

# EU Regulation on Product Exchange and Promotion of Cultural Exchange in Europe

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## 1 Introduction

The European Community has been created in order to eliminate barriers of trade and open the market to free movement for goods and services. Originally, the concept of free circulation was based on economic considerations concerning liberalization of trade. However the objective of the Treaty englobed that closer connections between the Member States could be established in the future. As the commerce within the Community has increased it has been realized that the European collaboration takes place between particular national entities. The activities of the societies joined in the common market are based on different cultural concepts, bearing common features. Cultural aspects have to be taken into consideration as part of the European integration.

The perspective of culture is reflected in the products subject to cross border circulation. A sales object which is brought on the international market cannot be considered as an isolated item. A product is part of its surroundings. It does not only assume functions. It also bears traditions and concepts related to a certain cultural area.

Products subject to exchange are not only goods. A augmenting part of the exchange is related to services.

## 2 Culture Related to the Society

### 2.1 *Concept of Culture*

Cultural relations are continuously developed within societies organized in national states, regional communities and similar entities with common distinctive features. The culture which is particular for the society is characterized by a common behaviour, common concepts and values. The society is founded on common traditions, and reactions and appraisals of the members of the society are foreseeable. The individuals of the entity are attached to each other through a feeling of identity and safety. The products adherent to

the society may express the cultural values of the entity through their qualities, functions or appearance. When such a product is transferred into another society it may influence the new cultural entity where it is placed.

## ***2.2 The Problem of Balancing Commercial and Cultural Exchange***

The exchange in the European Union is still based on the commercial principle of free movement of products within the Internal Market. But rules on culture have been inserted into the Treaty on European Union (abbreviated "T-EU")<sup>1</sup> in order to promote non-commercial activities and bring out common features of European culture. On this basis it should be expected that the exchange of cultures should be intensified to the same degree as the flow of products between the Member States is augmented when the products transfer cultural elements. However, the liberalization of commerce may as well create barriers to the exchange of cultures, as the Member States may lay down national measures of protection against intrusion of foreign culture related to products. The question is to what extent the legal regulation is able to contribute to a balanced relationship between the principle of free movement and the national protection of local culture in order to promote a free cultural exchange and make common cultural aspects visible.

## **3 Culture Related to Products**

Every type of products - goods, services or real property - may be bearer of culture.

By cultural products is traditionally meant national treasures and similar items such as objects of art, literature and painting as well as services like theater, film and music performances. Their immaterial and economic value is estimated according to their cultural qualities. Applied art such as "Danish Design"-furniture, represents a cultural concept besides its functional qualities.

Cultural features may be related to commercial goods and services as well, for example regional foodstuffs or clothing. Children's toys may express culture and transfer traditions, concepts and symbols.

Public relations, in particular TV-advertisements, constitute a special product category. The advertising is produced for business purposes. But the message it broadcasts is based on cultural and social values related to the place of destination. The advertisement film constitutes in itself an original creation conferred with immaterial values.

Gift objects represent a symbol language and intends to confirm cultural and social values in the relationship between the offeror and the receiver.

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<sup>1</sup> Treaty on European Union, signed in Amsterdam on October 2, 1997, called the Amsterdam Treaty. It has entered into force on the 1st of May 1999.

## 4 EU Regulation of Products in General

The regulation in the EU on the free movement of products and on the free movement of culture is based on different reasons. The Treaty establishing the European Community (abbreviated "the EC Treaty")<sup>2</sup> provides for an open market for uniform, standardized products. The regulation of the cultural sector does not intend to create a uniform European culture. On the contrary the Treaty provides for the maintenance of local varieties. Although the rules follow opposite intensions there may be observed a regulation which intends to balance the different interests.

The free movement of goods is promoted through the EC Treaty art. 28, formerly art. 30, which forbids quantitative restrictions and equivalent measures which form barriers of trade. Corresponding rules are laid down in the EC Treaty art. 49-50, formerly art. 59 – 60, for the free movement of services. However, the EC Treaty art 30, formerly art. 36, admits restrictions for the free movement of goods for certain cultural reasons such as the protection of national treasures and immaterial rights.

### 4.1 *Product Quality Regulation*

In order to get access to the Internal market the products must comply with requirements regarding safety and functional quality. A comprehensive EU legislation has been adopted concerning a great variety of products on the general basis of art. 94 and art. 95, formerly art. 100 and art. 100 A, of the EC Treaty. Toys for example may be made from glass only when it is inevitable for the use. Foodstuffs are subject to standardization concerning ingredients, additives etcetera.

### 4.2 *Sectors of commercial products related to Culture*

#### 4.2.1 **Foodstuff Sector**

Certain products may be produced in the traditional way although they do not comply with the rules of standardization, because they are considered as regional specialities based on a local tradition. For example Greek Feta-cheese, Danish liver paste and German beer may be produced in the traditional way regardless of standard requirements on additives laid down in the EU regulation.<sup>3</sup> Geographical designations and designations of origin for agricultural products may be protected on request as specified products when they are made from traditional raw materials or hold a traditional composition or are produced

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<sup>2</sup> The Treaty establishing the European Community is part of the Treaty on European Union.

<sup>3</sup> Council Decision no. 292/97/EC of the European Parliament and of the Council of 19.12.1996 on the maintenance of national laws prohibiting the use of certain additives in the production of certain specific foodstuffs, issued according to the Council Directive 89/107/EEC of 21.12.1988 on approximation of the laws of the Member States concerning additives authorized for use in foodstuffs intended for human consumption art. 3a.

according to traditional methods.<sup>4</sup> The question of using *bocksbeutel* bottles only for German regional wine based on local traditions has been raised before the EU Court of Justice (case 16/83, decision of 13 March 1984). However, the Court did not approve the bottles as specific local products.

#### 4.2.2 Sport Sector

Sport activities such as football games played by professional players are services subject to free movement. The teams adhere to national or regional entities where they confer the members of the society with a feeling of identity and pride when their team gets a prominent position. In the *Bosman* case (case C-415/93, decision of 15 December 1995) concerning the transfer of a Belgian football player to a french club, cultural considerations were invoked among other assertions in order to justify barriers to trans-border transfer. However, even if the arguments on culture were not accepted as legitimate barriers to the free movement in the EU, the culture as such was taken into consideration. So sport may be regarded as part of the local culture.

### 5 Regulation of Culture

It is within the scope of the European Union to create closer relations between the European peoples according to the Treaty on European Union. Art. 1 of the Treaty pronounces the perspective of approaching the European populations to each other, and the Treaty establishing the European Community art. 2 points out the augmentation of the quality of life and social cohesion and solidarity among Member States as one of the purposes of the Treaty.

A specified regulation of culture is laid down in the EC Treaty art. 151, formerly art. 128, which provides that the cultural diversity has to be respected in the same time as the common cultural heritage has to be promoted. The art. 151, paragraph 4, provides that the Community shall take cultural aspects into account in its action according to other provisions of the Treaty. Measures regarding cultural action have to be decided unanimously in the Council of Ministers. The Community has to share the competence in cultural matters with the Member States.

The EC Treaty art. 87 paragraph 3 *litra d*, formerly art. 92, admits national support in order to promote and maintain the cultural heritage to the extent where the common interests of commerce and free competition are not disregarded.

For action to be taken within the cultural sector the EC Treaty art. 5, formerly art. 3b paragraph 2, provides for the principle of subsidiarity. It means that in

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<sup>4</sup> Council Regulation no. 2081/92/EEC of 14.7.1992 on protection of geographic indications and designations of origin for agricultural products and foodstuffs (the "PDO-Regulation"), OJ L 208 of 24.7.1992 n. 1, amended by Regul. 535/97, and the Commission Regulation no. 2037/93/EEC, published in the OJ L 185 of 28.7.1993. The attestation rules are laid down in the Council Regulation no. 2082/92/EEC of 14.7.1992 (the "PGI- Regulation"), OJ L 208 of 24 July 1992 p. 9, and the Commission Regulation no. 1848/93/EEC, OJ L 168 of 10.7.1993. See *Ugeskrift for Retsvæsen* 1997.447 afdeling B: Knud Hansen: "Retsbeskyttelse af betegnelser for landbrugsprodukter og levnedsmidler", p. 448.

areas which do not fall within the exclusive competence of the Community, the achievement has to be made by the Member States. The Community shall take action only when action can be better achieved thereby and only, when it is necessary. So the cultural initiative shall normally be taken and promoted on national and regional level.

The Amsterdam Treaty has introduced an amendment in the EC Treaty art.151 paragraph 4. The amended provision points out that the Community shall take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.

Furthermore the European Council has agreed on a declaration to the Final Act of the Amsterdam Treaty on sport. The Council has pronounced that the Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together. The Conference calls on the bodies of the European Union to listen to sports associations concerning important questions and to consider the particular characteristics of amateur sport.

## 6 Particular Cultural Sectors

### 6.1 National Treasures, Art and Litterature

The EC Treaty art. 30, formerly art. 36, admits national barriers to the free movement of goods in order to protect *national treasures* possessing artistic, historic or archaeological value. The Directive (93/7) of 15.3.93 on return of national treasures prevents the transfer of such products from its place of origin. The Regulation (3911/92) of 31.12.1992 provides for restrictions concerning export of cultural goods. Within the framework of a community system the Member States retain the right to define what they understand by their cultural goods and how to protect them.

*Books* are commercial goods subject to free trade. But through their immaterial values they are as well important bearers and transferors of culture as they contribute to maintain and develop the local cultural aspects. In particular books and periodicals are important supporters of linguistic minority entities.

Within the book sector the EC Court of Justice has to a certain extent admitted systems of resale price maintenance, see for example the case 229/83 *Leclerc v. Au Blé Vert*. In this case, where books were subject to a retail price system in France, the books were exported from and reimported into France. The EC Court of Justice has pronounced that national rules concerning resale prices fixed by the book editor or the importer are admitted as far as the legislation is in accordance with the EC regulation of the free movement of goods.

The EU Council of Ministers has adopted resolutions in favour of the cultural aspects of the book sector, for example the Council Resolution of 18.5.1989 for promoting books and reading.

Furthermore, in order to support the development of the electronic medias, the EU Council has adopted a resolution of 25.7.1996 on electronic publishing and the libraries. The resolution propose the EU Commision to examine the

legal, technical and cultural aspects related to electronic documents and the problems created for the libraries within this field of innovation.

Within the sector of *tourism* cases on the access for foreign guides to follow tourist groups to national monuments and treasures have been brought before the EC Court of Justice. France, Italy and Greece have demanded that foreign guides should pass an examination in the countries in question in order to be authorized by the State.<sup>5</sup> The authorization was a condition for getting the access to follow their groups not only to places where special qualifications were required, but also to other places. The countries asserted that the authorization was necessary in order to protect the national cultural heritage and disperse correct information thereon. The EC Court of Justice pronounced that protection of such public interests of cultural nature may constitute legitimate barriers to the free movement of services. But the Court decided that concrete national measures were not acceptable in these cases.

## **6.2 *The Regulation of Services within the Audio/Visual Sector***

National and local radio- and television broadcasting is a sensitive medium which is open to influence from abroad. It is not possible to close the frontiers as everybody can take down programmes from foreign countries. The TV constitutes a complex field of opposite interests: On the one hand the TV constitutes an important public service institution for broadcasting of national and local non-material interests which disperses the culture of the country. On the other hand, the economic interests of tv -marketing are admitted as services subject to free movement. The economic resources raised by tv-advertising are regarded as useful for augmenting the economic support of the cultural programmes. The TV advertising brings illustrative messages directly to the potential client groups which may be selected according to their programme preferences. So the clients are exposed to a considerable influence from abroad which does not only consist of informative messages. Cultural elements such as concepts, behaviour and life style are used as measures of persuasion. This battlefield between economic and cultural interests as well as between national and foreign cultures is reflected in the EU law and legal practice.

Long time before the adoption of the European Union, when the practical European collaboration of that time was based on economic reasons only, the conflict between the principles of free movement of goods and services and the national reservations of cultural interests asserted by Member States has been submitted to the EC Court of Justice. The tendencies in the court practice are described hereunder in the section 6.2.2.

A common regulation intending to harmonize basic national TV provisions has been laid down in the 1989-Directive on the radio- and tv-broadcasting activities in the EU.

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<sup>5</sup> Reports of the EC Court of Justice (abbreviated "Reports") 1991 - 2, I. Page 659: Case C-154/89 (France). Page 709: Case C-180/89 (Italy). Page 727: Case C-198/89 (Greece).

### 6.2.1 The EC Directive on "Television without Frontiers"

On 3 October 1989 was adopted the directive on TV broadcasting activities.<sup>6</sup> The Directive has been amended by the European Parliament and Council Directive 97/36/EC of 30 June 1997 on Amendment of the Council Directive 89/552/EEC which has to be transposed by the Member States before the end of 1998.

The Directive intends to conciliate the television broadcasting activities considered as services subject to free movement with the considerations of public interest concerning TV as a medium for information, education and cultural variety. Art. 2 of the Directive provides that each Member State shall ensure the free access to television broadcasting on the condition that the transmissions are in accordance with the legislation in the broadcasting country and with the Directive. However, according to Art. 2a a Member State may prohibit foreign emissions under certain conditions, in particular when they might damage minor persons or encourage discrimination for example because of race or sex.

According to Art. 3 Member States may require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by the Directive. A new Art. 3a is added to the Directive. It provides that in case where a broadcaster under the jurisdiction of a Member State holds an exclusive right to broadcast events which are of essential interest for the Member State, the Member State may lay down measures in order to secure that an essential part of the population gets the possibility to follow the events through gratuite TV transmission. The events to be transmitted in this way are for example important international sport events, Olympic Games and the like. In this way, a Member State may promote sport events which involve cultural elements of importance for the country.

In the chapter 3 the Directive lays down rules for production and distribution of European TV programmes in order to promote European culture. A certain part of the transmission time has to be spent on the transmission of "European works". That means productions originating from the European Member States or other European countries mainly made in collaboration between authors and workers residing in the concerned European countries and made or controlled by producers established in one or more of those States. The rules thereon are controversial. It has been pointed out that the regulation is not in conformity with the principle of freedom of expression laid down in the art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States.

The Directive lays down restrictions on advertising and sponsoring in order to keep commercial interests separated from non commercial programmes.

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<sup>6</sup> Council Directive of 3 October 1989 on the Coordination of Certain Provisions laid down by Law, Regulation or Administrative Action in Member States concerning the Pursuit of Television Broadcasting Activities (89/552/EEC), OJ no. L 298 of 17.10.1989 p. 23.

## 6.2.2 Features of the Development in EU Case Law

By solving concrete cases the EC Court of Justice has endeavoured to balance the conflict between the economic interests of free movement for services and the protection of national interests. Although the Court has only decided a limited number of conflicts the development may be illustrated through some essential cases:

In *the case of the Dutch advertising agencies*, (Case 352/8, judgment of 26.4.1988, Reports 1988-4 p. 2085) Bond Van Adverteerders, a group of advertisement agencies established in the Netherlands had let over to producers in another Member State to produce commercial TV programmes with Dutch subtitles intended for the Dutch public. The advertising was transmitted from the foreign TV broadcasting stations through Dutch cable TV broadcasting to the Dutch cable TV subscribers. This practice was unlawful within the Netherlands as all TV publicity was submitted to a special organisation, the STER, which administered fees for licences of transmission and controlled the content of the publicity. The agencies asserted that the Dutch legislation formed a barrier of trade in relation to the free movement of services within the EEC. The Dutch government asserted that the intention of the legislation was to protect cultural interests and to ensure the variety of programmes. The EC Court pronounced that although the protection of culture was legal, the present form of legal protection was considered unlawful as the free movement of services was hindered in favour of national economic interests.

In a later *case against the Netherlands* (Case 353/89, judgment of 25.7.1991, Reports 1991-7, I, p. 4069), the national TV broadcasting stations had to apply the facilities offered by a Dutch company, NOB (Nederlands Omroepproductie Bedrijf). Transmissions from foreign TV broadcasting stations had to be distributed by a Dutch administrator of cable plants as well as other restrictions were laid down. The Dutch government admitted that the nature of the rules was economic, but asserted that the rules intended to protect the public good and were inevitable for the diffusion of culture and for safeguarding the freedom of expression. The EC Court pronounced that the rules were discriminating against the foreign TV broadcasting stations and went further than necessary for protecting public interests of cultural and non commercial character.

A recent decision of the EU Commission, the *Commission Decision of 26 June 1997 (97/606/EC)*<sup>7</sup> on the exclusive right according to the EC Treaty art. 90, paragraph 3, (now art. 87), to send tv-advertisements in Flanders, deals with a similar problem. Exclusive rights which are admitted to be exercised by enterprises according to the EC Treaty art. 90, section 1, (now art. 87), may not as such necessarily be in accordance with the Treaty. A private enterprise in Belgium, the VTM, possessed the exclusive right to broadcast tv advertisements to the Flemish area. The VTM invoked arguments of cultural policy in order to maintain its monopoly. However, the EU Commission considered that even if the VTM had to serve public service interests, its activities hindered the free trade and violated the EC Treaty art. 52, (now art. 43) on freedom of establishment. The Belgian authorities had to stop the violation of the Treaty.

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<sup>7</sup> See Official Journal of the EC L 244 of 6.9.1997 p. 18.



In a *case against Belgium* (Case C-211/91, judgment of 16.12.1992, Reports 1992-10, I, p. 6757), the national Belgian legislation prohibited among other restrictions the transmission on a broadcasting network of TV programmes from other Member States where the programme was not in the language or one of the languages of the Member State in which the broadcasting service was established. The EC Court pronounced that the foreign broadcasting stations were prevented from offering programmes in languages which were neither those of their own country nor of Belgium. All the contested measures favoured economic interests in Belgium and hindered the free movement of capital and the access to free establishment for companies. The legislation could not be justified by the need to preserve the cultural heritage.

However, certain cultural aspects are taken into consideration by the EC Court of Justice. In the *case of the non-commercial broadcasting TV organization "Veronica"* (Case C-148/91, Vereniging Veronica Omroep Organisatie, judgment 3.2.1993) the Veronica organization which had obtained broadcasting time in the Netherlands had subventioned the establishment in Luxembourg of a commercial broadcasting TV station whose programmes were directed to the Dutch public. Such activities exceeded the licence obtained according to the Dutch statute, Mediawet. The EC Court admitted that the prohibition laid down in the Mediawet could be maintained when it was necessary for safeguarding the regulation of cultural pluralism of non-commercial character. A similar decision was taken by the EC Court in the judgment of 5.10.1994 concerning a broadcasting TV station established in Luxembourg.

So, measures for cultural protection are admitted only when they are necessary for the protection of non-commercial interests. Discriminatory measures are unlawful.

## 7 Interaction between Trade and Culture in EU

Originally, economy and culture have been considered as two separate areas with no mutual relationship in the European Community.

The regulation of the free movement of products has been issued in order to open the market and to create equal conditions of competition. Cultural products have been subject to the same conditions unless they exceptionally are part of the national heritage. Immaterial rights such as copy rights and models are recognized to the extent where they constitute a legitimate protection of the economic outcome related to the artistic and other non-economic values of the product. The creator or producer keeps the exclusive right to bring the products on the market. But once they are marketed, they are admitted to be transferred and resold without trade restrictions, according to the principle of consumption. However, the immaterial values as such remain protected. Copying and modification of the works is not admitted.

These principles are supported in a case recently decided by the EC Court of Justice, Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, Judgment of 4 November 1997. The court has pronounced the consumption rule: In case where the right of a producer to prohibit the use of his

trade mark in relation to goods<sup>8</sup> is exhausted once the goods have been put on the Community market by or with the consent of the proprietor, then the reseller may in the same way use the trade mark for promotion purposes in order to attract the attention of the public to those goods. But a balance must be struck between the legitimate interest of the trade mark owner in being protected against resellers using his trade mark in a manner which could damage the reputation of the mark and the reseller's legitimate interest in being able to resell the goods in question by using advertising methods which are customary in his sector of trade. So, within these limitations, the reseller is free to present the goods to the public, taking into consideration the concepts, usages and immaterial values shared by the public of the area. He may use the local culture in planning and exercising his marketing activities. The Court of Justice has also pronounced that literary and artistic works may be subject of commercial exploitation as a source of remuneration for the copyright owner with respect of the exclusive rights of performance and of reproduction for the author. The Court holds that in the concrete circumstances of the case the protection conferred by copyright as regards the reproduction of protected works in a reseller's advertising may not, in any event, be broader than that which is conferred on a trade mark owner in the same circumstances.

The European Union has recognized culture as part of the European Community. A regulation intending to conciliate economic and cultural interests seems to develop but the approach is complex as the conflicting interests are related to different aspects: The first one to well established common rules, the second one to a variety of national particularities. However, the the two areas cannot stay separated from each other.

## **8 The Interdependence Between Economic and Cultural Interests**

It seems legitimate that cultural considerations may not prevail when the home production gets a preferential economic position in relation to foreign products. However it is not easy to make a clear distinction between economic and cultural reasons. For example a system of resale price maintenance such as the Danish price system on books where resale prices on new books are fixed for the first one and a half year should promote the dispersion of the literature made for a narrow group for lecturers, whereas the books for a broad public should benefit from a system of free pricing which might in the long run stimulate the general interests for reading and so could constitute a support for the narrow literature. The way of proceeding should be not to impose an amount of restrictions on the free circulation. But the development has to be observed, and it must be possible for the Member States to take action when restrictive national arrangements seem to be the most appropriate solution in accordance with the principle of subsidiarity.

Copy right protects the immaterial values of the product to the extent where the original features are manifest through the external form of the work. The

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<sup>8</sup> Right conferred on the proprietor of a trade mark under art. 5 of the First Council Directive (89/104/EEC) of 21.12.1988 to approximate the Laws of the Member States relating to Trade Marks.

author has the exclusive right to decide if he wants to bring the product on the market. But once the decision has been taken the author should exercise the copy right in collaboration with a commercial man in order to get a profitable position on the market and benefit from the economic conditions which the product must comply with. The copy right is still based on different national rules related to the traditions of the different Member States. However, measures of harmonisation are progressing which should constitute an appropriate common level of protection for artistic and other original works.

The rules on good marketing practices intend to protect the commercial value of particular products. So, the economic value related to the artistic and other immaterial elements of the product may also be protected. The protection is directed against unfair competition and prohibits imitation. The legislation is issued on the national level, but common rules such as misleading or comparative advertising are being developed. National traditions of good practices may constitute the basis for the development of common conceptions which should promote the circulation of culture-related products.

Common measures of support should be taken for stimulating the professional skill of producers, creators and actors and for promoting projects of collaboration. Also the interests for the products should be stimulated through information and education of the consumers.

The use of cultural products by the enterprises for example through sponsoring and advertising is based on mutual commercial and cultural interests which needs a legal regulation. Common rules have been issued such as rules laid down in the Directive on radio- and tv broadcasting without frontiers and the "soft law" codes of conduct on sponsoring and good practices of advertising.

## **9 The Role of Culture in the Future EU**

The ultimate goal of the Union is not only to promote the economic progression and ameliorate the material standards of living but also to create solidarity between the peoples and promote the identity of European citizens. This intention has to be taken into consideration regarding the Eastern countries which actually negotiate for obtaining an EU membership.

The strenght of the European Union seems to reside in a balanced regulation which adequately supports a common European identity founded on local varieties as well as it admits promotion of the exchange not only of products but also of cultural concepts.

### ***Abbreviations***

T-EU: Treaty on the European Union, signed in Amsterdam on october 2, 1997.

EC Treaty: Treaty establishing the European Community (part of the Treaty of the European Union).

Reports: Reports of Cases before the Court of Justice of the European Communities and the Court of First Instance.