

The right to access to culture under EU law

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Abstract:

The article analyses the non-recognition of the right to access to culture under EU law and its partial and indirect European implementation which reduced this human right to a right to access cultural markets of other Member States without discrimination. It shows that the asymmetry that exists on the European level favouring, on the one hand, non-political decision making over political processes, and, on the other hand, negative on positive integration, weaken national policies promoting access to culture without allowing space for specific European policies encouraging access to culture for all Europeans, because of the restricted nature of the EU competences in cultural matters.

1. Introduction

On May 2013, the *Special Eurobarometer on access and participation in cultural life* showed that the participation of Europeans in cultural life has dramatically decreased over the years (Eurobarometer, 2013). Participation in cultural life is a crucial component of a democratic society. The institutionalisation of a ‘democratic political community’, be it at the European or at the national level, rests, following Gérard (2007: 134-135), upon several requirements and notably, on the recognition and implementation of the principle of equality of rights and of opportunities. Sociological research has repeatedly highlighted, since Bourdieu’s works, that access and participation in, as well as contribution to cultural life are matters of crucial importance for equality of opportunities, social justice and cohesion because of the influence of cultural capital on cultural classifications and on social mobility (Bennett *et al.*, 2008; Lahire, 2008: 166; Peterson, 1992, 2005). Access to culture is far from being only a mere aspirational good; it appears, on the contrary, to be necessary for the existence of a vivid democracy.

Inside the rather diverse landscape of cultural policies in the European Union (EU), different meanings are given to the right to access to culture. Some countries, like France, have developed ‘dirigiste’ policies of ‘democratisation’, while others, like the UK, have endorsed the ‘arm’s length’ principle and private initiative. In other countries, issues of access to culture have been left to the market forces. Even inside a country, different visions of access to culture exist (Bonet and Négrier, 2011: 575). This variability does not prevent the ‘cultural question’ from being ‘a political and politicized question (...)’, for it is a ‘fundamental expression of individual self-determination, in the sense that it reflects how an individual sees himself in relation to others within the same community, and at the same time constitutes a communal expression of what a good society ought to look like’ (de Witte, 2013: 582-583). As a political and fundamental rights question, the ‘cultural question’ involves choices between liberal, market-based approaches of access to culture, and cultural policies of democratisation, promotion of cultural democracy and/or of cultural diversity.

In the EU context, two questions must therefore be asked. Does EU law recognise the right to access to culture? And what is the impact of the cultural action led by the EU on access to culture and on the ability of Member States to shape democratically the ‘cultural question’?

2. Recognition of the right to access to culture under EU law

The right to access to culture is a core component of the right to participate in cultural life. Participation in cultural life is a multifaceted human right; access to culture is one of its elements (and historically the first). The right to participate in cultural life has obtained broad recognition under international human rights law, initially through Article 27 of the Universal Declaration of Human Rights,¹ which thus provides a broad legal basis for the right to access to culture. Participation in cultural life has moreover been consistently interpreted as conferring *at minima* a right to access to culture (Bidault, 2010; Donders, 2002, 2007; Hansen, 2002; Goldrick, 2007, O’Keefe, 1998; Romainville, 2014a; Stamatopoulou, 2012). In particular, Article 15 of the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR), which provides the most comprehensive formulation of the right to participate in cultural life,² encompasses access to culture but also freedom of artistic expression, and the right to participate actively in cultural life and in the decisions concerning cultural life. Civil and political rights instruments also protect, albeit indirectly, some aspects of the right to access to culture, as illustrated by Articles 19 and 27 of the International Covenant on Civil and Political Rights.³ Access to culture is also recognised in the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)(vi))⁴, the Convention on the Rights of the Child (Article 31)⁵ and the Convention on the Elimination of All Forms of Discrimination Against Women (Article 13).⁶ Protection is also offered through regional instruments such as the Framework Convention for the Protection of National Minorities.⁷

The European Convention on Human Rights (ECHR) does not protect directly access to culture. However, the European Court of Human Rights (hereafter the ECtHR), in its *Akdas* judgment of 16 February 2010, has recognised that the right to information applies to cultural matters as well, including with respect to European literary heritage works. The ECtHR condemned Turkey for having seized Turkish translations of the novel ‘The Eleven Thousand Rods’ of Guillaume Apollinaire and for having criminally convicted the Turkish publisher for publishing this book. On the basis of the right to receive (and thus access) information, the ECtHR ruled that the margin of appreciation national authorities enjoy in fulfilling their obligations under the ECHR should not hinder the public’s access to an artwork (in a specific language) that formed part of the European literary cultural heritage.⁸ In the same vein, the ECtHR had previously recognised, in *Khurshid Mustafa and Tarzibachi v Sweden*, a right to

¹ Art. 27, Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810, at 71 (1948).

² Art. 15, International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 49, UN Doc. A/6316 (1966), 993 UNTS 3.

³ International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 UNTS 171.

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

⁵ Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49), at 167, U.N. Doc. A/44/49 (1989).

⁶ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 UN GAOR Supp. (No. 46), at 193, UN Doc. A/34/46.

⁷ Framework Convention for the Protection of National Minorities 1995, 2151 UNTS 243.

⁸ ECtHR, *Akdas v Turkey* (appl. no. 24351/94.), 16 July 2010, para. 30.

access to cultural expressions in the case of foreign television programmes.⁹ Last but not least, the right to access to culture is rooted in international and regional legal instruments concerning cultural policies. For instance, the United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions embodies explicit references to access to culture, both as a requirement for, and as a limit to cultural diversity, and defines cultural policies in reference to access to culture.¹⁰

Most of the above-mentioned instruments tend to interpret the right to access to culture in reference to cultural expressions, artistic creations and elements of cultural heritage. If, originally, the right to access to culture was limited to '*oeuvres majeures de l'Humanité*', it now encompasses a diverse set of cultural expressions, ranging from contemporary music to popular initiatives. Some commentators consider this opening of the right to access to culture to diverse cultural expressions as insufficient.¹¹ They suggest interpreting the right to access to culture in the light of a broader 'anthropological' conception of culture that extends to all 'distinctive ways of life'. It has been counter-argued, however, that cultural identity issues should not be addressed *as such* but only in relation with the core content of the right to access to culture – the diversity of cultural expressions – and as a particular dimension of that human right (Romainville, 2014a). Crucially, if this broader anthropological interpretation is adopted, access to culture risks becoming a problematic legal concept since it would embrace conflicting interests (Von Bogdandy, 2008: 243) into a legal concept too broad to be practicable on a legal level. On the contrary, if the right to access to culture remains in the sphere of the diversity of *cultural life*, then, it is possible to deduce precise negative and positive obligations imposed on states and to guarantee a certain level of *justifiability* of the right to access to culture for individuals. At the political stage, access to culture understood in that perspective can also revitalise the 'democratic objective' of cultural policies that has been undermined throughout the years notably because of the raise of other cultural policy objectives such as support for the creative economy (Mokre, 2007: 43; Pyykönen, 2012: 548-549; Blomgren, 2012).

The Charter of Fundamental Rights (CFR or the Charter) of the EU does not safeguard a right to access to culture for everyone. It only protects the right to participate in cultural life for the elderly in Article 25.¹² The drafters of the Charter decided to provide for a broad reference to cultural diversity in Article 22 of the CFR under the form of a broad general principle instead of a fundamental right to access to culture or cultural diversity. The absence of a right to access to culture or cultural diversity in the CFR can be explained by the relative invisibility of access to culture in the CFR's main sources of inspiration.¹³ However, by highlighting the importance of dissemination of culture and of the common cultural heritage, Article 22 of the

⁹ ECtHR, *Khurshid Mustafa and Tarzibachi v Sweden* (appl. no. 23883/06), 16 December 2008, para. 44. See also ECtHR, *Autronic AG v. Switzerland* (appl. no. 12726/87), 22 May 1990.

¹⁰ See preamble, para. 12, Art. 2(1) and (7), and Art. 4, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, 2440 UNTS.

¹¹ See notably the 'Fribourg Declaration', http://droitsculturels.org/paideia4d/wp-content/uploads/sites/3/2013/01/01_DeclarationFribourg.pdf, date accessed 14 May 2014.

¹² According to Article 25 CFR, 'The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'.

¹³ The original European Social Charter, for instance, was limited to the right to participate in cultural life for the elderly (art. 23), while the Revised Social Charter consolidated this reference and extended its scope for disabled persons (art. 15). It also introduced a reference to cultural life in the measures that states must undertake in order to ensure the effective exercise of the right to protection against poverty and social exclusion (art. 30 Revised Social Charter).

Charter, Article 3 of the Treaty on European Union (TEU) and Article 167 of the Treaty on the Functioning of the European Union (TFEU) do offer, to a certain extent, an indirect protection for the right to access to culture, since protection and promotion of cultural diversity is a prerequisite for the right to access to culture and constitutes its object. Moreover, under EU law, perhaps a right to access to culture *could* be considered as part of the ‘common constitutional traditions’ of the Member States, because it seems to fulfil all three criteria established by the Court of Justice of the European Union (CJEU) for the identification of common constitutional traditions: recognition in a number of constitutional orders, connection with the structural principles of the EU, and recognition in international and European human rights instruments.¹⁴ Indeed, first, access to culture is recognised in several national constitutional orders (e.g. Belgium, France, the Czech Republic, Romania, the Slovak Republic, Poland and Portugal), whereas other Member States safeguard the right to participate in cultural life for specific groups, such as minorities¹⁵ and young people.¹⁶ Second, access to culture can be seen as being connected with the structure of EU law: it is closely connected to the idea of cultural diversity whose protection and promotion has been elevated to constitutional status under EU law. Third, as we have seen, the right to access to culture is recognised by a broad range of international and European human rights instruments. However, seeing that, in the eyes of the CJEU, the CFR codifies the range of EU fundamental rights, and that the CJEU enjoys discretion in determining what are the common constitutional traditions (Schütze, 2012: 418), the recognition of the right to access to culture as a common constitutional tradition of the Member States is very unlikely to happen.

3. The EU liberal approach of access to culture

The recognition of a limited EU competence in the field of culture in the Treaties of 1992 has created a specific role for culture within the EU and for the EU in cultural matters, as discussed elsewhere in this volume. What is now Article 167 TFEU explains the nature and focus of EU cultural activity and also mandates, by means of paragraph 4, the integration of cultural considerations in other fields of EU intervention. However, the EU still lacks the competence to harmonise national cultural policies. Moreover, the implementation of Article 167(4) TFEU so far remains relatively disappointing (Psychogiopoulou, 2008, 2014).

In what follows, the analysis explores the weakening of national cultural policies as far as the protection and promotion of the right to access to culture is concerned, by EU law on negative integration and the limited development of EU cultural policies aimed at supporting access to culture. The sources of these two concurrent phenomena can be traced down in the *institutional double asymmetry* of EU law. Following Scharp (2010: 362, 370), this asymmetry has favoured non-political decision-making processes – especially by the CJEU and the ‘integration through law’ paradigm – over political decision-making processes and, in parallel, negative integration, driven by (neo-)liberal agendas, over positive integration.

3.1. Access to culture before the CJEU

¹⁴ See inter alia on those criteria: CJEU, Case C-44/79, *Hauer* [1980], ECR I-3727, at para. 32; and Opinion of Advocate General Kokott in C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd* [2007], ECR I-8301, delivered on 29 April 2010, at paras. 93-113.

¹⁵ See the Constitutions of Austria, Cyprus, the Czech Republic, Estonia, Finland, Latvia, Lithuania, FYROM; Slovak Republic, Sweden.

¹⁶ See the Constitution of Croatia.

In its early case-law, the Luxembourg Court confirmed the application of the economic provisions of what was then the Treaty establishing the European Economic Community to the cultural sector.¹⁷ To sum up, ‘European scrutiny can be seen to have had both a procedural and a substantive impact’ on national cultural policies. At the procedural level, ‘EU law requires Member States to articulate and clarify the basis of their cultural policies, support them with convincing evidence, engage in consultations with those potentially affected and ensure that they operate in a transparent and non-discriminatory way’ (Craufurd Smith, 2011: 877)). At the substantive level, cultural policies must not obstruct the free movement of goods, services and persons or ‘distort competition’. In this regard, the ‘presumption of a violation of free market rules’ (Scharpf, 2010: 372) can be denied only if the measure is justified and passes the CJEU’s proportionality test.

3.1.1. Cultural democratisation motives as admissible justifications

The CJEU admitted at an early stage a ‘cultural rule of reason’ with respect to the range of admissible justifications of national policy measures affecting the internal market. In *Cinéthèque*¹⁸ and *Libro*,¹⁹ for instance, the CJEU held that national restrictive measures supporting the production of films, or books as ‘cultural objects’, could be justified under EU law. In general, the CJEU accepts that national measures may be justified by imperative reasons in the public interest when they are inspired by cultural diversity considerations, in the sense of protecting minorities or national or regional cultural identities²⁰ and, to a far lesser extent, when they are inspired by democratic considerations related to participation in cultural life.²¹ In the *UTECA* case, those two dimensions appear to have converged: the national measure at stake sought both to protect cultural identity (by offering protection to the official languages of Spain) and democratisation (by encouraging cinematographic production). This might explain the sensitivity of the CJEU towards a national film policy aimed at protecting national languages.²²

3.1.2. The implicit recognition of a right to access to Member States’ cultures

Even when national cultural policy measures are rejected in light of internal market rules, cultural motives might not be absent. As Evangelia Psychogiopoulou (2008: 194) observed, ‘beneath the surface of judgments, attempts sometimes lurk to guarantee multi-cultural standards for the frontier-less market space created’ in order to increase ‘prospects of cultural

¹⁷ See *inter alia* CJEU, Cases C- 24/67, *Parke Davis* [1968], ECR 55; C55/80 and C-57/80, *Music Vertriebs Membran GmbH and K-Tel International* [1981], ECR 147.

¹⁸ CJEU, Cases C-60/84 and 61/84, *Cinéthèque* [1985], ECR 2618 [1986].

¹⁹ CJEU, Case C-531/07, *Fachverband der Buch- und Medienwirtschaft* [2009], ECR I-3717.

²⁰ In cases where culture is understood in a socio-cultural sense or in an anthropological sense, as referring to ‘traditions’, languages, moral, or socio-cultural elements of identity, the CJEU has showed some sensitivity to the justifications brought by the Member States. See CJEU, Cases C-267/91 and C-268/91, *Keck et Mithouard* [1993], ECR I-6097; C-275/92, *Schindler* [1994], ECR I-1039, para. 61; C-124/97, *Läärä* [1999], ECR I-6067, para. 14; and C-67/98, *Zenatti* [1999], ECR I-7289, para. 15.

²¹ The CJEU generally seems uncomfortable in dealing with cultural questions even if it has, during the years, taken into account cultural considerations. See, for instance, CJEU, Cases 18/71, *Eunomia di Porro* [1971], ECR 811; C-229/83, *Association des Centres distributeurs Edouard Leclerc et autres* [1985], ECR 305; C-199/06, *Centre d’exportation du livre français (CELF) and French Ministry of Culture and of Communication* [2008], ECR I-469; C-222/07, *Uteca* [2009], ECR I-1407; C-518/07, *Fundacion Gala-Salvador Dali and Visual Entidad de Gestion de Artistas Plasticos (VEGAP)* [2010], ECR I-1885; C-1/09, *Centre d’exportation du livre français (CELF) and French Ministry of Culture and Communications* [2010], I-02099; and C-79/09, *European Commission v. The Kingdom of the Netherlands*. [2010], ECR I-40.

²² CJEU, Case C-222/07, above.

interaction'. The CJEU's jurisprudence could also be read from the perspective of providing guarantees of access for all Europeans to the cultures of the Member States, and thus to a culture other than their own, and therefore to a 'diverse' cultural life. In interpreting free movement, the CJEU has indeed recognised and favoured access to culture from this perspective. In *Commission v Spain*, for example, the CJEU held that 'by applying a system whereby Spanish citizens, foreigners resident in Spain and nationals of other Member States (...) under 21 years of age benefit[ted] from free admission to national museums, while nationals of other Member States more than 21 years of age [were] required to pay an entrance fee', Spain had not respected its obligations under Articles 18 and 56 TFEU. The explicit reasoning of the CJEU relied on freedom of movement but access to culture received consideration through the linking of access to museums with the freedom of movement. According to the CJEU, 'since visiting museums is one of the determining reasons for which tourists, as recipients of services, decide to go to another Member State, there is a close link between the freedom of movement which they enjoy under the Treaty and museum admission conditions'.²³

3.2. Economic evaluation of cultural policies and proportionality

Despite occasional links drawn between free movement and access to culture considerations, the CJEU has not considered the value of national cultural measures that protect or promote access to culture in a systematic manner. In fact, in the vast majority of cases, relevant measures have been rejected.²⁴ This is due to the fact that the CJEU's reasoning is based on a definition of culture that essentially rests on economic terms (Littoz-Monnet, 2007: 152-156). Also, there is no 'preferential treatment' of culture when the CJEU applies the principle of proportionality.²⁵

As explained by Loic Azoulay (2013: 167), the current configuration of the proportionality test leads to a 'depoliticisation' of national policies, especially when it comes to matters that for the most part are excluded from the EU institutions' competences. As to the economic understanding of culture by the CJEU, the ambivalent nature of cultural goods and services has a key role to play. Because of this ambivalence, cultural policy concerns often merge with economic concerns (Romainville, 2014b). A cultural policy cannot function effectively if it is not supported by economic arrangements, which aim at guaranteeing resources for its realisation. This point was made particularly clear in the case of *Bond van Adverteerders v the Netherlands*. The system under scrutiny had economic goals (i.e. to provide the national broadcasting system with sufficient financial resources by restricting and organising advertising) that were intrinsically linked with cultural ones (i.e. to support the diversity and accessibility of the media landscape in the Netherlands).²⁶ The obsession of the CJEU with ensuring that protectionist goals do not undermine the establishment and proper functioning of the internal market, under the guise of cultural concerns (Psychogiopoulou: 141), prevented a comprehensive assessment of the national restrictive measures from the perspective of access to culture.

4. Access to culture in EU secondary law

²³ CJEU, Case C-45/93, *Commission v. Spain* [1994], ECR I-911, para. 6.

²⁴ See CJEU, Cases C-120/78, *Rewe-Zentral* [1979], ECR I-649; C-154/89, *Commission v. France* [1991] ECR I-659; C-180/89, *Commission v. Italy* [1991], ECR I-709; C-198/89, , *Commission v. Greece* [1991] ECR I-00727.

²⁵ See CJEU, Case C-353/89, *Commission v. Netherlands* [1991], ECR I-04069.

²⁶ CJEU, Case 352/85, *Bond van Adverteerders and others v The Netherlands State* [1988], ECR 2085.

The adoption of the first legislative EU instruments concerning culture was driven by economic arguments and was aimed at liberalising the cultural sector (Dumont, 1992). Consequently, in the 1980s, some Member States attempted to reorient the purely economic approach that was followed through supranational mechanisms, cultural cooperation at the intergovernmental level and the initiation of cultural programmes and projects. The European institutions thus ‘started focusing on the need to further cultural cooperation in order to promote a sense of European identity among European citizens’ (Littoz-Monnet, 2007: 54). The objective was to develop a European identity and citizenship through ‘new politics of cultural belonging’ (Tsaliki, 2007: 157-182).

These developments towards a more ‘positive’ cultural policy gradually translated into an express, albeit limited, recognition of an EU cultural competence in primary EU law, and the introduction of cultural considerations in EU secondary law, including from an ‘access to culture’ perspective. For instance, Article 14 of the Audiovisual Media Services Directive promotes national measures ensuring that major sporting and cultural events are freely accessible to the public.²⁷ Article 1(3)(a) of Directive 2002/21/EC (Framework Directive), in turn, as modified by Directive 2009/140/EC, recognises ‘a right to access a network’ by requiring any restriction to access to networks to be proportionate and to take due account of the human rights linked with access to a network.²⁸ This right to access networks is, in our digital world, an indispensable tool to access digital culture and information about cultural life, which are both elements of the right to access to culture. In certain instances, EU copyright law has also shown some sensitivity towards objectives concerned with the dissemination of culture, as discussed in more detail by Giuseppe Mazziotti in this volume, and it could therefore be viewed from an access to culture standpoint. In addition, the Structural Funds and the EU’s cohesion policies have been enriched with an access to culture component, through the allocation of subsidies to cultural activities, focused for instance on access to ICT technologies, or the development of cultural institutions whose aim is to democratise culture in certain neighbourhoods.²⁹

However, the driving forces underlying the various European legal instruments affecting culture are of an economic and liberalising nature: their aim is more to stimulate culture as a source of growth, competitiveness and employment and to facilitate cultural consumption in a free market than to facilitate genuine access to culture and to a diverse cultural life through cultural mediation, cultural education, dissemination of cultural information and so on. This is also the case in the field of state aids, where a specific derogation from the general principle of state aid prohibition has been introduced for state aids to promote culture and heritage conservation (Article 107(3)(d) TFEU), as examined by Delia Ferri in this volume. Although the European Commission (Commission) has generally developed a positive stance as regards cultural state aid, it has endorsed a restrictive definition of ‘heritage’, excluding, for instance,

²⁷ Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95, 15/4/2010, p. 1.

²⁸ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L 108, 24/4/2002, p. 33 (as modified by Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services, OJ L 337, 18/12/2009, p. 37.

²⁹ See for instance the *BUDA Fabriek* project in Kortrijk, Belgium and the *Quartier de la Création* project in Nantes, France.

state aids to museums which are not strictly structured on the dissemination of the arts from the scope of the cultural state aid derogation,³⁰ thus adopting a constrained understanding of the promotion of access to ‘culture’. In the same vein, it has restricted dramatically the exemptions admitted in Articles 106 and 107 TFEU for audiovisual services driven by the general interest. In the *BBC Curriculum* case,³¹ for instance, the Commission rejected a state aid that promoted access to culture. The BBC services eligible for support provided multi-media educational resources and covered literacy and history in a broad manner: they were thereby closely connected to access to culture on the Internet. The Commission, however, considered that these services exceeded the limits of the BBC’s public service mission, noting that the extension of the educational vocation of the BBC from radio and television services to the Internet was a ‘digression’ that did not come within the scope of the BBC’s ‘existing aid’, accepted under EU law. The result is that the Commission has reduced possibilities for an adaptation of ‘classic’ cultural policies to the promotion of access to culture in the digital era.

The EU’s cultural policy proper has undoubtedly acquired an access to culture dimension. Of particular relevance in this respect has been the *Culture 2000* programme, which put emphasis on the notion of common values and on the need for a better balance between cultural and economic considerations. The programme evoked ‘improved access to and participation in culture in the European Union for as many citizens as possible’ as one of its main objectives, emphasising the importance of the activities funded for ‘facilitating access to culture and wider cultural participation by the people in Europe, in all their social, regional and cultural diversity, in particular young people and the most underprivileged’.³² In the 2007-2013 Culture Programme, although the importance of access to culture was stressed in the preamble of the programme’s decision as a tool to fighting social exclusion, access to culture disappeared from the objectives of the programme. Access to culture rather received indirect support through the encouragement of the ‘transnational circulation of works and cultural and artistic products’ and the encouragement of ‘intercultural dialogue’.³³ The current *Creative Europe* programme lists among its specific objectives ‘the transnational circulation of cultural and creative works and transnational mobility of cultural and creative players, in particular artists’, as well as ‘reach[ing] new and enlarged audiences and improv[ing] access to cultural and creative works in the Union and beyond, with a particular focus on children, young people, people with disabilities and under-represented groups’.³⁴ However, these objectives have not yet led to the funding of activities that address genuine obstacles to access to culture (e.g. lack of desire for culture, lack of ‘keys’ to understand culture, symbolic barriers, etc.). It seems therefore that the democratisation project is limited to a mere cultural diffusion project without consideration given to the development of a cultural mediation policy, for instance. Moreover, the huge gap existing between the programme’s vast objectives and its budget is frustrating.

³⁰ Commission Decision 2004/167/EC of 17 September 2003 on State aids implemented by Germany for Space Park Development GmbH & Co, OJ L 61, 27/2/2004, p. 66.; Commission Decision 2005/401/EC of 8 September 2004 on the measure relating to Bioscope theme park implemented by France for ‘SMVP-Mise en valeur du patrimoine culturel’, OJ L 135, 28/5/2005, p. 21.

³¹ Commission Decision of 1 October 2003, United Kingdom BBC Digital Curriculum, OJ C 271, 12/11/2003.

³² See Decision No. 508/2000/EC of the European Parliament and of the Council of 14 February 2000 establishing the Culture 2000 programme, OJ L 63, 10/3/2000, p. 1, Art. 1(h) and Annex I, point I, 1(i).

³³ Decision No. 1855/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013), OJ L 372, 27/12/2006, p. 1.

³⁴ Regulation (EU) No. 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No. 1718/2006/EC, No. 1855/2006/EC and No. 1041/2009/EC, OJ L 347, 20/12/2013, p. 221. Art. 4.

5. Conclusion

Multiple factors account for and explain the non-recognition of a right to access to culture under EU law: the lack of a substantive EU cultural competence, which has forced most EU cultural action to be taken through an economic prism; the prohibition of harmonisation in the field of culture; the existing support for liberal intervention (Hooghe and Marks, 1997: 4); the weakening of strong cultural policies by European law and politics (Littoz-Monnet, 2007: 67, 153-156); and the tensions existing between different governance models of culture between the Member States.

This said, there exist two alternatives for a stronger recognition and implementation of the right to access to culture in EU law – beyond the protection offered as regards access to Member States' cultural markets other than one's own. The first is to develop within EU law a deeper integration of cultural concerns related to access to culture. This implies recognition of the right to access to culture and the right to participate in cultural life in the Charter, as well as an expansion of EU cultural competences and reinforced cultural mainstreaming in the context of EU policies other than culture for the implementation of the newly recognised CFR rights. This alternative, of course, presupposes that there is political desire to create a genuine democratic space at the EU level and to develop a genuine 'balancing' of the human right to access to culture with economic rights and policies. The second alternative is to acknowledge the absence of a genuine democratic space at the EU level that is able to deal with the issue of 'access to culture' and to expand 'shelf space' for democratic choices at the national level and for the Member States to decide over their own cultural policies as regards access to culture. This presupposes reconsidering the impact of national cultural policies on the internal market, particularly in the case of ambitious policy agendas on access to culture concerning for instance the regulation of book prices, copyright exceptions, the creation of online public libraries or taxation schemes concerning cultural goods and services, among other issues.

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