

In Defense of Member State Culture: The Unrealized Potential of Article 151(4) of the EC Treaty and the Consequences for EC Cultural Policy

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In Defense of Member State Culture: The Unrealized Potential of Article 151(4) of the EC Treaty and the Consequences for EC Cultural Policy

Collette B. Cunningham*

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Introduction

The level of integration achieved by the Member States of the European Community (EC or Community) is without precedent in modern history.¹ Initiated in the form of a six-member coal and steel management entity² designed to soothe post-war fears and drive economic development, European cooperation has resulted in a complex union of fifteen states with comprehensive economic, political, and social policies. The Community continues to grow both in size and scope, as evidenced by the recent introduction of the Euro and the anticipated entrance of thirteen new Member States.³

One dramatic example of the expansion of Community competence⁴ is the area of culture.⁵ The Community initially renounced the idea of a

1. DESMOND DINAN, *EVER CLOSER UNION? AN INTRODUCTION TO THE EUROPEAN COMMUNITY 2* (1994).

2. This entity was the European Coal and Steel Community (ECSC). *TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY*, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter *ECSC TREATY*]. The Community, which included France, Germany, Italy, Belgium, the Netherlands, and Luxembourg, began operating in August 1952, after ratification by the Member State Parliaments. DINAN, *supra* note 1, at 25-26.

3. The European Community began accession negotiations on March 31, 1998 with Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia. The EC invited Bulgaria, Latvia, Lithuania, Romania, the Slovak Republic, and Turkey into partnerships to speed their applications for membership. Finally, Malta reactivated its application for membership in October 1998. Europa, *Enlargement: Introduction*, at <http://europa.eu.int/comm/enlargement/intro/index.htm> (last visited Mar. 3, 2001).

4. The Community has competence in a field when a particular Treaty provision authorizes it. See generally PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 110-19 (2d ed. 1998).

5. A definition of culture is elusive because of the word's many connotations and meanings. For a sampling of definitions that indicate the scope of the word, see LOMAN ET AL., *CULTURE AND COMMUNITY LAW: BEFORE AND AFTER MAASTRICHT* (1992). The traditional view of culture includes "the highest intellectual achievements of human beings: the musical, philosophical, literary, artistic and architectural works, techniques and rituals which have most inspired humanity and are seen by communities as their best achievements." Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in *THE RIGHTS OF PEOPLES* 94 (James Crawford ed., 1988). Another definition offers a more anthropological perspective, and includes "the totality of the knowledge and prac-

“cultural policy.”⁶ Indeed, the word “culture” did not appear in an official document until 1969, and then only in an economic context.⁷ However, in the quest to create a European Economic Community (EEC), it became increasingly apparent that the elimination of trade barriers would have consequences for European culture. The elimination of barriers to trade meant eliminating restrictive economic practices established in and between the Member States. Some of the challenged practices had cultural value, preserving long standing traditions or practices. Cultural issues became intertwined with economic ones, and though the Treaty Establishing the European Economic Community (EEC Treaty)⁸ did not authorize Community institutions to take action in pursuit of cultural goals, they gradually began to do so. For almost twenty years, Community institutions increasingly recognized the need to preserve culture.

Europe is not a homogeneous place. To the contrary, the fifteen states that comprise the EU are nation states in their own right, each with a distinct cultural identity. A substantial part of the intrigue of Europe derives from the many nations that, though geographically close, are pleasantly distinct. Culture encompasses a people’s language, clothing, food, literature, music, art, architecture, and history and symbolizes the values of a nation and her peoples. Recognition of culture is important to preserve that which a people treasures. Preservation of national differences adds value to the world by preserving individuality in a time when free enterprise demands that borders be broken down.

By the early 1990s, commentators began to advocate expanding the Community’s competence to include culture. The goal was achieved in 1992 when the EEC Treaty was amended by the Treaty on European Union (TEU) to include a Title on Culture.⁹ The sole article—now Article 151 of

tices . . . of each of the particular groups of a society . . .” C. Guillaumin, *Women and Cultural Values*, in *CULTURES* (1979). This Note broadly defines culture as the abstract collection of all that is valued within a particular society. Applying this broad definition to the European Community, one readily acknowledges that culture is a pervasive concept. Every practice in society impacts culture in some way, from the practice of labeling wine to the manner in which football players are selected. The EC has not defined culture in a restrictive manner and the current discussion does not require such a limitation. For potential criticism of adopting such a broad definition of culture and the author’s responses, see *infra* note 260.

6. Comm’n of the Eur. Communities, *Community Action in the Cultural Sector*, BULL. EUR. COMMUNITIES, 1977, Supp. 6-1977 ¶ 3, at 5 [hereinafter *Community Action in the Cultural Sector*].

7. Comm’n of the Eur. Communities, *The Hague Summit, Final Communiqué of the Conference (2 Dec. 1969)*, BULL. EUR. COMMUNITIES, 1970, 1-1970 ¶ 4, at 12 [hereinafter *Hague Summit Final Communiqué*]. See also quote cited *infra* note 51.

8. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY], amended by TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter TEU], amended by TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The Treaty is now known as the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

9. TEU tit. IX (as in effect 1993) (now tit. XII). This Title contained one article—Article 128—on Culture. Article 128 was amended and renumbered by the Treaty of

the EC Treaty¹⁰—officially authorized institutional action on the basis of cultural considerations, thus providing the legal basis that the EEC Treaty had been lacking. Yet the Article also went further. For the first time the Community was required, under Article 151(4), to “take the cultural aspects” of its actions “into account under other provisions” of the EC Treaty.¹¹ The Article did not limit this admonition to a select group of provisions; rather, the logical inference was that action under any provision would have to take culture into account. Taken one step further, this indicated that Commission decisions to challenge a Member State practice as restricting the free movement of goods, persons, services, or capital¹² would have to recognize cultural value as a possible justification for the

Amsterdam and is currently Article 151 of the Consolidated Version of the EC Treaty. This Note refers to the Article as currently numbered, though it should be noted that most of the documents cited were written prior to implementation of the Treaty of Amsterdam and thus internally refer to Article 128.

10. The text of Article 151 reads as follows:

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
 - improvement of the knowledge and dissemination of the culture and history of the European peoples;
 - conservation and safeguarding of cultural heritage of European significance;
 - non-commercial cultural exchanges;
 - artistic and literary creation, including in the audio-visual sector.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe.
4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, *in particular in order to respect and to promote the diversity of its cultures.*
5. In order to contribute to the achievement of the objective referred to in this article, the Council
 - acting in accordance with the procedure referred to in Article 189b and after consulting the Committee of Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedures referred to in Article 189b;
 - acting unanimously on a proposal from the Commission, shall adopt recommendations.

EC TREATY art. 151 (emphasis added, denoting phrase added by the Treaty of Amsterdam). The TEU also mentioned “culture” in two other areas and amended the EC Treaty accordingly. Article 3(q) now sets forth as one of the activities of the Community contributing to “the flowering of the cultures of the Member States.” EC TREATY art. 3. Article 87 (formerly article 92) on aids granted by States includes “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest” as aid that is considered compatible with the common market. *Id.* art. 87(3)(d).

11. *Id.* art. 151(4).

12. *See id.* tit. I (focusing on free movement of goods), tit. III (focusing on free movement of persons, services and capital).

practice or that anti-competitive practices might be justified by their cultural value.

Acting under authority of Article 151, the Community currently administers an extensive funding program to support cultural undertakings in the Member States.¹³ This financing scheme, however, has represented the bulk of the Community's cultural policy in the years since Maastricht and the signing of the TEU. While the EC Treaty does not state that funding for cultural projects must be provided, Article 151 does require the Community to "take cultural aspects into account . . . in order to respect and to promote the diversity of its cultures."¹⁴ This explicit mandate is not being followed. The Commission has not altered its evaluation of Member State or individual practices in response to Article 151(4). Further, the European Court of Justice (ECJ) has failed to address the provision in many situations where it clearly applied. And where 151(4) has been mentioned, the ECJ has not accorded it much weight.

This Note argues that the Community is not utilizing the power given to it in Article 151(4) of the EC Treaty.¹⁵ Part I provides a brief background on the EU, focusing on why the cultural competence is necessary. Part II presents an analysis of the development of cultural policy in the Community by examining the legislative and judicial treatment of culture prior to 1992. Part III analyzes current cultural policy since the addition of Article 151 to the EC Treaty¹⁶ and explores why Article 151(4) has not been used more effectively. Part IV examines the recent dispute over cross-border fixed book prices, a clear example of where Article 151(4) could and should be heeded.

Finally, Part V emphasizes that, in order to recognize the full scope of the Community's competence, analysis under Article 151 should be an explicit step in legislative and judicial decision-making. The Commission should take full account of the cultural aspects of an alleged anti-competitive practice before declaring it illegal and should recognize cultural value as a potential justification for Member State practices deemed to impede the free movement of goods, persons, services, or capital. Likewise, the ECJ must recognize the import of Article 151(4) and clarify the action required under that provision. This Note concludes that Article 151(4) must be used more effectively to preserve the richness of the cultural mosaic within the Community.

13. Communication from the Commission to the European Parliament, the Council and the Committee of the Regions: First European Community Framework Programme in Support of Culture (2000-2004), 1998 O.J. (C 211) 18 [hereinafter First European Community Framework Programme in Support of Culture]; Proposal for a European Parliament and Council Decision Establishing a Single Financial and Programming Instrument for Cultural Cooperation (Culture 2000 Programme), 1998 O.J. (C 211) 18 [hereinafter Proposal for a Single Financing and Programming Instrument].

14. EC TREATY art. 151(4).

15. *Id.* ("The Community shall take cultural aspects into account in its action under other provisions of this Treaty.")

16. This analysis is based on the author's own evaluation of historical Community documents.

I. Background

A. The Need to Preserve Member State Individuality: The Integrative Force of the European Union

The origins of the current EC can be traced to the European Coal and Steel Community (ECSC).¹⁷ Founded in 1951 to establish a common market in coal and steel, the ECSC stabilized post-war relations between France and Germany and provided valuable economic development.¹⁸ Most importantly, the ECSC represented the “first step” in the integration of Europe.¹⁹

The second step came in 1957 with the Treaty Establishing the European Community (EEC Treaty)²⁰ and the Treaty Establishing the European Atomic Energy Community (Euratom Treaty).²¹ The underlying motivation for the treaties may have been political, but their focus was clearly economic.²² The EEC Treaty introduced, for example, the plan for economic integration between the six original member countries.²³

As other states joined the EEC,²⁴ calls for political cooperation grew, and in 1986 the Single European Act (SEA) amended the EEC Treaty.²⁵ The SEA laid out a timetable for economic integration and expanded Community competence to include such substantive areas as social and environmental policy.²⁶ In 1992, the ambitious TEU made further amendments.²⁷ The most significant changes included the creation of the EU,²⁸ the renaming of the “European Economic Community” to the “European Community,” a further expansion of Community competence, and

17. ECSC TREATY.

18. CRAIG & DE BURCA, *supra* note 4, at 9.

19. FRANCOIS DUCHENE, JEAN MONNET: THE FIRST STATESMAN OF INTERDEPENDENCE 239 (1994).

20. EEC TREATY.

21. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY].

22. CRAIG & DE BURCA, *supra* note 4, at 11. The aims of the Treaty, set forth in the preamble and Article 2, were to establish a common market, approximate the economic policies of the Member States, develop economic activities in the Community, increase stability, raise the standard of living, and promote closer relations between Member States. *Id.*

23. EEC TREATY art. 3.

24. The United Kingdom originally intended to remain outside the EEC and initiated the European Free Trade Association (EFTA) with Norway, Sweden, Austria, Switzerland, Denmark, and Portugal. In 1961, the U.K. applied for Community membership but the application was vetoed by France. Not until General Charles de Gaulle resigned from the French presidency was the U.K. accepted into membership. See CRAIG & DE BURCA, *supra* note 4, at 14-15. The U.K., Ireland, and Denmark joined the EEC in 1973, followed by Greece in 1981, and Spain and Portugal in 1986. *Id.* at 15. Austria, Sweden, and Finland subsequently joined the Community in 1995, bringing the current total to fifteen Member States. *Id.* at 29-31.

25. SINGLE EUROPEAN ACT, Feb. 17, 1986, 25 I.L.M. 503 (effective July 1, 1987) [hereinafter SEA].

26. CRAIG & DE BURCA, *supra* note 4, at 21.

27. TEU.

28. The European Union encompasses three pillars. The first is the Community pillar, which contains the EC, ECSC, and Euratom Treaties—the constitutive treaties of the European Union. The second pillar is the Common Foreign and Security Policy. The third pillar is Police and Judicial Co-Operation in Criminal Matters. CRAIG & DE BURCA,

the establishment of a timetable for European Monetary Union.²⁹ The most recent revision to the EC Treaty took place in 1997 with the Treaty of Amsterdam.³⁰

The driving force behind the EEC was the creation of a common market and the elimination of barriers to trade; it was not created to be the protector of European culture. Notwithstanding the changes made in 1992, these economic missions are still of primary importance. Thus, national laws that violate the Treaty's provisions on freedom of movement or competition will be challenged by the Commission, regardless of any cultural impact.³¹ This tension between EC economic policy and Member State cultural values gained widespread attention when the ECJ determined that EC law precluded the application of longstanding national football association rules limiting the number of foreign players who could be fielded in competition matches. Notwithstanding the association's arguments that nationalism played an important part in football, the ECJ determined, in *Union Royal Belge des Societes de Football Association v. Bosman*, that the players' right to freedom of movement superseded any Member State interest in watching their own footballers play on national teams.³² The law at issue in *Bosman* was arguably a reflection of cultural values and traditions. Such laws, regardless of any cultural impact, will be challenged by the Commission if they violate the EC Treaty provisions focused on freedom of movement or competition.³³

Purely economic common market regulation thus has the potential to wreak havoc on other, noneconomic values. Not only does such regulation strike down economically discriminatory laws, it also affects laws whose aim truly is to preserve and protect culture. The founding Treaties of the EU address this tension to some extent,³⁴ but protecting culture was not a legally permissible reason for violating any of the economically-based laws.

This Note advocates interpreting Article 151 as altering pre-1992 law by providing an exception to protect practices that are based in cultural notions from the prohibition on anti-competitive measures and from the provisions mandating free movement. In a time when free enterprise demands that borders be broken down, preservation of Member State cultural idiosyncrasies should be an admirable goal, not a condemned practice. Otherwise, the Member States of the EC risk the gradual elimination of those characteristics that make them unique.

supra note 4, at 32-45. For a discussion of the pillar structure under the TEU prior to the Treaty of Amsterdam amendments see *id.* at 25-29.

29. See generally TEU.

30. TREATY OF AMSTERDAM.

31. ELIES STEYGER, NATIONAL TRADITIONS AND EUROPEAN COMMUNITY LAW 2 (1997).

32. Case C-415/93, 1995 E.C.R. I-5040, [1996] 1 C.M.L.R. 645 (1995).

33. STEYGER, *supra* note 31, at 2.

34. See, e.g., EC TREATY art. 30 (formerly art. 36) (allowing restrictions on the free movement of goods when justified, *inter alia*, to protect "national treasures possessing artistic, historic or archaeological value").

B. Sources of Law and the Institutions that Create Law

The sources of Community law are categorically familiar to most sovereign states. Constitutive treaties are similar to a national constitution, legislative bodies create legislation, and courts render judicial opinions.³⁵ The types of Community legal action, however, are unique to the EC and fall into four categories: regulations, directives, decisions, and recommendations and opinions.³⁶

In most cases, the Community institutions may legislate through any of the first three categories.³⁷ The effect of each type of legal action, however, differs.³⁸ Regulations are binding on all Member States, whereas directives may be selectively addressed to particular Member States and are only binding as to the end to be achieved.³⁹ Decisions are binding in their entirety, but only on those to whom they are addressed. Recommendations and opinions have no binding force, though they might be examined in judicial proceedings. Recommendations provide a mechanism for the Commission to comment on an area of the law and are particularly pertinent to the development of policy.

These types of legislation are implemented through the actions of the three political institutions: the Commission,⁴⁰ the Council,⁴¹ and the European Parliament (Parliament).⁴² The Commission is the policy-making body and is the only institution with the sole power to initiate legislation.⁴³ The Council is a decision-making body, responsible for

35. International agreements and general principles of law are also sources of EC law. See INNS OF COURT SCHOOL OF LAW EUROPEAN COMMUNITY COMPETITION LAW IN PRACTICE 195 (2d ed. 1999).

36. EC TREATY art. 249 (formerly art. 189). Article 249 states:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

Id.

37. See CRAIG & DEBURCA, *supra* note 4, at 106 n.2 (giving examples of Treaty articles that require legislation by way of regulation), 109 & nn.17-18 (giving examples of treaty articles that require policy-making by way of decision).

38. ECJ decisions have interpreted the effects of each type of legislation more broadly than the original interpretations. For example, the ECJ has held that directives have direct effect and that Member States can be liable in damages for nonimplementation of a directive. CRAIG & DEBURCA, *supra* note 4, at 109.

39. *Id.* Thus, the method of implementation is left to the State addressed.

40. EC TREATY arts. 155-63.

41. *Id.* arts. 145-54.

42. *Id.* arts. 137-44.

43. MICHAEL HOPKINS, POLICY FORMATION IN THE EUROPEAN COMMUNITIES 3 (1981). The twenty members, including at least one representative from each Member State, make decisions through majority vote. CRAIG & DE BURCA, *supra* note 4, at 50.

approving the policies proposed by the Commission.⁴⁴ The Parliament is a forum for discussion and examines Commission proposals prior to the Council vote.⁴⁵ The other primary EU institution is the ECJ, the principal court of the Community.⁴⁶ The ECJ has jurisdiction to hear cases brought by a Member State or one of the Community institutions and also hears cases brought by private litigants in the Member States.

Each of the Community institutions has an affirmative role in shaping cultural policy. Within the Commission, there is a Directorate-General for Education and Culture.⁴⁷ The Council meets twice a year with the Ministers responsible for culture in each Member State.⁴⁸ Parliament has a Committee on Culture, Youth, Education, and the Media.⁴⁹ Finally, the ECJ has responsibility for interpreting and applying Article 151 in the cases that come before it.

C. Pre-Maastricht: The Infiltration of Culture into Economic Policy

As stated by two noted authorities on EU law, "it is important to understand the legal doctrine and policy of the Community in light of the EU's historical and political background and context."⁵⁰ Therefore, to fully understand the Community's current cultural policy, one must be conscious of its historical evolution. The following analysis examines the role of culture both before and after the creation of an explicit competence in culture. It demonstrates that although the Community has embraced the

44. EC TREATY art. 145. Each Member State has one representative that is authorized to commit the government of that state. *Id.* art. 146.

45. CRAIG & DEBURCA, *supra* note 4, at 67, 70-72. The European Parliament is the most populous body, comprising over 600 representatives elected directly by EU citizens. There are currently 626 representatives in Parliament. The Treaty of Amsterdam amended the EC Treaty to cap the number of members at 700. EC TREATY art. 189 (formerly art. 137). Parliament's role as a deliberative and consultative body, HOPKINS, *supra* note 43, at 6, means it is often the first institution to initiate discussion, as was the case in the realm of culture. Parliamentary documents help mark the emergence of new ideas, as those ideas first surface in Parliament discussions and then gain acceptance within the Community. Commission documents go one step further, setting forth the concrete policy proposals that the Council and Parliament will consider.

46. EC TREATY arts. 220-45 (formerly arts. 164-88). A Court of First Instance was created in 1989 to ease the caseload of the ECJ. CRAIG & DE BURCA, *supra* note 4, at 78-95 (providing information on the ECJ and the Court of First Instance); DAVID MEDHURST, *A BRIEF AND PRACTICAL GUIDE TO EC LAW* 33 (1990). The ECJ currently comprising fifteen judges, one selected by each Member State. As a court of general jurisdiction, the ECJ hears cases covering all topics, and its rulings bind the Member States and their inhabitants.

47. The current Commissioner charged with culture is Viviane Reding, Commissioner for the Education and Culture Directorate-General. For more information on Ms. Reding, see Europa, *Commissioner Viviane Reding*, at http://europa.eu.int/comm/commissioners/reding/index_en.htm (last visited Mar. 3, 2001).

48. LOMAN ET AL., *supra* note 5, at 142. A separate Cultural Council was also created to prepare for these meetings. *Id.*

49. EUROPARL, *Rules of Procedure of the European Parliament*, Annex VI, § XIII (14th ed. 1999) (detailing the responsibilities of the Committee on Culture, Youth, Education, and the Media), at http://www.europarl.eu.int/home/default_en.htm.

50. CRAIG & DE BURCA, *supra* note 4, at 4.

notion of a cultural policy, the caution with which it originally regarded such a policy is reflected in the current use of Article 151.

Though the EEC Treaty went into effect in 1957, it took more than ten years for cultural considerations to pierce the economic focus of the Community. The initial piercing was minimal—the word “culture” appeared in several brief statements made at the Summit meetings of 1969,⁵¹ 1972,⁵² and 1973.⁵³ These humble beginnings, however, signaled the recognition that the EC could not focus solely on economic policy.

The initial foray into the cultural field addressed culture primarily in connection with its economic impact.⁵⁴ The Commission’s first communication relating to culture,⁵⁵ *Community Action in the Cultural Sector*,⁵⁶ issued in 1977, was characteristic of the Community’s early stance on culture. The document focused not on the intrinsic value of culture but rather on its economic impact. First, the communication defined the cultural sector as “the socioeconomic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services.”⁵⁷ Second, the communication explained that culture would be supported indirectly by creating a prosperous economic and social environment.⁵⁸ Finally, to avoid any suggestion that it was acting outside

51. See *Hague Summit Final Communiqué*, *supra* note 7, ¶ 4, at 12. At the Hague, the Heads of State or Government of the Member States declared that they regarded Europe as an “exceptional seat of . . . progress and culture.” *Id.*

52. See Comm’n of the Eur. Communities, *The First Summit Conference of the Enlarged Community, Declaration*, BULL. EUR. COMMUNITIES, 1972 10-1972, ¶ 3, at 15-16. At the Paris Summit, the Heads of State or Government of the Member States declared that economic expansion was not an end in itself and should “emerge in an improved quality of life as well as an improved standard of life,” recognizing, in particular, intangible values. *Id.*

53. See Comm’n of the Eur. Communities, *The Communiqué on European Identity*, BULL. EUR. COMMUNITIES, 1973, 12-1973, at 118. This communiqué, adopted at the Copenhagen Summit, made specific references to culture, in contrast to the more extemporaneous remarks at the 1969 and 1972 summit meetings. The Heads of State or Government stated that the European states wished “to preserve the rich variety of their national cultures,” *id.* ¶ 2501(1), at 119, and that “the diversity of cultures within the framework of common European civilization” gave Europe “its originality and its own dynamism,” *id.* ¶ 2501(3), at 119.

54. The Parliament’s first resolution related to culture, issued in 1974, was aimed at protecting European cultural heritage and requested Commission action in areas such as the exchange of cultural works, provision of services by cultural workers, taxation of cultural institutions, protection of cultural heritage, restoration of monuments, and preservation of works of art. Resolution on the Motion for a Resolution Submitted on Behalf of the Liberal and Allies Group on Measures to Protect the European Cultural Heritage, ¶¶ 9-13, 1974 O.J. (C 62) 5. Parliament issued a second resolution of more limited scope in 1976. Resolution on Community Action in the Cultural Sector, 1976 O.J. (C 79) 6. This resolution was short and simply acknowledged the Commission document on *Community Action in the Cultural Sector*, *supra* note 6; requested a timetable for implementation of its suggestions; addressed cultural exchanges; and suggested integrating Member State cultural policies into the Union. *Id.*

55. LOMAN ET AL., *supra* note 5, at 144.

56. *Community Action in the Cultural Sector*, *supra* note 6, ¶ 1, at 5.

57. *Id.* ¶ 3, at 5.

58. *Id.*

the EEC Treaty,⁵⁹ the Commission bluntly stated that “Community action in the cultural sector d[id] not constitute a cultural policy.”⁶⁰

In 1982, the Commission issued a second communication entitled *Stronger Community Action in the Cultural Sector*.⁶¹ The document again addressed culture only in the austere terms of the Treaty, focusing on free movement of goods, persons, services, and capital.⁶² For example, it proposed action to address the status of “cultural workers,” including artists, but did so only because those workers experienced restrictions on their movement.⁶³ Likewise, the communication addressed cultural goods in terms of the free movement of goods,⁶⁴ development of the cultural sector in terms of creating jobs to combat unemployment,⁶⁵ and preservation of architectural heritage as a resource to generate economic activity through

59. The Treaty did not contain authorization to act on the basis of culture until 1992, when the EEC Treaty was amended by the Treaty on European Union. See *infra* Part II.

60. *Community Action in the Cultural Sector*, *supra* note 6, ¶ 3, at 5. To avoid the appearance of a cultural policy, which it was not authorized to pursue, the Commission characterized its actions as applying the EEC Treaty to the cultural sector. “Most Community action in the cultural sector is nothing more than the application of the EEC Treaty to this sector. . . . The legal basis is the Treaty itself.” *Id.* ¶ 5, at 7. The Commission focused on the free movement of cultural goods, *id.* ¶¶ 6-7, at 7; free movement of workers, *id.* ¶ 13, at 10; harmonization of taxation, *id.* ¶¶ 15-19, at 11-12; and harmonization of copyright, *id.* ¶¶ 20-35, at 12-17. Regarding free movement of goods, the concern was that “administrative formalities impede(d) the free movement of cultural goods between the countries of the Community.” *Id.* ¶ 7, at 7. Also addressed was the issue of preventing thefts of cultural goods. *Id.* ¶¶ 8-12, at 7-10. One aspect of freedom of movement of workers includes workers’ awareness of opportunities for employment in other Community countries. The Commission noted the unsatisfactory level of such information available to cultural workers and the need to address the problem. *Id.* Three discussion topics emerged regarding harmonization of taxation. The first involved the tax barriers faced by cultural foundations and patrons—two main sources of funding for cultural activities. The second involved the effects of making cultural goods subject to a value added tax (VAT). The third dealt with the negative tax effects experienced by cultural workers. *Id.* The discussion pertaining to harmonization of copyright focused on problems relating to the harmonization of copyright, the resale rights of creative artists in the plastic arts sector, and protection of the property of cultural craftsmen. *Id.*

61. Comm’n of the Eur. Communities, *Stronger Community Action in the Cultural Sector*, BULL. EUR. COMMUNITIES, 1982, Supp. 6-1982 [hereinafter *Stronger Community Action in the Cultural Sector*].

62. *Id.*

63. *Id.* at 5. “The Community is concerned with creators . . . and performers . . . seen in terms of their social situation as employees or self-employed people and not of their artistic personality which is their business and theirs alone.” *Id.* Thus the focus is on “cultural workers,” not “artists.” *Id.*

64. *Id.* ¶¶ 7-9. Article 30 of the EC Treaty allows Member States to prohibit or restrict the export of “national treasures possessing artistic, historic, or archaeological value.” EC TREATY art. 30 (formerly art. 36). However, the Commission stated that barriers to freedom of trade in cultural goods, specifically works of art, would not be allowed as they ran “counter to the interests of creative artists, traders, and the influence of national cultures.” *Stronger Community Action in the Cultural Sector*, *supra* note 61, ¶ 7.

65. *Stronger Community Action in the Cultural Sector*, *supra* note 61, ¶ 11. As a “labor intensive sector,” the cultural sector was seen as a “resource for combating unemployment.” *Id.*

tourism and research.⁶⁶ This language, crafted to eliminate all elements of emotion typically associated with the word "culture," demonstrated the Commission's intent to limit any discussion of culture to an economic context.

Noneconomic aspects of culture did occasionally enter the discussion. For example, the 1977 Communication encouraged cultural exchanges among the states and the promotion of socio-cultural activities at a European level.⁶⁷ Overall, however, the Commission seemed determined to focus only on those aspects of cultural action that were in line with the traditionally economic role of the EEC. There were two clear justifications for this. First, the Commission stated that the EEC's competence was already broad enough.⁶⁸ In other words, there was no reason for the Community to discuss culture as a social value; its relevance was purely in its impact on the economic sector. Second, the Commission reaffirmed that "there [wa]s no pretension to . . . launch a European cultural policy."⁶⁹ This stance remained constant for several years.

By the late 1980s, however, Community institutions were developing cultural policy for the sake of culture itself, not simply to achieve market-oriented goals. By 1987, the Single European Act (SEA) had entered into force,⁷⁰ adding, inter alia, EU competence in social and environmental policy to the Treaty. Perhaps inspired by this expansion, the Commission's third communication on culture, *A Fresh Boost for Culture in the European Community*,⁷¹ revealed a vision of culture more removed from economic notions. The forward, written by Carlo Ripa di Meana, Member of the Commission with special responsibility for culture, recognized that the EU would not be limited to economic and social integration.⁷² Instead, the Union would encompass the larger European cultural identity, defined in the Communication as "a shared pluralistic humanism based on democracy, justice and freedom."⁷³ This language was noticeably less sterile than that in the 1977 and 1982 Communications, indicating that culture deserved the institutions' attention as a social and not just an economic force.⁷⁴

66. *Id.* ¶¶ 19-23. In this context, the Commission stressed that the legal basis for the preservation of architectural heritage lay "in the fact that it is a contribution to a rich resource that generates economic activity . . . and that conservation . . . is . . . an economically and socially viable activity." *Id.*

67. *Id.* ¶¶ 53-57. The Commission defined European socio-cultural activities as activities whose "field of application w[ould] extend to all the countries of the Community," *id.* ¶ 54—those activities intended to "encourage active participation in cultural life," *id.* ¶ 55.

68. *Id.* at 5.

69. *Id.* ¶ 24.

70. SEA.

71. *A Fresh Boost for Culture in the European Community*, COM(87)603 final.

72. *Id.* at 5.

73. *Id.*

74. By contrasting the proposal with an economic or social integration, perhaps the Commission envisioned a cultural integration; that is, an EU-guided plan to unify Europe into one larger cultural identity. If this was indeed the case, the Member States later rejected the development of cultural policy solely along these lines, in favor of one

The 1987 Communication defined general guidelines for Community action in the cultural sector on three fronts,⁷⁵ announced the intention to establish a Permanent Committee on Culture,⁷⁶ and set out a framework program for 1988-1992.⁷⁷ The framework covered five fields: creation of a European cultural area,⁷⁸ promotion of the European audiovisual industry,⁷⁹ access to cultural resources,⁸⁰ training for the cultural sector,⁸¹ and dialogue with the rest of the world.⁸² Although the discussion continued to focus on the economic and political concerns mandated by the EEC Treaty,⁸³ the Communication did not deny, and indeed, recognized that the Commission was creating cultural policy.⁸⁴ The Parliament responded

that respected the multitude of European cultures. The 1997 amendment to Article 151 amended subsection 4 to read: "The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures." EC TREATY art. 151. The Commission has recently reaffirmed that the EU must take account of Europe's individual cultures. *Europa, Commission Communication, Strategic Objectives 2000-2005, Shaping the New Europe* (Jan. 9, 2000), available at http://europa.eu.int/comm/external_relations/news/01_00/doc_00_4.htm.

Political integration must be pursued taking full account of our national and regional identities, cultures and traditions. . . . [P]eople want effective, accountable institutions that involve them in the way Europe is governed and which take account of their rich and diverse cultures and traditions. . . . Europe is increasingly expected to make an effective contribution to . . . affirming European citizenship by recognizing our rich and diverse cultural, linguistic and ethnic heritage.

Id.

75. The three fronts were cultural action in the framework of the Community system, coordination, and cooperation. See *A Fresh Boost for Culture in the European Community*, *supra* note 71.

76. See *id.*

77. *Id.* at 9-25.

78. The first field—creation of a European cultural area—was most reflective of the past Community documents. The creation of such an area meant "giving priority to the free movement of cultural goods and services, improving the living and working conditions of those involved in cultural activities, creating new jobs in the cultural sector . . . and encouraging the emergence of a cultural industry . . ." *Id.* at 9.

79. The second field of the framework—promotion of the European audiovisual industry—included measures to improve the free movement of goods within the Community, *id.* at 14 (discussing the Media program), and the success of European goods in the world market, *id.* at 17-18 (focusing on the development of high-definition television). It explicitly recognized the threat American and Japanese programs posed to European cultural independence. *Id.* at 13.

80. The third field—access to cultural resources—focused on multilingualism, promoting culture in the regions of Europe, preserving cultural heritage, and implementing a "young people's pass" for entrance to museums and cultural events. *Id.* at 18-20.

81. The fourth field stressed the need to train cultural administrators, sound and vision specialists, journalists, and restoration specialists. *Id.* at 21-24.

82. *Id.* The fifth field—dialogue with the rest of the world—established the goal of coordinating European cultural events outside of the Community and welcoming cultural events from non-Member States inside the Community. *Id.* at 24-25.

83. *Id.* at 6, 7.

84. *Id.* at 7.

with a resolution⁸⁵ that echoed the same recognition: cultural policy could not be confined to an economic discussion.⁸⁶ The need for official community competence was clear; it was time to legalize action taken on behalf of culture.

Throughout this period, the ECJ faced many of the same issues as the Commission. Cultural issues began to arise as part of economically grounded disputes. Some of the cases appear on the surface to demonstrate that the judges were "ready to acknowledge cultural preoccupations as overriding reasons of general interest, able to impose restrictions on fundamental principles of Community law."⁸⁷ However, a "careful examination" shows that the ECJ left little room for cultural considerations to play a role.⁸⁸

One primary reason for this is that under the ECJ case law, "national measures pursuing 'cultural' aims can prevail upon Community law principles under the condition that they are non-discriminatory and satisfy the proportionality test."⁸⁹ This follows from the free movement provisions of the Treaty, which only allowed Member States to impinge on the free movement of persons, goods, services, and capital under certain conditions. These exceptions are laid out in Article 30 and encompass restrictions justified, *inter alia*, on grounds of public morality, public policy, and the protection of national treasures.⁹⁰ The ECJ has interpreted this provision narrowly; thus the restrictions are interpreted narrowly. As noted by Valsamis Mitsilegas, "The restrictive interpretation . . . does not leave much space for culture justifying measures contrary to the economic freedoms well established in the Treaty."⁹¹

II. Addition of a Cultural Competence to the EC Treaty: The Implementation of the Maastricht Treaty

The Intergovernmental Conference (IGC) on Political Union⁹² presented the opportunity for the Community to remedy its unfounded action in the

85. See Resolution on a Fresh Boost for Community Action in the Cultural Sector: "Education, Culture, Société-Le Chantier Est Immense," 1989 O.J. (C 69) 180 [hereinafter Resolution on a Fresh Boost for Community Action in the Cultural Sector].

86. *Id.* ¶¶ A-H, at 183.

87. Valsamis Mitsilegas, *Culture in the Evolution of European Law: Panacea in the Quest for Identity?*, in *EUROPE'S OTHER: EUROPEAN LAW BETWEEN MODERNITY AND POSTMODERNITY* 116 (Peter Fitzpatrick & James Henry Bergeron eds., 1998).

88. See *id.*

89. *Id.* at 117.

90. EC TREATY art. 30.

91. Mitsilegas, *supra* note 87, at 117.

92. In January 1990, Jacques Delors, President of the European Commission proposed to hold an Intergovernmental Conference (IGC) on Political Union. RICHARD CORBETT, *THE TREATY OF MAASTRICHT FROM CONCEPTION TO RATIFICATION: A COMPREHENSIVE REFERENCE GUIDE* at xvii (1993). One factor crucial to movement toward European Political Union (EPU) was a reconciliation between France and Germany following Mitterand's opposition to German unification. DINAN, *supra* note 1, at 165. The conference on Political Union was in addition to the IGC already scheduled to take place on European Monetary Union (EMU). CORBETT, *supra*, at 6, 127. The European Council formally agreed to the principle of an IGC on Political Union on June 25-26, 1990, *id.* at xvii, and

cultural arena, namely by incorporating cultural policy into the EC Treaty. Despite having just recognized that cultural policy should not be confined to an economic discussion, the Parliament proposed only minor suggestions for action to be taken at the IGC. For example, it advocated the amendment of one article⁹³ to include, as an objective, access to education and culture.⁹⁴ In contrast, the governments of Denmark, France, Germany, the Netherlands, and Spain proposed expanding the Community's competence to include culture.⁹⁵ Their initial proposal was embraced by other Member States, who echoed the need to "integrate the social, cultural and environmental spheres in Community policy"⁹⁶ and to protect European cultural heritage.⁹⁷

Not every Member State agreed that a special community cultural policy should be developed. For example, the Dutch government stated that such a cultural policy would be unjustifiable due to the need to protect the

shortly thereafter the Parliament adopted detailed proposals for action to be taken at the IGC. Resolution on the Intergovernmental Conference in the Context of Parliament's Strategy for European Union (11 July 1990) [hereinafter Martin II Report], *reprinted in* CORBETT, *supra*, at 112. The Commission published its opinion on Political Union in October of 1990. European Commission: Formal Opinion Pursuant to Article 236 of the EEC Treaty on the Proposal for Amendment of the Treaty Establishing the European Economic Community with a View to Political Union (Oct. 21, 1990), *reprinted in* CORBETT, *supra*, at 165. Here the Commission acknowledged that while "cultural affairs should . . . be a matter for the Member States," the Treaty should include an article on the "cultural dimension of Community activities." *Id.* pt. IV.1.g, at 170. The Parliaments of the European Community agreed. Conference of Parliaments of the European Community: Final Declaration ¶ 11 (Nov. 30, 1990), *reprinted in* CORBETT, *supra*, at 199. While the European Council did not request a specific article on culture, it asked the IGC to consider enlarging Community competence to "safeguard . . . the diversity of the European heritage and promot[e] cultural exchanges and education." Conclusions of the European Council Meeting, pt. 4.viii (Dec. 14-15, 1990), *reprinted in* CORBETT, *supra*, at 103. When a decision had to be made, most Member States supported the expansion of Community competence through "the development of a cultural policy for the Community." European People's Party Dublin Congress Document: For a Federal Constitution of the European Union ¶ 4 (Nov. 15-16, 1990), *reprinted in* CORBETT, *supra*, at 202. The IGC on EPU opened in December 1990.

93. Martin II Report, *supra* note 92, ¶ 14, at 114. The article at issue was Article 117, which noted the need to promote improved working conditions and standard of living. See EC TREATY art. 117 (as in effect in 1990) (now art. 136).

94. See Martin II Report, *supra* note 92, ¶ 14, at 114. In a separate resolution, the Parliament confirmed that regardless of the type of action taken, "far-reaching competences" in the field of culture would remain with the Member States. Resolution on the Principle of Subsidiarity ¶ 9 (12 July 1990) [hereinafter Giscard d'Estaing Report], *reprinted in* CORBETT, *supra* note 92, at 120.

95. CORBETT, *supra* note 92, at 51.

96. Belgian Senate Resolution on the Achievement of European Union and the Preparation of the Parliamentary Assizes on the Future of Europe, pt. III.b (13 July 1990) [hereinafter Belgian Senate Resolution], *reprinted in* CORBETT, *supra* note 92, at 141.

97. *Id.* In a discussion on citizenship, the Spanish Government specifically confirmed that cultural policy was being transferred to the Community. Spanish Government Proposals Towards a European Citizenship (Sept. 1990), *reprinted in* CORBETT, *supra* note 92, at 156. Denmark, France, Germany, the Netherlands, and Spain had proposed expanding the Community's competence to include culture, and a Belgian senate resolution and Spanish government memo confirm that this proposal was "embraced." *Id.*; see also Belgian Senate Resolution, *supra* note 96.

“pluralistic nature of the societies which make up the Member States.”⁹⁸ Denmark further stressed the need for the Community to focus on promotion, as opposed to management, of culture.⁹⁹

These concerns seemed to be shared, at a certain level, by many of the parties involved in the drafting. Though the Member States in favor of incorporating cultural policy into the Treaty eventually won the argument, the final language was carefully drafted to avoid references to “European culture.” For example, the original draft of Article 151 ordered the Community to “contribute to the flowering of the cultures of each Member State, at the same time bringing European identity and the European cultural dimension to the fore.”¹⁰⁰ Later drafts removed the language referencing European identity and European cultural dimension,¹⁰¹ replacing it with milder language about “bringing the common cultural heritage to the

98. Dutch Government First Memorandum: Possible Steps Towards European Political Union (May 1990) [hereinafter Dutch Government First Memorandum], *reprinted in* CORBETT, *supra* note 92, at 133.

99. Danish Government Memorandum, Approved by the Market Committee of the Folketing (Oct. 4, 1990), *reprinted in* CORBETT, *supra* note 92, pt. VI.2, at 161. Denmark also proposed drafting a chapter “concerning cultural cooperation within the Community and with third countries” with the aim of promoting “cross-border cultural exchanges.” *Id.* The Dutch advocated adding a provision to allow for the consideration of culture, rather than the development of a special Community policy. See Dutch Government Policy Document on European Political Union, pt. 1.6(d) (Oct. 26, 1990), *reprinted in* CORBETT, *supra* note 92, at 177.

100. Luxembourg Presidency “Non-Paper”: Draft Treaty Articles With a View to Achieving Political Union, tit. XVI(1) (Apr. 12, 1991) [hereinafter Luxembourg Presidency Non-Paper], *reprinted in* CORBETT, *supra* note 92, at 268 (1993). The entire draft was as follows:

1. The Community shall contribute to the flowering of the cultures of each Member State, at the same time bringing European identity and the European cultural dimension to the fore.
2. Action by the Community, which shall respect the diversity of cultures in Europe, shall encourage cooperation between Member States and, if necessary, support and supplement their action in the following areas:
 - improvement of the knowledge and dissemination of the culture and history of the European peoples;
 - conservation and safeguarding of the cultural heritage;
 - cultural exchanges;
 - artistic and literary creation;
 - training in the cultural field;
 - development of the European audio-visual sector.
3. The Community and the Member States shall foster cooperation with third countries and the appropriate international organizations in the sphere of culture.
4. The Council, acting on a proposal from the Commission [role of the European Parliament], shall adopt measures to contribute to the attainment of the objectives referred to in this article.

Id.

101. Luxembourg Presidency “Draft Treaty on the Union,” art. 3(p) (June 18, 1991) [hereinafter Luxembourg Presidency Draft Treaty], *reprinted in* CORBETT, *supra* note 92, at 294. The draft amended section one to state that Community contributions would “respect . . . [Member State] national and regional diversity.” *Id.* tit. XIX(1), at 309. The prior focus on “European identity and . . . European cultural dimension,” Luxembourg Presidency Non-Paper, *supra* note 100, tit. XVI(1), at 276, was removed. The draft also deleted the phrase in section two on respecting the diversity of cultures in Europe.

fore.”¹⁰² The TEU also addresses this issue, stating that “[t]he Union shall respect the national identities of its Member States.”¹⁰³

The evolution of Article 3(q) is equally illuminating. This provision originally listed, as one of the activities of the Community, “contribution to education and training of high quality and to the flowering of European culture in all its forms.”¹⁰⁴ A later draft adjusted the purpose to read “the flowering of the cultures of Europe in all their forms.”¹⁰⁵ The final draft amended Article 3 to remove all reference to European culture,¹⁰⁶ thus directing the Community to contribute to “the flowering of the cultures of the Member States.”¹⁰⁷

These drafting changes seem directed to the concern, vocalized by the Dutch memorandums, that enlarging the Community competence to include culture would be license for the Community to intrude upon Member States’ cultures. Though the final provisions do give the Community some power over community policy, it seems clear that the Member States wanted to protect Member State pluralism. Indeed, though numerous changes occurred as the drafting process continued,¹⁰⁸ there are three key details, occurring between the initial drafting and the signing, that are relevant to an understanding of Article 151.

First, the final proposal limited the Community’s cultural competence by forbidding, in 151(5), harmonization of cultural laws and regulations of the Member States.¹⁰⁹ Harmonization requires Member State rules to be

102. EC TREATY art. 151(1). It should be noted that the text of Article 128(2)—the precursor to Article 151(2)—also underwent several drafts. The initial draft was as follows: “Action by the Community, which shall respect the diversity of cultures in Europe, shall encourage cooperation between Member States . . .” Luxembourg Presidency Non-Paper, *supra* note 100, at 268. A later draft deleted the phrase on respecting the diversity of cultures in Europe. Luxembourg Presidency Draft Treaty, *supra* note 101, at 294. The reason for this change is not clear, though it is possible that it was simply considered unnecessary due to the existing reference to the Member States.

103. TEU art. 6(3) (formerly art. F).

104. Luxembourg Presidency Non-Paper, *supra* note 100, art. 3(p), at 276.

105. Luxembourg Presidency Draft Treaty, *supra* note 101, art. 3(p), at 294.

106. Dutch Presidency Draft Union Treaty art. 3(q) (8 Nov. 1991), [hereinafter Dutch Presidency Draft Union Treaty], *reprinted in* CORBETT, *supra* note 92, at 349. It also condensed the areas for action, addressing the audiovisual sector as part of artistic and literary creation. *Id.* tit. XIX(2), at 361.

107. EC TREATY art. 3(q).

108. The Luxembourg Presidency Draft Treaty renamed the article “Culture” and removed training in the cultural field from the list of areas where the Community was to encourage cooperation. Luxembourg Presidency Draft Treaty, *supra* note 101, tit. XIX(2), at 309. The Title encouraged cooperation with international organizations, particularly the Council of Europe. *Id.* tit. XIX(3), at 309. Finally, the draft set forth the procedure for decision making—qualified majority voting by the Council “on a proposal from the Commission in cooperation with the European Parliament.” *Id.* tit. XIX(4), at 309-10. This is the procedure under Article 252. *See* EC TREATY art. 252 (formerly art. 189c). Additional changes were made, but reversed in later drafts. The Community’s role to “support and supplement” became “support and complement.” Luxembourg Presidency Draft Treaty, *supra* note 101, tit. XIX(2), at 309. “Conservation and safeguarding of the cultural heritage” became “restoration of the cultural heritage.” *Id.*

109. *See* EC TREATY art. 151(5). The initial change was made in the Dutch Presidency Draft Union Treaty, *supra* note 106, tit. XIX(5), at 361. That draft allowed the Council to

similar, though not identical, and is accomplished through directives issued by the Council.¹¹⁰ The EC Treaty gives the Community legal authority to harmonize laws in order to ensure functioning of the internal market.¹¹¹ Thus, by forbidding harmonization in certain situations, Article 151(5) prevents the Community from superseding Member State laws and regulations in the cultural arena, thereby confirming that culture is an area of predominantly Member State, and not Community, concern. Article 151 would only contain such a provision if the drafters wanted to allow Member States to preserve their individual cultural idiosyncrasies.

Second, Article 151(5) adopted co-decision as the voting procedure.¹¹² Under each of the three decision-making procedures available under the EC Treaty, the Commission proposes initiatives and legislation and decides which projects will receive financial support.¹¹³ Early drafts of Article 151 had required the cooperation procedure detailed in Article 252 (formerly Article 189c) which allows the Council to adopt the Commission's proposal, even if the Parliament does not approve. The co-decision procedure under Article 251 (formerly Article 189b), on the other hand, requires adoption by both the Council and Parliament. If Parliament rejects the initial proposal, it must work with the Council to devise a conciliation position. Requiring the co-decision procedure for action under Article 151 adds to the scrutiny any cultural proposals must endure, suggesting the Member States' desire to render more difficult the implementation of any such proposals.

Third, the final version of Article 151 not only requires the Council to act through the co-decision procedure for all agreements¹¹⁴ but also requires it to act unanimously, rather than by qualified majority.¹¹⁵ The debate between unanimous voting and qualified majority voting (QMV)

adopt "recommendations and incentive measures" and forbid "harmonization of the legislative and regulatory provisions of the Member States." *Id.*

110. See generally BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 430 (1993).

111. EC TREATY arts. 94-97 (formerly arts. 100, 100a-d, and 102).

112. This change came after a meeting of the foreign ministers. Dutch Presidency Note in the Light of Discussions at the Noordwijk "Conclave" of Foreign Ministers 12-13 November 1991 Proposing Modifications to its Working Document [hereinafter Dutch Presidency Note], reprinted in CORBETT, *supra* note 92, at 375. The original draft of the Article did not specify a voting procedure, presumably because a decision on the procedures for adopting cultural measures had not yet been made. Luxembourg Presidency Non-Paper, *supra* note 100, tit. XVI(4), at 276.

113. There are three decision-making procedures under the EC Treaty: consultation—the procedure under Article 250 (formerly article 189a); co-decision—Article 251 (formerly article 189b); and cooperation—Article 252 (formerly article 189c). Under consultation, the Commission proposes a measure, and the Council acts on it, with a consultative role for the Parliament. Under cooperation, the Parliament is able to propose amendments or reject the Council's position, though the Council can still adopt the act by unanimity. Co-decision gives the Parliament the strongest role, by providing for a Conciliation Committee to work out disagreements between Parliament and the Council. CRAIG & DE BURCA, *supra* note 4, 131-37 (detailing the three procedures).

114. Dutch Presidency Note, *supra* note 112, tit. II.12(b), at 377; see also TEU art. 128(5).

115. *Id.*

has been a longstanding one.¹¹⁶ While there was once a preference for unanimous voting, today, unless the Treaty specifies otherwise, voting in the Council is by majority.¹¹⁷ Article 151 is one of only a handful of articles in the entire Treaty to require both co-decision and unanimity.¹¹⁸ The Community has stated that “[t]his complex procedure is justified by the particular sensitivity of cultural issues,”¹¹⁹ but the need to achieve unanimity has greatly restricted the Council’s ability to act.¹²⁰

Not only does the drafting process reveal something about the scope of the Article as a whole, it is also indicative of the purpose of 151(4). Section four of the Article, requiring the Community to “take cultural aspects into account in its action under other provisions of this Treaty,” was not a part of the initial draft. Rather, the drafters added it seven months after the initial drafting.¹²¹ Rules of statutory construction prevent this additional language from being dismissed, as no language in a statute should be construed as superfluous.¹²² With this in mind, the only logical interpretation of 151(4) is that it mandates Community institutions to take account of cultural aspects when acting under the Union’s monetary and economic policies. In this respect, the Article would provide an additional safeguard against the erosion of Member State culture and would thus respect Member State national and regional diversity.

The institutional restrictions on voting are also indicative of how 151(4) should be interpreted. First, though the drafters limited the ability

116. CRAIG & DE BURCA, *supra* note 4, at 14. In 1965, when the Council planned to shift to QMV for all proposals, chaos erupted, and the resolution was to use QMV only in exceptional circumstances. *See id.* at 13.

117. *Id.* at 142. This can be a simple majority or a qualified majority; the latter currently requires sixty-two out of a possible eighty-seven votes. *Id.*; *see also* EC TREATY art. 205(2) (formerly 148(2)). For a discussion on the number of votes held by each Member State, the current use of QMV, and other specifics on voting, *see* CRAIG & DE BURCA, *supra* note 4, at 142-43.

118. EC TREATY arts. 18, 42, 47, 67, 71, 137. Prior to the Treaty of Amsterdam, only two articles required co-decision and unanimity—the article on culture and Article 130(i), which addressed the Research Framework Program. EC TREATY art. 130(i) (as in effect in 1995) (now art. 166); *see also* EUR. COMM’N, INTERGOVERNMENTAL CONFERENCE 1996: COMMISSION REPORT FOR THE REFLECTION GROUP 77 (1995). The decision-making process was further complicated by the final version of the TEU, which introduced another body to the policy-making process—the Committee on Regions (COR). EC TREATY arts. 263-65 (formerly arts. 198a-c). This advisory assembly was created to ensure that low-level officials are consulted on certain EU proposals. Eur. Union, *Introducing the Committee of the Regions*, at http://www.cor.eu.int/overview/Intro/intro_eng.html (last visited Jan. 20, 1999). Cultural proposals must be referred to the COR, though Council recommendations do not. EC TREATY art. 151(5).

119. Europa, *Culture: Current State and Prospects*, at <http://europa.eu.int/scadplus/leg/en/lvb/l29001.htm> (last visited Mar. 4, 2001).

120. Many have advocated the introduction of QMV, yet even at the IGC in early 2000 there was no proposal to change the procedure under Article 151(5). *See infra* notes 184, 199 and accompanying text.

121. Dutch Presidency Draft Union Treaty, *supra* note 106, tit. XIX(4), at 361 (“The Community shall take cultural aspects into account in its action under other provisions of this Treaty.”).

122. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 24 (1997).

of the Parliament and Council to act (and therefore limited potential intrusion on the Member States), they did not limit the power of the Commission to use Article 151(4) to protect Member State culture. At the least, the inability to move to QMV shows a reluctance to give the EU too much power in the cultural realm. If the voting was by qualified majority rather than unanimity, it would be easier to pass Europe-wide measures. The inability to adopt QMV as the method of decision-making under Article 151 indicates that Member States prefer that cultural issues be left to them and that the EC simply recognize cultural value when it is relevant to Commission or ECJ decision-making or proceedings.

Second, where the political branches of the Community prove ineffective, commentators assert that the ECJ has a duty to intervene.¹²³ Here, the Parliament and Council cannot act effectively, and the Commission is not acting under the mandate in 151(4). This idea is addressed in greater detail in Part IV.

The final version of Article 151 set out three main aims covering a broad range of activities: first, the Community would contribute to the flowering of the cultures of the Member States, while respecting their diversity; second, it would encourage contemporary cultural creation; and third, it would foster cooperation among the Member States, between the EU and third countries, and between the EU and certain international organizations. Community action was intended to improve the knowledge and dissemination of the culture and history of the European peoples, to conserve and safeguard cultural heritage of European significance, and to support cultural exchanges and artistic and literary creation. In addition, the Community was required to take cultural aspects into account in its other policies.¹²⁴ On February 7, 1992, the TEU was signed in Maastricht, Netherlands; the Member States ratified it, and it went into force in November 1993.¹²⁵ Yet the mere existence of an article on culture did not end the debate. On the contrary, it proved to be just the beginning.

123. RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE* 128 (1998).

124. EC TREATY art. 151(4). See generally Europa, *Information, Communication, Culture, Audiovisual Media*, at http://europa.eu.int/en/comm/dg10/index_en.html (last visited Mar. 4, 2001) [hereinafter *Information, Communication, Culture, Audiovisual Media*].

125. The Treaty was ambitious, and the ratification process proved to be very difficult. In states that held national referendums, the results demonstrated that ratification was far from certain. In France, the vote was narrowly in favor, 51.05% to 48.95%. DINAN, *supra* note 1, at 187. The first referendum held in Denmark voted against approval of the Treaty. After complex negotiations through which Denmark opted out of select Treaty provisions, a second referendum found 56.8% of the voters in favor. *Id.* at 191. See generally *id.* at 168-83 (detailing the Maastricht Treaty negotiations), 183-93 (discussing the ratification crisis); CRAIG & DE BURCA, *supra* note 4, at 24.

III. What Happened After Maastricht? Diagnosing the Non-Use of Article 151(4)

The addition of an Article on culture did not dominate the negotiations at Maastricht. Instead, the Article “went largely unnoticed.”¹²⁶ Larger issues of monetary union and social reform dominated the agenda, and they were the focus of the implementation and ratification process.¹²⁷ Nonetheless, culture was now a recognized aim of Community action,¹²⁸ and the institutions began to explore this newly established competence.

An analysis of cultural policy from 1992-2000 reveals that the Community is not utilizing its power under 151(4). Rather than detailing eight years of cultural policy, this Section will pinpoint specific causes for the current state of 151(4). First, Article 151(4) was initially given a narrow interpretation, and this narrow interpretation led to almost exclusive reliance on 151(1) and (2). Second, reliance on sections (1) and (2) means that EC cultural policy has been limited to focusing primarily on providing Community funding for culturally-related projects. These projects are difficult to implement due to the complex decision-making procedure under 151(5). Third, although commentators have criticized the action taken under Article 151, no changes have been made. Finally, despite obvious difficulties, the ECJ has done nothing to correct the misinterpretation of 151(4).

A. Initial Interpretations of Article 151(4) Were Restrictive, Leading to Almost Exclusive Reliance on Article 151(1) and (2)

Shortly after the signing of the TEU, the Commission commented on the new cultural competence with a communication, *New Prospects for Community Cultural Action*.¹²⁹ The Ministers of Culture responded with their own conclusions concerning guidelines for Community cultural action;¹³⁰ conclusions that, in retrospect, established “ground rules” for future Commission action. The Ministers of Culture read Article 151(1) as suggesting a “Community wide range of actions in order to promote cultural activities.”¹³¹ This expansive reading of the first part of the Article¹³² contrasted with the narrow reading of Article 151(4), interpreted as requiring the Community to take culture into account only in “the preparation of any new action or policy,”¹³³ even though the Article does not mandate this

126. Adam Breeze, *A Culture That Will Obey Diktat*, *TIMES* (London), July 12, 1992, LEXIS, News Library, TTIMES File.

127. DINAN, *supra* note 1, at 168-83 (discussing the many issues raised in negotiating and drafting of the treaty).

128. *Information, Communication, Culture, Audiovisual Media*, *supra* note 124.

129. *New Prospects for Community Cultural Action*, COM(92)0149. The communication confirmed the responsibilities outlined in Article 151 (formerly Article 128) and suggested various courses of action. *Id.*

130. See *Conclusions of the Ministers of Culture Meeting Within the Council of 12 November 1992 on Guidelines for Community Cultural Action*, 1992 O.J. (336) 1 [hereinafter *Conclusions of the Ministers of Culture*].

131. *Id.* ¶ 3. This was deduced from the language of Article 151(1).

132. This refers to sections one and two. EC TREATY art. 151(1)-(2).

133. *Conclusions of the Ministers of Culture*, *supra* note 130, ¶ 7.

restrictive interpretation.

This interpretation had two effects. First, it confined the scope of the Article to Community-wide actions that would promote cultural activities with a European dimension.¹³⁴ Second, the Ministers interpreted Article 151(4) as applying only to the preparation of new actions or policies.¹³⁵ Though not discussed or perhaps even contemplated at the time, this decision effectively foreclosed Member States from requiring the Community to take culture into account when evaluating the legality of existing Member State laws. In the view of this author, it was at this early date that Article 151 became the basis for a program of Community-based policies, rather than a vehicle for protecting individual Member State cultures.

B. The Community's Extensive Reliance on Article 151(1) and (2) Has Meant that Policy Has Focused Primarily on Providing Funding for Culturally-Related Projects

The authority for Community action concerning culture comes from Article 151, as discussed extensively above. Four of the five sections of that Article focus on Community action:¹³⁶ "the Community shall contribute to the flowering of the cultures of the Member States,"¹³⁷ "action . . . shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in [cultural] areas;"¹³⁸ "the Community . . . shall foster cooperation with third states and international organizations in the sphere of culture;"¹³⁹ "the Community shall take cultural aspects into account in its action under other provisions of this Treaty."¹⁴⁰

Since Maastricht, the Community's action under Article 151 has been primarily on the grounds of 151(1) and (2).¹⁴¹ Section one recognizes general competence in culture, while the thrust of section two is to encourage cooperation between Member States. The Community, however, has gone beyond simple encouragement and taken an active role in the support and supplementation of Member State action, a role that the EC Treaty says should be taken only "if necessary." This limiting language

134. *Id.* ¶ 3.

135. *Id.* ¶ 7. The Ministers also made reference to agreements with non-EU countries and invited the Commission to present annual outlines of its proposals in the cultural area. *Id.* ¶¶ 9, 10.

136. The fifth section sets out the voting procedure to be followed when acting under the article. EC TREATY art. 151(5).

137. *Id.* art. 151(1). The remainder of Article 151(1) states: "and at the same time bringing the common cultural heritage to the fore." *Id.* The fact that the provision addresses both Member State culture and the broader cultural heritage only supports the assertion in Part II that Article 151 endeavors to protect more than a common Euro-culture. The Community's use of section 151(1) contrasts sharply with non-use of section 151(4).

138. *Id.* art. 151(2).

139. *Id.* art. 151(3).

140. *Id.* art. 151(4).

141. The Community has acted under Article 151(3), but that topic is outside the scope of this note.

did not prove to be much of an obstacle for the Council, Commission, and Parliament as they embarked on a wide-ranging crusade to fund Community cultural projects. These projects, in fact, have become the central focus of Community action under Article 151.¹⁴²

Even before the signing of the TEU, various cultural projects were underway. These included the annual designation of a European City of Culture¹⁴³ and efforts to protect Europe's architectural heritage,¹⁴⁴ promote books and reading,¹⁴⁵ promote the development of the European audiovisual industry,¹⁴⁶ and strengthen European cultural networks.¹⁴⁷ The framework program under which these policies operated was scheduled to expire in 1992.¹⁴⁸ But rather than utilizing the new cultural competence to explore alternative ways of protecting culture, Parliament simply proposed expanding future funding programs to include new types of culture.¹⁴⁹

142. The projects fall into two main areas: first, transnational and local cultural projects, and second, projects in which culture functions as an instrument of economic development. EUR. COMM'N, *INVESTING IN CULTURE: AN ASSET FOR ALL REGIONS* 5 (1998). The first group includes such things as funding an International Celtic Film Festival, *id.* at 7; renovating a synagogue in Cracow, *id.*; and aiding the creation of an Internet site showing works of art from several European regions, *id.* at 8. The second group of projects recognizes that culture can generate employment and economic development by "creating jobs in the cultural and heritage sectors, by making a region more attractive to tourists and potential investors, and by contributing to the social integration of marginalized groups." *Id.* at 5. Programs seen as economically advantageous are not confined to one genre and include such efforts as restoration of the Queluz National Palace in Portugal, *id.* at 18, and the construction of a large scale venue for the visual arts in Salford, England, *id.* at 17.

143. One city of culture was chosen each calendar year "to open up to the European public particular aspects of the culture of the city." Resolution of the Ministers Responsible for Cultural Affairs, Meeting Within the Council, of 13 June 1985, Concerning the Annual Event 'European City of Culture,' 1985 O.J. (C 153) 2 [hereinafter Resolution of the Ministers Concerning the City of Culture].

144. See Resolution of the Ministers With Responsibility for Cultural Affairs, Meeting Within the Council of 13 November 1986 on the Protection of Europe's Architectural Heritage, 1986 O.J. (C 320) 1.

145. This was discussed repeatedly by the Council and Parliament. See Council Resolution of 9 November 1987, 1987 O.J. (C 309) 3 (promoting the translation of major works of European culture); Resolution on a Fresh Boost for Community Action in the Cultural Sector, *supra* note 85, ¶¶ 57-64, at 189; Resolution of the Council and the Ministers Responsible for Cultural Affairs Meeting Within the Council of 18 May 1989 Concerning the Promotion of Books and Reading, 1989 O.J. (C 183) 1.

146. This was known as the Media program. See A Fresh Boost for Culture in the European Community, *supra* note 71, at 14-15 (laying an early foundation for the program); Council Decision of 21 December 1990 Concerning the Implementation of an Action Programme to Promote the Development of the European Audiovisual Industry (Media) (1991 to 1995), 1990 O.J. (L 380) (adopting the Media program).

147. Resolution of the Council and the Ministers for Culture Meeting Within the Council of 14 November 1991 on European Cultural Networks, 1991 O.J. (C 314) 1.

148. The framework program proposed in December of 1987 was scheduled to expire in 1992. A Fresh Boost for Culture in the European Community, *supra* note 71.

149. Resolution on Community Policy in the Field of Culture, 1994 O.J. (C 44). This was the first time the Official Journal devoted a section specifically to culture. *Id.* at 184. The Resolution expressed the desire to expand future action beyond the past focus on architectural heritage, books, reading, and the audiovisual sector. *Id.* ¶ H, at 185. Parliament asked the Commission to "draw up proposals for the benefit of music, thea-

The result was that the first stage of Community cultural action following the ratification of Maastricht took the form of three budgetary programs.¹⁵⁰ One program focused on the dissemination and translation of literary and theatrical works (Ariane),¹⁵¹ another was designed to support artistic and cultural creation (Kaleidoscope),¹⁵² and the third aimed to support the European cultural heritage (Raphael).¹⁵³ The goals embodied by these programs reflected the spirit, and even the express language, of Article 151(1) and (2). For example, under 151(2), the Community can “support and supplement” Member State action in “the dissemination

ter, dance, the plastic arts, literature, historical research, cinema and all other forms of art.” *Id.* ¶ 15, at 187. The resolution encouraged the creation of an EC cultural policy in order to promote a European cultural identity. *Id.* ¶ 19, at 187. The Parliament also advocated an increase in budgetary resources devoted to culture. *Id.* ¶ 12, at 186 (noting that the Parliament “deplores the inadequate funding of the cultural sector” and the Structural Funds should be used to help fund cultural measures). On the budgetary point the Council was more conservative, preferring to limit the budget to prevent the Community from expanding action too much, thus interfering with Member State action. See, e.g., *Culture/Audiovisual Council: Public Broadcasting and Book Prices on Agenda for November 17*, EUR. REP., Nov. 11, 1998, LEXIS, News Library, EURRPT File. The budgetary struggle thus began, with Parliament advocating a substantial budget for culture and the Council suspicious of the purpose of such spending. This debate nearly derailed the new cultural policy before it even became a reality.

150. In August 1994, the Commission proposed three incentives for action. See Commission Communication on Community Action in Favour of Culture (Aug. 2 1994), discussed in *EU: Commission Adopts Framework to Promote Culture*, AGENCE. EUR., Aug. 3, 1994. Each incentive was based on prior measures.

151. Parliament and Council Decision No. 2085/97/EC of 6 October 1997 Establishing a Programme of Support, Including Translation, in the Field of Books and Reading (Ariane), 1997 O.J. (L 291) [hereinafter Decision Establishing Ariane]. Ariane was not the first effort in the field of books and reading. From 1990 to 1995, the Commission ran a pilot scheme for the translation of works, gave a prize for literature and a prize for translation each year, and provided grants to translation schools. Europa, *European Union Support in the Books and Reading Sector*, at http://europa.eu.int/comm/culture/cpariane99_en.html (last visited Mar. 12, 2001).

152. See Parliament and Council Decision No. 719/96/EC of 29 March 1996 Establishing a Programme for Artistic and Cultural Activities with a European Dimension (Kaleidoscope) for the Period 1996-1998, 1996 O.J. (L 99) [hereinafter Decision Establishing Kaleidoscope 1996-1998]. The Kaleidoscope program was originally set up in 1990 and had three initiatives: supporting artistic and cultural events with a European dimension, encouraging artistic and cultural creation, and encouraging cultural cooperation in the form of networks. Europa, at *Kaleidoscope Programme 1999: Support for Cultural Co-operation Projects in the EU*, <http://europa.eu.int/comm/culture/cpkaleidoscope99.en.html> (last visited Mar. 12, 2001). The 1994 proposal was designed to support artistic and cultural creation and cooperation in the field of theater arts (dance, music, theater, and opera), the plastic or spatial arts (three-dimensional art, such as sculpture or bas-relief, and visual arts, such as painting, sculpture, or film), the applied arts (art put to practical use), and audiovisual creation.

153. See Parliament and Council Decision No 2228/97/EC of 13 October 1997 Establishing a Community Action Programme in the Field of Cultural Heritage (Raphael) 1997 O.J. (L 305) [hereinafter Decision Establishing Raphael]. Cultural heritage had long been an area of Community action, and four initiatives were underway when the Raphael program was established. The Community distributed grants to projects devoted to the conservation of European architectural heritage, gave subsidies to centers that trained nationals in conservation and restoration, provided direct subsidies to restore monuments, and gave aid to initiatives to raise public awareness. See Europa, *supra* note 150.

of . . . culture,” in “artistic and literary creation,” and in the “conservation and safeguarding of cultural heritage.”¹⁵⁴ Projects Ariane, Kaleidoscope, and Raphael each addressed one of these areas. Further, under 151(1), the Community must “contribute to the flowering of the cultures of the Member States,”¹⁵⁵ an end that is being met by financing cultural Member State programs. Conversely, the requirement in 151(4) to take cultural aspects into account under other Treaty provisions did not play a role in any of the budgetary proposals.

Action under Article 151(1) and (2), however, had limited initial success. Due to the complex procedure required to reach agreement on cultural action, the Council could not agree on the budgetary allocations.¹⁵⁶ The result was that almost three years after Maastricht entered into force none of the three cultural programs had been implemented.¹⁵⁷

To remedy this situation, the Commission proposed the adoption of a single financial and programming instrument for Community cultural measures.¹⁵⁸ In light of the past fragmentation of budgetary resources that had plagued Community cultural efforts,¹⁵⁹ the Commission thought that having one consolidated source of funding would prevent Community funds from being over-dispersed.¹⁶⁰ The “Culture 2000 Programme”

154. EC TREATY art. 151(4).

155. *Id.* art. 151(1).

156. Central to the delay was the procedure implemented by Article 128, requiring the fifteen Council members to unanimously adopt proposals. *See supra* notes 115-19 and accompanying text.

157. *EU: Broad Agreement on Need to Revise Article 128 of EU Treaty*, AGENCE EUR., Mar. 1, 1996. Though the Commission proposed these programs in 1994, Kaleidoscope was not adopted until March 1996 and the others not until late 1997. Decision Establishing Kaleidoscope 1996-1998, *supra* note 152 (signed Mar. 1996); Decision Establishing Ariane, *supra* note 151 (signed Oct. 6 1997); Decision Establishing Raphael, *supra* note 153 (signed Oct. 13 1997). Despite the delayed adoption, Kaleidoscope has achieved some success. *EP News*, IRISH TIMES, Nov. 28, 1998, at 20 (noting that 1428 cultural programs were backed by the EU from 1996-1998).

158. The Framework Program encompasses several documents, including the First European Community Framework Programme in Support of Culture, *supra* note 13 and the Proposal for a Single Financing and Programming Instrument, *supra* note 13. The Commission made every effort to avoid the mistakes of past Community action in the cultural sector by conducting an in-depth consultation process to target relevant concerns. One source of information was the Commission’s First Report on the Consideration of Cultural Aspects in European Community Action, COM(96)0160 final. The evaluation conducted by the Commission in 1998 came to seven conclusions: the current programs were too rigid; there was too little recognition of the cultures present in Europe; as a driving force in society, cultural creation should be made a priority; cultural goods and services are unique and should not be governed uniformly by market regulating mechanisms; culture is able to strengthen social cohesion; culture is an asset for the Union’s external policy; and each European citizen must have the right of access to culture and the right to express his creativity. First European Community Framework Programme in Support of Culture, *supra* note 13, § II, pt. 3. Italy had initially suggested creating a single fund for all resources allocated to Community cultural activities in June 1997. *Culture Council: Support Gathers for Common Cultural Fund*, EUR. REP., July 2, 1997, LEXIS, News Library, EURRPT File.

159. First European Community Framework Programme in Support of Culture, *supra* note 13, § I.

160. *Id.* § III.

strove to offer “a comprehensive and transparent vision of the Community actions in support of culture”¹⁶¹ and focused on Article 151 as the basis for cultural action.¹⁶² Further, it proposed simplifying and reinforcing cultural action, keeping in mind the principles of subsidiarity¹⁶³ and proportionality.¹⁶⁴

The goal of the framework program was to reserve Community funds for those projects where they would have a significant impact.¹⁶⁵ Yet again, the focus was on funding, not on expanding the types of action possible under 151. Ironically, 151(4) could have been used to achieve several of the goals articulated by the framework—for example, supporting culture and acting in line with subsidiarity. That option has been largely ignored, but not due to the overwhelming effectiveness of the other options. Indeed, the framework program initially stalled because, once again, the Council and the Parliament could not agree on the budget.¹⁶⁶

It should be noted that, despite budgetary struggles, the Community

161. *Id.* § 1.

162. Proposal for a Single Financing and Programming Instrument, *supra* note 13, pmb., ¶ 5.

163. As explained in the Treaty, subsidiarity means that action shall be taken “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community.” EC TREATY art. 5 (formerly art. 3b). The SEA first introduced the subsidiarity principle into Community law, though only in the context of environmental policy. *Id.* arts. 174-76 (formerly art. 130r-t). The TEU extended the scope of the principle to all Community action not within the exclusive competence of the Community. *See* TEU art. 2 (formerly Article B); BERMAN ET AL., *supra* note 110, at 46-47.

164. Proposal for a Single Financing and Programming Instrument, *supra* note 13, ¶¶ 9, 14.

165. *Id.* The framework program proposed three main types of projects for implementation. The first type are integrated projects covered by cultural cooperation agreements. *Id.* art. 2(a), annex I(1). These “cultural cooperation agreements” would be for a period of three years or less and would involve large-scale cultural events, cultural events and tours within the Community, measures involving numerous disciplines, measures to train and mobilize those in the cultural professions, and measures directed to increase awareness of cultural heritage. *Id.* annex I (1). The second type are considered major projects of European or worldwide significance. *Id.* art. 2(b), annex I(2). Major projects encompass such events as the European City of Culture program, a European Union cultural festival, and other projects that are “substantial in scale and in scope.” *Id.* annex I(2). The third type are specific, innovative, or experimental projects to encourage new forms of creativity and cultural expression. *Id.* art. 2(c), annex I(3). These projects must involve at least four Member States, making the cooperative nature their defining characteristic. *Id.* annex I(3). This framework was intended to replace the Kaleidoscope, Ariane, and Raphael programs. Press Release, Comm’n of the Eur. Communities, Commission Approves the First European Union Framework Programme in Support of Culture (2000-2004) (May 6, 1998), available at http://www.europa.eu.int/comm/press_room/index_en.cfm; *see also* Proposal for a Single Financing and Programming Instrument, *supra* note 13, art. 2 (setting forth the three types of cultural action to be pursued).

166. It has since become final under the name Culture 2000. Decision No. 508/2000/EC of the European Parliament and of the Council of 14 Feb. 2000 Programme, 2000 O.J. (L 63).

has made financial contributions to hundreds of cultural efforts.¹⁶⁷ These local-level projects undoubtedly allow Member States to protect aspects of their culture. However, Article 151 authorizes action to take place on many levels and mandates that cultural policy in the European Union encompass more than just financial support.

C. Commentators Have Criticized the Action Taken Under Article 151, but No Changes Have Been Made

The Parliament's resolution in early 1993 welcoming Article 151¹⁶⁸ noted "with anxiety" that the Community was moving rapidly to a single market without assessing the resulting impact on culture.¹⁶⁹ This resolution was issued shortly after the Council of Ministers presented their restrictive interpretation of Article 151(4)—limiting the import of 151(4) to the "preparation of any new action or policy"¹⁷⁰—and it seemed to indicate Parliament's view that Article 151 should instead be used to combat the strength of the market provisions of the Treaty. The Parliament did not, however, explicitly refer to the Council's interpretation, nor did it clarify what type of role it did see for Article 151. At a minimum, the statement reflects Parliament's concern regarding unchecked harmonization and the threat it poses to individual Member State cultures.¹⁷¹

An opinion issued in April 1995 by the Committee of the Regions reminded the Community that "EU action must not be to the detriment of cultural identities and specificities."¹⁷² The opinion also deduced two guiding principles for Community action: "subsidiarity and the requirement that the EU complement Member States' action."¹⁷³ Rather than pushing for a series of Community programs, the COR implicitly acknowl-

167. Europa, "Culture 2000": 219 Projects Selected in the First Year, at http://europa.eu.int/comm/culture/cp2000_en.html (last visited Mar. 12, 2001).

168. Resolution on the Commission Communication Entitled 'New Prospects for Community Cultural Action,' 1993 O.J. (C 42) 17 [hereinafter Resolution on New Prospects for Action].

169. *Id.* ¶ 29(k), at 179. The resolution also stated that "economic integration w[ould] have to go hand in hand with a genuine social dimension." *Id.* ¶ K, at 175.

170. Conclusions of the Ministers of Culture, *supra* note 130, ¶ 7.

171. Debates on cultural issues continued to arise within Community institutions and among the Member States. One French member of Parliament (MEP) tentatively suggested reducing the number of EU working languages from eleven to five. *EU: Belgium and the Netherlands Against Reducing Number of Working Languages to Five*, AGENCE EUR., Dec. 22, 1994. Other MEP's reacted with disbelief, asserting the proposal would be contrary to Article 151(1) (formerly 128(1)). *See id.* The Council responded to this debate by reaffirming that "[l]inguistic diversity is a component of the national and regional diversity of the cultures of the Member States referred to in Article 128" and reiterating the equality of the official languages with the working languages. Council Conclusions of 12 June 1995 on Linguistic Diversity and Multilingualism in the European Union, *reprinted in*, TEXTS CONCERNING CULTURE AT EUROPEAN COMMUNITY LEVEL, 1993-1997 at 79 (COUNCIL OF THE EUROPEAN UNION GENERAL SECRETARIAT, Supp. 1998).

172. Opinion on the Proposal for a European Parliament and Council Decision Establishing a Support Programme in the Field of Books and Reading - Ariane, ¶ 2.7, 1996 O.J. (C 100) 35.

173. The COR deduced these principles from prior Commission statements, determining that "any Community incentive measures must support and supplement efforts

edged that a successful cultural policy did not necessarily involve overt Community action.¹⁷⁴ These suggestions would indicate support for a strong interpretation of 151(4) that would allow Member States and individuals to put forth culture as a reason to sustain certain practices. Again, the suggestion was to focus not on a series of projects, but on acts that would be in line with subsidiarity.

The failed attempt to implement any meaningful cultural policy in the first few years following Maastricht prompted many observers to advocate amending Article 151.¹⁷⁵ One proposal involved changing the voting procedure in Article 151 from unanimous to qualified majority voting, a recommendation provoked by the delayed adoption of the Kaleidoscope, Ariane, and Raphael programs.¹⁷⁶ Most striking were the conclusions reached by representatives of the cultural sector, the Parliament, the Council of Ministers, and the Commission in a meeting held in 1996.¹⁷⁷ This group concluded that the cultural dimension should receive more attention in Community policies¹⁷⁸ and found that the concept of culture as a European value should be strengthened.¹⁷⁹ One of the participants, the European Forum for Arts and the Heritage, explained that any amendment

by the Member States, regions and local authorities, while respecting the principle of subsidiarity." *Id.* ¶ 2.3.

174. *Id.* Further, the opinion reminded the EU to limit itself to useful programming. *Id.* ¶ 2.6. This was seen as a way to prevent the EU from taking over small-scale projects that should really be in the hands of the Member States. *Id.* These suggestions envisioned a Community policy that was not focused solely on funding projects to promote some form of Euro-culture. Breeze, *supra* note 126 (accusing the EC of "dreaming up countless schemes to create a homogeneous, bland 'Euro-culture'"). Finally, the COR urged a continual evaluation of the EU actions in the cultural area. Opinion on the Proposal for a European Parliament and Council Decision Establishing a Support Programme in the Field of Books and Reading - Ariane, *supra* note 172, ¶ 2.8. This suggestion came to fruition. Resolution on the First Report on the Consideration of Cultural Aspects in European Community Action, 1997 O.J. (C 55) 37 [hereinafter Resolution on the First Report of the Commission].

175. Early 1996 was an appropriate time to assess the article, since an Inter-Governmental Conference was scheduled for March 29 to discuss EU institutional reform. Numerous suggestions for improving Article 151 (formerly Article 128) were made in the weeks leading up to the ICG, all focused on possible amendments to the Treaty. Some recognized that the Article should be used not simply as a justification for allocating funds to cultural projects, but as a tool to bring culture into the legal and political realm. The European Forum for the Arts and Heritage detailed several amendments, including changing the wording in Article 151(2) to support the culture of non-Europeans living in Europe and to protect commercial exchanges. *Culture: Tightening Up Maastricht's Provisions*, EUR. REP., Feb. 24, 1996, LEXIS, News Library, EURRPT File. This change was not made when the Treaty was amended. EC TREATY art. 151(2). A Parliament resolution also noted the need to strengthen the cultural dimension of the Union. See Resolution Embodying (i) Parliament's Opinion on the Convening of the Intergovernmental Conference, and (ii) an Evaluation of the Work of the Reflection Group and a Definition of the Political Priorities of the European Parliament with a View to the Intergovernmental Conference, 1996 O.J. (C 96) 77, ¶ E.

176. *Culture: Tightening up Maastricht's Provisions*, *supra* note 175.

177. *Id.* The meeting was held on February 23, 1996 in Amsterdam and was sponsored by the European Cultural Foundation and the European Parliament's Committee for Culture. *Id.*

178. *EU: Broad Agreement on Need to Revise Article 128 of EU Treaty*, *supra* note 157.

179. *Id.*

made to Article 151 should not be seen as an attempt to “emphasize vague notions of a common culture as an alternative to celebrating the diversity of regional and communal life.”¹⁸⁰ The statement was another reminder that the EU’s focus should be on respecting the diversity of cultures, not creating some overarching European culture.

The Commission must have viewed the conclusions reached at the 1996 meeting as a signal that 151(4) should be used more strongly because the Commission undertook an ambitious review of the scope of Article 151(4), focusing on the way EC policies and texts took cultural aspects into account.¹⁸¹ After reviewing Community action pertaining to culture and the single market,¹⁸² the Community’s internal policies,¹⁸³ audiovisual policy,¹⁸⁴ and foreign relations,¹⁸⁵ the document concluded that many EC policies impacted the cultural sector,¹⁸⁶ yet it noted that these policies were conducted independently of any consideration of the Community’s competence in the cultural arena.¹⁸⁷ The Communication set forth broad measures to help the EC reconcile the goals of the current policies with the cultural objectives of the EC Treaty.

Parliament criticized Commission’s report for its lack of substantive solutions and its fairly obvious conclusions.¹⁸⁸ In response, Parliament introduced several proposals that were clearly directed to give substance to

180. *Culture: Tightening Maastricht’s Provisions*, *supra* note 175.

181. First Report on the Consideration of Cultural Aspects in European Community Action, *supra* note 158. This report was a substantial effort with five parts: Culture and the Single Market—Regulatory Aspects, Culture in the Community’s Internal Policies, Audiovisual Policy, Culture in Community Foreign Relations, and Conclusions. *Id.*

182. This topic included a chapter on each of the following: freedom of movement and professionals in the cultural sector; copyright; taxation; competition policy; movement of cultural assets; traditional and regional agricultural produce; and culture in the judgments of the European Court of Justice. *Id.* pt. I.

183. This topic included a chapter on culture, cohesion, and balanced regional development; culture, social, and human resources policy; culture and advanced information and communications technologies; and culture and other internal policies, such as the environment, tourism, research, small and medium enterprises, social economics, and European town-twinning. *Id.* pt. II.

184. This topic included a chapter on regulatory aspects and a chapter on support actions. *Id.* pt. III.

185. This topic included a chapter on external cooperation actions and a chapter on commercial policy. *Id.* pt. IV.

186. *Id.* pt. V.

187. Commission’s First Report on the Consideration of Cultural Aspects in European Community Action, *supra* note 158, pt. V.1.

188. For example, the report made two observations. First, the Commission observed that decisions of the ECJ and legislative acts of the Community had “to reconcile achievement of the objectives of the Treaty with the specific objectives of cultural policies.” *Id.* pt. V. In certain sectors this meant that “cultural aspects . . . have not received the priority treatment which may be accorded to them in certain Member States.” *Id.* Second, the Commission observed that “a great majority of the policies and actions implemented by the Community now include a cultural dimension.” *Id.* The Parliament noted these conclusions with disdain, pointing to their insignificance then criticizing the Commission for failing to act on the findings. Resolution on the First Report of the Commission, *supra* note 174, ¶ G. A further criticism was that the Commission did not evaluate the programs implemented under Article 151 (formerly Article 128), including the Ariane, Raphael, and Kaleidoscope programs. *Id.* ¶ D.

the notion of culture in EC law and to salvage Article 151 from its fate as a budgetary tool.¹⁸⁹ First, it endorsed QMV as the only way to establish a genuine European cultural dimension.¹⁹⁰ Second, it suggested the addition of a clause to Article 151 to require all EC acts with a cultural impact to be compatible with cultural objectives.¹⁹¹ Third, it stated that Article 151 should be the legal basis for all legislation with a cultural purpose.¹⁹²

Other commentators were also critical of the EU cultural policy. In fact, this Note's analysis and proposal align with views expressed by Professor Brigid Laffan, from University College Dublin's Department of Politics, and Michael D. Higgins, the former Irish Minister for Arts, Culture and the Gaeltacht, in their 1996 address to a meeting of the EU cultural ministers.¹⁹³ Professor Laffan argued that "the EU faced a 'legitimacy crisis' brought on by its failure to incorporate cultural issues into the broad thrust of economic integration" and that "[a]ttempts at integration that define Europe only in economic terms, or that ignore the importance of culture, are destined to fail."¹⁹⁴ She characterized the historical development of cultural policy as "tentative and shallow," elaborating as follows:

EU cultural policies in the 1980's were fragmented, with no coherent rationale about the role of culture in European integration. In fact, the Union's activities appeared to touch a raw nerve in the member states. There was a general unrest and unease, albeit more pronounced in some member states than in others, at the Union's growing involvement in both education and cultural policy.¹⁹⁵

She suggested that Article 151 reflects this unease, pointing

to the contradiction in aims to provide a flowering of the cultures of individual member states, while at the same time stressing Europe's common cultural heritage. 'Is there not a tension between preserving the diversity and variety of cultures in Europe and at the same time seeking to recognize

189. Resolution on the First Report of the Commission, *supra* note 174.

190. *Id.* ¶ 1; see also *supra* notes 114-16 and accompanying text (discussing QMV).

191. Resolution on the First Report of the Commission, *supra* note 174, ¶ 2.

192. *Id.* ¶ 3. Fourth, it suggested enlarging the scope of Article 128 to provide broader protection for European languages. *Id.* ¶ 5. Specifically, the Parliament advocated changing Article 151 (formerly Article 128) to reference "the safeguarding and protection of European languages both inside and outside of Europe" and to protect "predominately cultural objectives." *Id.* The latter was suggested as a replacement to the language in Article 151(2) protecting only "non-commercial cultural exchanges." EC TREATY art. 151(2). Fifth, it asked the Commission to submit integrated cultural programs to ensure consistency between Articles. Resolution on the First Report of the Commission, *supra* note 174, ¶ 5. Finally, it proposed an increase in the overall funding for culture. *Id.* ¶ 13. Though it noted the need for increased funds, Parliament indicated that a specific fund for Community cultural activity was not desirable. *Id.* The Parliament also called on the Commission to use a zero rate VAT and apply fixed prices for books with homogeneous language areas, as measures to eradicate illiteracy and encourage reading. *Id.* ¶ 24.

193. See Unisíonn Mac Dubhghaill, *Ministers Warned Over Role of Cultural Issues in EU*, IRISH TIMES, Sept. 26, 1996, 1996 WL 12402645.

194. *Id.*

195. Unisíonn Mac Dubhghaill, *EU Ministers Take to Heart UCD Professor's Devastating Critique of Policies on Culture*, IRISH TIMES, Sept. 30, 1996, 1996 WL 12402994.

commonalities?¹⁹⁶

Mr. Higgins echoed Professor Laffan's concerns regarding the EU:

Essentially, the affairs of the Union have been dominated by the four freedoms that constitute the basis of the single market—free movement of goods, persons, services and capital.

...

[A]s we approach the end of this century and the millennium there is a real danger that we may be reaching a crisis in relation to the concept of European civilisation.

I believe that our citizens are gradually being turned into passive consumers without compassion and care for one another in an ever more aggressive, deregulated and competitive society. In effect our citizens are being dehumanized.

In my view the Union has an obligation to take this situation into account and to address it as a priority. On the other hand, I am optimistic that if we are prepared to take the legal opportunity presented by Article [151(4)] of the Maastricht Treaty to place the cultural dimension more centre stage in the policy-making deliberations of the Union, we can pull back from the brink.¹⁹⁷

Despite all of these suggestions, none were implemented with the Treaty of Amsterdam.¹⁹⁸ Parliament, the Commission, and others are clearly discontent with the current use of Article 151, including 151(4), yet there has been no noticeable shift in the use of the Article. Many have advocated the introduction of QMV, yet even at the IGC in early 2000 there was no proposal to adopt this procedure in lieu of the one currently required by Article 151(5).¹⁹⁹ Perhaps this is just a reflection of the Member States' fear of Community involvement in the cultural sphere. Regardless, the only change made to the text of Article 151 subsequent to

196. *Id.*

197. Mac Dubhghaill, *supra* note 193. Mr. Aad Nuis, the State Secretary of Education, Culture and Science in the Netherlands, agreed that "the EU has only scratched the surface of the possibilities inherent in Article [151] of the Maastricht Treaty. In particular, he pointed out that paragraph 4 of the article gives the EU the legal authority to involve cultural considerations in every area of EU activity." Mac Dubhghaill, *supra* note 195.

198. What happened is a mystery, due partly to the lack of a paper trail. The Draft treaty drawn up by the Dutch Presidency embodied none of these suggestions. Resolution on the Draft Treaty, 1997 O.J. (C 200) 70. While stressing that the monetary dimension of the EU was still dominant, the draft only addressed culture in the context of embracing language as a dimension of cultural policy. *Id.* ¶ 4(e). "Language policy must be specifically recognized as a dimension of cultural policy and Article [151] of the Treaty must be adjusted accordingly." *Id.*

199. A European Union Culture Forum was held in Brussels the 29th and 30th of January 1998. This forum brought together 350 people from the European institutions, Member States, other European countries, international organizations, and various cultural figures. Europa, *Le Forum Culturel de L'Union Européenne*, at http://europa.eu.int/comm/culture/forum_fr.html (last visited Mar. 12, 2001). Organized by the Directorate General X to formulate ideas for the future action program, commentators criticized it for accomplishing little, with too many speeches and not enough discussion. *Cultural Policy: The Future After 1998*, EUR. REP., Apr. 22, 1998, LEXIS, News Library, EURRPT File.

Maastricht was a small addition to the end of 151(4). To the existing text "[t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty"—the Treaty of Amsterdam added "in particular in order to respect and to promote the diversity of its cultures."²⁰⁰ While this did not go as far as many commentators had hoped, this basic change reaffirmed an important tenet: in its quest to achieve free movement and level competition, the Community must respect the individual cultures of its peoples.

D. The European Court of Justice Has Done Nothing to Correct the Misinterpretation of Article 151(4)

The preceding sections noted the significant discontentment over the use of Article 151, yet the Community's lawmaking institutions have done little to resolve the problem. The decision-making procedure required by 151(5) is an obstacle to Parliamentary and Council action, and the present situation thus is one where the shortcomings of the legislative bodies are apparent. Renaud Dehousse has suggested that in such situations the ECJ should be compelled to act in order to fill the political void.²⁰¹ In other words, the ECJ should step forward and establish what Article 151(4) means and how it must be followed. The ECJ, however, has not done so.

The ECJ's pre-1992 case law made it clear that the Treaty would not be interpreted as providing a general cultural exception. The addition of a Title on Culture, however, could have shifted the court's analysis in subsequent cases. The new Title on Culture could have been interpreted as expanding the scope of Article 30 (formerly Article 36) and Article 39 (formerly Article 48), thus creating a cultural exception to the free movement provisions. Or the ECJ could have interpreted Article 151 as a new exception, independent of Article 30. Instead, the ECJ continues to evaluate cases involving culture in the same way it did prior to Maastricht's implementation.²⁰² The ECJ has limited Article 151's scope and confined its application. Though the ECJ has not yet discussed the Article in depth,²⁰³ cases referencing Article 151 indicate that the ECJ will not provide the

200. Some commentators had also recommended adding a section on culture to the preamble. *European Union/IGC: Calls for Maastricht Treaty Improvements*, EUR. REP., Mar. 6, 1996, LEXIS, News Library, EURRPT File. This addition was also not made in the final Treaty. EC TREATY pmbl.

201. DEHOUSSE, *supra* note 123, at 128.

202. MITSILEGAS, *supra* note 87, at 122. Mitsilegas summarizes the situation succinctly:

After the entry into force of the Maastricht Treaty the European Court of Justice dealt with a number of cases involving culture. In these rulings the Court did not refer to the new provisions of the Treaty, but continued to view these cultural aspects in the light of their relationship with the free movement of persons, services and capital.

Id. The statute of the ECJ requires the court to state the reasons on which their judgments are based. ECJ STATUTE art. 33; see also CRAIG & DEBURCA, *supra* note 4, at 86. ECJ decisions should thus indicate whether the court is basing decisions on Article 151.

203. Parliament actually threatened to institute proceedings against the Council in order to force the ECJ to rule on the scope of Article 151 (formerly Article 128). *EU: EP/Institutions - Article 128: Parliament is Considering Proceedings Against the Council so as to*

boost for culture that many observers hope for.²⁰⁴ Indeed it seems that it is not “ready to accept culture as a prominent consideration for Community law.”²⁰⁵

Perhaps the most obvious case where Article 151 should have been addressed more seriously was *Union Royale Belge des Societes de Football Association v. Bosman*.²⁰⁶ *Bosman* involved a challenge to European Football Confederation rules that permitted national football associations to limit the number of foreign players who could be fielded by a club in competition matches. Many national associations had such rules. The French Cour d'Appel, Liege asked the ECJ to rule on whether the nationality clauses were prohibited by Article 39 (formerly Article 48) on freedom of movement of workers, and the ECJ held that they were. Germany argued that sport is often a cultural, rather than economic, activity and that Article 151(1) required the Community to respect the national and regional diversity of the cultures of the Member States. The ECJ dismissed the cultural argument with a single sentence. The brief explanation was that the question submitted by the French appellate court related only to the scope of the free movement of workers guaranteed by Article 39; it did not relate to the conditions under which “Community power of limited extent,” such as those based on Article 151, could be exercised. The ECJ did not explain its determination that the Community’s power to act on behalf of culture was a power of “limited extent.” In sum, the *Bosman* decision indicated that the ECJ does not view cultural protection as a priority within EC law.

Notwithstanding the ECJ’s view that Article 151 was not properly before it, the Advocate General avoided a discussion of Article 151, though one could have been helpful to the decision. The Advocate General’s opinion stated: “Under [former] Article [39(3)], freedom of movement is to give workers the right, ‘subject to limitations justified on ground of public policy, public security or public health,’ to accept offers of employment actually made [and] to move freely within the territory of member States for

Oblige the Court of Justice to Rule on the Scope of Article 128 on Culture, AGENCE EUR., Jan. 25, 1997.

204. The ECJ first mentioned Article 151 (formerly Article 128) in 1993, shortly before the Treaty on European Union went into effect. In a challenge to the legality of the Treaty, *Brunner v. European Union Treaty*, 1 C.M.L.R. 57 (BVerfG 1993) (F.R.G.), the German Federal Constitutional Court found the culture provisions to be legal because they only allowed the Community to encourage cooperation among Member States and to give support for their measures. *Id.* at 92. A later case confirmed that basic cultural policy remained a matter for the Member States. Case 1/94, *Re Uruguay Round Treaties*, 1994 E.C.R. I-5276, [1995] 1 C.M.L.R. 205 (1994). Both decisions were in line with Member State concerns mentioned above. Another case, Case C-360/92P, *Re Net Book Agreements: Publishers Association v. Commission*, 1995 E.C.R. I-54, [1995] 5 C.M.L.R. 33 (1995), will be discussed *infra* Part II.C. In *Portugal v. European Community Council*, Case C-268/94, 1996 E.C.R. I-6207, [1997] 3 C.M.L.R. 331 (1996), the court upheld an agreement between the EC and India that included culture as a basis of cooperation, even though the Council was not involved. *Id.* ¶¶ 36-37. It determined that the Member States were not committed to any particular type of action by the agreement. Thus, they did not need Council participation in the agreement. *Id.*

205. Mitsilegas, *supra* note 87, at 117.

206. Case C-415/93, 1995 E.C.R. I-5040, [1996] 1 C.M.L.R. 645 (1995).

that purpose”²⁰⁷ Thus, even though the provisions at issue were found to violate Article 39, if they fell into an exception, they would be upheld as compatible with the Treaty. The ECJ had, in past cases, fashioned some sort of exception by holding that “rules which proscribe that only players who possess the nationality of a State can play in that country’s national team are consistent with Community law.”²⁰⁸ The Advocate General recognized that this “conclusion appears obvious and convincing, but [it] is not easy to state the reasons for it;”²⁰⁹ in other words, he recognized the exception, but could not identify its foundation in EC law. Due to the facts of the case at hand, however, he determined that the ECJ’s exception—whatever it might be based upon—could not be based on Article 39(3), and he thus declined to address it any further. This was truly unfortunate, as he could have suggested that Article 151 was the source of the exception and he could have urged the ECJ to evaluate culture as an inherent exception—equal to those listed in Article 39(3). Whether the ECJ agreed, this would have presented a more plausible, more legal, and more settling view of the ECJ’s past rulings, rather than determining that an exception exists with no legal foundation.²¹⁰ Subsequent ECJ decisions have not indicated any change in position.

In *Commission v. Belgium*,²¹¹ Belgium tried to use Article 151 as a justification for its failure to comply with a directive that harmonized national laws on broadcasting activities.²¹² The directive itself pursued cultural aims, and a clause in the directive said Member States could not restrict transmission of broadcasts for reasons related to fields coordinated by the directive.²¹³ The ECJ held that a Member State could not subject programs from other Member States to further controls on the basis of Article 151. It further emphasized that the Community could still adopt measures to implement the fundamental freedoms, even when cultural considerations need to be taken into account.²¹⁴

*Daniele Annibaldi v. Sindaco Del Comune di Guidonia e Presidente Regione Lazio*²¹⁵ was a clear attempt by the ECJ to limit Community cultural competence. The court held that a regional law establishing a park in order to “protect and enhance the value of the environment and cultural heritage” of the area fell outside the scope of Community law.²¹⁶ Reasoning that the law did not implement a provision of Community law in the field of culture, the ECJ concluded that the law was thus outside its

207. *Id.* ¶ 133.

208. *Id.*

209. *Id.*

210. For further analysis of the *Bosman* decision, see Rachel B. Arnedt, Comment, *European Union Law and Football Nationality Restrictions: The Economics and Politics of the Bosman Decision*, 12 EMORY INT’L L. REV. 1091 (1998).

211. Case C-11/95, 1996 E.C.R. I-4153, [1997] 2 C.M.L.R. 289 (1996).

212. *Id.* ¶ 58.

213. *Id.* ¶ 59.

214. *Id.*

215. Case C-309/96, 1997 E.C.R. I7505, [1998] 2 C.M.L.R. 187 (1997).

216. *Id.* ¶ 24.

jurisdiction.²¹⁷

In summary, the new cultural provisions in the Treaty have not prompted the ECJ to adjust its analysis in cases involving culture. By continuing to treat culture as it did prior to Maastricht, the ECJ prevents Article 151 from performing its intended role. The ECJ could have interpreted Article 151 to require that cultural aspects be taken into account "vis-à-vis EC fundamental economic rules."²¹⁸ Instead, the ECJ has continued to analyze cases as if Article 151 had not become law.²¹⁹

IV. A Clear Example of the Weakness of Article 151(4): The Dispute over Cross-Border Fixed Book Prices

The need for Article 151(4) to play a stronger legislative and judicial role in EC legal doctrine is illustrated by the recent disputes over cross-border book price-fixing schemes. Resale price maintenance (RPM), a practice that allows publishers to determine the price at which retailers sell books, was once the norm across Europe.²²⁰ RPM is designed to protect small booksellers from larger retailers who would otherwise be able to sell books at substantially reduced rates,²²¹ which in turn is a way to ensure greater diversity in available titles.²²² While the Commission has decided that intrastate price fixing does not present a threat to competition, it has continued to challenge price-fixing arrangements that cross Member State borders.²²³ The latter are typically arrangements among states that share a common language, such as Finland and Sweden, the United Kingdom and Ireland, and Germany and Austria.²²⁴

The Commission has instituted at least three actions against such agreements,²²⁵ alleging that they violate the competition rules laid down in Article 81 (formerly 85) of the EC Treaty.²²⁶ Two of these actions resulted

217. *Id.*

218. Mitsilegas, *supra* note 87, at 123.

219. One recent case, Case C-200/96, *Metronome Musik v. Music Point*, 1988 E.C.R. I-1971, was sympathetic to the use of Article 151, recognizing the relevance of the Article in the context of copyright works, even though the directive at issue was adopted prior to the time the article entered into force. *Id.* ¶ 22.

220. *Book Price Maintenance: German and Austrian Publishers Urged to End Pact*, EUR. REP., Jan. 17, 1998, LEXIS, News Library, EURRPT File.

221. LOMAN ET AL., *supra* note 5, at 101.

222. *Id.*

223. *Book Price Maintenance*, *supra* note 220.

224. *Id.*

225. The first action was initiated against the Netherlands and Flemish Associations of Publishers and Booksellers (the VBBB/VBVB agreement). Commission Decision 82/123 of 25 November 1981, 1982 O.J. (L 54) 36. The second was initiated against a system between the U.K. and Ireland (the Net Book Agreements). Commission Decision 89/44 of 12 December 1988, *Publishers Association - Net Book Agreements*, 1989 O.J. (L 22) 12. The third was initiated against two German-Austrian RPMs (the *Samelrevers/Einzelrevers* agreement). Commission Decision IV/34.657 of 23 February 1996, *Notification of Book Price Agreements in the German Language Area*, 1996 O.J. (C 54) 2.

226. EC TREATY art. 81 (formerly art. 85). The text of that article reads as follows:

in decisions by the ECJ,²²⁷ one of which was issued after the implementation of Maastricht.²²⁸ That case, *Re The Net Book Agreements*, annulled the Commission decision that found the agreements in violation of Article 81.²²⁹ Though one reason the decision was annulled was the failure of the Commission to recognize the benefits of the Net Book Agreements to the Irish book market,²³⁰ there was no reference to culture or Article 151 in the decision. The applicant argued that the Commission was required to consider the cultural aspects of the case, a position noted in the Advocate General's opinion. Though the Advocate General agreed with the applicant, he stated that such a duty followed from pre-established ECJ case law,²³¹ and he thus did not give independent weight to the existence of Article 151.

This response was unfortunate for several reasons. First, in contrast to earlier case law, Article 151 now was a part of the Treaty and thus should have had independent effect on the ECJ's analysis. Second, by failing to explore the scope of Article 151, the ECJ left the Article's strength uncertain. Such uncertainty is of little help to others whose practices are chal-

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1. The Following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices;
 which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

227. Case 54/36, *VBBB & VBVB v. Commission*, 1984 E.C.R. 29; *Re The Net Book Agreements: Publishers Association*, 1995 E.C.R. I-54; [1995] 5 C.M.L.R. 33.

228. *Re The Net Book Agreements: Publishers Association*, 1995 E.C.R. I-54; [1995] 5 C.M.L.R. 33.

229. *Id.*

230. *Id.*

231. *Id.* ¶ 60.

lenged by the Commission. Notably, even though the ECJ ultimately upheld the Net Book Agreements in 1995, the 1989 Commission decision had already taken its toll, and the agreements collapsed.²³²

Perhaps due to the questions left unanswered by *Re The Net Book Agreements*, the Council asked the Commission to study the significance of Article 151(4) in relation to those articles of the EC Treaty affected by cross-border fixed book prices.²³³ The Commission waited more than six months before even issuing a call for tenders, and it is not clear that a study was ever completed.²³⁴ The Commission did announce its view that the two German-Austrian book price maintenance pacts mentioned above²³⁵ violated competition law²³⁶—a subtle suggestion that the parties find another way to accomplish their goal of “promoting the sale of literary works in German speaking Europe.”²³⁷

German, Austrian, and Swiss authors fought to keep the pricing system, declaring that it maintained a diversity of titles that could not survive in a completely free market.²³⁸ They relied on Article 151(4) to try and force the Commission to take the cultural impact of its measures into account.²³⁹ Yet the Competition commissioner denied the applicability of Article 151(4) to the price-fixing dispute. He refused to acknowledge any link between culture and the book price agreements, stating that the publishing houses were not limited to classic literature, but could publish, for example, popular fiction.²⁴⁰ This argument is unpersuasive, as the Community has repeatedly stated that cultural policy was intended to protect all culture, not simply highbrow art and literature.²⁴¹ German authorities quite appropriately said the Commission had “not taken sufficiently into account the cultural aspect of books.”²⁴²

232. Christine E. Zandvliet, Note, *Fixed Book Prices in the Netherlands and the European Union: A Challenge for Community Competition Law*, 3 COLUM. J. EUR. L. 413 (1997/98).

233. See Council Decision of 22 September 1997 on Cross-Border Fixed Book Prices in European Linguistic Areas, 1997 O.J. (C 305) 2. “Those articles” most likely meant the articles detailing free movement and competition. See EC TREATY arts. 23-31 (formerly arts. 9-37) (free movement of goods), arts. 39-60 (formerly arts. 48-73h) (free movement of persons, services, and capital), arts. 81-89 (formerly arts. 85-94) (common rules on competition).

234. The failure of the Commission to address the issue was noted by two questions posed by Jessica Larive. Written Question No. E-O 772/98 by Jessica Larive (ELDR) to the Council, 1998 O.J. (C 310) 126; Written Question No. E-O773/98 by Jessica Larive (ELDR) to the Commission, 1999 O.J. (C13) 8.

235. *Re Net Book Agreements: Publishers Association*.

236. *Book Price Maintenance*, *supra* note 220. This was not a final decision. *Id.*

237. *Id.*

238. *Book Price Fixing: German-Austrian Publishers Fighting to Maintain Pact*, EUR. REPORT, Apr. 1, 1998, LEXIS, News Library, EURRPT File.

239. *Id.*

240. *Id.*

241. See First European Community Framework Programme in Support of Culture, *supra* note 13; First Report on the Consideration of Cultural Aspects in European Community Action, *supra* note 13.

242. *Germans Have No Plans to End Book Price Pact*, EUR. REP., Jan. 24, 1998, LEXIS, News Library, EURRPT File.

Despite agreement by Parliament and the Council of Ministers that the pacts could be authorized,²⁴³ and Germany and Austria's continued assertion that eliminating the system would "jeopardize the diversity and broad accessibility of books"²⁴⁴ the Commission refused to yield. As a result, the cross-border system was to be dismantled by June 30, 2000 and replaced by a national system of fixed book prices.²⁴⁵

The initial refusal of the Commission to recognize even the applicability of Article 151 seems to have given way, albeit rather belatedly, to the recognition that Article 151 does play an important role. In response to two separate questions, the Commission seems to adapt the position advocated by this Note, that is, it interprets Article 151 as an explicit step in Community decision making and views Article 151 as a possible exception under the free movement provisions. The most recent of the Commission's responses is the furthest reaching of the two:

[T]he Commission would point out that any decision it adopts can be taken only within the legal framework laid down by the EC Treaty, as interpreted by the Community courts. Within that framework, . . . the relevant provisions in force are those laid down in Article 81 (formerly Article 85) et seq. of the EC Treaty, and the cultural clause in Article 151(4) (formerly Article 128(4)) of the EC Treaty. They permit a thorough case-by-case analysis in which all the relevant factors, including cultural factors, can be taken into account. . . .

Pursuant to Article 151(4) of the EC Treaty, the Commission is required to take cultural aspects into account in its action under other provisions of the EC Treaty in order, among other things, to respect and promote the wide variety of cultures existing in the Community. When the Commission applies the EC Treaty rules on competition, it therefore considers, in a positive spirit, whether an agreement or a practice has cultural objectives and contains cultural provisions which are actually put into practice and may justify imposing restriction on competition commensurate with the objectives in mind. These questions are considered with a view to the possible application of Article 81(3) (formerly Article 85(3)) of the EC Treaty, which lays down that the Commission may exempt restrictive agreements or practices the advantages of which outweigh the disadvantages as regards consumers, provided that they simply impose the restrictions indispensable to the attainment of their objectives and do not eliminate competition in respect of a substantial part of the products in question. The Commission also takes account of any alterations which the parties may make to such agreements or practices. Cultural benefits may constitute advantages for consumers under this rule. Lastly, under Article 151(4) of the EC Treaty, a cross-border book price fixing agreement cannot be exempted unless the agreement or practice in question satisfies all the conditions laid down in

243. *Competition Policy: Commission to Clarify the Issue of Cross-Border Book Price Fixing*, EUR. REP., Oct. 25, 1997, LEXIS, News Library, EURRPT File [hereinafter *Competition Policy*]; *European Parliament Resolution on Common Book Price-Fixing Across Borders*, 1998 O.J. (C 379).

244. Press Release, Comm'n of the Eur. Communities, 2195th Council Meeting on Culture/Audiovisual, Luxembourg (June 28, 1999), LEXIS, News Library, RAPID File.

245. See Press Release, Comm'n of the Eur. Communities, Reaction by Commissioner Mario Monti to the Agreement on the Fixed Book Price (Germany and Austria) (Feb. 23, 2000), LEXIS, News File, RAPID File.

Article 81(3) of the EC Treaty, and this presupposes, among other things, that the cultural benefits adduced are clearly shown to exist.²⁴⁶

Ultimately, the Commission did not recognize any cultural benefit stemming from the cross-border book price-fixing system, and the system was dismantled. Their narrow view of what constituted a cultural benefit resulted in the dismantling of the German–Austrian agreement in place since 1885²⁴⁷—without any acknowledgment of the possible cultural effect. This aspect of the decision is hardly laudable. Nevertheless, the legal framework outlined in the Commission’s response is itself quite promising. As noted in the beginning of the portion quoted above, the Commission will act “within the legal framework laid down by the EC Treaty, as interpreted by the Community courts.”²⁴⁸ If the ECJ broadens the application of Article 151 and uses it to “mitigate the full force of Community competition legislation,”²⁴⁹ the future of the provision would be dramatically changed.

V. Solutions

Although Article 151(4) has not been completely ignored in legislative and judicial policy making, neither the ECJ nor the Commission have given much weight to its legal effect.²⁵⁰ Instead, the Article has been seen as a grant of authority that allows the Community to sponsor and fund a variety of cultural projects. While these actions have not been without success, the Community should take a wider view of its responsibility in the cultural field. Such a wider view would not require an expansion of the bases for action; rather it would involve expanding the range of permissible legal action for regulating entities so as to allow more leeway when that action affects culture. This Note thus proposes interpreting Article 151(4) as an exception to the market provisions of the Treaty.

A. Re-evaluate the Interpretation of Article 151

Article 151(4) states that the Community shall take cultural aspects into account in its action under other provisions of this Treaty.²⁵¹ This explicit mandate is in contrast to Article 151(2), which simply says that the Community must encourage cooperation between Member States and can, if necessary, support and supplement their action. Article 151(2) does not command, or even explicitly authorize, the implementation of a mecha-

246. Written Question P-1989/99 by Norbert Glante (PSE) to the Commission (28 October 1999), Answer Given by Mr. Monti on Behalf of the Commission (15 November 1999), 2000 O.J. (C 170 E) 134 [hereinafter Commission Answer to Mr. Glante]; see also Written Question No. E-0773/98 by Jessica Larive, *supra* note 234.

247. *Competition Policy*, *supra* note 243.

248. Commission Answer to Mr. Glante, *supra* note 246.

249. *Competition Policy*, *supra* note 243.

250. See, e.g., *Re Net Book Agreements: Publishers Association*, 1995 E.C.R. I-54, [1995] 5 C.M.L.R. 33. The opinion of the Advocate General did not find that Article 151 (formerly Article 128) added anything to the already established case law of the ECJ. See *supra* notes 229-32 and accompanying text.

251. EC TREATY art. 151(4).

nism to fund cultural projects, yet the Community had few reservations about taking on such a task. Section four has the potential, more so than any other section, to protect culture. Further, that protection does not require the Community to propose or finance any kind of cultural scheme. Before any progress can be made, however, the European Community must undo the damage caused by early, erroneous interpretations of the Article.

Specifically, the ECJ is the institution vested with the power to reinterpret or expand upon the interpretation of Article 151. The Commission acts "within the legal framework [of] the EC Treaty, as interpreted by the Community courts."²⁵² If the ECJ ignores Article 151 when analyzing cultural issues, then commentators cannot reasonably expect the Commission to give much weight to the Article. If the ECJ were to devote proper attention to the analysis of 151 in a relevant situation, however, then the Commission would follow suit. The future of Article 151, therefore, rests with the judges of the ECJ.

B. Recognize Culture as a Rule with Mandatory Force: Interpret 151(4) to Allow Cultural Worth to Justify Exemption from the Competition Rules and Provide an Exception to the Freedom of Movement Provisions

The potential of Article 151(4) can be seen in the context of Community law concerning the internal market.²⁵³ One tenet of the internal market is the elimination of "quantitative restrictions on imports and all measures having equivalent effect."²⁵⁴ This general rule is subject to certain exceptions that allow states to justify restrictions on grounds such as public policy and public health.²⁵⁵ Though the exceptions are interpreted restrictively,²⁵⁶ an exception for culture found roots in Community law even prior to the implementation of Maastricht.²⁵⁷

252. Commission Answer to Mr. Glante, *supra* note 246.

253. The internal market is defined in Article 14 (formerly Article 7a) of the EC Treaty as "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured." EC TREATY art. 14(2). The common market is a separate concept, and it is in that context that the rules on competition are relevant. LOMAN ET AL., *supra* note 5, at 23.

254. EC TREATY art. 30.

255. Article 30 (formerly art. 36), which applies to the free movement of goods, allows

prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

EC TREATY art. 30.

256. CRAIG & DE BURCA, *supra* note 4, at 786 (noting that the exceptions have been interpreted narrowly both by the ECJ and in a series of directives).

257. LOMAN ET AL., *supra* note 5, at 23 (noting a possible cultural exception to the freedom of movement laws). Further, a rule of reason developed in the context of the internal market provisions, specifically Article 28 (formerly article 30). Specifically, in the context of the article prohibiting "[q]uantitative restrictions on imports and all measures having equivalent effect"—Article 28 (formerly article 30). *Id.* at 44. This was seen as a step toward recognizing a cultural exception. *See id.* The rule of reason is

Prior to the addition of Article 151 there was no legal basis for action on behalf of culture.²⁵⁸ This was sufficient explanation for the failure of the Commission and the ECJ to take culture into account when evaluating the compatibility of individual and Member State practices with EC law.²⁵⁹ Yet that is no longer the case. Today those bodies are commanded by the language in Article 151(4) to recognize the cultural aspects of issues under analysis. At a minimum, Article 151 should be interpreted as an exception cognizable under the Treaty. Yet it is in fact even stronger, as the Community is not only authorized to take culture into account, but is given the responsibility to act affirmatively on behalf of culture.²⁶⁰ This grant of affirmative competence is evidence of intent on behalf of the Member States, Commission, Council, and Parliament to protect Member State culture. There is no reason to think this protection should be limited to the funding of culturally-related projects.

Thus, culture should play a role not only in the implementation of new policy but also when evaluating Member State laws that implicate the internal market provisions of the Treaty—or individualized arrangements that implicate the competition provisions. To ensure that the cultural aspects of situations before the Commission and the ECJ are taken into account, compatibility with Article 151 should become an explicit part of any legal analysis where a party raises a cultural justification.²⁶¹ This would give recognition to the unique legal mandate detailed in Article 151(4), a mandate that goes beyond the simple acknowledgment of cultural interests seen prior to the implementation of Maastricht.

Adopting QMV in the Council is not enough. While this would facilitate passage of the budget for cultural projects, QMV would not fully address the current problems with EC cultural policy. If anything, the abil-

distinct from the exceptions in Article 30 (formerly article 36). 2 LAW OF THE EUROPEAN COMMUNITIES 119 (David Vaughan ed., 1986).

258. See *supra* Parts I.C, II.

259. Note, however, that the ECJ and the Commission did, at times, seem to make exceptions for culture. See, e.g., Joined Cases 60 & 61/84, *Cinetheque v. Federation Nationale des Cinemas Francais*, 1985 E.C.R. 2605.

260. EC TREATY art. 151.

261. Given that Member State culture can be implicated in such a multitude of ways, critics of my proposal might argue that to require an assessment of the cultural variable would be to undertake an overwhelming and potentially impossible task. While the argument has some merit, there are two responses. First, the Community recognized the importance of the cultural variable when it made the affirmative decision to add Article 151 to the EC Treaty. That Article requires the Community to consider the cultural dimension of its actions; the provision becomes meaningless if culture is not considered in the decision-making process. Second, while many practices have a cultural dimension, there is admittedly a threshold at which the cultural dimension becomes important enough to consider. Clearly, when the parties to the Commission or ECJ proceedings assert that a challenged practice has cultural value, the Commission or the ECJ must properly consider that argument. While this is already being done to a certain extent, this Note argues that neither the Commission nor the ECJ has given enough weight to the mandate of 151(4) in that both tend to dismiss assertions of cultural value without giving them serious consideration. Surely, according more legal weight to an argument that is already being asserted will not jeopardize the functioning of the ECJ or the Commission.

ity to pass measures more easily, in the context of current cultural policy, might simply encourage the trend to address culture on a programmatic basis.

The Community does not need to act covertly when culture is at issue. Indeed, it must not. Rather, it must recognize the impact its actions have on culture and make its decisions regarding the import of culture overtly, so they may be exposed for examination. Even more importantly, those decisions must be made only after giving full weight to the interest of the Community in protecting individual Member State culture from gradual and otherwise inevitable erosion.

C. A More Expansive Interpretation of Article 151 is Consistent with EC Law

1. Article 151(4) Must Have Been Intended to Have an Effect on the Market Provisions of the Treaty

The addition of an article on culture created a unique situation within EC law.²⁶² While the Community then had explicit authorization to act on behalf of culture, exactly what that meant in the context of Community law was uncertain. Early debates on the addition of an article on culture focused on enlarging Community competence so that Member State culture could be protected.²⁶³ Rather than simply inserting "culture" as an exception under the internal market or common market provisions of the Treaty,²⁶⁴ an entire article on culture²⁶⁵ was added. The Member State governments were not oblivious to the relationship between market and culture. To the contrary, they recognized that relationship explicitly.²⁶⁶ Thus it would be reasonable to deduce that the drafting of Article 151 envisioned some impact on the market provisions of the Treaty. The language of 151(4) also indicates such an intent.²⁶⁷

262. The TEU also added titles on public health, EC TREATY tit. XIII (formerly tit. X), and consumer protection, *id.* tit. XIV (formerly tit XI). These titles were similar in scope to the title on culture, yet their impact was notably clearer, as protection of health was already an exception under Article 30 (formerly 36).

263. See *supra* Part II.

264. The provisions that could have been amended to add a cultural exception include Article 30 et seq. (formerly Article 36) concerning free movement of goods; Article 39 et seq. (formerly Article 48) concerning free movement of persons; Article 43 et seq. (formerly Article 52) concerning right of establishment; Article 49 (formerly Article 59) concerning free movement of services; Article 56 et seq. (formerly Article 73b) concerning free movement of capital; and Article 81 (formerly Article 85) concerning competition. EC TREATY.

265. Technically, the TEU created a title on culture with Article 128 (now Article 151) as the sole article. *Id.* tit. IX (now tit. XIII).

266. See *supra* notes 92-107 and accompanying text.

267. "The community shall take cultural aspects into account in its action under other provisions of the Treaty." EC TREATY art. 151(4). This language can reasonably be interpreted as addressing the provisions mandating creation of an internal market and the provisions regulating competition.

2. Article 151(4) is More Consistent with Subsidiarity than the Current Cultural Policy

Giving substance to a legal argument that may be made before the Commission or the ECJ is more in line with the other bases of the Treaty, particularly subsidiarity.²⁶⁸ Subsidiarity limits the scope of Community action to those areas where action on a Member State level would be insufficient or ineffective to achieve the desired outcome.²⁶⁹ One justification for this principle is that it allows the Member States to retain control over particularly sensitive fields, such as culture.²⁷⁰ Under Culture 2000, two of the three projects proposed for implementation and funding would leave control in the hands of the Member States.²⁷¹ Though the Community role is largely restricted to control over funding, this includes the power to control the types of events that get funded.²⁷² Such a power is not insignificant and has raised concern about the potential for Community influence in the cultural field.²⁷³

In contrast, concerns over subsidiarity weigh in favor of recognizing culture as an exception. In this context, rather than taking affirmative action, the EC would be recognizing a Member State interest. That is, the Commission and the ECJ would find that the interest of a state in protecting, for example, a cultural industry outweighed the EC Treaty's prohibition against restrictions on the free movement of goods. This approach respects the principle of subsidiarity because the Community would not be acting in an area best left to the domain of the Member State. To the contrary, the Community would be respecting "national and regional diversity" and "taking cultural aspects into account in its action," both of which are mandated by Article 151 and thus by the EC Treaty.

VI. Outlook for the New Millennium

Culture is distinct.²⁷⁴ It is more than a good or a service,²⁷⁵ yet defining what the word culture encompasses is difficult,²⁷⁶ if not impossible.²⁷⁷

268. *Id.* art. 5 (formerly 3b); *see also supra* note 163.

269. EC TREATY art. 5.

270. BERMANN ET AL., *supra* note 110, at 47.

271. The cultural cooperation agreements and specific projects would include events left to Member State control, though the former would also encompass large-scale Community events. *See supra* note 92.

272. STEYGER, *supra* note 31, at 88. Elies Steyger notes that power lies in the accumulation of money. If state budgets for culture were to decline, Community funding might replace national subsidies, thus giving the Community control over eligibility criteria for financing. *Id.*

273. There is also concern that EU officials might abuse their power by funding projects that should not receive EC funds, but would be more appropriately funded by a national government. *See, e.g., EP News, supra* note 157.

274. Marcelino Oreja, Speech entitled Culture and European Integration: Foundations of the European Community's Cultural Activities (Mar. 6, 1997) [hereinafter Oreja Speech] (noting that "culture has distinct characteristics"), at <http://europa.eu.int/en/comm/dg10/oreja/0603en.html> (last visited Mar. 1, 1998).

275. *Id.* (noting that "cultural goods . . . are not commodities like others").

276. *See supra* note 5 (providing two distinct definitions of culture).

Devising a Community definition of culture is especially arduous because national identity in Europe has and will continue to change dramatically.²⁷⁸ Within the current EU, the presence of large immigrant populations has altered the traditional conception of "European." No longer is every nationality defined by white skin and Western customs. Multiculturalism is changing the face of Europe, literally and figuratively. The addition of eleven new Eastern European countries²⁷⁹ will further challenge Community identity, as the concept of culture will have to expand to encompass the unique experiences and histories of these peoples.

Though early Community attempts at cultural policy were characterized by their attempts to create a European culture, the desirability of this policy was questioned and has been rejected. Former Minister Oreja urged the EC to take on the role of "guarantor and protector of cultural diversity"²⁸⁰ and encouraged Member States to focus on the survival and flowering of their own culture and language, rather than engaging in a process of cultural leveling.²⁸¹

While these words provide some comfort, the Community's continuing emphasis on large-scale cultural projects belies Mr. Oreja's aspirations. The Community is still too focused on financial action.²⁸² A more effective solution lies in centering EC cultural policy in the hands of the Member States. By allowing members of the Community to decide what they consider to be of cultural value within their own territory, the Community would avoid the need to define culture in order to protect it. When a state is summoned before the ECJ or the Commission, that state should be able to assert the protection of Article 151(4) and have its cultural concerns considered. The Commission undoubtedly retains the right to challenge practices within the Member States that violate the four freedoms or the competition laws. The Commission and the ECJ can still review the cultural interests asserted by a state to ensure that they are not disguised attempts at protectionism.²⁸³ Yet the focus should be on protecting culture as the Member States see it. Effective use of Article 151 requires the recognition of culture as an exception, much like the public policy exception in Article 30 (formerly Article 36), and mandates the explicit analysis of cultural issues confronted in Commission opinions and ECJ decisions.

277. As noted by one author, not all books are considered to have cultural value. LOMAN ET AL., *supra* note 5, at 49.

278. Carl Honore, *Fortress Europe: Who Are We?*, HOUSTON CHRON., Dec. 9, 1998, at A24.

279. *See supra* note 3.

280. Oreja Speech, *supra* note 274.

281. *Id.*

282. *See supra* Part III.B.

283. This is the type of analysis contemplated under Article 30 (formerly Article 36). Exceptions to the free movement of goods provisions are set out with the proviso that to gain an exception, the restriction must not be an "arbitrary discrimination or a disguised restriction on trade." EC TREATY art. 30.

Conclusion

The Community has certainly advanced a long way from its initial focus on coal and steel. A cultural policy, once shunned by the Community, now resides within the Treaty, coexisting with the policy on free movement of goods, persons, services, and capital, and the rules governing competition. This cultural mandate, however, has been sorely neglected.

The result is that the market remains the central focus, and as far as culture is concerned, the only significant achievement is that the Community has recognized Article 151 as providing a legal basis for funding cultural programming. If the present trend continues, the focus will remain economic, and cultural competence will continue to be underutilized.

Yet this scenario is not predestined. The Community gave itself the power to balance culture against economic concerns. Article 151(4) must be used more effectively if cultural policy is to have any lasting effect. Continued failure to recognize its importance would be an undeserved blow to Community cultural policy.

