Cultural Diversity 'Under Review' The *Fachverband der Buch- und Medienwirtschaft* Case

Case C-531/07, Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH, Judgment of the Court (Second Chamber) of 30 April 2009

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Abstract

The increasingly high profile given to cultural diversity in the European Union (EU) reflects a long-term trend. However, despite the clarity of the EU legal framework and despite the strong political commitment to cultural diversity, the relationship between culture and the market remains problematic.

The purpose of this case note is to examine the Fachverband der Buch case and to highlight the still limited scope of cultural derogations within the EU. This ECJ judgment also shows the manifold and problematic borders of the meaning of 'cultural diversity'.

A. Introduction

In today's world, music, books, films and many other cultural goods and services move across European (and international) borders. The growing trade of these cultural products constitutes an important part of the European economy within the internal market.

Trade in cultural products results from the exports and imports of tangibles and intangibles conveying cultural content that might take the form of either a good or a service (books, recorded CDs, video games, printing or dubbing services, etc.). Trade in cultural products is the means by which to satisfy demand of different cultural goods and thus to ensure cultural rights. These rights are hedged with access qualifications, viewed in terms of the concrete opportunities available on the market for individuals or community groups to gain access to the culture that best matches their cultural profile.[1] Thus, these rights (which are fully recognized as fundamental rights)[2] may be deeply affected by market rules,

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1 E. Psychogiopoulou, *Accessing Culture at the EU Level: an Indirect Contribution to Cultural Rights Protection?*, *in* F. Francioni & M. Scheinin (Eds), Cultural Human Rights, 223, at 223 (2008).

2 This relationship between cultural rights and market logic emerges in Art. 5 of the UNESCO Declaration on cultural diversity, which reads as follows: "Cultural rights are an integral part of

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i.e. by a predominantly *laissez-faire* economy. The idea of 'cultural exception' stemmed from this consideration.[3] The 'cultural exception' was mainly based on an ideological approach that assumes the unfairness of market rules[4] and on the risk of cultural uniformity around the globe, going against the artistic values and against the values of culture itself.[5] The notion of cultural diversity represents the most recent development of the concept of the cultural exception.[6] Such an evolution represents neither a purely linguistic change nor a mere semantic evolution: it lies upon an ideological change. The protection of cultural goods and services cannot derive only from a 'preferential' treatment, but from a more complex approach, which includes protection and promotion of individual and collective rights and *identitarian* claims. As Von Bogdandy has pointed out, "the success of the term 'cultural diversity' relies conceptually on the theme of identity. Looking at international documents for the answer to why 'cultural diversity' is worthy of protection, one regularly finds the allusion to its role in the formation and protection of identity."[7]

The 'cultural exception' is well known in the EU legal framework. Former Article 36 EEC (now Article 30 EC) allowed for the restriction of the free movement of goods based on the need "to protect national treasures possessing artistic, historic or archaeological value." The exceptional character of cultural action can also be clearly recognized in Art. 87(3)(d) EC, which establishes a derogation clause to the general prohibition of state aid.

Currently, the structural and normative paradigm of the protection of cultural diversity seems to have replaced the concept of cultural exception even in the EU legal framework. Cultural diversity involves regimes of cultural federalism and the guarantee of religious, linguistic and other rights for persons belonging to cultural minorities, but also recognition of the distinctive nature of cultural goods

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human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms." On cultural rights as fundamental rights *see* G. Famiglietti, Diritti culturali e diritto della cultura. La voce "cultura" dal campo delle tutele a quello della tutela 62 (2010).

3 The 'cultural exception' is defined as the possibility to maintain European and National policies of "quotas" and grants of state aid to cultural sectors. S. Foa & W. Santagata, Eccezione culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate (2004) available at http://www.aedon.mulino.it/archivio/2004/2/santfoa.htm.

4 *See* F. Benhamou, L'economia della cultura 125 (2004); J. M. Dijan, La politique culturelle 37 (1996).

5 *See* for comprehensive overview, S. Regourd, L'exception culturelle (2004).

6 R. Mazza, *Liberalizzazione del commercio internazionale degli audiovisivi e salvaguardia dei valori culturali*, 2007 La comunità internazionale 761, at 764.

7 A. von Bogdandy, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship* (2007) at http://www.jeanmonnetprogram.org.

and services. A direct reference to the (protection and promotion) of cultural diversity appears in Article 151 EC. The Article stresses the need to comply with fundamental concepts: maintenance of cultural diversity while respecting the principle of subsidiarity, supplementing the action of Member States and promoting common heritage. Moreover, Article 151(4) EC establishes that the Community must take cultural aspects into account in its action under other provisions of the Treaty. The Nice Charter contains norms concerning cultural rights (freedom of expression, arts, religion)[8] as well as the explicit reference to cultural diversity in the Preamble and in Article 22. Additionally, cultural diversity features prominently in many political statements and soft law documents.[9]

The increasingly high profile given to cultural diversity in the European Union reflects a long-term trend. However, despite the clarity of the EU legal framework and despite the strong political commitment to cultural diversity, the relationship between culture and the market remains problematic.

The judgment discussed here, which goes to the heart of the issues that arise in the context of the free movement of goods, shows the limited scope of cultural derogations. The judgment demonstrates that such derogations cannot be used to distort free trade rules. It also shows the manifold and problematic borders of the meaning of 'cultural diversity'.

As will be seen, the Court of Justice, in this case, defended the market rules and clearly held that a rule prohibiting importers of German-language books from selling at a price below the retail price fixed or recommended by the publisher in the State of publication constitutes a restriction on the free movement of goods which cannot be justified for cultural reasons.

B. Factual Background

The Austrian legislation (*Bundesgesetz über die Preisbindung bei Büchern*, BGBl. I, 45/2000; hereinafter the *BPrBG*)[10] contained provisions on the obligation to sell German-language books at a fixed price. In particular, the legislation provided that the publisher or importer was to fix and publish a retail price and the importer

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[8] *See* Arts. 10, 11, 13 and 22 of the Charter of Fundamental Rights of the European Union, OJ 2010 C83, p. 389.

[9] *See, e.g.* Council Resolution on the Promotion of Linguistic Diversity and Language Learning in the Framework of the Implementation of the Objectives of the European Year of Languages 2001, of 14 February 2002, The commission Action Plan COM (2003) 449, the White Paper 'Teaching and Learning' COM (1995)590, the communication A New Framework Strategy for Multilingualism, COM (2005)596 final. The proposal for the European Year on Intercultural dialogue COM (2005)467 final. *See also* J. C. Barbato, *La diversité culturelle: élément de l'identité de l'Union Européenne en matière d'actions culturelles extérieures dans la perspective de l'Union élargie*, *in* J. Andriantsimbazovina & C. Geslot (Eds), Les Communautés et l'Union européennes face aux défis de l'élargissement 299 (2002). B. De Witte, *The Protection of Linguistic Diversity*, *in* X. Arzoz (Ed), Respecting Lingusitic Diversity 175 (2008).

[10] Many other legislative schemes in Europe provide for a policy of fixed prices, or for other measures supporting the book market. *See* http://www.culturalpolicies.net/web/comparisons-tables.php?aid=33&cid=45&lid=en.

was not to fix a price below the retail price fixed or recommended by the publisher for the State of publication, less any value added tax comprised in it.[11]

Beginning in August 2006, *LIBRO Handelsgesellschaft mbH* (*LIBRO*) advertised books published in Germany for sale in Austria at prices which were lower than the minimum set for Austria on the basis of German prices.

Fachverband der Buch- und Medienwirtschaft (the Trade association of the chamber of commerce for the book and media trade, hereinafter the *Fachverband*) asked the Austrian court for an injunction directing *LIBRO* to cease advertising at prices lower than those set by the Federal Law. The Austrian court of first instance granted that application, holding that, even if the Austrian binding price scheme constitutes a restriction on the free movement of goods contrary to Article 28 EC, it is "justified for cultural reasons and by the need to maintain media diversity."

LIBRO lodged an appeal on a point of law ('Revision'), and the *Oberster Gerichtshof* asked the Court of Justice for a preliminary ruling. The question referred was whether and, if so, on what conditions, Community law precludes a national statutory binding price scheme such as that at issue in the main proceedings. The national court asked whether the provisions on the free movement of goods in Articles 28 and 30 EC preclude certain elements of a price-fixing system for books. In particular, it asked whether Article 28 EC should be interpreted as meaning that it precludes the application *per se* of national provisions which oblige only importers of German language books to fix and to publish a retail price for books imported into Austria which is binding on the retailer, where the importer cannot fix a retail price which is lower than the retail price fixed or recommended by the publisher for the State in which the book is published. In case of a positive answer, the Austrian judge asked whether the national statutory obligation to sell books at the fixed price, where incompatible with Article 28 EC, can be justified by reference to Article 30 EC or Article 151 EC.

In case of a negative answer to the first question, the Austrian judge asked whether the national statutory obligation to sell books at the fixed price is compatible with Articles 3(1)(g) EC, 10 EC and 81 EC, notwithstanding the fact that it succeeded and replaced the previous contractual obligation on booksellers to sell at prices fixed by publishers for published works (the 1993 *Sammelrevers* scheme).[12]

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[11] Para. 3 of the *BPrBG* reads as follows: "(1) The publisher or importer of goods falling within Paragraph 1 shall fix and publish a retail price for the goods falling within Paragraph 1 which he publishes or which he imports into Austria.(2) An importer shall not fix a price below the retail price fixed or recommended by the publisher for the State of publication, or the retail price recommended for Austria by a publisher which has its seat elsewhere than in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA), less any value added tax ['VAT'] comprised in it. (3) An importer who purchases goods falling within Paragraph 1 in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA) at a price which is lower than the normal price may, notwithstanding subparagraph (2) above, apply a discount to the price fixed or recommended by the publisher for the State of publication, or in the case of re-import the price fixed by the Austrian publisher, proportionate to the commercial advantage he has obtained."

[12] *Sammelrevers 1993* was a standard-form agreement between the respective publishers,

C. The Advocate General's Opinion

Before examining the Court's judgment it is useful to review Advocate General Trstenjak's Opinion, delivered on 18 December 2008. She traced the legal framework and observed that the Court had already been called on to rule on the compatibility with Community law of price-fixing systems for books.[13] Such systems are relatively widespread in Europe and often justified in terms of the status of books as cultural assets. The Advocate General recalled that supporters of fixed prices justify such systems – which entail vertical price-fixing agreements, or else the equivalent of vertical price-fixing – on the basis of the importance of a diversity of titles and a supply of books at reasonable prices. Nonetheless, vertical price-fixing agreements are measures which give rise to questions regarding compatibility with Community law, despite the fact that both the European Parliament and the Council have expressed a positive attitude to national price-fixing systems for books.

The Advocate General first considered whether the Austrian system can be considered compatible with Article 28 *et seq.* EC, *i.e*. whether Article 28 EC must be interpreted as meaning that a national provision such as paragraph 3 of the *BPrBG* is a measure having effects equivalent to a restriction on imports. The Advocate General underlined that the Court has consistently held that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions (the *Dassonville*

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wholesalers and retailers which applied in particular to German-language books. That system concerned the fixing of the price of German-language books and was based, in essence, on the obligation on booksellers to apply the retail price established by the publisher. There was no horizontal agreement between the publishers. However, the conclusion and monitoring of individual agreements were carried out on a centralised basis through price maintenance trustees. The main element of the *Sammelrevers 1993* was the establishment of fixed retail prices, that is to say, the prices which retailers could charge their customers. On 8 February 2000, five years after Austria joined the European Union, the *Sammelrevers* scheme was notified to the Commission, which demanded that the Austrian publishers abandon the system and that all cross-border impacts be eliminated by 30 June 2000 at the latest. The notifying parties therefore presented, on 31 March and 10 May 2000, a modified version of the *Sammelrevers* scheme providing for the termination of the contracts concluded by the Austrian publishers and booksellers, which therefore formally left that system. The new system was then the subject of a negative clearance (Case COMP/34.657 – *Sammelrevers*, OJ 2000 C 162/25) in which the Commission found a lack of a significant impact on cross-border trade. *See* E. Psychogiopoulou, *The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?*, 12 European Law Journal, 575, at 580 (1996).

[13] *See, inter alia,* Judgment of 10 January 1985, Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v. SARL "Au blé vert" and others*, [1985] ECR 1; Judgment of 28 October 1986, Case 355/85, *M. Driancourt v. Michel Cognet*, [1986] ECR 3231; Judgment of 3 October 2000, Case C-9/99, *Echirolles Distribution SA v. Association du Dauphiné e altri*, [2000] ECR I-8207. On this case law, *see* M. Niedobitek, The Cultural Dimension in EC Law 140 *et seq* (1997).

principle).[14] She then recalled the Court's ruling in *Keck*.[15] In that case, the Court made it clear that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (the *Keck* exception).

The Advocate General considered that the Austrian provisions constituted a 'selling arrangement' but that they were addressed, on the one hand, to Austrian publishers and, on the other, to importers of German books.[16] She argued that Austrian and German books are *not* treated in the same way under the *BPrBG,* and that this may have a negative effect on the selling of German books in Austria. According to the Advocate General, a German publisher may, unlike an Austrian publisher, operate his own pricing policy for Austria if he allows the importer to charge a purchase price which is lower than the normal one. Consequently, the German publisher must, if necessary, submit to trade terms which reduce his sales in order to give effect to his pricing policy in Austria, but an Austrian publisher need not do this. In particular, the Austrian retail price for Austrian books can be determined by reference to Austrian market conditions, but in the case of German books the Austrian retail price is determined by the German retail price in so far as a lower price may not in principle be charged. Consequently, an essential parameter of competition for the sale of German books is in principle determined not by reference to Austrian market conditions but by reference to German market conditions.[17]

The Advocate General considered various arguments, but concluded that this unequal treatment could not fall within the *Keck* exception. It therefore constituted, in her view, a measure having equivalent effect to a restriction of imports within the meaning of Article 28 EC.[18]

The Advocate General then dealt with the second question referred by the Austrian court, *i.e*., whether, the Austrian provision could be justified for under Article 30 or Article 151 EC. In the submissions of those parties there did not seem to be any justification for unequal treatment as between Austrian and German books.

The Advocate General's arguments rely on the general statement that books fall within the substantive scope of the free movement of goods. The cultural nature

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[14] Judgment of 11 July 1974 in *Case 8/74, Procureur du Roi v. Benoît and Gustave Dassonville*, [1974] ECR 837.

[15] Judgment of 24 November 1993 in *Joined Cases C-267/91 and C-268/91, Bernard Keck and Daniel Mithouard*, [1993] ECR 6097.

[16] In the present case, the difference lies in the fact that the Austrian retail price of German books, unlike that of Austrian books, is not discretionary and therefore cannot be fixed solely by reference to market conditions in Austria. Accordingly, paras. 3(1) and (2) of the *BPrBG* give rise to unequal treatment which relates to the origin of the books.

[17] Para. 45 *et seq.*

[18] Para. 89.

of such goods, she said, cannot be reason to exclude them from free movement rules. She also stressed that Article 30 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Furthermore, she insisted that "Article 151(4) does not amount to a 'cultural escape clause' in relation to other provisions of the Treaty."[19] This led her to the conclusion that Article 151(4) cannot confer upon Member States discretionary power to enact measures that result in discrimination in selling goods from other Member States. The differential treatment of German and Austrian books was thus in her view incapable of being justified on the basis of that provision.[20]

Lastly, the Advocate General considered whether the Member States' duty of sincere cooperation under the second paragraph of Article 10 EC, read in conjunction with the competition law provisions of Articles 3(1)(g) and 81 EC, is to be interpreted in such a way that it would preclude the *BPrBG*.

According to settled case law, an infringement of the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) and 81(1) EC may be presumed only where a Member State: requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81, or reinforces their effects; or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.[21] On the basis of this case law, the Advocate General concluded that "the adoption of a State-organised price-fixing system for books is not, in principle, a breach of the duty of good faith under the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) and 81 EC in the group of cases where an anti-competitive agreement is rendered superfluous. This, however, is subject to the conditions that the price-fixing system for books is purely national and that the rules of that system are not contrary to Community law, particularly the provisions on the free movement of goods. In the present case, the second condition at least is not fulfilled."[22]

D. The Judgment of the Court

The Court began by stating that the aim of the judgment was to answer the question of whether the provisions of the EC Treaty on intra-Community trade precluded those of the *BPrBG* relating to the importation from another Member State of German-language books.

Firstly the Court considered whether Article 28 EC must be interpreted as meaning that it precludes national provisions on the price of imported books (such

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19 Para. 107.

20 The Advocate General added that "even supposing there were an admissible justification, the unequal treatment of Austrian and German books could not be regarded as proportionate. There should be more moderate ways of attaining the desired objectives, particular the protection of books as cultural assets and consumers' interest in reasonable prices for books." (Para. 108).

21 *See* Judgment of 21 September 1988 in *Case 267/86, Pascal Van Eycke v. ASPA NV.*, [1988] ECR 4769.

22 Para. 195.

as those contained in *BPrBG)*. The Court recalled that, under *Dassonville,* all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered measures having equivalent effect to quantitative restrictions for the purposes of Article 28 EC. The Court then recalled the *Keck* exception.[23] According to the Court, "in so far as the national provisions on book pricing, such as those in Paragraph 3 of the *BPrBG*, do not concern the characteristics of those goods, but solely the arrangements under which they may be sold, it must be regarded as concerning selling arrangements within the meaning of *Keck and Mithouard*."[24]

Thus, the Court found, following the Advocate General's approach that Paragraph 3(2) of the *BPrBG*, by prohibiting Austrian importers of German-language books from fixing a retail price below that fixed or recommended by the publisher for the State of publication, provided for less favourable treatment for imported books and were to be regarded as a measure having equivalent effect to an import restriction contrary to Article 28 EC.

The Court stressed the fact that, for imported books, the Austrian legislation created a distinct regulation which had the effect of treating products from other Member States less favourably. The European judges clarified that factual circumstances such as those adduced by the German Government were irrelevant. Indeed, the German Government had contended that all the considerations concerning the restrictive effects of the Austrian provisions were unfounded because in reality the importation into Austria of books from Germany covered the majority of the Austrian market, and that the Austrian market for German-language books could not be considered independently from the German market. Equally irrelevant to the Court was the option, granted to the importer by Paragraph 3(3) of the *BPrBG*, of applying a price lower than that charged by the foreign publisher, and the option, granted to the retailer by Paragraph 5 of the *BPrBG*, of applying a reduction of 5% to the price fixed.[25]

The Court then considered the purpose of the measure (namely "to achieve a pricing system for books which has regard to the status of books as cultural assets, to the interests of consumers in reasonable prices for books, and to the commercial characteristics of the book trade"). The ECJ, recalling the *Leclerc* case, pointed out that "the objectives raised by the referring court, such as the protection of books as cultural objects, cannot constitute a justification for measures restricting imports within the meaning of Article 30 EC."[26]

Even more significantly, the Court restricted the scope of the "cultural exception" in Art. 30 EC, considering that the exception cannot be interpreted as having the broader meaning of "protection of cultural diversity." The Court stated that "the protection of cultural diversity in general cannot be considered to

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[23] *See above* Section B.

[24] Para. 20.

[25] Para. 29.

[26] Para. 32 (citing Case 229/83, *Association des Centres Distributeurs Leclerc et Thouars Distribution and others*, at para. 23).

come within the 'protection of national treasures possessing artistic, historic or archaeological value' within the meaning of Article 30 EC."[27]

Furthermore, again following the Advocate General, the Court underlined that Article 151 EC, "which provides a framework for the activity of the European Community in the field of culture cannot be invoked … as a provision inserting into Community law a justification for any national measure in the field liable to hinder intra-Community trade."[28]

In principle, the Court did accept that "the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods." However, it stressed that that these measures must be proportionate, in the sense that they must be "appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it."[29] In that regard, said the Court, "the objective of the protection of books as cultural objects can be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the Austrian market which takes the conditions of that market into account."[30]

As a consequence of these findings, and following Advocate General yet again, the Court did not regard it as necessary to consider the third question posed by the national court, *i.e.*, the question of whether the *BPrBG* was compatible with the Member States' duty of sincere cooperation under the second paragraph of Article 10 EC, in conjunction with the competition law requirements of Articles 3(1)(g) and 81 EC.

E. Analysis and Concluding Remarks

The *Fachverband der Buch* case provided the Court with a new opportunity to clarify the scope of the principle of cultural diversity. This is a question that has already attracted much attention from academics and other commentators.[31] Indeed, the Court does not avoid this query. However, its answer is, to some extent, over-simplified. The tension between the EU's internal market rules and national rules regarding cultural goods is resolved by recognizing the primacy of free trade. Even if the Court's judgment in *Fachverband der Buch* does not differ substantially from previous judgements on book market,[32] this it seems to ignore constitutional and political trends. As mentioned above, in recent years (taking into account Article 151(4) EC) there has been a shift from the idea of the 'cultural

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27 *Id.*

28 Para. 33.

29 Para. 34.

30 Para. 35.

31 *See, inter alia,* B. De Witte, *Non-market Values in Internal Market Legislation*, *in* N. Nic Shuibhne (Ed.), Regulating the Internal Market 61 (2006); E. Psychogiopoulou, The Integration of Cultural Considerations in EU Law and Policies (2008). D. Ferri, La costituzione culturale dell'Unione Europea (2008).

32 *See supra* note 12.

exception' to a more complex (and inclusive) notion of cultural *diversity,* on the basis of which a State system of financial aid and of protection of cultural goods should not be regarded as inimical to the internal market.

Art. 151 EC cannot be seen as a provision inserting into Community law a justification for any national measure liable to hinder intra-Community trade.

Even if Art. 151(4) EC contains a general clause of consistency for cultural aspects with relevant reference to the respect and promotion of cultural diversity, added by the Amsterdam Treaty,[33] the Court largely ignores (or neglects) these cultural aspects. According to the European judges, the principle of cultural diversity cannot be used to justify measures having equivalent effect to a restriction of imports within the meaning of Article 28 EC (such as the Austrian one). This means that, according to the Court, cultural diversity is unable to provide a sound normative foundation for the State regulation of the cultural market or of cultural objects such as films, books, etc. But this implies that the Court deprives this principle of any real legal significance. In particular, the Court does not recognize the protection of cultural diversity as a constitutional value or as a pre-condition to economic freedom.

Admittedly, the freedom of movement cannot be seen as incompatible with the promotion of cultural diversity. Culture (or rather cultural diversity) and the market are not incompatible: the market reveals the *condition* of a society's culture. Nonetheless, if the defence of freedom of movement in cultural goods and services maintains its present course, the current EC rules as interpreted by the Court of Justice would not allow countries to give sufficient protection to cultural values.

It is true that there are other policy options, other than fixed price policies, which countries can and should employ. In this respect, the Court's judgment can stimulate the development of new and/or effective rules for the protection of cultural goods (and contents/values). However, the weakness of the judgment is that the reasoning of both the Advocate General and the Court seems to lie on a simple equation that conflicts with the assumptions upon which cultural diversity is based. According to the Court, books are cultural goods, but it seems cultural goods are not different from other goods. This is in stark contrast with the UNESCO Convention,[34] under which the principle of protection and promotion of

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[33] *See* W. Maurus, *The "Culture Clause" in Article 151, par. 4 TCE and its Implications for the Policies of the European Union*, *in* E. Banús & B. Elío (Eds.), Actas del VI Congreso "Cultura Europea"-Pamplona, 25-28 october 2000, at 721 (2001).

[34] The UNESCO Convention on the protection and promotion of the diversity of cultural expressions was adopted in Paris on 20 October 2005. It entered into force on March 2007 and is intended to fill a legal *lacuna* by establishing a series of rights and obligations, at both national and international levels, with a view to the real protection and promotion of cultural diversity. EU Member States, acting individually, and the European Community (EC), represented by the Commission, both played an important role in the approval of the Convention. *See*, *ex multis,* S. Regourd, *Le paradigme européen de la diversité culturelle à l'aune de la Convention UNESCO*, (2006) Revue des Affaires Européennes 607; G. Poggeschi, *La "Convenzione sulla protezione e la promozione della diversità delle espressioni culturali" dell'Unesco entra a far parte del* corpus *legislativo italiano. Una novità nel panorama degli strumenti giuridici internazionali?* (2007) available at http://www.aedon.mulino.it.

cultural diversity is based on the understanding that cultural activities, goods and services, as vehicles of identity, values and meaning have a 'distinctive nature'.[35] This special nature, despite the judges' reasoning, has been fully acknowledged by the European Commission, which accepts that "cultural products and services have specific characteristics that mark them out from other forms of production."[36]

The Court's judgment is only a 'solid' judgment from the point of view of the freedom of movement. It clearly shows a negative attitude of the Court of Justice towards (cultural) derogations to internal market rules.

[35] *See* Art. 1 of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions.

[36] *See* Odile Quintin's speech at the meeting on the Convention on the Protection and Promotion of the Diversity of Cultural Expression, organized by the UNESCO German Commission on 26 November 2007 in Paris (*see* http://www.unesco.de/fileadmin/medien/Dokumente/Kultur/Konsultation_Paris_2007/Speech_Quintin.pdf).