-546/93, Métropole Télévision S.A., ECR II-649.
31) CFI judgment of 21 March 2001, case T-206/99, Métropole Télévision v. Commission, ECR II-1057.
32) Commission Decision 2000/400/CE of 10 May 2000, OJ L 151 of 24 June 2000, p.18.
33) CFI judgment of 8 October 2002, joined cases T-185/00, T-216/00, T-299/00 and T-300/00, Métropole Télévision S.A. (M6), Antena 3 de Television, Gestevision Telecinco CA, SIC - Sociedade Independente de Comunicaçao S.A. v. Commission; confirmed by ECJ order of 27 September 2004, case C-470/02 P, EBU.

34) Commission Decision 1999/242/CE of 3 March 1999, TPS, OJ L 90 of 2 April 1999, p.6; confirmed by CFI judgment of 18 September 2001, case T-112/99, Métropole Télévision (M6) and Télévision Française 1 S.A. (TF1) v. Commission.
35) Commission Decision 1999/781/CE of 15 September 1999, British Interactive Broadcasting/Open, OJ L 312 of 6 December 1999, p.1.
36) Commission Decision of 29 December 2003, C(2003) 5192 final.
37) J. Cloos et al., *Le traité de Maastricht*, 2nd ed., Brussels, Organisation Internationale et Relations Internationales, Établissements Émile Bruylant, 1994, p.333.
38) L. Bekemans and A. Balodimos, *Le Traité de Maastricht et l'éducation, la formation professionnelle et la culture* [the Treaty of Maastricht and education, vocational training and culture], *Revue du Marché de l'Union européenne*, no.2, 1993, p.135. In the same vein: G.S. Karydis, *Le juge communautaire et la préservation de l'identité culturelle nationale* [the Community judge and the preservation of national cultural identity] (1994), 30 (4), *Revue trimestrielle de droit européen*, p.559.
39) A. Riou, *Culture et le Traité de Rome* [Culture and the Treaty of Rome], *Les Petites Affiches*, no.81, 1996, p.39.
40) OJ C 23 of 30 January 1992, p.3.
41) Commission proceedings initiated on 12 February 1997, concerning aid to SFP, OJ C 126 of 24 April 1997, p.4.
42) Commission Decision 98/466/EC of 21 January 1998, granting conditional approval to aid which France has decided to grant to Société Française de Production, OJ L 205 of 22 July 1998, p.68.
43) State aid - France, N 797/2001, C(2002) 2593 final, 17 July 2002. See also State aid N 631/2001 United Kingdom, C(2002) 1886 final, 22 May 2002.
44) State aid NN 42/03, OJ C 219 of 16 September 2003, p.3.
45) State aid - France, N 3/1998, 3 June 1998.
46) Council Resolution of 12 February 2001 on national aid to the film and audiovisual industries, OJ C 73 of 6 March 2001, p.3.
47) Council Resolution of 21 January 2002 on the development of the audiovisual sector, OJ C 32 of 5 February 2002, p.5.
48) Communication from the Commission on certain legal aspects relating to cinematographic and other audiovisual works, COM(2001) 534 final, 26 September 2001, OJ C 43 of 22 February 2002, p.6. The Commission nevertheless stated that "territoriality requirements exceeding what may be judged acceptable under the necessity and proportionality criteria go beyond the strict limits of cultural promotion and aim basically at industrial objectives", p.10.
49) State aid - Belgium, N 410/2002 (ex CP 77/2002), C(2003) 1469 final, 13 May 2003, paragraph 22.
50) State aid - Germany, N 261/2003, 15 October 2003, OJ C 295 of 5 December 2003, p.15. Concerning State aid granted by the Länder, and more particularly: State aid - Germany, Land of North Rhine-Westphalia, N 44/2003 (ex CP 172/2001), 19 March 2003; State aid - Germany, Land of Schleswig-Holstein, N 733/2002, 21 January 2003; State aid - Germany, Land of Baden-Württemberg, N 782/2001, 20 December 2001; State aid - Germany, Land of Hamburg, N 693/2001, 28 November 2001.
51) State aid - Austria, N 513/2003, 16 December 2003, OJ C 65 of 13 March 2004, p.6.
52) State aid - Belgium (Flemish-speaking Community): Vlaams Audiovisueel Fonds, N 681/2002, 27 November 2002. See also: State aid - Belgium, N 410/2002 (ex CP 77/2002), C(2003) 1469 final, 13 May 2003.
53) State aid - Denmark, N 486/2001, 13 November 2001.
54) State aid - Spain, Andalusia, N 325/2002, 17 July 2002; State aid - Spain, Estremadura, N 698/2001, 20 December 2001.
55) State aid - Finland, N 777/2001, 20 December 2001.
56) State aid - Netherlands, N 580/2004 (continuation of N 746/2001 and N 530/2003), OJ C 230 of 20 September 2005, p.7.
57) State aid - United Kingdom (Wales), N 753/2002, C(2003) 905 final, 2 April 2003.
58) State aid - United Kingdom (Northern Ireland), N 503/2004, OJ C 230 of 20 September 2005, p.7.
59) State aid - Belgium (French-speaking Community), N 548/2001, OJ C 150 of 3 October 2002, p.7.
60) *Id*, p.6. The Commission seems to consider that the aid granted by the public authorities in Bavaria to the undertaking Bavaria Film is incompatible with the Treaty: "The aid in question is investment aid. It is unlikely to be covered by the derogation in Article 87(3)(d) for aid to promote culture". State aid - Germany, C 51/03 (ex NN 57/03) – State aid for Bavaria Film GmbH, OJ C 249 of 17 October 2003, p.2.
61) Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320 of 15 November 2001, p.5.
62) Aid NN 70/98, OJ C 238 of 21 August 1999, p.3.
63) Communication from the Commission on the application of State aid rules to public service broadcasting, op. cit., supra note 61, p.8.
64) The future of European regulatory audiovisual policy, COM(2003) 784 final of 15 December 2003, p.8.
65) CFI judgment of 27 February 1997, case T-106/95, FFSA and Others v. Commission, ECR II-229. This is indirectly upheld in the Altmark judgment: "where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations (…) such a measure is not caught by Article 87(1) of the Treaty", but must meet a number of conditions. ECJ judgment of 24 July 2003, case C-280/00, Altmark, ECR I-7747, paragraph 87.
66) Decision of 15 October 2003, OJ L 119 of 23 April 2004, p.1 (Italy); Decision of 15 October 2003, OJ L 142 of 6 June 2005, p.1 (Portugal); Decision of 10 December 2003, OJ L 361 of 8 December 2004, p.21 (France).
67) Following the Commission's decisions involving Portugal and France, private broadcasters in these countries lodged individual appeals. Appeal lodged on 31 December 2003 against the Commission of the European Communities by SIC - Sociedade Independente de Comunicaçao S.A., OJ C 71 of 20 March 2004, p.31; appeal lodged on 13 April 2004 by Télévision Française 1 S.A. against the Commission of the European Communities, OJ C 168 of 26 June 2004, p.8.
68) State aid - Italy, E9/2005, OJ C 235 of 23 September 2005, p.3; State aid - France, E10/2005, C(2005) 1166 final of 20 April 2005.
69) Commission Decision of 19 May 2004, C(2004) 1814 final of 19 May 2004.
70) State aid - Denmark, N 313/2004, C(2004) 3632 final of 6 October 2004.
71) Appeal lodged on 7 January 2005 by TV Danmark A/S and Kanal 5 Denmark Ltd against the Commission of the European Communities, OJ C 69 of 19 March 2005, p.23.
72) Aid NN 70/98, OJ C 238 of 21 August 1999, p.3.
73) Aid NN 88/98, OJ C 78 of 18 February 2000, p.6.
74) State aid - United Kingdom, N 631/2001, C(2002) 1886 final of 22 May 2002.
75) State aid - France, N 54/2005, C(2005) 1479 final of 7 June 2005.
76) The developments that follow are taken from the following article: L. MAYER, *L'ambivalence du statut juridique des biens et services culturels en droit communautaire : les principes de libre circulation et de libre prestation* [the ambivalence of the legal status of cultural goods and services in Community law – the principles of freedom of movement and freedom to provide services], (2002), Vol. 43, no. 4, *Les Cahiers de Droit*, pp.725-732.
77) T. Margue, *L'action culturelle de la Communauté européenne* [cultural action undertaken by the European Community], *Revue du Marché de l'Union européenne*, no.2, 1993, p.171. But see also: J.M. Frodon, *Droit de cité pour la culture*, *Le Monde* newspaper, 18 September 1992.
78) It should also be mentioned that this treaty introduced a further provision on culture – Article 3(p) (now Article 3(1)(q) EC) states that "the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: […] q) a contribution to […] the flowering of the cultures of the Member States". Moreover, the European Union's Charter of Fundamental Rights states in its preamble that "the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe (…)". Article 22 of the Charter, entitled "Cultural, religious and linguistic diversity", affirms moreover that "the Union shall respect cultural, religious and linguistic diversity", OJ C 364 of 18 December 2000, p.8 and p.13.
79) L. Bekemans and A. Balodimos, *loc. cit.*, note 38, p.132.
80) *Id*. p.133. Other writers point out that the United Kingdom also asked for this form of procedure to be introduced in decision-making: J. Cloos et al., *loc. cit.*, note 37.
81) European Parliament Resolution of 30 January 1997 on the first Commission report on the consideration of the consideration of cultural aspects in European Community action, OJ C 55 of 24 February 1997.
82) See: French Presidency note on the extension of qualified majority voting, 28 September 2000, CONFER 4776/00, p.29: IGC, Results of the IGC.
83) Treaty of Nice, amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts, OJ C 80 of 10 March 2001, p.1. Regarding the decision-making referred to in Article 133, on the common commercial policy, Article 2(8) of the Treaty of Nice introduces new wording for Article 133(6), according to which "an agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation. In this regard, by way of derogation from the first sub-paragraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States" (author's italics).
In the end, after copious discussion, this unanimous decision-making concerning the common commercial policy was included in the draft European Constitution.
84) European Parliament Resolution of 20 January 1994 on Community policy in the cultural sector, OJ C 44 of 14 February 1994, p.184.
85) European Community action in support of culture, COM (1994) 356 final of 27 July 1994, OJ C 235 of 23 August 1994. The Council's conclusions agreed with the principles brought out in this communication: Council's conclusions of 10 November 1994 concerning the Commission communication on Community action in support of culture, OJ C 248 of 9 December 1994, p.1.
86) First report on the consideration of cultural aspects in European Community action, COM(1996) 160 of 18 April 1996. See also: Council Resolution of 20 January 1997 on the integration of cultural aspects in Community action, OJ C 36 of 5 February 1997, p.4. Council Decision of 22 September 1997 regarding the future of European cultural action, OJ C 305 of 7 October 1997, p.1.
87) L. Bekemans and A. Balodimos, *loc. cit.*, note 38, p.135. In the same vein: G. Vaudersanden and L. Dubouis, *Commentaire MEGRET, Le droit de la CEE*, more particularly *La place de la culture dans la CE, analyse de l'article 128* [the role of culture in the EC – analysis of Article 128], 2nd ed., Brussels, Études européennes, no.8, 1996, p.8; A. Lange, *Descartes, c'est la Hollande. La Communauté Européenne : culture et audiovisuel* [Descartes is Holland. The European Community – culture and the audiovisual sector], *Quaderni*, no.19, winter 1993, p.92.
88) G.S. Karydis, *loc. cit.*, note 38, p.559.
89) *Id*. The writer refers to the submissions of the Advocate General, Mr Van Gerven, in the Fedicine judgment. These point to evolution in Community law, which now takes the cultures of the Member States into consideration, more particularly with the introduction of Article 151. ECJ judgment of 4 May 1993, case C-17/92, Federacion de distribuidores cinematograficos v. Estado Español, ECR I-2266, submissions by the Advocate General, points 22 et seq. See also those writers who have made the point that Article 151 has made it possible to reinforce case-law theory concerning the mandatory requirements and overriding reasons relating to the general interest: G. Vandersanden and L. Dubouis, *loc. cit.*, note 87, p.6.
90) Council Resolution of 21 January 2002 on the role of culture in the development of the European Union, OJ C 32 of 5 February 2002, p.2.
91) *Id*. Article 151 was the subject of discussion on its application at a number of informal meetings of Ministers for Culture held in 2001 and 2002: Council Resolution of 25 June 2002 on a new work plan on European cooperation in the field of culture, OJ C 162 of 6 July 2002, p.5.
92) Council Resolution of 25 January 1999 concerning public service broadcasting, OJ C 30 of 5 February 1999, p.1. See also: Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320 of 15 November 2001, p.5.
93) Communication from the Commission on the follow-up to the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works, COM(2004) 171 final of 16 March 2004, p.3.
94) European Commission, State aid action plan, consultation document, June 2005, p.17.