CULTURAL DIVERSITY AND GATS

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Cultural diversity: an idea gaining support

Cultural diversity has become the key notion in discussions on broadcasting and other audiovisual services in a globalized economy. To be precise, media pluralism should be part of this notion of cultural diversity. The media have an important role to play in disseminating culture, and the Internet will not diminish it.

Cultural diversity has thus become a recognized and legitimate public policy objective which no future trade negotiations will be able to ignore. As the European Commissioner in charge of trade, Mr Pascal Lamy, put it at an EBU seminar in Brussels: "Le combat idéologique sur la diversité culturelle a été gagné" (The political debate on cultural diversity has been won).

The remaining questions relate to practical implementation. What are the political and legal measures to preserve and promote cultural diversity? This question has to be answered primarily on the regional and national planes but is also relevant on the European and global levels. Moreover, what consequences arise from this for the ongoing negotiations on trade liberalization within the World Trade Organization (WTO)?

Cultural exception?

The traditional answer is the so-called cultural exception or exception culturelle. It means that cultural services and cultural policy measures should not be covered or affected by trade liberalization. However, such an exception was not achievable during the Uruguay Round, and is no more likely to be achieved in the new Round. It is now widely accepted that audiovisual services have a double character: on the one hand they are economically relevant activities and are traded internationally, and on the other hand they fulfil important cultural, democratic and social functions for each society.

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The real challenge, therefore, is to bring the economic and cultural aspects together and to ensure that the removal of trade barriers enhances cultural diversity and does not lead to dominance by certain cultures and to an exacerbation of existing imbalances.

Initial solutions (or, at least, attempts at finding a solution) to this challenge can be found at the European level, i.e. both the Council of Europe and the European Union. The clause on culture in the EC Treaty and the Protocol on Public Service Broadcasting do not yet provide perfect solutions, but at least they offer a basis for reconciling economic and cultural objectives.

**Point zero**

In contrast, at the global level nothing similar exists. If I may quote Mr Lamy again, at the EBU's seminar he gave the following striking characterization of this lack of global standards for cultural diversity: "Au niveau international on est en état de normes zéro". ("As regards international standards, we are at point zero.")

However, he did not take a position on who, i.e. which international organization, should draw up such rules on cultural diversity: the UN, UNESCO, the OECD, the International Network on Cultural Policy? Or the WTO?

As regards the concept of cultural diversity, very important preparatory work was undertaken by the Council of Europe which led to its December 2000 Declaration on Cultural Diversity. On 2 November 2001, UNESCO adopted its Universal Declaration on Cultural Diversity, which, although not legally binding, will certainly help a great deal in defining a common global understanding of cultural diversity.

It is important to understand that the objective of cultural diversity does not simply mean the protection of cultural identity and sovereignty; it implies (in the words of the Council of Europe Declaration) the "co-existence and exchange of culturally different practices and the provision and consumption of culturally different services and products". It is also important to stress the link between the concept of cultural diversity and the freedoms of creative expression, of information and of the media.

**Lack of interface**

Assuming that a common understanding of the concept of cultural diversity can be found, the next and probably more difficult challenge will be to ensure respect for cultural diversity in future trade agreements.

If we were already at the stage where internationally-recognized legal rules for cultural diversity existed, they could naturally be integrated into, or referred to in, a future trade agreement. In this respect the cultural aspects are not unique; there are other public policy objectives which need to be reconciled with the trade rules, including the protection of the environment, of public health, of social minimum standards, etc. In the case of the protection of intellectual property, this has even led to a special trade agreement, TRIPS.

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2 See Diffusion 2001/2.
Uncertainties

The result of the Uruguay Round has been that the overwhelming majority of WTO Member States made no liberalization commitments with regard to audiovisual services in the General Agreement on Trade in Services (GATS). However, this does not provide long-term legal certainty for audiovisual and cultural policy measures.

1. Progressive liberalization

There are countries like the United States and Japan which expect liberalization commitments in the audiovisual sector from their trading partners, in line with the overall GATS principle of progressive liberalization.

2. Curbs on subsidies and domestic regulation

There are a number of horizontal GATS rules which even today apply to audiovisual services, e.g. regarding regulatory transparency. It is true that these rules are, as yet, very rudimentary and do not impose obstacles on audiovisual and cultural policy. However, there are more rules in preparation and, in particular, multilateral disciplines on subsidies and on domestic regulation. As public funding and the regulation (including licensing) of audiovisual services are probably the main instruments of audiovisual policy today, a conflict with such future disciplines is almost inevitable.

3. Re-classification of services

There is growing uncertainty about the very notion of audiovisual services. In GATS this notion is not narrowly defined. In principle, it should therefore also cover future services such as video-on-demand and music-on-demand. However, it is certainly not a coincidence that the United States (in its communication of December 2000) has questioned the current classification of audiovisual services.

4. Virtual goods

It makes little difference whether somebody purchases software on a physical CD-ROM (or buys music on a CD) or downloads such material from the Internet. Thus it might be argued that everything that can be downloaded onto the hard disk should be treated in the same way as software on a physical support.

The problem is that the proponents of the "virtual goods" theory draw the conclusion that all these activities should fall within GATT instead of GATS (rather than the other way round). This has far-reaching consequences since the GATT agreement (on goods) currently has a much more liberal trade regime than the GATS agreement (for trade in services). Under GATT, Member States do not have the same power to decide on the degree of market openness which they have under GATS. The main instrument that they may still have at their
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disposal is tariffs (although this is not normally the case for software). Apart from the fact that it might be difficult to impose any tariffs on material which is electronically downloaded over the Internet, the imposition of tariffs on imported material may not be the most appropriate way of pursuing audiovisual and cultural policy objectives. Thus the result could be trade liberalization, without the possibility of proper safeguards.

What does all this mean for television? Digital television will not only allow broadcasters to transmit interactive applications together with the television programme but will also allow viewers to record audiovisual programmes (and the relevant software applications) on their digital decoders. As with personal video recorders which are already coming onto the market, digital decoders will, in the future, have an in-built hard-disk memory.

What, then, is the difference between the reception of an audiovisual programme and the downloading of software? Will broadcasters be regarded as suppliers of virtual goods, just like Microsoft? Or will it be possible to maintain the principle that audiovisual content cannot simply be treated as a commercial commodity?