

ARTICLE 128 IN THE TREATY OF MAASTRICHT: HARBINGER OF A NEW EUROPEAN CULTURAL POLICY?

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Abstract

The European Union started to regard culture as an important factor in building a political union only recently. Although the Treaty of Rome, which established the European Economic Community, contained few provisions related to culture and which would allow actions to be taken in this sensitive area, the Community began since the 1970s to get involved in cultural affairs. The Maastricht Treaty was the first legal document to establish clear competences in the field of culture at the supranational level, through the inclusion of article 128. As there is no consensus in the literature on the impact of article 128 on the European cultural policy, the aim of this paper is to highlight the main arguments in favor of seeing the article as bringing something new or as limiting itself to acknowledge the developments undertaken so far.

Keywords: European Union, culture, Treaty of Maastricht, European Commission.

INTRODUCTION

The European Union – EU started to regard culture as an important factor in building a political union only recently. Although the Treaty of Rome, which established the European Economic Community, contained few provisions related to culture and which would allow actions to be taken in this sensitive area, the Community began since the 1970s to get involved in cultural affairs.

The Maastricht Treaty was the first legal document to establish clear competences in the field of culture at the supranational level, through the inclusion of article 128¹. As there is no consensus in the literature on the impact of article 128 on the European cultural policy, the aim of this paper is to highlight the main arguments in favor of seeing the article as bringing something new or as limiting itself to acknowledge the developments undertaken so far. The paper will analyze not only the provisions of the article but also the practice of the European

¹ Article 128 was first introduced by the Treaty on the European Union, Official Journal C 191, 29 July 1992. Article 128 became article 151 after the Amsterdam Treaty (1997) due to renumbering, and article 167 after the Lisbon Treaty (2007) Here on the concept of article 128 will be used in this paper.

institutions and of the member states before and after the adoption of the Treaty of Maastricht in order to show that the second view is more appropriate when talking about the importance of article 128 for the European cultural policy.

The methodology used for preparing this paper involves the analysis of the main documents issued by the European institutions in relation with the cultural field. At the same time, the article is based on the review of the secondary literature focusing on the development of a cultural policy at the European level. It is important to mention that most of the articles and books on the topic are mainly descriptive or prefer to analyze the impact that the European cultural policy has on transition countries, on trade policy etc., or strictly analyze the article from a legal point of view. As culture is one of the most controversial and sensitive field for member states when it comes to integration, it is crucial to pay attention to the impact that the adoption of article 128 had on the development of a genuine cultural policy at the EU level. The issue is even more important because, as it will be demonstrated in the article, the European institutions through their deliberate actions, and less the member states, through the insertion of a new article in the Treaty of Maastricht, can be considered the founders of the EU cultural policy.

The first part of the paper presents the main developments in the cultural field prior to the adoption of the Treaty of Maastricht, as this is indispensable if one is to analyze the importance of article 128. The next part of the paper focuses on the major arguments in favor of regarding article 128 as a novelty and as a base for the development of a cultural policy at the European level. The arguments in favor of seeing article 128 as just trying to catch up with the developments undertaken so far by the European institutions in the cultural field are the subject of the subsequent part, while in the conclusion part the main findings of the paper are summarized.

MAIN DEVELOPMENTS IN THE CULTURAL FIELD PRIOR TO THE TREATY OF MAASTRICHT

The Treaty of Rome did not formulate a Community cultural policy, did not empower the institutions to take actions in the cultural field as such and contained only few provisions related to culture. These provisions were included in article 30 of the Treaty on the European Community – EC (former article 36 of the Treaty on the European Economic Community - EEC) which allowed member states to restrict imports and exports in order to protect national treasures and in article 182 EC (former article 131 EEC) which speaks about the Community duty to assist third countries in their cultural development. Some of the authors consider that culture was intentionally dismissed in the early days of European integration (Sasatelli 2006, 25) because it was considered that it is a domain which comes under the remit of other international organizations, such as the Council of Europe or UNESCO.

The absence of an explicit cultural competence did not prove to be an obstacle for developing actions in the cultural area by the European institutions and by the member states (Psychogiopoulou 2006, 575). As stated by scholars (Galle

2001, 111), some loopholes have been found in the Rome Treaty which allowed intervention in the cultural field and the setting of some programmes with clear cultural implications. The European institutions followed by the member states started to recognize the importance of culture in increasing the popular support for European integration. Moreover, it can also be said that the Community had no other choice but to address cultural matters due to a number of circumstances: the development of cultural industries, the wider consumption of cultural goods and services, the recognition that culture and commerce are not mutually exclusive (Craufurd Smith 2004, 26) and that in fact the Treaty of Rome affected also trade in cultural goods. The concept of spill-over as developed by the neo-functionalists scholars seems to work perfectly when analyzing the interdependence between trade and culture.

The only way in which involvement in cultural matters before 1992 is to be understood is by looking at the actions undertaken in this period by the European institutions. Starting with the beginning of the 1970s the two main supranationalist bodies in the then EEC, the European Parliament and the European Commission, highlighted the need for more direct action towards comprehensive integration. Their concerns were backed by the *Declaration on European Identity* of 1973 and the *Tindemans Report* of 1975 which established a direct link between a European identity and action in the cultural field.

The first Communication of the Commission related to the cultural field was issued in 1977 and addressed issues such as: free movement of cultural workers, intellectual property rights, improvement of living and working conditions of cultural workers etc. The fact that no action was undertaken by the member states to follow its recommendations (Mc Mahon 1995, 126) did not impede the Commission to adopt a second communication in 1982 in which the same areas as in the past were identified and a few more were added: training of cultural workers to reduce unemployment and widening of audience and conserving heritage. This time the communication had a positive consequence in that the first informal meeting of the ministers of culture of the member states took place, followed by the first formal meeting in 1984.

Up to the adoption of the last communication of the Commission prior to 1992, some important steps were taken at the European level in the field of culture. The second *Adonnino Report* prepared by the committee having the same name and adopted in 1985 suggested a number of symbolic actions for the Community to undertake in order to promote European identity. Some of its suggestions became a reality in the EEC during the next years, such as: a flag, the European City of Culture initiative, a European literature prize etc (Shore 2001, 107-121). The Commission's communication of 1987 followed these developments and mainly tried to clarify the competence in the field and identified four areas in which intervention was needed until the completion of the single market.

It is important to state that the Commission mainly had an economic view on culture throughout all this period and this statement is confirmed if one notices that all of the areas of intervention identified by the Commission were mainly

applications of the Treaty of Rome to culture. This attitude of the Commission should not be surprising considering the fact that it had to consider the reluctance of some of the member states to address cultural issues (United Kingdom, Denmark) and the possibility of causing frictions with other international organizations acting in the field (Craufurd Smith 2004, 21). The Commission had to act cautiously in a field where it lacked competence and where its intervention could always be contested. The Commission always stressed the fact that it was not talking about a cultural policy but rather of actions in the cultural sector in order to appease member states concerns (Mc Mahon 1995, 132) and to show that the main interest was the completion of the single market.

Despite of its cautious rhetoric, intentionally or not, the Commission can be said to have acted exactly in the way predicted by neo-functional scholar, namely as a purposeful institution (Rosamond 2000, 53), which pointed and used the relation between sectors in order to expand its competence to the cultural field and to make sure that culture would not be excluded from the integrationist process. Moreover, the Commission also confirmed Mark Pollack's principal-agent analysis as it used its powers of informally setting the agenda of European integration through non-binding documents (Pollack 1999, 4) so as to encompass at least for the future the cultural field as well.

Another institution which constantly fought for a cultural policy at the EU level was the European Parliament, the main supranational actor having a pro-integrationist stance towards culture, a dirigiste view on the way that cultural policy should look like at the European level (Littoz-Monet 2007) and a non-economic understanding of the concept of culture. In contrast with the Commission, the powers of the Parliament to advocate in favor of a cultural policy were limited mainly to non-binding documents such as resolutions which cannot be viewed as having a great impact on member states positions during this period (Obuljen 2004, 31-32).

The European Court of Justice - ECJ also began to address cultural issues pretty early in cases related to the free movements of cultural goods. Its decision in the Italian Art Treasures judgment made it clear that the principle of free movement of goods applies to works of art and to any products which can be valued. This surprising judgment constituted a clear sign for the member states that they cannot use the cultural argument in order to escape their obligations related to the internal market (Psychogiopoulou 2006, 580) and that their cultural policies have no chance of being as independent as it was envisioned in the first years of European integration. Again, one can see here the role of supranational institutions using their powers in order to extend competence in new areas of European integration. Although it analyzed culture mainly from an economic perspective, the intervention of ECJ in cultural matters is even more important as its actions cannot be restricted in any way by the member state.

On the other side of the debate, the member states constantly showed their reluctance to cede their sovereignty in the cultural field prior to 1992. The main documents adopted by the ministers of culture were resolutions, which are non-

binding documents. The reluctance of member states has also been confirmed by the fact that culture was not included in the Single European Act, although ministers of cultures always stated their interest to advance cooperation in the field (Craufurd Smith 2004, 23). Despite this negative attitude, some actions and programmes were adopted even before the Maastricht Treaty. One can talk here about programmes such as: MEDIA, a pilot project for translation, actions to promote books and readings, a pilot project on architectural heritage etc. Moreover, there were also important directives and regulations adopted, from which one can mention: the Television without Frontiers Directive, a regulation on the export of cultural goods etc. The impact of projects financed through the structural funds (European Social Fund, European Rural and Development Fund) and which had cultural implications also needs to be remembered here.

ARTICLE 128: HARBINGER OF A NEW CULTURAL POLICY

As the previous section has argued, Community's action in the cultural sector prior to the inclusion of article 128 in the Treaty of Maastricht was based on some limited provisions of the Treaty of Rome. Maastricht changed this situation and for the first time included an article totally dedicated to culture, thus bringing this area under the remit of the newly established European Union. For a better understanding of the analysis that follows it is good to have a look on the article itself. The first version of the article included in the Treaty of Maastricht states:

Article 128

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

The Council shall act unanimously throughout the procedures referred to in Article 189b;

- acting unanimously on a proposal from the Commission, shall adopt recommendations.

The novelty of the article and its importance cannot be denied if one thinks that cultural actions at the European level were previously mainly intergovernmental in nature, based on the consensus of the member states to act in this area. Article 128 represents a break with the past as it transfers cultural cooperation from the intergovernmental arena into the supranational one (Sassatelli 2006, 27). If early cultural actions had a questionable legitimacy due to the lack of competence in the area (Craufurd Smith 2007, 48), this is no longer the case after the introduction of article 128. Moreover, article 128 also meant that member states could have a single voice in international negotiations related to cultural aspects (Schlesinger 2001, 93).

The inclusion of an article which institutes a cultural policy at the European level cannot but be seen in relation to the new desire of the member states, namely: building a political union. Article 128 signals that the member states have understood the role that culture could play in accomplishing this desiderata. If article 128 is to be seen as a novelty, this is only one of the reasons for which member states can be said to have agreed to include the article. States may have wanted to put an end to the previous period of uncertainty, to clearly set the line between their competence and the competence of the EU in what regards culture (Psychogiopoulou 2006, 582), and to set some principles on which the decisions of the European Court of Justice would be based in the future. If one employs the classification of states as dirigiste or liberal in terms of the cultural policy model that they favor, then it is clear that dirigiste states also favored the introduction of article 128 because they considered it to be the base on which financial programmes to promote culture could be adopted. All of these reasons are a sign of rationality from the part of member states and they confirm Moravcsik's theory of liberal intergovernmentalism which predicts that the last word in including a domain on the integration agenda belongs to the member states which follow their national interests and act rationally in intergovernmental bargains (Moravcsik 1993, 473).

As for article 128, one can notice that the main innovation brought by it is the fact that it clearly states the aim of the cultural policy, the principles on which Community action in the field should be based, the areas to be covered and the legislative procedure to be followed. If confusion existed in the previous years regarding the scope of a cultural policy, article 128 emphasizes that the aim is not building a homogenous European culture but rather celebrating diversity and promoting a dialogue between national cultures (Costa 2001, 105).

The two principles which will be at the basis of the European cultural policy are subsidiarity and preservation of diversity of the national cultures. Article 128 is seen by many scholars as being a model for applying subsidiarity (Shore 2001, 114) as it does not give the European Union a legal mandate to lead or

control polices in the cultural sectors, but only a role to encourage cultural cooperation between states, to support and supplement their actions only if necessary and only in a number of areas settled in paragraph 2 of the article. The principle of preservation of cultural diversity is stated in the very first paragraph of article 128 but it can also be implied from the fact that harmonization is excluded in the cultural policy. Preservation of cultural diversity must be seen as the most important concern of member states as what they feared most was harmonization and lost of their traditions and ways of life.

Concerning the decision-making procedure to be used in the cultural policy, article 128 talks about codecision procedure combined with unanimity in the Council of Ministers. The unanimity requirement was to be eliminated only with the adoption in 2007 of the Treaty of Lisbon. Thus, the European Parliament gained a saying in cultural matters at the EU level (Bekemans and Lombaert 2001, 199), and did not hesitate in the following years to use its powers in order to promote more favorable legislation in what regards culture. The article also clarifies that the EU is to act in the cultural field mainly through incentive measures.

Another provision of article 128 that catches the eye of any observer is paragraph 4, which sets culture as a cross-cutting principle of the Community. The paragraph states that culture has to be taken into account in all the other policies and by the European institutions. As such the paragraph can be seen as legitimizing all informal cultural actions undertaken in other Community areas prior to the adoption of the article and demands a more systematic approach to cultural matters at the EU level (Psychogiopoulou 2006, 584). Also implied in paragraph 4 is recognition of the fact that cultural actions can be taken based on other articles of the Treaty on the European Union, meaning in practice that the EU legislator can use other venues if it wants to employ harmonization in the cultural field.

As for the practice in the field of culture, one can also find here some changes brought by the inclusion of article 128 in the Maastricht Treaty. The main innovation since the Treaty of Maastricht is the fact that in contrast to the previous years when actions in the cultural field had to be justified in economic terms, from now on programmes and actions with purely cultural aim had legitimacy (Schelter 2001, 211).

If actions before 1992 were merely symbolic and lacked a clear coherence, it was expected that better cultural actions are going to be undertaken and that more funds are going to be reserved for culture. Indeed, if culture is to be seen in a restrictive way, one cannot but notice that three new programmes emerged in the middle of the 1990s. These programmes were: Kaleidoscope - the EU culture/arts support programme, Ariane - the programme package for the support of literature and translation at the European level, and Raphael (Ellmeier and Rasky 1998) - the programme package for the support of the European cultural heritage. In total these programmes were allocated a budget of approximately 67 millions. In 2000 they were replaced by a new initiative of the EU, the so-called programme Culture 2000 which tried to put under the same umbrella the three programmes mentioned

before. Its total budget for the period 2000-2006 was 236 millions and it was replaced by Culture 2007-2013 programme, a more ambitious action of the Community in the field which had twice the budget of its predecessor. With a total budget of 400 million EUR for 2007 – 2013 the programme co-financed around 300 different cultural actions per year. For the period 2014-2020 the Creative Europe programme was designed to combine the previous Culture programme and MEDIA programme and the budget available has increased with around 9% according to the data provided by the European Commission.

All the arguments presented above cannot but convince one that indeed article 128 represents a break with the past and that it led in theory and in practice to the development of a new and genuine European cultural policy.

ARTICLE 128: CATCHING UP UPON FORMER DEVELOPMENTS

Some of the arguments that determine one to see that article 128 did not bring anything new in the cultural field and that it only legitimized actions undertaken so far can be found in the provisions of the article itself. First of all, one can observe that the article uses very broad terms, such as: “common cultural heritage” or “flowering of the cultures of the member states” without even attempting to define what understanding national governments attribute to the concept of *culture*. It seems that again the European Court of Justice is left with the task of defining what culture means (Obuljen 2004, 34) just like prior to the adoption of the Maastricht Treaty, as member states could not reach a consensus on the issue. Moreover, the so-called slogan that characterizes the European Union, “unity in diversity”, does not really clarify the intentions of the member states in what regards the cultural policy. The use of such vague terms could mean in practice a lack of effectiveness of the provisions related to culture as one cannot really say what are the priorities and objectives of the European cultural policy (Craufurd Smith 2007, 53). The ambiguity of the article can be seen as a sign of tensions between member states interests in the field and as a sign that the article represents a compromise between the actors involved.

Concerning the powers gained by the European institutions in the cultural field, one cannot but notice that these are very limited and do not represent a total break with the situation existing before the Maastricht Treaty. The subsidiarity principle stated in paragraph 2 of article 128 clearly indicates that the member states did not lose any power they enjoyed prior to the adoption of this article. States have been willing to allow the EU to adopt incentive measures, mainly financial programmes, from which they can gain, but have been as reluctant as ever to cede parts of their sovereignty in the field of culture. Moreover, member states have secured their powers in the field by proclaiming unanimity as the sole procedure in the European cultural policy, even in the case of recommendations. This decision points to the conclusion that the member states wanted to be sure that no decision could be imposed on them in the cultural sector (Schelter 2001, 210) by other member states in collaboration with European institutions if they do not all agree on it. It took more than a decade and the adoption of the Lisbon Treaty for

states to be willing to eliminate the unanimity requirement for decisions adopted in the cultural field.

The actions that the EU can take in the cultural field have been limited to incentive measures; the areas of action are limited to four, while harmonization has been banned. The exclusion of harmonization in the cultural field means in practice that as before the Treaty of Maastricht most of the legislation will have to be based on articles of the treaty other than article 128 (Craufurd Smith 2007, 51). The inclusion of paragraph 3 in article 128 does not change the competence of the EU in the field, because, as previously mentioned, cultural cooperation with third countries was included even in the Rome Treaty. Due to the limitations of the article in clearly establishing a genuine cultural policy, it is possible to see article 128 as a success of states that favor a liberal approach to cultural matters.

The practice looks even worse than the theory. One of the most celebrated innovations of article 128 was the introduction of culture as a cross-cutting principle at the EU level. As good as it may look on paper, the practice does not provide us with much evidence that something has changed. Analyzing the impact of this paragraph on the work of the ECJ and of the legislative, some scholars have argued that cultural issues still remained unaddressed by the main institutions (Psychogiopoulou 2006, 584). Recent decisions of the ECJ in cases related to culture prove that the court has maintained its economic vision upon culture, a finding that confirms historical institutionalism's idea that once a path has been set the institutions are most likely to follow the same approach in the future unless some major external factors intervene (Hall and Taylor 1996, 941).

As for the concrete actions and programmes taken in the cultural area, one can see them as being too fragmented and small in scale even after the Maastricht Treaty. The same programmes covering the same areas are present in the European cultural policy even after 1992. For example, programmes like: Kaleidoscope; the programme in the area of cultural heritage, symbolic actions (European City of Culture) have been adopted even before Maastricht and the new article 128 did not solve their financial problems nor did it make them more coherent. For example, Culture 2000 had its own strengths (as for example providing grants to projects in all artistic and cultural fields or gathering under the same umbrella the programmes existing before) but had many drawbacks as well: lack of financial means, no proportionality between the objectives envisioned to be attained and the financial provisions (Craufurd Smith 2007, 61), the selection procedure was too complicated, there were many delays in payments. It is also striking that with every new financial period the names of the programmes dedicated to culture have changed, creating even more confusion for the possible beneficiaries and for the larger public.

Even now it is not article 128 that it is use as the base for adoption of some programmes with clear cultural implications due to its procedural limitations and the limited funds available for culture. An analysis of the impact of structural funds in the cultural field allocated by the European Commission showed that there are much more funds available for culture from these funds than from culture (billions

of euros compared to some 400 millions available for Culture 2007 programme), just like prior to the introduction of article 128. As for the reasons why member states would prefer projects financed through the structural funds than those financed through cultural programmes these are twofold: structural funds have an economic aim and thus states gain more and they retain control on the money, in contrast to cultural programmes where they have no saying (Craufurd Smith, 2004, 68).

From this perspective, article 128 seems to serve only one scope: that of protecting national cultures and of impeding further attempts of harmonization in the cultural field of the European institutions. States were frustrated by the constant interference of supranational institutions in the cultural field prior to 1992 and as a response they sent a signal to the European institutions that they should limit their actions for the future. This finding seems again to confirm the principal-agency analysis mentioned before, which argues that whenever principals feel that agents have gone beyond their competences, they are going to react and limit their actions for the future through administrative procedures (Pollack 1999, 3), in this case through the adoption of an article regarding culture in the Maastricht Treaty. It also confirms that integration in the cultural field is less likely to take place compared to the economic field as it is an area of high politics if one is to follow the division between low and high politics developed by the intergovernmentalist scholars (Rosamond 2000, 77).

CONCLUSION

The inclusion of article 128 in the Maastricht Treaty was mostly considered to be the beginning of a genuine European cultural policy. While looking solely at the main provisions of the article one would be inclined to adopt the previous mentioned view, the practice before and after the conclusion of the treaty shows that in practice little has changed. As before 1992, culture seems to remain mainly under the exclusive competence of the member states, cultural programmes are still underdeveloped and dispersed across various policies while financial problems related to culture did not disappear. Moreover, structural funds finance in bigger proportion projects related to culture than the programmes established under the umbrella of the cultural policy. The adoption of articles 128 can be considered a success in that it legitimized the actions undertaken by EU institutions prior to 1992 but at the same time it confirmed the member states control over this domain by restricting the areas in which the EU institutions can intervene.

As stated by one of the scholars (Obuljen 2006, 36), *l'exception culturelle* is the best concept that characterizes the European cultural policy not only in international negotiations but also inside the European Union. Just how long will member states maintain their reluctant attitude towards a genuine cultural policy at the EU level and how long can they lie to themselves that they can maintain their independence in the cultural field? Only the future will answer to these sensitive questions.

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