Initiativkreis Öffentlicher Rundfunk Köln
Resolution of April 25 2005

What Happened to the Media Functions in the UNESCO Cultural Convention?

More Emphasis Must be Placed on Public Service Broadcasting!

The cultural convention which is to be adopted during the 33rd General Conference of UNESCO in October 2005 shall guarantee cultural diversity in times of increasing liberalization and globalization, especially under the influence of the GATS (portal.unesco.org/culture, Towards a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions). The German Commission for UNESCO has initiated a Federal Coalition of Cultural Diversity that accompanies the wording of this convention (*www.unesco.de, Plattform: UNESCO-Konvention zur kulturellen Vielfalt). Our Initiativkreis belongs to this Coalition which met on April 26 2005 in Berlin for its fourth round of discussions in order to elaborate a draft for the Intergovernmental Conference in Paris on May 25 to June 3 2005 for the closing debate. There we have proposed the following suggestions - which are shared by the Initiativkreis Öffentlicher Rundfunk Berlin – to include the media, in particular public broadcasting, in the convention. These suggestions met with interest and support in Berlin, and they partly found their way into the German draft. The text from June 2 2005 that was disposed at the Conference in Paris also considers some of them as it explicitly refers to the media and to public service broadcasting. However, we regard our resolution still as relevant for the ongoing discussion about the final text of the cultural convention.*

1. In accordance with the resolution adopted by the 32nd General Conference by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in October 2003, there are currently intensive endeavours to draft an international convention on the protection of cultural contents and artistic expressions. This agreement should represent a new counterbalance in term of cultural law, as opposed to relevant conventional regulation in international trade law that has been in place for some time, in particular, with respect to the General Agreement on Trade in Services (GATS), and prevent economizing of cultural life. We emphatically welcome and support this project which also concerns the area of broadcasting.

2. Initially, a preliminary draft dated July 2004 was drawn up by a group of independent experts (CLT/CPD/2004/CONF-201/2, accessible via www.unesco.de). Further discussions, in particular the two intergovernmental meetings of experts in September 2004 and in January/February 2005, were largely determined by this draft. In March 2005, the Director-General of the UNESCO summarized the progress achieved in the discussion in a report to which a “composed” and not yet completely revised second draft was appended (CLT/CPD/-2005/CONF.203/6, Appendix 1, accessible via www.unesco.de). In April 2005, the chairman of the intergovernmental meeting of experts presented a completely revised, "consolidated" third draft (171 EX/INF.18, Appendix 2, accessible via www.unesco.de). The content of the third draft is, as is the second draft, by and large, similar to that of the first one and is intended to perfect the clarification of definitions and language.

3. Quite some progress has been made in formulating adequate general standards of a new relationship of culture and economy. Admittedly, certain conceptual weaknesses and deficits that had already emerged in the first draft have been re-encountered in the second and third draft, especially in the field of media. Particularly the public sector of the media, with all its inherent idiosyncrasies, is not yet being appropriately addressed. This should be discussed and possibly reme-

died during the upcoming intergovernmental meeting of experts scheduled for May/June 2005. Therefore, we wish to contribute the following comments regarding some significant passages in the text.

4. As customary in international law, priority is given in the drafts to individual fundamental rights, such as "freedom of expression, information and communication" (Art. 2 No. 1 of the third draft). This combines demands for "free flow of ideas" (preamble of the third draft, No. 10 and 19) including freedom of access and choice. It remains unsaid, however, that it is creation of an informative public sphere, diversity of content, candour, willingness for discourse and free formation of opinion that is based on these conditions. Also unmentioned is the fact that all this calls for the implementation of a qualified mediating function on the part of properly organized, relatively autonomous, and fundamentally altruistic media.

5. In the tradition of German constitutional law, broadcasting has been earmarked to assume an appropriate "medium and factor" task. In this context, freedom of broadcasting is described as a public "*serving* freedom" (decisions of the German constitutional court, Vol. 57, Page 295, 319 et seq.). This is a functional starting point which remains non-negotiable at national level and could also become relevant at an international level. In our opinion, it should also appear in the UNESCO Cultural Convention. But the drafts are not satisfactory in this respect.

6. In the preamble of the first and second draft, along with individual basic rights pertaining to information and communication, "pluralism of the media" is mentioned and declared to be a commodity which equally merits protection (6th respectively 7th recital). This wording is not repeated under the headings "Objectives and Principles" in Art. 1 and Art. 2. The media and their functions are not explicit mentioned anywhere. Furthermore, in the third draft the media have been dropped from the preamble too. Initially there was mention of the media in the complementary appendices. Later on, however, the appendices were omitted entirely. More on this in the following:

7. Definitions in Art. 4 concern, among other items, "cultural services" (Art. 4 No. 4 in the first draft respectively No. 3 in the second and third draft,). In Annex I of the first draft, a list of examples was supplied in which, among other items, "radio and television programmes", "radio and television services" and "radio broadcasting service" were mentioned. This Annex has been dropped from the second and third draft without any substitution.

8. Concerning the definition of "cultural policies" in Art. 4 No. 7 of the first draft respective Art. 4 No. 5 of the second and third draft, in Annex II there was a list of examples of possible measures to be taken, as under the heading "Promoting pluralism, cultural and linguistic diversity in and for the information society": "policies that enhance media pluralism and develop community, linguistic and minority services in public radio and television and on the World Wide Web" (No. 1 Paragraph 4). Here, at least, a public broadcasting sector was explicitly mentioned. However, that was reminiscent of US ideas that tend to relegate Public Broadcasting Service (PBS) to a niche role. That led to rejection in Europe and to increased demands for improvement. But instead of this, Annex II was deleted from the second and third draft without any substitution. This is an extremely unsatisfactory result.

9. It is worth knowing how public service broadcasting is implicitly taken into account in other, more generally outlined rules in the drafts, whereby a distinction is to be made between rights and duties of the contracting states at national and at an international level. At the first level, "each State Party may adopt measures, especially regulatory and financial measures, aimed at protecting and promoting the diversity of cultural expressions within its territory, particularly in

cases where such expressions are threatened or in a situation of vulnerability" (first draft, Art. 6 No. 1). Among others, this might include "measures which encourage and support public service institutions" (ibid. No. 2 lit. (e)). Similar on the issue of a national guarantee of "appropriate public service institutions" the second draft in Art. 6 No. 2 lit. (e). The vulnerability clause however – which once again should have been interpreted in the meaning of a niche role for the public sector – has been removed there in No. 1. The tone of the passage is taciturn. The urgent, concrete structural problems raised by today's dual broadcasting systems are brushed off without more ado. This is also the case in the third draft that in Art. 6 No. 2 lit. (f) utilizes the even more general concept "public institutions".

10. Article 12 in the revised version of the second and third draft is rather more to the point when it states: The contracting parties should "enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international cultural exchanges and sharing of best practices" (Art. 12 lit (b)). But this is only mentioned with a view to international cooperation. It obviously implies that an appropriate internal potential, as described in Art. 6 et seq., within the states exists and is intact. Indeed, this seems to be the crux of the matter.

11. The great importance of public service institutions with regard to the preservation and promotion of cultural diversity has been repeatedly stressed lately during the cultural-political GATS/UNESCO debate in the national political arena, exemplified in the unanimous resolution taken in German Federal Parliament on September 23 2004 (Deutscher Bundestag, document 15/3054 in the revised committee version document 15/3584). According to this the media, above all public service broadcasting, should make a considerable contribution to the issue. Considering continually changing communication habits formed in the population, so the Parliament, the future depends very much on appropriate development of these public service institutions, including utilization of new technologies.

12. European Parliament recently voiced a similar view. In its resolution on working towards a UNESCO Cultural Convention on April 14 2005 (Document No. P6_TA-PROV(2005)0135), it demanded "that the Convention must recognize the very important role played by public services, notable public service broadcasters, in safeguarding, supporting and developing cultural diversity and identity and access for all citizens to quality content and knowledge". States should retain the right to organize, 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". This especially in view of new media content and new means of distribution in the digital age. The principle of "technological neutrality" should also be explicitly mentioned in the convention.

13. This ambitious regulatory approach was explained, above all, by the broadcasters themselves who must ponder the issue of dubious, on-sided economically management of the EC law on state aid by the Brussels Commission, the quarrel regarding a restrictive "Funktionsauftrag" with respect to the extent of license fee financing, online activities et cetera, and who are endeavouring to put a stop to the concomitant GATS influence which would support the attacks from Brussels (Eva Maria Michel, http://www.uni-koeln.de/wiso-fak/rundfunk/pdfs/17003.pdf; Verena Wiedemann, http://www.ioer.org/09dokumente/wiedem.pdf; Verena Metze-Mangold, http://www.uni-koeln.de/wiso-fak/rundfunk/pdfs/19204.pdf; Fritz Pleitgen, Archiv für Presserecht 2005, p. 1 et seq.). The very precise in-depth ARD Comments on the UNESCO draft convention on the protection of the diversity of cultural contents dated August 20 2004 which were prepared by ARD Liaison Office Brussels currently remain unsurpassed (accessible via www.unesco.de). The equally substantial and thorough Briefing Paper of the EBU Legal Department, issued on October

28 2004 (including an annex dated September 13 2004) concurs with the aforementioned ARD statement. These papers, which continue to remain topical, contain critical commentaries and precisely formulated proposals for amendments and supplements to passages mentioned herein and to numerous other passages which are unsatisfactory in view of media specific aspects. Finally, a few examples:

14. The wording “and their corollary, freedom and pluralism of the media” is to be amended to the list of individual basic freedoms in Art. 2 No. 2, now No. 1. For the key rule of Art. 6 No. 2 lit. (e), now lit. (f), on the guarantee of national authority in internal area, ARD/EBU suggest the following new version: “Measures which organize public service institutions, such as public broadcasters…, define their remit, provide for their funding, and facilitate and encourage public access to them.” Parallel to this, the definitions of Art. 4 are to be complemented by an item No. 8 regarding “Public Service Institutions” with the following wording: “Public Service Institutions refer to organizations charged with public obligations and financed partly or wholly with public funds.” All this is foreseen to be valid “across all platforms, networks and devices and independent of technologies used”, as recommended in a supplement to Art. 6 No. 2 lit. (a). Detailed explanations regarding the development guarantee, which comprises convergence phenomena, shall be made in the annexes which is hereafter to be formulated more precisely and not to be eliminated.

15. The guarantee of unrestricted development opportunities for the public sector is, as stressed in the ARD paper, the main quarrel in the current GATS dispute, as well as in the negotiations on the UNESCO convention. And now it must be noted that the recommendations made by ARD/EBU have been completely ignored in the second and third convention draft. With respect to public service broadcasting, these subsequent drafts fall short of the initial draft. This is very surprising and, once again, makes it evident that there is still need for improvement here.

16. Equally essential, as this will determine the course of all further negotiations, is the unresolved question of the relationship between UNESCO Convention and WTO/GATS: Preferential/inferior/equal treatment? The much disputed and technically difficult legal question in Art. 19 of the first draft had remained unanswered. This question is now cautiously answered in Art. 20-21 of the third draft with something akin to equal ranking. This is indicated in the introduction of the third draft: The suggested revision should ensure that all international instruments be “complementary and mutually supportive” (No. 10). Does this imply that the option of Cultural Law playing second fiddle to Trade Law – totally unacceptable to our mind – has finally been eliminated? Is the way opened to weigh up and to find out concrete concordance solutions? This is a fundamental question that affects all areas of cultural life. It is going to take a lot more intensive effort to bring about an equal ranking response in this matter.