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**EBU Position Paper on
Draft UNESCO Convention on cultural diversity**

The EBU strongly supports the initiative for a UNESCO Convention, not least because the protection and promotion of cultural diversity and media pluralism are an important factor in the European audiovisual model, and of public service broadcasting in particular.

The EBU appreciates the new "Consolidated Text" of April 2005¹ prepared by the Chairperson of the Intergovernmental Meeting pursuant to the recommendation of the latter at its second session, and welcomes the proposed new title "Convention on the protection and promotion of the diversity of cultural expressions". In view of its improved readability, logical structure and clarity, we trust that Member States of UNESCO will use this draft as a basis for further negotiations. Nevertheless, we believe that a number of further improvements need to be made so that the Convention can fully achieve its purpose. (Unless specified otherwise, the comments in this Position Paper, and in particular the references to particular Articles, refer to this Consolidated Text.)

The present Position Paper defines a number of objectives and expectations on the part of broadcasters with regard to an international instrument on cultural diversity and suggests various improvements with particular regard to

- *the role of public service institutions,*
- *the freedom and pluralism of the media,*
- *technological neutrality, and*
- *coherence between cultural and trade instruments.*

Moreover, care has to be taken to ensure that the scope of the Convention is wide enough to cover all policies and measures which achieve cultural policy objectives in a direct or indirect way. Concrete proposals for amendment of the Consolidated Text are included in the Annexe.

¹ Document CLT/CPD/2005/CONF.203/6 – Add. of 29 April 2005.

1. Main expectations

In the broadcasters' view, the new international instrument on cultural diversity should:

- Clarify the legitimacy of national policies to preserve and promote cultural diversity and media pluralism
- Clarify the relationship with international trade law so as to improve coherence of international governance and to prevent the protection of cultural diversity being subordinated to other policies
- Recognize the important role which public service institutions - and in particular public service broadcasters - play in safeguarding and promoting cultural diversity (leaving it to each country to organize such institutions, define their remit, and provide for their funding)
- Recognize that in the digital age policies to protect and promote cultural diversity need to encompass the use of new technology and distribution platforms, in line with the principle of technological neutrality
- Facilitate cultural exchanges and the free flow of information regardless of the delivery mechanism (including free reception of unencrypted radio and television services)
- Increase the diversity of the origins of audiovisual products (including better conditions for audiovisual production and distribution in developing countries)
- Create a discussion forum on cultural policy issues, including a mechanism to identify best practices.

2. Key issues

a) Coherence with other international instruments, and particularly trade agreements

We do not believe that it would be possible for the Convention to achieve its purpose if it were made subordinate to trade agreements. Consequently, Option B in Article 19 of the preliminary draft, and later proposals based on this Option, should be rejected.

Taking account of the opposition at the intergovernmental meeting to both Options A and B, the Consolidated Text now attempts a "third approach" regarding the relationship to other instruments (Articles 20 and 21). It avoids the establishment of any hierarchy between different international instruments, promotes coherent interpretation and application, and provides for consultations with a view to promoting the principles and objectives of the Convention in other international forums. Moreover, the Intergovernmental Committee will be entrusted with the task of establishing "procedures and other mechanisms for consultation" aimed at promoting the principles and objectives of this Convention in other international forums (Article 23(5)(f)).

We greatly appreciate this compromise proposal, which clearly goes in the right direction. However, more attention needs to be given to future-oriented mechanisms which prevent the principles and objectives of the Convention from being undermined by any future trade agreements.

The new approach is also in line with the recent Resolution of the European Parliament on the draft UNESCO Convention,² since the Parliament believes "that the issue of the relationship between international trade law and the future UNESCO Convention is a key aspect, which should best be approached in such a way that the protection of cultural diversity is given at least the same priority as other policies, and on no account a lesser priority" (Point 15).

Conclusion:

Any compromise regarding the relationship with other instruments should be based on the following principles:

- no subordinate character of the provisions of the Convention vis-à-vis other international instruments,
- promotion of coherence between international instruments, including in the way existing agreements are interpreted,
- obligation for Contracting Parties to consult each other and to respect the objectives of the Convention when entering into new international agreements which may affect cultural diversity.

For concrete amendments see Annexe (points 3, 13, 14 and 15).

b) Increasing the diversity of the origins of audiovisual products

To achieve the objective of cultural diversity, it will sometimes be necessary to give preferential treatment to certain cultural contents and artistic expressions. However, such preferential treatment may be considered discriminatory and in conflict with trade principles, such as the MFN (Most Favoured Nation) principle and the principle of national treatment.

It is therefore important for the future Convention to clarify the cases where such preferential treatment is legitimate from a cultural policy point of view. The relevant areas are, in particular:

- content requirements (such as the quotas on European and independent productions)
- access rules (such as must-carry rules on cable networks)
- funding (such as public funding for certain productions and for public services)

² European Parliament resolution on working towards a Convention on the protection of the diversity of cultural content and artistic expression, adopted on 14 April 2005 (P6 TA-PROV(2005)0135).

- co-production and co-distribution agreements.

While all these measures are mentioned in the draft in one way or another, it is not always clear (although it is probably understood) that they can have a preferential character. However, as far as content requirements are concerned, the formulation in Article 6(2)(b) has unfortunately become less clear, as it now refers to "opportunities" provided for domestic cultural activities rather than to "space" reserved for such activities.

Suggestions for improvements

Clarification of the legitimacy of reserving space for domestic cultural products and services.

Clarification of the legitimacy of the preferential character of policy measures regarding content requirements, access, funding and co-productions.

For concrete amendments see Annexe (points 8, 9 and 12).

c) Preservation and promotion of freedom and pluralism of the media

Unfortunately, the Consolidated Text no longer explicitly mentions freedom and pluralism of the media. (In the preliminary draft, "media pluralism" was mentioned in the Preamble and in Annex II). Although we very much welcome the general reference to freedom of expression (Recital 11 and Article 2(1)), this cannot replace recognition of the importance of media pluralism for cultural diversity.

In modern society, cultural diversity cannot be dissociated from media pluralism. As has been emphasized by, in particular, the Council of Europe Declaration on cultural diversity, media freedom and media pluralism are "a basic precondition for cultural exchange" and "essential for democracy and cultural diversity". Policies to protect and promote media pluralism should therefore be recognized as an integral part of cultural policies.

The European Parliament too, in its above-mentioned Resolution, expressed the belief "that media pluralism must be a fundamental principle of the Convention" (Point 12) and that the Convention "must very clearly underline the right of States Parties to develop, maintain and implement policies and laws designed to promote and protect cultural diversity *and media pluralism*" (Point 5, emphasis added).

Suggestions for improvements

Reinsertion of the reference to media pluralism in the Preamble.

Inclusion of media pluralism in the objectives or guiding principles of the Convention.

Explicit mention of measures to safeguard and promote media pluralism among legitimate cultural policy measures.

For concrete amendments see Annexe (points 1, 4 and 11).

d) Role of public service institutions

While appreciating the fact that the Consolidated Text maintains the clause on public service institutions with minor modifications (see Article 6 (f)), we believe that the current formulation should be improved and reinforced.

As far as the modifications are concerned, it is not clear what the qualification "appropriate" means. Is it a reference to the cultural remit of such institutions? If there is a need to make it clearer what kind of institutions are meant, it would be better to mention some examples, such as public libraries, museums, theatres and public service broadcasters. There is also an inconsistency between the English and French texts, insofar as the English text uses the term "public institutions" instead of "public service institutions". The term used so far, i.e. "public service institutions", seems more precise.

The European Parliament, in its above-mentioned Resolution, expressed the view "that the Convention must recognise the very important role played by public services, notably public service broadcasters, in safeguarding, supporting and developing cultural diversity and identity and access for all citizens to quality content and knowledge" (Point 6). It also stated "that States should retain the right to organise, fund and define the remit of public service institutions devoted to safeguarding cultural diversity and media pluralism, notably that of public service broadcasters, in order to ensure their democratic and social relevance for their societies, and that this must also apply in the digital knowledge age" (Point 19).

Suggestions for improvements

Recognition of the important role of public service institutions in the Preamble.

Clarification that the term "cultural industries" may also include "public service institutions".

Definition of "public service institutions".

Clarification of individual States' competence with regard to the organization, remit and funding of public service institutions.

For concrete amendments see Annexe (points 2, 5, 7 and 10).

e) Technological neutrality

It should be clarified beyond any doubt that the on-line provision of cultural and audiovisual services (or "digital products") is covered by the Convention. The Consolidated Text does this indirectly through the definition of cultural diversity, stating that cultural diversity "is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, *whatever the means and technologies used.*" (Article 4, emphasis added)

The European Parliament, in its above-mentioned Resolution, also emphasized "that the Convention must protect the rights of States Parties to extend their cultural policies to new media content and new means of distribution and that the principle of technological neutrality must be explicitly mentioned in the Convention" (Point 20).

Suggestion for improvement

Indirect mention of the principle of technological neutrality, by making reference to various technologies, platforms, networks and devices.

For concrete amendments see Annexe (point 8).

f) Transparency

The Consolidated Text no longer mentions "transparency" among the guiding principles of the Convention (Article 2). Article 9, which is entitled "information sharing and transparency", is rather vague. There no longer seems to be any obligation to publicize cultural policy measures.

Suggestion for improvement

Entrusting the Intergovernmental Committee with the task of drawing up guidelines on transparency.

For concrete amendments see Annexe (point 16).

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UNESCO - draft Convention on cultural diversity

EBU Proposals for amendment to the Consolidated Text of 29 April 2005

Preamble

1. Amend Recital 10 as follows:

"10. *Aware* that cultural diversity is strengthened by the free flow of ideas and pluralism of the media, and that it is nurtured by constant exchanges and interaction between cultures,"

2. Add new Recital after Recital 11:

"11bis. Recognizing the very important role played by public services, and notably public service broadcasters, in safeguarding, supporting and developing cultural diversity and identity and access for all citizens to quality content and knowledge,"

Article 1 - Objectives

3. Add new Point (j):

"(j) to promote coherence of international governance, particularly between cultural and trade aspects."

Article 2 - Guiding Principles

4. Amend principle No. 1 - Principle of respect for human rights and fundamental freedoms - as follows:

"No one may invoke the provisions of this Convention in order to infringe human rights guaranteed by international law or to limit the scope thereof. Cultural diversity can be protected and promoted only if fundamental freedoms such as freedom of expression, information and communication, and their corollary, freedom and pluralism of the media, as well as the ability of individuals to choose cultural expressions, are guaranteed."

Article 3 - Scope of application

See amendment 6 below.

Article 4 - Definitions

5. Amend definition No. 4 - Cultural industries - as follows:

"Cultural industries' refers to industries, including public service institutions, producing and distributing cultural goods or services as defined in paragraph 3 above."

6. Amend definition No. 5 - Cultural policies - as follows:

“‘Cultural policies’ refers to those policies related to culture, whether at the local, regional, national or international levels, which are either focused on culture as such, or which are designed to have a direct or indirect effect on cultural expressions of individuals, communities or societies, including the creation, production, dissemination, distribution of and access to cultural activities, goods and services.”

7. Add new definition No. 8 - Public Service Institutions - :

“‘Public service institutions’ refers to organisations charged with public service obligations and financed partly or wholly with public funds.”

Article 6 – Rights of Parties at the national level

8. Amend sub-paragraph (2)(b) as follows:

"(b) measures which in an appropriate manner ~~provide opportunities for~~ reserve a certain space for domestic cultural activities, goods and services among all those available within the national territory, in order to ensure opportunities across all media, platforms, networks and devices, for their production, dissemination, distribution and enjoyment, including provisions relating to the language used for such activities, goods and services.

9. Amend sub-paragraph (2)(d) as follows:

"(d) measures aimed at providing public financial assistance; in granting such assistance, Parties may determine the nature, amount and beneficiaries thereof and restrict access to such assistance to its citizens where appropriate;"

10. Amend sub-paragraph (2)(f) as follows:

"(f) measures ~~aimed at~~ which establishing and supporting appropriate public service institutions, such as public broadcasters, libraries, archives, galleries and museums, define their remit, provide for their funding, and facilitate and encourage public access to them;"

11. Add new sub-paragraph (2)(h):

"(h) measures to safeguard and promote pluralism of the media."

Article 12 – Promotion of international cooperation

12. Amend sub-paragraph (5)(e) as follows:

"(e) encourage the conclusion of co-production and co-distribution agreements, which may have a preferential character."

Article 20 – Relationship to other instruments

13. Amend paragraph (2) with follows:

"2. Parties shall take into account the objectives and principles of this Convention ~~When interpreting and applying other international instruments or and shall not when~~ entering into other international obligations which are incompatible with this Convention. ~~Parties shall take into account the objectives and principles of this Convention.~~"

Article 21 – International consultation and coordination

14. Amend as follows:

"Parties undertake to promote the principles and objectives of this Convention in other international forums. For this purpose, Parties shall consult each other in order to develop common approaches, bearing in mind these objectives and principles."

Article 23 – Intergovernmental Committee

15. Amend sub-paragraph (5)(f) as follows:

"(f) to establish procedures and other mechanisms for consultation aimed at promoting the principles and objectives of this Convention in other international forums, with a particular view to ensuring that other international instruments that may have an impact on cultural diversity are coherent with these principles and objectives."

16. Add new sub-paragraph (5)(h):

"(h) to prepare and submit for approval by the Conference of Parties guidelines on information sharing and transparency, also with a view to making cultural policies more transparent for the public."
