

The right to participate in cultural life under EU Law

Le droit de participer à la vie culturelle en droit de l'Union européenne

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Abstract

*T*aking the increasing importance of the EU in cultural matters as a starting point, this article attempts first to assess to what extent the right to participate in cultural life (as defined based on various human rights instruments) is protected under EU law. Second it discusses the impact of EU law and policies on the enjoyment of this right. It highlights that the respect, protection and promotion of the right to participate in cultural life within EU law are obstructed by the asymmetry that exists at the European level and which favors on the one hand, non-political decision-making over political processes, and, on the other hand, negative on positive integration. This asymmetry indeed weakens national cultural policies without allowing space for specific European policies for positive integration. Third, it explores avenues for a better protection of the right to participate in cultural life under EU law.

Résumé

*P*artant du constat d'une emprise croissante du droit européen sur les matières culturelles, cette contribution cherche premièrement à définir dans quelle mesure le droit de participer à la vie culturelle est protégé en droit européen, en se fondant sur la définition de ce droit telle qu'elle a été développée en droit international. Deuxièmement, l'article détermine l'impact du droit et des politiques européennes sur l'exercice effectif du droit de participer à la vie culturelle. Il montre que le respect, la protection et la promotion du droit de participer à la vie culturelle sont entravés par l'asymétrie qui favorise, en matière culturelle et en droit européen, l'intégration négative sur l'intégration positive et les décisions de nature non politique sur les processus décisionnels politiques. Cette asymétrie affaiblit les politiques culturelles nationales qui tendent à promouvoir la réalisation du droit de participer à la vie culturelle tout en empêchant le développement d'une politique européenne positive. Troisièmement, l'article envisage deux alternatives pour assurer une meilleure mise en œuvre du droit de participer à la vie culturelle à l'échelle européenne.

¹ This article has been presented to the conference "European law and cultural policies/ Droit européen et politiques culturelles" co-organized by the Research Centre on State and Constitution (CRECO) and by the European Studies Institute of the University of Saint-Louis Brussels. This article gives a survey of the debates animating the conference. It will also appear in the collective book publishing the contribution presented at the conference.

I. Introduction

The complex nature of cultural life – extending as it does from art, to cultural heritage and to cultural industry² – explains why since the early days of European integration, and although no competence in cultural policies was explicitly recognized by the European Union (EU) until 1992, the organization was only involved in cultural matters insofar as they had a strong connection with economic interests. Twenty years after the attribution to the EU of certain powers in cultural matters through Article 128 (now Article 167 of the Treaty on the Functioning of the European Union (TFEU)), the EU has become a key player in the cultural field. The locus of decision-making in cultural matters has, to a certain extent, shifted towards the EU institutions. This displacement of the centre of power in the decision-making process in cultural matters has transformed this policy area's main features and 'the image of the policy problems at stake'.³ This transformation expresses itself predominantly in the areas of trade in cultural goods and services, media, employment in the cultural field, international negotiations in the fields of cultural diversity and the protection of cultural heritage.⁴

II. The importance of participation in cultural life at the EU level

Taking the increasing importance of the EU in cultural matters as a starting point, this article attempts first to assess to what extent the right to participate in cultural life (as defined based on various international human rights instruments) is protected under EU law; second to discuss the impact of EU law and policies on the enjoyment of this right and third to explore avenues for a better protection of such right under EU law.

Those questions are of clear importance: in May 2013, the special Eurobarometer on access to and participation in cultural life showed that European participation in cultural life has dramatically decreased over the years,⁵ despite the fact that participation in cultural life is a crucial component of a democratic society. First, the institutionalization of a 'democratic political community' – be it at the European or at the national level – rests upon several requirements, including equality of rights and opportunities.⁶ Sociological research has repeatedly highlighted that access to and participation in, as well as contribution to cultural life

² R. J. NEUWIRTH, "The Culture Industries: From the Common Market to A Common Sense", in D. WARD (ed.), *The European Union and the Culture Industries. Regulation and the Public Interest*, London, Ashgate, 2008, pp. 241-244; L. MAYER-ROBITAILLE, *Le statut juridique des biens et services culturels dans les accords commerciaux internationaux*, Paris, L'Harmattan, 2008.

³ A. LITTOZ-MONNET, *The European Union and Culture: between economic regulation and European cultural policy*, Manchester: Manchester University Press, 2007, p. 155.

⁴ See notably: R. CRAUFURD SMITH, "The Evolution of Cultural Policy in the European Union", in P. CRAIG and G. DE BÚRCA (eds.), *The Evolution of EU Law – 2nd Edition*, Oxford, Oxford University Press, 2011, pp. 869-895.

⁵ Eurobarometer Special Surveys n° 399, *Cultural access and participation*, 4 May 2013.

⁶ P. GÉRARD, *L'esprit des droits. Philosophie des droits de l'homme*, Brussels, Bruylant, 2007, pp. 134-135.

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.⁷ Secondly, theorists of democracy demonstrate the importance of the inclusion of individuals in the ‘public space’ for the constitution of a vibrant democracy.⁸ In that perspective, the functioning of a democratic community rests notably on the existence of a public space of discussion ‘in which the diversity of interests and opinions can be expressed’, through which the collective will can be built⁹ and, ultimately, principles such as equality and autonomy can be discussed.¹⁰ Here, participation in a diverse cultural life is once more crucial. It allows individuals to build their conception of the ‘good life’ and the meaning they give to human and social experiences through rich and accessible cultural structures.¹¹ It allows them to express themselves, to criticize, to adopt a subversive and distant point of view. It can thereby be said that cultural policies implementing the right to participate in cultural life are answering a fundamental democratic requirement. Participation in cultural life is not only a mere aspirational good and appears necessary for the existence of a vivid democracy.

This belief in the value of participation in cultural life for democracy is present in all Member States, even if somewhat differently. Inside the rather diverse landscape of cultural policies in the EU, different meanings are given to the right to access to culture. Some countries, like France, have developed ‘dirigiste’ policies of ‘démocratisation’, while others, like the UK, have endorsed the ‘arm’s length’ principle and support private initiative. In other countries, issues of access to culture have been left to the market forces. Even inside a country, different visions of participation in cultural life exist.¹² This variability does not prevent the ‘cultural question’ from being ‘a political and politicized question’ (...) ‘one of the most fundamental expressions 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’.¹³ As a political and fundamental rights

⁷ T. BENNETT, M. SAVAGE, E. BORTOLAIA SILVA, A. WARDE, M. GAYO-CAL and D. WRIGHT, *Culture, class, distinction*, London, Routledge, 2008; B. LAHIRE, “The individual and the mixing of genres: cultural dissonance and self-distinction”, *Poetics*, vol. 26, 2008, p. 166; B. LAHIRE, *La culture des individus. Dissonances culturelles et Distinction de soi*, Paris, La Découverte, 2004; R. A. PETERSON, “Problems in Comparative Research: The Example of Omnivorousness”, *Poetics*, vol. 33, 2005, pp. 257-282; R. A. PETERSON, “Understanding audience segmentation: from elite and mass to omnivore and univore”, *Poetics*, vol. 21, 1992, pp. 243-258. Those studies, while reviewing Bourdieu’s classic studies of the ‘distinction’, demonstrate more than ever the complexity and importance of the impact of cultural capital on modern forms of inequality.

⁸ See inter alia: J. HABERMAS, *The Crisis of the European Union. A Response*, Cambridge, Polity Press, 2012, pp. 12-52; J. HABERMAS, “So, why does Europe need a Constitution”, <www.newleftreview.net/NLR24501.shtml> 2001-12 (last consulted June 2014); J. HABERMAS, “Public Sphere, an Encyclopedia Article”, in M. G. DURHAM and D. KELLNER (eds.), *Media and Cultural Studies: Keywords*, Oxford, Blackwell Publishers, 2001, pp. 102-109; J. HABERMAS, “Les dilemmes de la démocratie: l'exemple de la crise actuelle de l'Union européenne”, in Y.-C. ZARKA (ed.), *Refaire l'Europe avec Jürgen Habermas*, Paris, PUF, 2012, pp. 20-21.

⁹ P. GÉRARD, *op. cit.*, pp. 134-135.

¹⁰ P. GÉRARD, *op. cit.*, p. 131.

¹¹ See among others: W. KYMLICKA, “Dworkin on Freedom and Culture”, in R. DWORKIN and J. BURLEY (eds.), *Dworkin and his Critics: With Reply By Dworkin*, Oxford, Blackwell Publishers, 2004, pp. 113-133; R. DWORKIN, *A Matter of Principle*, Oxford, Oxford University Press, 1985, pp. 221-233.

¹² See L. BONET and E. NÉGRIER, “The End(s) of National Culture? Cultural Policy in the Face of Diversity”, *International Journal of Cultural Policy*, vol. 17, n° 5, 2011, pp. 574-589.

¹³ F. DE WITTE, “EU Law, Politics, and the Social Question”, *German Law Journal*, vol. 14, 2013, pp. 582-583.

question, the ‘cultural question’ involves choices between liberal, market-based approaches of access to culture, and cultural policies of democratization, promotion of cultural democracy and/or of cultural diversity. All these choices are democratic choices on fundamental democratic questions and on the implementation of crucial fundamental rights for the development of democratic societies. In this context, the problem that must be addressed here is the following: how does EU law influence the ability of Member States to democratically shape the cultural question and to develop their own vision of the policies implementing the right to participate in cultural life?

III. A workable definition of the right to participate in cultural life

The answering of this question must begin with the necessary recollection of the definition of the right to participate in cultural life. The latter has obtained broad recognition under international human rights law, initially through Article 27 of the Universal Declaration of Human Rights¹⁴ and has recently received much attention in the literature.¹⁵ It is in Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966 (I.C.E.S.C.R.) that the most comprehensive formulation of the right can be found: “The States Parties to the present Covenant recognize the right of everyone (...) to take part in cultural life (...). The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture”.¹⁶ Civil and political rights instruments protect, albeit indirectly, some aspects of the right to participation in cultural life, as illustrated by Articles 19 and 27 of the International Covenant on Civil and Political Rights.¹⁷ The right to participate in cultural life is also listed in the International Convention on the Elimination of All Forms

¹⁴ Article 27, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹⁵ Among others: M. BIDAULT, *La protection internationale des droits culturels*, Brussels, Bruylant, 2010; Y.-M. DONDEERS, *Towards a right to cultural identity*, Antwerp/Oxford, Intersentia/Hart, 2002; Y.-M. DONDEERS, “The Legal Framework of the Right to Participate in Cultural life”, in Y.-M. DONDEERS *et al.* (eds.), *Human Rights in Education, Science and Culture. Legal Developments and Challenges*, London/Ashgate, Unesco Publishing, 2007; A. HANSEN, “The Right to Take Part in Cultural Life: Towards Defining Core Obligations”, in A. R. CHAPMAN and S. RUSSELL (eds.), *Core Obligations: Building a framework for Economic, social and cultural rights*, Antwerp/Oxford/New York, Intersentia, 2002; R. O’KEEFE, “The “right to take part in cultural life” under article 15 of the ICESR”, *International and Comparative Law Quarterly*, vol. 47, 1998, pp. 904-923; D. MCGOLDRICK, “Culture, Cultures and Human Rights”, in M. A. BADERIN and R. MCCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, pp. 447-473; J. RINGELHEIM, “The evolution of cultural rights in international human rights law”, in D. MOECKLI, S. SHAH and S. SIVAKUMARAN (eds.), *International Human Rights Law 2nd Edition*, Oxford, Oxford University Press, 2014, Chap. 14; C. ROMAINVILLE, “Le droit à la culture: une réalité juridique”, *Ann. dr.*, vol. 73, 2013, pp. 351-377; C. ROMAINVILLE, *Le droit à la culture, une réalité juridique. Le régime juridique du droit de participer à la vie culturelle en droit constitutionnel et international*, Brussels, Bruylant, 2014; E. STAMATOPOULOU, “Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights”, *Human Rights Quarterly*, vol. 34, 2012, pp. 1170, 1192.

¹⁶ Article 15, International Covenant on Economic, Social and Cultural Rights 1966, 993 U.N.T.S. 3 [hereinafter I.C.E.S.C.R.], G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

¹⁷ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

of Racial Discrimination (Article 5 (e) vi),¹⁸ the Convention on the Rights of the Child (Article 31)¹⁹ or the Convention on the Elimination of All Forms of Discrimination Against Women (Article 13).²⁰ Protection is also offered through regional instruments such as the Framework Convention for the Protection of National Minorities.²¹ Within the Council of Europe's framework, the right to participate in cultural life receives only an indirect protection. The European Convention on Human Rights (E.C.H.R.) does not directly protect the right to participate in cultural life. However, the European Court of Human Rights (ECtHR), in its *Akdas* judgment of 16 February 2010, has recognized 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 its 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.²² In the same vein, the ECtHR had previously recognized, in *Khurshid Mustafa and Tarzibachi v Sweden*, a right to access to cultural expressions in the case of foreign television programmes.²³ Still on the basis of article 10 of the Convention, the ECtHR has recognized since its *Müller* case²⁴ that artistic expression is covered by freedom of expression. It also protects freedom of association in the cultural sector²⁵ and integrates cultural considerations in the interpretation of restrictions to the right of property in the case of cultural heritage protection.²⁶ For its part, the original European Social Charter limited the right to participate in cultural life for the elderly.²⁷ The Revised Social Charter not only consolidated this reference²⁸ but also extended its scope for disabled persons²⁹ and 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

¹⁸ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

¹⁹ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

²⁰ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

²¹ Framework Convention for the Protection of National Minorities 1995, 2151 U.N.T.S. 243 [hereinafter Framework Convention], reprinted in H. KLEBES, "The Council of Europe's Framework Convention for the Protection of National Minorities", *Human Rights Law Journal*, vol. 16, 1995, p. 92.

²² Eur. Ct HR, *Akdas v Turkey*, 16 July 2010, appl. No. 24351/94, para. 30.

²³ Eur. Ct HR, *Khurshid Mustafa and Tarzibachi v Sweden*, 16 December 2008, appl. No. 23883/06, para. 44. See also Eur. Ct HR, *Autronic AG v Switzerland*, 22 May 1990, appl. No. 12726/87.

²⁴ Eur. Ct HR, *Müller and Others v Switzerland*, 24 May 1988, appl. No. 10737/84.

²⁵ See among other: Eur. Ct HR, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, 2 January 2001, appl. No. 29221/95 and 29225/95.

²⁶ See among other: Eur. Ct HR, *Beyeler v Italy*, 5 January 2000, appl. No. 33202/96.

²⁷ The rationale for the recognition of this right was that the elderly shouldn't suffer from being excluded from society because of their age. See Council of Europe, Protocol Amending the Social Charter (No. 142) and Explanatory Report, (Council of Europe Publishing, 2001), 166.

²⁸ Art. 23 Revised Social Charter.

²⁹ Art. 15 Revised Social Charter.

social exclusion.³⁰ Last but not least, the right to participate to culture is rooted in international and regional legal instruments concerning cultural policies.³¹

The term 'cultural life' refers to cultural expressions, artistic creations and elements of cultural heritage, as well as the intellectual operations and methods linked with the creation of, the familiarization with and the initiation into these cultural expressions and heritages.³² It also protects some facets of cultural identities.³³ The right to participate in cultural life implies six legal prerogatives for individuals: a right to artistic freedom; a right to the protection, development and promotion of cultural heritage and cultural diversity; a right to freely access culture and cultural information; a right to freely and actively participate in cultural life and a right to participate in the decision-making processes in cultural matters.³⁴ Under international human rights law, negative and positive obligations deduced from the right impose duties on the state to respect, protect and fulfil that human right. Such obligations require the state to conduct cultural policies promoting participation in cultural life for everyone. This means the state shall provide opportunities for individuals to be included in the cultural public sphere. By doing so, the state would necessarily develop approaches to culture that go beyond classical cultural policies aimed at favouring the commodification of cultural goods and services, policies for the protection of cultural heritage or for the promotion of nationalist agendas through culture. Positive obligations attached to the right to participate in cultural life call for public policies 'experimenting with new forms of public access and models of participation in the cultural field'.³⁵ Those positive obligations also call for a genuine ownership and authorship of the citizens over cultural questions.

³⁰ Art. 30 Revised Social Charter.

³¹ See for instance: Preamble, para. 12 and Article 2, 1° and 7°, Article 4 Convention on the protection and promotion of the diversity of cultural expressions 2005, 2440 U.N.T.S. [hereinafter Convention on cultural diversity]. See also M. CORNU, "La Convention pour la protection et la promotion de la diversité des expressions culturelles, nouvel instrument au service du droit international de la culture", *Journal de droit international*, vol. 133, 2006, p. 934.

³² See the commentaries of the UN Committee on Economic, Social and Cultural Rights, the Revised Guidelines for the redaction of State reports and the following contributions: Y.-M. DONDERS, "Cultural life in the context of Human Rights", *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights*, 2008, pp. 2 at 3; Y.-M. DONDERS, *Towards a right to cultural identity*, *op. cit.*, pp. 231, 272; C. GRONI, "Right to take part in cultural life (article 15 (1) (a) of the Covenant)", *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights*, 2008, E/C.12/40/3, 4, 6; O'KEEFE, *op. cit.*, p. 923; R. STAVENHAGEN, "Cultural rights and Universal Human Rights", in A. EIDE *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, pp. 85, 109.

³³ See Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of Everyone To Take Part in Cultural Life (art. 15), 21 December 2009, E/C.12/GC/21 (2009); 17 IHRR 608 (2010).

See on the problems raised by a diluted interpretation of the right to participate in cultural life: C. ROMAINVILLE, *Le droit à la culture, une réalité juridique. Le régime juridique du droit de participer à la vie culturelle en droit constitutionnel et international*, *op. cit.*

³⁴ See on the definition of the right to participate in cultural life: M. BIDAULT, *op. cit.*; M. CRAVEN, "The right to participate in cultural life in the ICESCR", in R. FISHER *et al.* (eds.), *Human Rights and Cultural Policies in a Changing Europe*, CIRCLE Publications, 1994, pp. 161-171; Y.-M. DONDERS, "Cultural life in the context of Human Rights", *op. cit.*, pp. 2-3; Y.-M. DONDERS, *Towards a right to cultural identity*, *op. cit.*, pp. 231-272; C. GRONI, *op. cit.*; A. HANSEN, *op. cit.*, p. 285; MCGOLDRICK, *op. cit.*; R. O'KEEFE, *op. cit.*; C. ROMAINVILLE, *Le droit à la culture, une réalité juridique. Le régime juridique du droit de participer à la vie culturelle en droit constitutionnel et international*, *op. cit.*; E. STAMATOPOULOU, *op. cit.*; R. STAVENHAGEN, *op. cit.*

³⁵ It is noteworthy that by promoting cultural democratic policies, the right to participate in cultural life revitalizes one of the objectives of cultural policies that have been often 'forgotten' because of the focus on 'autonomy' in cultural matters and because of the process of accumulation of cultural objectives in Western democracies (inter

This article will rely on the above-mentioned definition of the right to participate in cultural life first to determine whether this human right is somehow included in European (constitutional) law (IV.). The main claim of the following part is that the asymmetry that exists on the European level – which undermines national cultural policies without allowing space for specific European policies of positive integration³⁶ – obstructs the respect, protection and promotion the right to participate in cultural life. Indeed, a genuine respect, protection and promotion of this fundamental right is impeded on the one hand, by the economic and liberalization-focused approach to culture deployed at the EU level, which weakens domestic cultural policies implementing it, and, on the other hand, by the restricted competences of the EU in cultural matters and by the fact that the limited policies developed on the basis of those competences do not counteract the weakening of cultural policies (which do have an impact on the internal market) and of cultural rights through negative integration (V.). The purpose of the last part is to explore two possible answers that could lead to a stronger implementation of this human right. The first is to acknowledge the absence of a genuine democratic space at the EU level able to deal with cultural questions and thereby to create expanding ‘shelf space’ for democratic choices at the national level and, thereby, for each Member State to decide over their own cultural policies. The second is, from the perspective to create a genuine democratic space at the EU level, to develop within EU law a deeper integration with regards to cultural concern: this would necessarily start with recognizing the right to participate in cultural life within the Charter, expanding the cultural competences of the EU, reinforcing the cultural mainstreaming of all EU interventions in the cultural fields (direct or indirect), and developing a coherent and multifaceted EU approach to culture (VII.).

IV. The partial and indirect recognition of a right to participate in cultural life in EU Law

After having discussed the main objections to the recognition of a right to participate in cultural life in EU law (A), the recognition of this human right will be analysed in the Treaties (B) and within the framework of the general principles of EU law (C).

alia promotion of cultural diversity, protection of cultural heritage, encouragement to growth through support to the Creative class).

³⁶ This asymmetry has been described by Fritz W. SCHARPF in “The Asymmetry of European Integration, or why the EU cannot be a ‘Social Market Economy’”, *Socio-Eco. Rev.*, vol. 8, 2010, pp. 211, 217, re published in F. W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, Frankfurt/New York, Campus Verlag, 2010. In this paper, Fritz Scharpf describes ‘the impact of two institutional asymmetries: the first one favouring policy-making by non-political actors and impeding political action at the European level, and the second one favouring negative integration and impeding specific policies of positive integration (...). These institutional asymmetries, I will then try to show, have the effect of undermining the institutions and policy legacies of Social Market economies at the national level, and they also impede efforts to re-create similar institutions and policies at the European level’ (p. 214). This asymmetry finds its roots in the fact that ‘[i]n the highly structured European policy processes, decision rules – and, more generally, institutions, are bound to create strong asymmetries, favouring some actors and some policy goals, and impeding or obstructing other’ (p. 214).

A. THE OBJECTIONS TO THE RECOGNITION OF A RIGHT TO PARTICIPATE IN CULTURAL LIFE IN EU LAW

One of the main reasons advanced for the rejection of any EU obligations in the field of cultural rights is grounded in the idea that the proper place for cultural debates is the Council of Europe rather than the EU, because of the political nature of the former organization and because of the depth of its involvement with cultural rights and cultural policies.³⁷ A further argument for the rejection of EU responsibility with respect to the right to participate in cultural life is to be found in the limited scope of EU competences in cultural matters. According to this argument, since the limited competences of the EU in cultural matters are mainly in support of the Member States' cultural policies, it would not be fair to criticize the EU for failing to recognize, protect and realize a right to participate in cultural life, since almost all the tools are in the hands of the Member States. The current division of labor between the EU and the Member States in cultural matters would justify the action of the former.

These objections are not convincing. First, the invoked difference of nature between the EU and the Council of Europe is irrelevant with regard to the right to participate in cultural life. The difference in nature and mandates between these two institutions does not preclude EU responsibility with respect to the right to participate in cultural life. Secondly, it is widely accepted that when EU actions have consequences that directly affect human rights, the respect for such rights is a necessary safeguard: 'wherever a form of governmental authority is vested and exercised, whether on the national or international plane, human rights need to be guaranteed as parallel safeguards'.³⁸ But, despite appearances to the contrary, the EU does intervene in a large range of cultural matters. Indeed the so called 'competence creep'³⁹ has also affected European cultural competences. The extension of EU cultural competences does not indeed manifest itself only in successive Treaty revisions but also, and mainly, in the use of implied powers provisions, the construction of the implied competences doctrine and in the large interpretation by the ECJ of the functional competences regarding the internal market.^{40 41} As recalled by Rachael Craufurd Smith, 'the fact that there was no explicit ascription of cultural competences to the EEC in 1957 did not, however, mean that culture was excluded from the new Community's sphere of operations'.⁴² Indeed, from the

³⁷ See on that argument: Y.-M. DONDEERS, "The protection of Cultural Rights in Europe: None of the EU's Business?", *Maastricht J. Eur. & Comp. L.*, vol. 10, 2003, p. 145.

³⁸ J. E. WETZEL, "Introduction", in J. E. WETZEL (ed.), *The EU as a "Global Player" in Human Rights?*, London, Routledge, 2011, p. 15.

³⁹ M. A. POLLACK, "Creeping Competence: The Expanding Agenda of the European Community", *Journal of Public Policy*, vol. 14, n° 2, 1994, p. 95; S. WEATHERILL, "Competence Creep and Competence Control", *Yearbook of European Law*, vol. 23, n° 1, 2004, pp. 5-12.

⁴⁰ See: Articles 114 TFEU (ex 96) and 352 (ex 308). Over the latter disposition, before its revision through the Lisbon Treaty, J. H. H. Weiler wrote: 'it became virtually impossible to find any activity which could not be brought within the "objectives of the Treaty"' in J. H. H. WEILER, "The Transformation of Europe", *Yale Law Journal*, vol. 100, n° 8, 1991, pp. 2403, 2445-2446. See also: M. POIARES MADURO, "Altneuland: The EU Constitution in a Contextual Perspective", *The Jean Monnet Working Paper Series*, vol. 5, n° 4, 2004, p. 12.

⁴¹ J. H. H. WEILER, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999.

⁴² R. CRAUFURD SMITH, "The Evolution of Cultural Policy in the European Union", *op. cit.*, pp. 869-895.

1968 Italian Art Treasures case, it was made clear that insofar as cultural policies have an impact on the internal market – and this is often the case, given the close ties between economic and cultural policies and the dual nature of cultural goods and services – they are subjected to EC law. Whether through negative integration under the pressure of the four economic freedoms of movement, or through positive integration built on the harmonization of internal market legislation, the prohibition of state aid or competition law, the EU has greatly extended its action in fields of special importance for cultural life such as media, publishing, copyright protection, state support to cultural institutions, international trade agreements on films or protection of cultural heritage. The sum of these actions has had a far greater impact on the cultural sectors and policies than the fragile positive cultural policies developed on the basis of Article 167 of the Treaty. In part, this has to do with the fact that the latter competences must respect the subsidiarity principle and are required to take into consideration the specificities of culture in all EU policies. In a context where entire sectors of cultural life have been comprehensively subjected to economic rationality – largely thanks to the dual nature of cultural objects as both commercial and cultural assets – it would be unconscionable to ignore the need to safeguard the right of individuals to participate in cultural life: to do so would result in the utter commodification of culture.

We can therefore conclude that there are no *prima facie* grounds on which to reject the idea that the EU may have certain duties regarding the right to participate in cultural life. However, the protection of the right to participate in cultural life under EU law remains weak, regardless of whether such protection is grounded in the EU Treaties (B) or in general principles of EU law derived from the common constitutional traditions of the EU Member States or from the ratification of international instruments by Member States or by the EU (C).

B. THE RIGHT TO PARTICIPATE IN CULTURAL LIFE IN THE EU TREATIES

The Charter of fundamental rights of the European Union (The Charter) provides for a broad reference to cultural diversity in its Article 22, which states that the Union shall respect cultural, religious and linguistic diversity. It protects a central component of the right to participate in cultural life in Article 13 by explicitly protecting the freedom of the arts. However, the EU Charter does not safeguard the right to participate in cultural life for everyone: it only protects this human right for the elderly in Article 25.⁴³ One can only conclude that the Charter codifies ‘the protection of cultural (...) interests’⁴⁴ but develops a very restrictive approach to the right to participate in cultural life, particularly on the question of

⁴³ Article 25 states that “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”.

⁴⁴ WETZEL, *op. cit.*, p. 9.

its holders and on the question of its normative content. This is in sharp contrast with the extensive recognition of social rights in the Charter.

This relative invisibility of cultural rights in the Charter can be explained both by the fact that, in contrast with social rights (in particular those of workers), the EU Treaties make no reference to cultural rights, and by the social focus of the two Council of Europe instruments that influenced the formulation of the solidarity rights in the EU Charter: in contrast to the I.C.E.S.C.R., neither the European Social Charter nor the E.C.H.R. refer in general terms to the right to participate in cultural life (see above).⁴⁵

The EU treaties do contain some indirect protections for the right to participate in cultural life in highlighting the importance of cultural diversity and of common cultural heritage. Article 3 of the TFEU states that ‘the Union (...) shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced’. Article 167 of the TFEU enumerates the aims of the action of the EU, namely the improvement of the knowledge and dissemination of the culture and history of the European peoples, the conservation and safeguarding of cultural heritage of European significance, non-commercial cultural exchanges, artistic and literary creation, including in the audiovisual sector.

C. THE RIGHT TO PARTICIPATE IN CULTURAL LIFE AS A GENERAL PRINCIPLE OF EU LAW

The other ground for obligations regarding the right to participate in cultural life at the EU level lies in the concept of general principles of EU law which derived from the common constitutional traditions of EU Member States or from the ratification of international instruments by Member States or by the EU.

Regarding common constitutional traditions, article 6, 3, TEU indeed states that ‘[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. Yet, an appraisal of the constitutional orders of the 27 Member States leads to the conclusion that a specific right to participate in cultural life is recognized only in the Constitution of Belgium (under the form of a right to ‘épanouissement culturel’)⁴⁶ and of Portugal (under the form of a

⁴⁵ See L. GOLDSMITH, “Consolidation of Fundamental Rights at EU level – the British Perspective”, in K. FEUS (ed.), *The EU Charter of Fundamental Rights – text and commentaries*, London, Constitution for Europe, Federal Trust Series 1, Logan Page, 2000, p. 33; W. GRIFFITHS, “A Charter of Fundamental Rights of the European Union: A Personal Political Perspective”, in K. FEUS (ed.), *The EU Charter of Fundamental Rights*, op. cit., pp. 46-47.

⁴⁶ Art. 23: ‘Everyone has the right to lead a life in keeping human dignity. To this end laws (...) guarantee economic, social and cultural rights (...). These rights include among others (...) “the right to cultural and social fulfilment” ’.

broad ‘right to culture’).⁴⁷ A right to minimal social inclusion through, among others, participation in cultural life has been recognized in the case law of the German and Italian constitutional Courts.⁴⁸ A right to access to culture is recognized in the Constitutions of the Czech Republic, Romania, Slovak Republic and Poland.⁴⁹ Moreover, some constitutional orders recognize the right to participate in cultural life for specific groups, such as minorities⁵⁰ and young people.⁵¹ Furthermore, in the majority of States, the right to freedom of artistic expression is recognized as such in the Constitution.⁵² In many constitutional orders where a right to participate in cultural life isn’t expressly guaranteed, one finds certain obligations regarding cultural life – the nature, scope and extent of which are very similar to the international obligations deduced from the right to participate in cultural life for that State. In a nutshell, nearly all Member States’ constitutional orders enshrine some components of the right to participate in cultural life. However, seeing that, in the eyes of the CJEU, the Charter codifies the range of EU fundamental rights, and that the CJEU enjoys discretion in determining what the common constitutional traditions are,⁵³ the recognition of the right to access to culture as a common constitutional tradition of the Member States is very unlikely to happen.

The membership of Member States and of the EU to international instruments protecting the right to participate in cultural life is, to some extent, another plausible grounds for European responsibilities based on a recognition of this human right as a general principle of EU law. If one accepts that ‘European human rights would (...) not find an external structural limit in the international obligations stemming from the United Nations’⁵⁴ then, conversely, seeing the materially binding nature of the Covenant, Covenant rights might be considered as an external structural limit to European obligations. The EU might thereby be required to expand its own human rights protection scheme in order to allow or facilitate what is ‘materially required’ of all Member States, notably obligations stemming from the ICESCR, even if the EU is not a party to the Covenant. This conclusion is reinforced by Article 6 of the TEU and by the fact that all EU Member States have ratified or acceded to the Covenant.⁵⁵ It gains further ground

⁴⁷ Art. 73: ‘1. Everyone shall possess the right to education and culture’.

Art. 78: ‘Everyone shall possess the right to cultural enjoyment and creation (...)’.

⁴⁸ BVerfG, 1BvL 1/09 vom 9 Februari 2010, Absatz – Nr (1-220) and Corte Costituzionale, Sentenza 251/2008, 25 June 2008.

⁴⁹ Art. 6: ‘The Republic of Poland shall provide conditions for the people’s equal access to the products of culture which are the source of the Nation’s identity, continuity and development’.

⁵⁰ Austria: Art. 8; Cyprus: Art. 2 and 108; Czech Republic: Art. 25; Estonia: at p. 49-50; Finland: Section 17, 121; Latvia: Art. 114; Lithuania: Art. 37 and 45; Macedonia: 48; Slovakia: Art. 34; Sweden: Instrument of Government, 2.

⁵¹ Croatia: Art. 63.

⁵² Austria: Art. 17(a); Bulgaria: Art. 54; Croatia: Art. 69; Czech Republic: Art. 15; Estonia: Art. 38 and 45; Basic Law of the Federal Republic of Germany: Art. 5 (3); Greece: Art. 16; Hungary: Art. X (3); Latvia: Art. 113; Lithuania: Art. 42; Macedonia: Art. 48; Poland: Art. 73; Portugal: Art. 42; Romania: Art. 30; Slovakia: Art. 43 and 44; Spain: Section 30; Sweden: Art. 16 and 23.

⁵³ SCHÜTZE, *European Constitutional Law*, Cambridge, Cambridge University Press, 2012, p. 418.

⁵⁴ SCHÜTZE, *op. cit.*, p. 422.

⁵⁵ F. COOMANS, ‘Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organizations’, *Max Planck Year Book of United Nations Law*, vol. 11, 2007, pp. 375-378.

in the fact that ‘as its powers are being extended, and as it exercises more of the powers conferred upon it by the Member States, the Union is not in a position to ignore, in its law – and policy-making, the requirements of international and European human rights instruments’.⁵⁶ Moreover, all EU Member States and the EU itself have adhered to numerous international instruments indirectly protecting the right to participate in cultural life. All Member States and the EU are members of the Convention on cultural diversity. Although the legal scope of that Convention remains uncertain,⁵⁷ this instrument nurtures deep links with the right to participate in cultural life. Its main feature is the reaffirmation of the sovereign right of States to conduct cultural policies in its Article 2 and 5. The Convention refers to policies of cultural democratization, to policies that promote dissemination and protect cultural expression (article 8, 1° and 2°) as well as to policies conducive to public awareness and the education of audiences about cultural diversity (article 10). Moreover, the Convention refers explicitly to fundamental rights, conceived as necessary conditions for cultural diversity but also as limits to cultural diversity⁵⁸ and to cultural rights⁵⁹ and underlies the deep links between cultural diversity and human rights. More specifically, the Convention expresses the right to participate in cultural life in the form of a principle of ‘equitable access’. This principle asserts that ‘[e]quitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding’.⁶⁰ The Declaration on Cultural Diversity, that preceded the Convention, was far more explicit by recognizing extensively, and more comprehensively, the right of individuals to participate ‘in the cultural life of their choice’, to have ‘equal access to art’ and, it asserted that ‘the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity’.

V. Participation in cultural life and the EU liberal approach to cultural matters

In the first part of this article, we saw that the recognition of a limited European competence in culture in the Treaties of 1992 (Article 128 of the Maastricht Treaty, 167 TFEU) creates a specific role for culture within the EU and for the EU in cultural matters. Article 167 expressly recognizes EU cultural competence (in

⁵⁶ J.H.H. WEILER, *The Constitution of Europe ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, *op. cit.*

⁵⁷ See among other: M. HAHN, “A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law”, *Journal of International Economic Law*, vol. 9, n° 3, 2006, pp. 515-552; R. CRAUFURD SMITH, “The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?”, *International Journal of Communication*, vol. 1, 2007, pp. 24-55; C. BEAT GRABER, “Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity”, in H. SCHNEIDER and P. VAN DEN BOSSCHE (eds.), *Protection of Cultural Diversity from an International and European Perspective*, Antwerp/Oxford, Intersentia, 2006, pp. 141-161.

⁵⁸ Art. 2 Cultural Diversity Convention, and M. CORNU, *op. cit.*

⁵⁹ Preamble, para. 12 and Art. 2, 1°, Cultural Diversity Convention.

⁶⁰ Art. 2, para. 7 of the Cultural Diversity Convention.

paragraphs one through three) and introduces the principle of the integration of cultural considerations in all aspects of EU interventions (paragraph 4). However, the EU still lacks the competence to harmonize national cultural policies – its activity is mainly in support of the actions of Member States and is conditioned by subsidiarity. Moreover, the implementation of Article 167(4) so far remains disappointing even if progress is being made in the right direction.⁶¹ It seems that EU law has indeed not taken culture seriously, especially in those fields – such as internal market legislation – where it has potentially severe cultural impacts.

The increasing attention paid to culture in EU discourses remains thereby to some extent rhetorical. It has surely helped to shape cultural diversity as an overarching paradigm for EU cultural policies and to refine EU cultural policies in the 2007 Agenda for Culture in a Globalising World and in the Culture Programmes. But, even within the EU's positive cultural policies, it remains extremely difficult to identify consistent and coherent lines, especially on the question of participation in cultural life, where the vast scope of those policies are structurally weakened by limited resources, unclear strategic objectives and criteria. EU cultural policies appear highly paradoxical, oscillating constantly between promoting consumer choice at any cost in order to expose citizens to cultural diversity – but consequently limiting cultural policy to economic regulation and to a strict application of free movement principles to cultural matters – and protecting cultural diversity through the preservation of cultural lives that have become endangered through the very same liberalisation the EU has stimulated.⁶²

The source of the faint development of European cultural policies and the weakening of national cultural policies which have an impact on the internal market by European law can be traced down through the institutional double asymmetry of European law. Following Scharpf, this asymmetry has favoured the non-political decision processes – and especially the ECJ and the 'integration through law' process – over the political and, in parallel, has favoured negative integration, driven for (neo)liberal purposes, over policies of positive integration.⁶³ This explains why the weakening of national cultural policies – and thus of the right to participate in cultural life – through negative integration led by the ECJ and through technical European legislations regarding the internal market in cultural matters was not counterbalanced by strong European cultural policies, the development of the latter being impeded by the absence of a political consensus among

⁶¹ See: E. PSYCHOGIOPOULOU, *The Integration of Cultural Considerations in EU Law and Policies*, Leiden, Martinus Nijhoff Publishers, 2008.

⁶² R. CRAUFURD SMITH, "The Evolution of Cultural Policy in the European Union", *op. cit.*

⁶³ Scharpf writes that "(...) by the end of the 1970s, European integration had reached a highly asymmetric institutional configuration: Attempts to remove national barriers to trade through legislative harmonization continued to be severely impeded by the 'joint decision trap', whereas 'Integration through Law' was able to move forward without political interference through the seemingly inexorable evolution of judicial doctrines protecting and extending the Treaty-based rights of private individuals and firms". Scharpf argues that this asymmetric configuration had 'a powerful impact on the capacity and the direction of, European political legislation' towards 'Liberalization' (F. W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, *op. cit.*, p. 362). Afterwards, "(...) judicial decisions did provide the crucial impulse for the relaunch of European legislation in the second half of the 1980s, and they have continued to provide a dynamic stimulus for further legislation ever since" (*Ibid.*, p. 370).

the Member States over cultural policies and by the predominance of economic objectives over other objectives. As a consequence, as Scharpf quite harshly summarizes: 'European law, judicial and legislative, is now cutting deeply into the substance of the socioeconomic regimes of social markets economies'⁶⁴ and thereby is also affecting the cultural policies that were developed in those regimes.

To study the extent to which European law has affected cultural policies, and thereby the implementation of the right to participate in cultural life, we will first analyse the action of the Court of Justice of the European Union (CJEU or ECJ) to seek whether the Court takes cultural considerations – including cultural participation – seriously, even when interpreting free movement principles and internal market legislation. This case law is crucial, not only for the patent above-mentioned reason but also because cultural rights, as fundamental rights, do not mean anything if they do not possess a minima an interpretative effect (A).⁶⁵ Secondly, we will study the legislative action in cultural fields to identify whether cultural considerations are effectively being taken into account and whether a genuine European cultural policy based on cultural democracy has been developed (B).

A. PARTICIPATION IN CULTURAL LIFE BEFORE THE COURT OF JUSTICE

From its early case law, the Luxembourg Court avoided the question of the absence of a European competence in the cultural sector by confirming the application of Community law to the cultural sector insofar as cultural services or products have economic consequences and have the potential to affect the internal market.⁶⁶ Moreover, the Luxembourg Court whittled the scope of the rule set in Article 36 of the Lisbon Treaty that excludes 'national treasures' from the application of Community law.⁶⁷ The cultural sector, despite its exclusion from European competences, fell to a large extent into the ever-extending domain of European scrutiny because of its potential impact on the internal market.⁶⁸ Thereby, in this case, like in other cases, 'if an impediment to the exercise of European liberties is alleged, the Court takes judicial notice of its potential effect – which then establishes the rebuttable presumption of a Treaty violation'.⁶⁹

However, this presumption may be rebutted if the Member State can justify the measure in question. As Rachael Craufurd Smith puts it, 'European scrutiny can be seen to have had both a procedural and a substantive impact' on cultural

⁶⁴ F. W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, op. cit., p. 372.

⁶⁵ See inter alia: A. R. CHAPMAN and S. RUSSELL (eds.), *Core obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp, Intersentia, 2002.

⁶⁶ See inter alia: ECJ, 29 February 1968, *Parke, Davis v Centrafarm*, C-24/67; ECJ, 20 January 1981, *Musik-Vertrieb Membran GmbH and K-Tel International v GEMA*, Joined cases C-55 & C-57/80.

⁶⁷ ECJ, 10 December 1968, *Commission v Italy*, C-7/68.

⁶⁸ Regarding the extension of the Court's domain of scrutiny, see the famous *Dassonville* and *Cassis* cases.

⁶⁹ F. W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, op. cit., p. 361. The author speaks of a 'procedural asymmetry between rule and exception'.

policies. At the procedural level, 'EU law requires Member States to articulate and clarify the basis of their cultural policies, support them with convincing evidences, engage in consultations with those potentially affected and ensure that they operate in a transparent and non-discriminatory way'. At the substantive level, cultural policies may not obstruct the free movement of goods, services and persons or 'distort competition'.⁷⁰ In this regard, the rebuttable presumption of a violation of free market rules can be established if the measure is considered as being justified and if it passes the Court's proportionality test – and it is on the Member State to show the proportionate character of the measure. The Court also admitted at an early stage a 'cultural rule of reason' in the application of internal market legislation. In the *Cinéthèque*⁷¹ case, the Court accepted that cultural motives can justify restrictions to the four freedoms of movements. In the latter case and in the *LIBRO*⁷² case the Court explicitly held that measures to support movie production or books as 'cultural objects' could be justified under EC law. In some cases the Court considers culture as constituting a legally protected interest mostly by paying some respect to claims inspired by cultural diversity (in the sense of protection of minorities or of national cultural identities) and, to a far lesser extent, to democratic considerations related to cultural life.⁷³ As Evangelia Psychogiopoulou states, 'beneath the surface of judgments, attempts sometimes lurk to guarantee multi-cultural standards for the frontier-less market space created'.⁷⁴

1. *The reinforcement of the right to participate in the cultural lives of other Member States without discrimination and of freedom of choice*

For this reason, in the construction of the four freedoms of movement, the CJEU has already recognised and favoured some elements of the right to participate in cultural life connected with the idea of freedom of choice and cultural diversity, mostly without explicitly recognising it. The cornerstone of this implicit recognition or reinforcement of the right to participate in cultural life is often Article 12 of the Treaty, which concerns the principle of non-discrimination on the grounds of nationality. In its case law regarding the negative integration, the ECJ implicitly regards the common market as a space favouring cultural interactions, movement of cultural goods and services. This vision opens up broad perspectives for cultural consumption, freedom of choice and the right to participate in the

⁷⁰ R. CRAUFURD SMITH, "The Evolution of Cultural Policy in the European Union", *op. cit.*, p. 877.

⁷¹ ECJ, 11 July 1985, *Cinéthèque v Fédération Nationale des Cinémas Français*, Joined Cases 60&61-80.

⁷² ECJ, 30 April 2009, *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, C-531/07.

⁷³ The ECJ seems uncomfortable in dealing with cultural questions even if it has, in recent years, taken into account some cultural considerations in its decision-making. See, for instance, 26 October 1971, *Eunomia di Porro*, C-18/71; 10 January 1985, *Leclerc v Au blé vert*, C-229/83; 12 February 2008, *Centre d'exportation du livre français (CELF) and French Ministry of Culture and of Communication*, C-199/06; 5 March 2009, *Unión de Televisión Comerciales Asociadas (UTECA) c. Administración General del Estado*, C-222/07; 15 April 2010, *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP)*, C-518/08; 11 March 2010, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication*, C-1/09; 14 June 2012, *European Commission v Kingdom of the Netherlands*, C-79/09.

⁷⁴ E. PSYCHOGIOPOULOU, *op. cit.*, p. 144.

cultural lives of other Member States without discrimination. The rejection of national discriminatory measures is clearly motivated by 'prospects of cultural interaction'.⁷⁵

In *Steinhauser*, the Court found a violation of Article 43 of the Treaty on the grounds that the City of Biarritz refused to allow a German artist to participate in a tendering procedure for the allocation of rented lock-ups belonging to the municipality (used for the exhibition and sale of crafted products) unless he proved his French nationality.⁷⁶ By prohibiting such discrimination, the Court undoubtedly extends the possibilities for Community nationals to participate in the cultural life of other countries. In *Commission v Spain*, the Court held that 'by applying a system whereby Spanish citizens, foreigners resident in Spain and nationals of other Member States of the EEC under 21 years of age benefit from free admission to national museums, while nationals of other Member States more than 21 years of age are required to pay an entrance fee', Spain did not respect its obligations towards Article 7 and 59 of the EC Treaty. The explicit reasoning relies on freedom of movement but the Court did consider the question of access to culture by linking access to museums with freedom of movement: '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'.⁷⁷ In *Commission v Greece*, the Court found that cultural professionals benefit from the free circulation of workers and that

in not restricting the requirement of Greek nationality to access to posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities in the public sectors (...) radio and television broadcasting, and at the Athens Opera and in municipal and local orchestras, the Hellenic Republic has failed to fulfil its obligations under Article 48 of the Treaty and Article 1 of Regulation No. 1612/68.⁷⁸

In that case, the Court extended potential participation as a professional in the cultural life of other Member States. In its *De Coster* judgment, the Court considered that a local tax more likely to be applied to foreign television programmes was contrary to freedom of establishment.⁷⁹ By doing so, the Court indirectly improved access to diverse contents in the territory of the Member State. In *Commission v France*, the Court enlarged the participation of foreign artists in French cultural life by declaring the conditions for engaging such artists on the national market incompatible with the free movement of services.⁸⁰ In *Arnoud Gerritse*, the Court held that Germany had exercised its tax powers inconsist-

⁷⁵ E. PSYCHOGIOPOULOU, *op. cit.*, p. 144.

⁷⁶ 18 June 1985, *P. Steinhauser v City of Biarritz*, C-197/84.

⁷⁷ 15 March 1993, *Commission v Spain*, C-45/93, para. 6.

⁷⁸ 2 July 1996, *Commission v Greece*, C-290/94, para. 39.

⁷⁹ 29 November 2001, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, C-17/00.

⁸⁰ 15 June 2006, *Commission v France*, C-255/04.

ently with Community law as the German tax legislation indirectly disadvantaged foreign artists.⁸¹ This judgment favoured access to the cultural markets of Member States for non-nationals, extending also the public's access to a diversified range of cultural activities. Indeed, this access would have been highly impacted by the taxation measures in a context where the taxation of the artist lies in the country of their performance. Finally, in *Commission v Italy*,⁸² the Court held incompatible with Articles 12 and 49 of the EC local measures that the Italian Government had allowed and that established advantageous rates for access to museums and other cultural institutions for Italian nationals and persons resident within the territory of the authorities running the museum or public monument in question. The Court judgment is 'directed at ensuring equality of treatment for cultural enjoyment, irrespective of both nationality and residence considerations'.⁸³ This decision clearly reinforced access to culture to all Europeans by forbidding any discrimination based on a national basis but also – and less convincingly – any cultural favour provided by local authorities to their residents (and tax contributors).

2. The weakening of the elements of the right to participate in cultural life whose implementation require positive cultural policies

This case law reveals a multi-cultural paradigm that the Court is willing to pursue in cultural cases and that improves certain components of the right to participation in cultural life: freedom of choice and the right to access and participate in the cultural lives of other Member States. However, the intention to protect cultural diversity and cultural participation from any form of discrimination is never spelled out explicitly, despite the possibility – introduced by Article 167 of the Treaty – for the Court to do so.

Because of this reluctance to clearly address cultural issues, the CJEU, despite the crucial character of the European scrutiny regarding cultural policies, 'has not systematically considered the impact of Community rules on national cultural policies'⁸⁴ and even less so on the national cultural policies that are concerned with participation in cultural life. In those cases where the Court rejected cultural policies by invoking some generous 'cultural' arguments, it did so by bypassing and ignoring 'the social and political construction of solidarity, and it did also violate the norms of reciprocity'.⁸⁵ And, in all cases, the result of European scrutiny on the 'cultural rules of reason' is that, as in other fields, it 'maximizes the

⁸¹ 12 June 2003, *Arnoud Gerritse v Finanzamt Neukölln – Nord*, C-234/01.

⁸² 16 January 2003, *Commission v Italy*, C-388/01.

⁸³ E. PSYCHOGIOPOULOU, *op. cit.*, p. 149.

⁸⁴ E. PSYCHOGIOPOULOU, *op. cit.*, p. 150.

⁸⁵ F. W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, *op. cit.*, p. 380. The author points out that 'the extension of personal mobility rights for individual creates special burdens for national welfare states with high levels of collectively financed services and transfers, and thus also creates incentives favouring convergence toward the liberal minimum of social protection'.

Court's quasi discretionary control over the substance of member-state policies' to the extent that 'it is for the Court, rather than for national constitutions and national democratic processes to determine the legitimate purposes of national policy'.⁸⁶

The application by the CJEU of the free movement principles to cultural policies can have the reverse effect as that just described: to affect measures that are of special importance for participation in cultural life. In a vast majority of the cases relating to cultural policies, the Court did reject the measures invoking cultural policy motives to justify restrictions to the free movement of goods or of services.⁸⁷ The Court reasoned mainly on the basis of a definition of cultural products in economic terms,⁸⁸ in great part thanks to the active support of the Commission – which initiated numerous proceedings before the Court in order to achieve its own economic and liberalizing policy objectives in the cultural field.⁸⁹ It is clear that the increasing admission of a 'cultural' rule of reason to justify restriction to free movement principles does not change the nature of the balance operated by the Court: the admissibility of restrictions on the basis of a cultural policy objective is often excluded when the proportionality test is applied.⁹⁰

This exclusion has perverse effects on participation in cultural life, especially when economic and cultural considerations are both underlying a cultural policy aimed at protecting cultural diversity or participation in cultural life. Cultural policy concerns often merge with economic concerns, as cultural goods and services are highly ambivalent. The elaboration of a cultural policy that aims at protecting and promoting cultural participation cannot, in general, function effectively if it is not supported by economic arrangements which aim at ensuring enough financial resources for the realization of that policy and which, the fore, have an impact on the internal market. This point is particularly clear in the case of *Bond van Adverteerders*, where the system under scrutiny undoubtedly had economic goals but where these were intrinsically linked with cultural ones and were structured as an indispensable support for the overall policy.⁹¹ The same conclusion applies for *Commission v Italy* on the question of advantages of a cultural nature being recognised for residents (who participate in cultural policies via their tax contributions). The cultural goal (enhancing access to cultural heritage for the residents) was intrinsically link with a more 'social' one (promoting solidarity and fiscal cohesion) and to an 'economic' one (safeguarding the finances of local authorities by reserving those favours to residents). The Court's obsession with ensuring that 'protectionist goals, under the guise of cultural concerns, do not undermine establishment of the internal market'⁹² has prevented the Court from

⁸⁶ *Ibid.*, p. 361.

⁸⁷ See EJC, 20 February 1979, *Rewe-Zentral*, C-120/78; 26 February 1991, *Commission v France*, C-154/89; 26 February 1991, *Commission v Italy*, C-180/89; 26 February 1991, *Commission v Greece*, C-198/89.

⁸⁸ LITTOZ-MONNET, *op. cit.*, pp. 152-156.

⁸⁹ *Ibid.*, pp. 45-46.

⁹⁰ See ECJ, 25 July 1991, *Commission v Netherlands*, C-353/89.

⁹¹ ECJ, 26 April 1988, *Bond van Adverteerders and others v The Netherlands State*, C-352/85.

⁹² E. PSYCHOGIOPOULOU, *op. cit.*, p. 141.

systematically assessing the importance of the measures for national cultural policies. This obsession of the Court's has far reaching implications. Firstly, this means that economic considerations cannot truly be balanced with cultural, social and democratic considerations, such as those related to the right to participate in cultural life, due to the predominant importance of economic considerations within EU law. Secondly, the Court's case law is tantamount to a closure on the debate over culture, trade and democracy. Though, it remains to a large extent a political choice to define culture, cultural goods and services as economic goods and services. The variety of answers offered in the EU Member States show that this question has indeed been seen as a political one, implying democratic deliberations on culture and cultural policies.⁹³

The growing importance of this European scrutiny has led the ECJ to be the ultimate judge of cultural questions whenever there is an impact on the internal market. In this context, the fact that the ECJ has not developed a clear appraisal of cultural policies and their relationship with democracy, markets and fundamental rights has huge implications for cultural rights, policies and democracy. The impact of the extension of European scrutiny is univocal: it results in a restriction in the democratic leeway for developing cultural policies and the political choices that remain available at the national level, especially when cultural considerations merge with economic ones. It means also that EU scrutiny, because of its economic vision of cultural questions, does not leave much space for democratic choices and almost reduces to nothing the possibility of conducting strong cultural policies that regard part of cultural industries as being a cultural question – and not only an economic one. In the cultural field also,

■ the case law does not recognize a sphere of national autonomy in which purposes of public policy and the measures through which these are to be realized should be chosen by democratically legitimated political processes. Whenever it is claimed that such measures might impede the exercise of European liberties, or might violate the prohibitions against discrimination, or might distort market competition, national institutions and policy choices are at the mercy of the ECJ's discretion, which is generally guided by a unipolar logic that maximizes Europeanization at the expense of national autonomy.⁹⁴ ■

⁹³ We can see here a form of depoliticization of the culture/trade question which is to some extent reduced to a purely economic question. This process of depoliticization has been illuminated by Loïc Azoulai. This author observes such a process of depoliticization especially when it comes to matters excluded from EU institutions' competences, through the current configuration of the proportionality principle. See L. AZOULAI, "The European Court of Justice and the Duty to Respect Sensitive National Interests", in M. DAWSON, B. DE WITTE and E. MUIR (eds.), *Judicial Activism at the European Court of Justice*, Northampton, Edward Elgar, 2013, p. 167.

⁹⁴ F. W. SCHARPF, *Community and Autonomy. Institutions, Policies and Legitimacy in Multilevel Europe*, *op. cit.*, p. 373.

B. THE PROTECTION OF THE ELEMENTS OF THE RIGHT TO CULTURAL LIFE LINKED WITH CULTURAL IDENTITY

The conclusion is however different in cases where culture is understood in a sociocultural sense or in an anthropological sense, as referring to ‘traditions’, languages, moral, or sociocultural elements of identity. The Court showed some sensitivity to the justifications invoked in those cases,⁹⁵ even if, again, this larger admission did not change the nature of the proportionality test.⁹⁶

Except in the *UTECA* case,⁹⁷ which directly relates to cultural life and the protection of language as an element of the cultural identity, it is doubtful that this case law can be interpreted as protecting and enhancing cultural policies or elements of the right to participate in cultural life. Firstly, this case law can be connected to the German constitutional court judgment on the Lisbon Treaty, where the German Court seeks to protect the ‘constitutional identity’ of Member States and thereby seeks to limit the potential extension of European powers. It thereby intends to protect national autonomy where policy choices are highly dependent on cultural, historical and linguistic perceptions. It does thereby protect, to a certain extent, culture understood as a heritage, as a symbol, as a process of (national) identification. But it does not protect culture as a democratic stake, as an ongoing creation that requires State interventions, as a contemporary phenomenon that can be said to require public policies extending access and participation. Secondly, even if the case law of the German constitutional court has had some ramifications for EU law and the case law of the ECJ, it does not imply that these cultural considerations will not be balanced with market orientated considerations. Thirdly, in some cases, as with Federal States, the identification of those ‘cultural’ elements of the constitutional identity and of the ‘cultural’ perceptions that influence political decisions may be highly complex, even if we situate this constitutional identity at the regional or at the sub regional level. Fourthly, if the protection of constitutional identity does require sufficient space for public choices dependent on a certain form of ‘cultural heritage’, it does not require ‘sufficient space for national policy choices shaping the economic and social conditions affecting the lives of the citizens’, contrary to what the German Court has argued. Choices concerning the general economy of culture aren’t considered to be protected.

⁹⁵ See with respect to ‘traditions’: ECJ, 24 November 1993, *Keck and Mithouard*, C-267 & 268/91; 24 March 1994, *H.M. Customs and Excise v Schindler*, C-275/92, para. 61; 21 September 1999, *Läärä and Others*, C-124/97, para. 14; 21 October 1999, *Questore di Verona v Diego Zenatti*, C-67/98, para. 15.

⁹⁶ See also ECJ, 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, C-208/09.

⁹⁷ ECJ, 5 March 2009, *Unión de Televisiónes Comerciales Asociadas (UTECA) c. Administración General del Estado*, C-222/07 (see on the latter case: C. ROMAINVILLE, “Arrêt ‘UTECA’: le soutien à la production culturelle dans une langue déterminée”, *Journal de droit européen*, n° 161, 2009, pp. 209-213).

VI. Participation in cultural life within EU legislation

Legitimized by the ECJ's case law on EU competences in the cultural sector, the adoption of the first legislative EU instruments on culture was driven by economic arguments and aimed at liberalizing the cultural sectors.⁹⁸ Consequently, in the 1980s, some Member States attempted to reorient the purely economic approach to culture through supranational mechanisms, cultural cooperation at the inter-governmental level and the initiation of cultural programmes and projects. In that perspective, the European institutions 'started focusing on the need to further cultural cooperation in order to promote a sense of European identity among European citizens'.⁹⁹ The objective was to develop a European identity and citizenship through a 'new politics of cultural belonging'.¹⁰⁰

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 some that are directly concerned with participation in cultural life. 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.¹⁰¹ 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.¹⁰² 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, 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,

⁹⁸ H. DUMONT, "Les compétences culturelles de la Communauté Européenne. Bilan critique et perspectives", *Revue Interdisciplinaire d'études juridiques*, vol. 29, 1992, pp. 1-47.

See for instance in public aid to cinema: Commission Decision 89/441/EEC of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394 Publishers Association – Net Book Agreements) (O.J., L 208, 20 July 1989). See on book pricing: Decision of the Council 97/C 305/02 of 22 September 1997 on cross-border fixed book prices in European linguistic areas (O.J., C 305, 7 October 1997).

⁹⁹ A. LITTOZ-MONNET, *op. cit.*, p. 54.

¹⁰⁰ L. TSALIKI, "The Construction of European Identity and Citizenship Through Cultural Policy", *European Studies. An interdisciplinary Series in European Culture, History and Politics*, vol. 24, 2007, pp. 157-182.

¹⁰¹ 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) (O.J., L 95, 15 April 2010, p. 1).

¹⁰² Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (O.J., L 108, 24 April 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 (O.J., L 337, 18 December 2009, p. 37)).

or the development of cultural institutions whose aims are to broaden participation in cultural life for everyone.

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, emphasizing 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'.¹⁰³ 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 fight 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'.¹⁰⁴ 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'.¹⁰⁵ 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 democratization project is limited to a mere cultural diffusion project without consideration being 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 remains frustrating.

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 participation in cultural life through cultural mediation, cultural education, support to cultural expression, dissemination of cultural information and so on. In the copyright sector, participation in cultural life is undermined by Directive 2011/77/EU on the term of copyright and certain related rights, which extends copyright

¹⁰³ See Decision No. 508/2000/EC of the European Parliament and of the Council of 14 February 2000 establishing the Culture 2000 programme (O.J., L 63, 10 March 2000, p. 1, Art. 1(h) and Annex I, point I, 1(i)).

¹⁰⁴ Decision No. 1855/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013) (O.J., L 372, 27 December 2006, p. 1).

¹⁰⁵ 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 (O.J., L 347, 20 December 2013, p. 221).

protection from 50 to 70 years. Previous copyrights legislation had already weakened participation in cultural life by protecting and promoting technical measures and by undermining exceptions to copyrights and affecting the effective benefit of the public domain. 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). Although the European Commission has generally developed a positive stance as regards cultural state aid, it has endorsed a restrictive definition of 'heritage', excluding, for instance, state aids to museums which are not strictly structured on the dissemination of the arts from the scope of the cultural state aid derogation,¹⁰⁶ thus adopting a constrained understanding of the promotion of access to 'culture'. In the same vein, it has dramatically restricted the exemptions admitted in Articles 106 and 107 TFEU for audiovisual services driven by the general interest. In the *Kinderkanal and Phoenix* case, it holds that broadcasting educational and current affairs programmes cannot be regarded as cultural.¹⁰⁷ The *BBC Curriculum* case¹⁰⁸ is also revealing with respect to online services providing free interactive learning materials to homes and schools. 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. If the Commission acknowledges that 'education has been an element of BBC's public service throughout its existence [and] that it could be argued that the natural or logical evolution of a public service that manifests itself in an expansion of the scope of related activities and a deployment of more resources', it however holds that 'the use of public funding to enter markets that are already developed and where the commercial players have had little or no exposure to the BBC as a competitor cannot be considered as maintaining the status quo regarding the nature of the scheme'.¹⁰⁹ 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. In this decision, the Commission dangerously limits Member States' capacities to adapt their cultural policies to the new information society by excluding those potential adaptations from the definition of public service broadcasting. This overall restrictive approach endangers the realization of the right to participate in cultural life, which requires modern cultural policies adapted to new forms of cultural practices and new initiatives to improve participation in cultural life.

¹⁰⁶ Commission Decision 2004/167/EC of 17 September 2003 on State aids implemented by Germany for Space Park Development GmbH & Co, (O.J., L 61, 27 February 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' (O.J., L 135, 28 May 2005, p. 21).

¹⁰⁷ Commission Decision State Aid No. N. 70/98 of 21 August 1999, *Kinderkanal and Phoenix* (O.J., C 238/3, 21 August 1999 [43]).

¹⁰⁸ Commission Decision State Aid No. N. 37/2003 of 1 October 2003, *United Kingdom BBC Digital Curriculum* (O.J., C 271/06, 12 November 2003).

¹⁰⁹ *Ibid.* It is noteworthy that the Impact Assessment on this measure only focused on economic impacts. The programme was finally suspended in 2007.

Multiple factors can explain the predominance of an economic regulation over a genuine cultural policy at the EU level: the long-lasting lack of extensive and positive EU competence, which has forced any cultural intervention to be made through an economic prism; the absence of a harmonisation competence and of positive integration in the cultural field; the existing support for liberal intervention;¹¹⁰ the alteration, by European institutions and private actors, of 'the contours of the policy debate [that] make the nature of the default position less desirable for member states'¹¹¹ (with the 'default position' referring to the promotion of strong cultural policies);¹¹² the action of powerful international actors and industries that have managed to transfer decision-making powers in cultural matters to the EU level;¹¹³ the difficulties arising around the notion of a European cultural identity, which is argued to affect the possibility of a strong European cultural policy, as well as the strong tensions between different governance models of culture co-existing in Europe.

* * *

Neither the interpretative action of the ECJ in cultural issues nor the legislative initiatives can be considered as implementing the right to participate in cultural life. Neither at the procedural level nor at the substantive one has EU law developed a coherent line to respect, protect and promote democratic dimensions of cultural policies and especially participation in cultural life. Despite rhetorical references to the importance of participation in cultural life, EU interventions in cultural matters remain highly ambivalent and inconsistent on the internal scene even if the major role played by the EU in the adoption of the Convention on cultural diversity has strongly positioned the EU as a proponent of cultural policies and, to some extent, cultural rights, on the external scene.¹¹⁴ On the contrary, by focusing on cultural diversity and on the right to access the cultural lives of other Member States without discrimination, EU cultural policy seems to have forgotten the other dimensions of cultural policies and, in particular, questions of access to and participation in cultural life and, mainly, their fundamental linkage with democracy.

¹¹⁰ L. HOOGHE and G. MARKS, "The Making of a Polity: The Struggle Over European Integration", *European Integration Online Papers*, vol. 1, n° 4, 1997.

¹¹¹ A. LITTOZ-MONNET, *op. cit.*, p. 67.

¹¹² *Ibid.*, pp. 153-156.

¹¹³ *Ibid.*

¹¹⁴ See the recent discussion on film negotiations at the WTO.

VII. Two alternatives to strengthen the right to participate in cultural life under EU law

In our view, there are two alternatives – which can be combined – to strengthen the legal regime of the right to participate in cultural life at the EU level, a strengthening which, as it must be recalled, is a necessary step towards the creation and the functioning of a transnational public sphere.¹¹⁵

A. POLITICAL REGENERATION OF THE “CULTURAL QUESTION” AT THE EUROPEAN LEVEL

The first option would entail a deep reform of European law towards a stronger development of the right to participate in cultural life at the EU level, by requiring an adequate balance with economic considerations. A political and legal development of this human right and of its justiciability at the EU level would need to afford effective protection to individuals even if the exercise of said right was to have a negative effect on the economic integration project.¹¹⁶ Moreover, through the intervention of the principle of non-regression, the development of an EU right to participate in cultural life would avoid a reduction in the level of protection and fulfilment of that human right. The implementation of the standstill effect on cultural matters would imply that budgetary cuts imposed by the financial crisis and the discretionary status of cultural expenditures might have to be rethought, or, at least, justified.

The development of the right to participate in cultural life in EU law would need ‘appropriate governance mechanisms designed to ensure that human rights are taken fully into account, especially in the preliminary stages of policy setting and law making, and on the participation of the relevant stakeholders in the design and implementation of these policies’.¹¹⁷ We follow the proposal of Olivier De Schutter for a general ‘mainstreaming’ of all human rights to monitor them concretely.¹¹⁸ In the case of the human right to participate in cultural life, this procedural requirement would mirror and strengthen the ‘cultural mainstreaming’ enshrined in article 167(4) of the TUE, a provision that should be a cornerstone for culture to be considered as a vital issue in EU law. Its implementation so far has been disappointing because of ‘the provision’s overly delicate wording, which does not create a clear legal obligation for compliance throughout the entire sphere of Community activities (...)’ and of the large ‘margin of discretion left

¹¹⁵ See on the necessity of a vivid public sphere at the European level and the role of law in the elaboration of such a sphere: J. HABERMAS, *The crisis of the European Union: A response*, Oxford, Polity Press, 2012, p. 46.

¹¹⁶ R. BURCHILL, “Assessing the EU’s Position on Human Rights: Is It a Desirable One?”, in J. E. WETZEL (ed.), *The EU as a “Global Player” in Human Rights?*, London, Routledge, 2011, p. 23.

¹¹⁷ O. DE SCHUTTER and P. ALSTON, “Introduction. Addressing the Challenges Confronting the EU Fundamental Rights Agency”, in O. DE SCHUTTER and P. ALSTON (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publishing, 2005, p. 1.

¹¹⁸ O. DE SCHUTTER, “Mainstreaming Human Rights in the European Union”, in O. DE SCHUTTER and P. ALSTON (eds.), *Monitoring Fundamental Rights in the EU, op. cit.*, pp. 37-72.

to the European institutions'¹¹⁹ but also because of the absence of clarity, the 'unhelpful eliding of intrinsic and instrumental values and the political administrative morass'.¹²⁰ However, Evangelia Psychogiopoulou interestingly states that when attempts, even if limited, were made to take Article 167(4) seriously, 'the implied cultural powers conferred (...) by means of [this provision] (...) supports the emergence of an environment conducive to increased access to, and participation in, cultural life, stimulating the provision of a variety of cultural options for European citizens, with respect to cultural creation and cultural enjoyment'.¹²¹ No doubt that a European right to participate in cultural life and Article 167(4) could be mutually reinforcing, if the right to participate in cultural life is fully recognized and implemented and if techniques such as "impact assessment" are developed in cultural matters.¹²² For instance, this could help to reframe controls over State aids in cultural matters by truly taking cultural considerations into account. We believe that, by reinforcing a democratic cultural policy through the full recognition and implementation of the right to participate in cultural life, EU institutions could find ways to reconcile the multiple dimensions of culture and to allow for a balancing between cultural, social, ethical and economic considerations in cultural matters.¹²³ Further conceptual development of the right to participate in cultural life could help to clarify and to enrich European cultural policies especially by reinforcing the policies that 'take place via the participatory agency of the citizens'.¹²⁴

B. PRESERVING NATIONAL "SHELF SPACE" FOR NATIONAL CULTURAL MEASURES PROTECTING AND PROMOTING PARTICIPATION IN CULTURAL LIFE

If the suppositions of Floris de Witte about the fact that 'the creation of a transnational public sphere [which is needed for a political regeneration of the social as of the cultural question at the EU level] will require time, while further integration cannot possibly serve to strengthen the capacity of the European citizens to actually answer the social question', then it is crucial to 'look at how EU law can help the political on the national level to re-attain that capacity'.¹²⁵ In simple terms, the question is how to interpret EU free movement law in order to create more 'shelf space' for national measures protecting and promoting cultural life 'while not renouncing on the justice enhancing quality of free movement, in so far as it offers citizens both a wider choice of alternative lifestyles and engen-

¹¹⁹ E. PSYCHOGIOPOULOU, *op. cit.*, p. 347.

¹²⁰ C. GORDON, "Great expectations – the European Union and cultural policy: fact or fiction?", *International Journal of Cultural Policy*, vol. 16, 2010, pp. 101-120.

¹²¹ E. PSYCHOGIOPOULOU *op. cit.*, p. 348.

¹²² See: J. M. SCHINDLER, "Culture, Politics and Europe: *en route* to Culture-Related Impact Assessment", Munich, July 2012, available on <<http://uni-potsdam.academia.edu/JoergSchindler/Activity>> last accessed June 2014.

¹²³ This policy is also still lacking in education. See L. MARTIN, *L'Union européenne et l'économie de l'éducation. Émergence d'un système éducatif européen*, Brussels, Larcier, 2011.

¹²⁴ See U. STAIGER, "New Agendas? Culture and Citizenship in EU policy", *International Journal of Cultural Policy*, vol. 15, 2009, p. 2.

¹²⁵ F. DE WITTE, "EU Law, Politics, and the Social Question", *op. cit.*, p. 604.

ders claims to solidarity and [rights]’.¹²⁶ This can be done by revising the ‘proportionality test’, giving more weight to national leeway measures protecting and promoting participation in cultural life, limiting the exclusion of particularly disproportionate market restrictions, lightening or reversing the burden of proof, opening the debate to all stakeholders. Recognition of the democratic dimension of culture – and not only of its economic and “symbolic” dimensions – and of its linkage with political and social rights would also help to rethink the assessment of domestic cultural policies and value them as the expression of a genuine democratic expression. An ambitious implementation of Article 167§4 and the elaboration of a procedural framework that would help to systematically analyse the impact of European measures on national cultural policies and on the objectives they pursue would also be a solution. Taking seriously the “cultural provisions” contained in EU treaties and in the Convention on cultural diversity could be another option for the Court to justify another appreciation of national cultural policies. Two other options are also available: attenuate the pernicious effects of mutual recognition and regulatory competition, as Saydé proposed¹²⁷ and incorporate ideas of transnational solidarity within the functioning of the free movement provisions, as de Witte suggested.¹²⁸

VIII. Conclusion

Participation in cultural life is a long way from enjoying the full and direct benefits of protection under EU law. The Charter of Fundamental Rights limits its benefits to the elderly and only recognises its most classical component, namely freedom of the arts, for all citizens. EU Treaties contain indirect protection for some elements of this fundamental right, such as protection of cultural diversity or non-discrimination principles but do not confer any direct protection to the core elements of the right, such as access and participation in cultural life. An analysis of the common constitutional traditions of Member States shows that in the majority of Member States’ constitutions an obligation to protect culture, cultural heritage and cultural diversity is affirmed. In certain constitutions, a right to access to culture is recognized as well as a right of minorities to develop their cultural life. However, with the exception of Belgium and Portugal, participation in cultural life isn’t recognized as such in European constitutional texts. The ratification by Member States of international instruments such as the ICESCR or the Convention on cultural diversity also provide indirect grounds that may be mobilized to plead for the recognition, at the EU level, of the right to participate in cultural life.

¹²⁶ *Ibid.*, p. 605.

¹²⁷ A. SAYDÉ, “One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law”, *Cambridge Y. Eur. Legal Studies*, vol. 13, 2011, pp. 365 and 370; F. DE WITTE, “EU Law, Politics, and the Social Question”, *op. cit.*, p. 605.

¹²⁸ F. DE WITTE, “Transnational Solidarity and the Mediation of Conflicts in Justice in Europe”, *European Law Journal*, vol. 18, n° 5, p. 694.

However, as European powers and activities in cultural matters expand through its economic competences and as the double asymmetry of European integration continues to affect cultural matters, there is, at the EU level, not only a need for the restatement of the principle of cultural diversity but also for the protection of participation in cultural life. Recognition and implementation of the right to participate in cultural life is best considered an urgent need at the European level, given the complex problems raised by European integration, European citizenship and cohesion, 'all of which depend on the quality of the conditions determining access to and creation of culture, expression and meaningful participation in Europe's communicative space'.¹²⁹ The development of a more integrated approach to culture is also a pressing matter in the new media and cultural landscape widely dominated by the digital society, by new forms of cultural participation and consumption and in a context of growing policy fragmentation in relation to culture.

But the strengthening of access and participation to culture is above all a crucial point for the elaboration and the functioning of a vivid transnational public sphere that could transform the EU into a genuine democratic political construction. An improved place for the right to participate in cultural life is clearly possible at the EU level. We have sketched two alternatives to strengthen this human right and we have outlined the benefits that such a development would entail. In rearticulating its approach to culture on the basis of the right to participate in cultural life, the EU could find ways to reconcile the multiple dimensions of culture through an approach that is flexible, that allows for balancing human rights with other cultural, social and economic considerations and that takes ethical claims and the public interest in culture truly into account.

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¹²⁹ K. SARIKAKIS, "The Place of Media and Cultural Policy in the European Union", *European Studies. An interdisciplinary series in European Culture, History and Politics*, vol. 24, 2007, p. 21.