

**Direct and market governance paths for the creation of an EU political identity:
cultural heritage policy**

Mark Thatcher

Mark Thatcher, LUISS, Rome and London School of Economics

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Abstract

Cultural heritage has a dual nature: it is closely linked to identity creation; it has economic features. The article contrasts two policies pursued by the European Commission: activities to directly develop an EU identity; governing cultural heritage markets. It both can contribute to the creation of an EU create a policy identity and compares them through two subcases: EU creation of public symbols and labels; regulation of cross-border trade in artistic objects. It argues that although the first developed earlier and enjoyed an expansion of Treaty powers, it has met important limitations in terms of specific definitions of values and differentiation from other European identities. The second saw a gradual development of specific EU values and definitions that are differentiated from those of other polities though cultural exceptions to general rules of EU markets or their adaptation. The conclusion points to a different path of political identity creation than that suggested by studies of cultural nationalism for nineteenth century European nation states, one that is related to the EU as a market maker and shaper.

Key words: cultural heritage; political identity; culture

Introduction

Culture has both economic and non-economic features that are important for its role in building political identity. The European Commission recognises “the dual nature of culture, being on the one hand an economic good that offers important opportunities for the creation of wealth and employment, and, on the other, a vehicle of identities, values and meanings that mirror and shape our societies” (Commission, 2014a: paragraph 72).

In line with this ‘dual nature’, the EU has pursued two sets of policies. One has explicitly sought to create an EU political identity through cultural heritage using means such as public labelling, symbols and cultural spending programmes. This has parallels with processes seen in nation state building in Europe.

The second group has focused on the economic aspects of cultural heritage. It has included exceptions to general EU market principles, creating rules for trade in cultural heritage goods and services and linking cultural heritage with economic development. But policies to govern markets are not neutral- they involve choices and the expression of aims and values. Such processes can contribute to creating political identities, even if this is not their explicit aim.

They can be particularly important for cultural heritage, where the values linked to its dual nature can conflict.

Cultural heritage thus offers an example of political identity building through two types of EU policies: explicit identity-creating strategies; indirect creation through market governance. The article examines these by looking at top-down policy identity by the European Commission, both generally and then in a subcase for each (EU public symbols and labels; EU rules governing cross-border trade in artistic objects). It argues that the EU has faced major limits in its ability to build a top-down EU policy identity in cultural heritage, but that there have been significant differences between the two sets of policies. The first has seen significant new Treaty competencies, as well as the expansion of activities. But, the subcase shows that it has been marked by constraints in terms of articulating specific and well-defined EU values that are differentiated from those of member states and other European bodies. The second set expanded later and with fewer Treaty changes. But it has seen significant articulation and definition of distinct values. To explain these differences, the article underlines not only the legal framework but also the differing ability of the Commission to overcome divisions among member states in pursuit of making and shaping markets.

The findings suggest that the EU is more capable of constructing a policy identity by creating market rules than through explicit identity-creating programmes. More broadly, they point to a different path for EU identity creation than that suggested by studies of cultural nationalism for nineteenth century European nation states, one that is related to the EU as a builder and shaper of markets.

The article begins by discussing links between cultural heritage and political identity before offering an overview of each set of policies and then analysis of the subcases.

Cultural heritage, EU cultural policy and political identity building

Cultural heritage can be material, such as buildings, monuments or art, or immaterial, such as languages or customs. It does not simply exist but is created, notably by selecting and attaching meaning to certain objects or practices through processes of ‘heritagisation’ (Smith, 2006; Harrison, 2013). David Lowenthal defines heritage as ‘the celebration of the past for present purposes’, but a past ‘in danger’ that therefore needs protection (Lowenthal, 1998; cf. Wright, 2009). Hence heritagisation can be highly political and particularly strong in times of crisis and institutional development.

Indeed, a wide literature on ‘cultural nationalism’ shows that nationalists, including state actors, created much cultural heritage as part of strategies to establish national identities, often in the nineteenth century or later (Hutchinson, 2013, 1987; Lersson, 2006; Anderson, 1983; Hobsbawm and Ranger, 1983). They sought to create, support and sustain ‘imagined’ communities of groups that identify with ‘the nation’ through many means: ‘invented traditions’, symbols, myths, places of commemoration, ‘national styles of architecture’ or ‘national recreations’ (Smith, 1991, esp. ch 4; Smith, 2013; Billig, 1996; Hobsbawm and Ranger, 1983; Anderson, 1983). In similar vein, studies on contemporary ‘heritage’ underline that state actors produce an ‘authorised heritage discourse’ (an ‘official’ view of the past and its relevance for today) and use heritage to attract popular support for the nation (Smith,

2006; Wright, 1985; Hewison, 1987). Such strategies are not confined to nation states: for example, a literature has analysed the creation of EU ‘political myths’, in both economic and non-economic domains (della Sala, 2010).

Sometimes inspired by the literature on nationalism in Europe, studies have analysed EU cultural policies that directly promote an EU identity (eg Cram, 2009; Shore, 2000; Sassatelli, 2002; Patel, 2012; Calligaro, 2013) They have argued about the effectiveness of the EU’s ‘unity in diversity’ strategy (discussed below), the degree of integration achieved and the extent to which EU institutions have followed a deliberate strategy of seeking legitimacy through cultural policy. Views range from a claim that European elites and institutions, especially the European Commission, have engaged in a strong centralising drive for EU integration (Shore, 2000) to arguments that policy making is in fact highly fragmented with a dispersion of power to many actors (Calligaro, 2013; Sassatelli, 2009). Recent analyses of EU cultural policy have claimed that there has been a major shift towards promoting economic aims and see culture and economy as being in tension or indeed contradiction. Some have argued that the focus on the ‘knowledge economy’ may indeed represent an industrial policy strategy for culture (Littoz-Monnet, 2015; Crawford Smith, 2015) and that, it is “economic instrumentalism rather than identity-building that presently prevails” (Scheslinger, 2018: 2; see also Primorac et al, 2017).

The literatures on cultural nationalism, heritagisation and EU cultural policies underline the political nature of heritage and its functions in creating political identity. They show that policy makers, including in recent polities such as the EU, can engage in heritagisation. At the same time, the literatures need and careful application when examining EU policy identity. Many studies of cultural nationalism are based on the nineteenth century and/or on nation

states, and its development in the 21st century at the EU may well differ. For its part, the literature on EU heritage frequently forms part of much wider debates on the existence and strength of a European cultural identity, European integration and the substantive content of the policies (eg Sassatelli, 2009; MacNamara, 2015; and Calligaro, 2013), whereas here the analysis concerns top-down political identity created through policies. Of particular note for the EU as a ‘regulatory state’ centred on market creation, is that many studies treat identity building and market integration as separate or as conflicting alternatives. Yet governing markets involves setting out values and aims, and hence, even if indirectly and without being an explicit objective, creating a policy identity; similar creation can be seen in other cases such as trade negotiations or the role of ECB (see Duina and Smith, and Jones, this issue).

The present article compares two sets of policies pursued by the European Commission, one of directly promoting a ‘European identity’, and then a second of governing cultural heritage markets. The first has parallels with the processes identified by the cultural nationalism literature. The second group of policies can create an EU political identity even if indirectly. This is true even (or perhaps particularly), in cultural domains which have an explicit set of alternative values to those of competitive markets and economic benefits. The two sets policies are undertaken primarily by the same DG within the European Commission and involve discourses that set out values and hence political identity. But they differ in terms of forms of action and the article explores their contrasting political dynamics and implications for EU policy identity construction.

EU policy identity is defined as a coherent set of political values that are articulated and claimed to be fundamental, shared across the EU and distinctive with respect to other polities, including member states (see Saurugger and Thatcher, this issue). The article does not

examine whether and why European integration has occurred, the distribution of power among actors or whether a European cultural identity held by citizens has developed; these issues are examined by other research. Policy identity is studied through policy making, including policy aims, the policy process and also legislation and Treaty provisions which not only set a legal framework but also express values. Given space constraints, most attention is given to the European Commission, whose importance has been underlined by studies of cultural policy.¹ An inductive approach of suggesting possible explanatory factors is followed since at present, there are few specific hypotheses concerning the comparison between direct and market-shaping process of EU identity construction. Finally, while much of the EU literature refers to ‘culture’, sometimes using it almost interchangeably with cultural heritage, the article is concerned with the latter as defined by the Commission (indeed, the definitions and examples that it provides are used as evidence about the EU’s policy identity).

Directly promoting an EU identity through cultural heritage

a) The ‘unity in diversity’ strategy

The Commission’s dominant policy in cultural heritage during the 1970s, 1980s and 1990s was explicitly to create an EU identity through a sense of European consciousness. It is well defined by Calligaro as “actions consisting of the representation of the European project capable of arousing the citizens’ feelings of belonging to the EC” (Calligaro, 2013: 6).

Heritage was valued as “a means of making this European identity visible and accessible

¹ Although other European organisations such as the European Parliament and Council of Europe are also influential—eg see Sassatelli 2009, Calligaro 2013, and Psychogiopouou 2015

throughout ..the EU” (Calligaro, 2013: 89-90; Sassatelli, 2009). The central strategy was promoting ‘unity through diversity’- avoiding positing an EU identity as an alternative to other identities, especially national ones.

The Treaty framework both provides the legal base for EU action and at the same time, expresses values.² The Treaty of Rome gave no specific powers to the then EEC over culture. However, the Maastricht Treaty changed this position. It set out certain general aims and values. Its Preamble stated the objective of its signatories “desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”, and then Article 2(p) of providing “a contribution..... to the flowering of the cultures of the Member States”. It offered a non-exhaustive definition of cultural heritage, which seemed to be very separate from markets, notably through a reference to ‘non-commercial exchanges’ and greatly expanded the European Community’s remit of action, although subject to ‘subsidiarity’. Thus Article 128(2) allowed “action by the Community ...aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the ...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”. It sought to ‘mainstream’ culture as an objective across different policies and offered a general legal basis for ‘incentive measures’.³

² For a legal overview, see Crawford Smith 2015.

³ Albeit with constraints in terms of member state agreement and avoiding harmonisation -Articles 128(4)) and 128(5).

Subsequent Treaties maintained the wide use of the term ‘cultural heritage’ and provided further powers. The Treaty of European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) underlined the importance of ‘unity in diversity’ as well as making an oblique reference to heritage in the sense of an endangered past. Thus Article 3.3 of the TEU states that the EU “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.” The Maastricht Treaty provisions over the meaning of cultural heritage were repeated in similar terms,⁴ underlining the non-economic features of cultural heritage as well as the complementary and non-rival relationship with the cultural heritage of member states. Legislation was permitted for the achievement of these objectives.⁵

Thus since 1992, the Treaties have provided wider powers to EU institutions. Equally, they make reference to a series of powerful non-economic values that are usually regarded as fundamental to Western democracies. But in fact, even before having a legal foundation, the Commission had begun to promote culture, often in close cooperation with the European Parliament and operating in a discrete manner in order to avoid national opposition. Activities began in the 1970s, notably with the 1973 Declaration on European Identity and then grew in the 1980s and 1990s (see Calligaro, 2013, especially ch 2; and Shore, 2000). Within the Commission, from the mid-1980s under Jacques Delors, ‘culture’ was recognised as an explicit responsibility and made part of a DG, initially that for Information and more recently usually the DG for Education (eg the present DG is for Education, Culture, Youth and Sport).

⁴ Eg in the TFEU, Title XIII ‘Culture’ and Article 167, although it added “in particular in order to respect and to promote the diversity of its cultures”.

⁵ Article 167(5), former 128 in the Maastricht Treaty.

The Commission has engaged in a wide range of activities from creating networks to offering education and supporting preservation of selected architectural heritage sites and digitalisation of heritage objects and cinema films.⁶ After 2000, the diverse activities were brought together in broader programmes, the Culture 2000 programme and the ‘Cultural Programme’ for 2007-2013, followed by the ‘Creative Europe’ Programme for 2014-2020.

The most important, long-lasting activities and representative activities for policies to directly promote an EU identity have been those of creating EU public symbols and labels.

b) Creating EU public symbols and labels

Policies to create EU public symbols and labels have been pursued in several guises. Analysing the EU’s discourse of ‘placing’ heritage in the wider and diverse context, Lähdesmäki (2016) identifies five forms or strategies: rewarding labels and awards to sites, particularising cities, emphasising historical monuments, creating new spaces and ‘iconizing European administrative buildings’. They began in earnest in the 1980s.

Following the Fontainebleau summit of 1984 and then the Adonnino Report of 1985 which was entitled ‘A People’s Europe’ (Commission 1985), attempts were made to create EU symbols to aid citizen identification, such as an anthem (Beethoven’s Ode to Joy) and a flag. European Heritage Days were another initiative: on the same day throughout Europe, usually in September, historic buildings and cultural artefacts are made available for public viewing. This has been on-going since 1985 and was initiated by the Council of Europe, with the EU joining in 1999. In addition, there are now European Cultural Routes, run jointly with the

⁶ Europeana; for films, see http://ec.europa.eu/archives/information_society/avpolicy/reg/cinema/index_en.htm

Council of Europe, which provide paths and pilgrim routes.⁷ A ‘European heritage label’ has been developed thanks to a Decision in 2011. It applies to heritage sites that are chosen because they “celebrate and symbolise European history, ideals and integration”; sites include Robert Schuman’s house or a museum for De Gasperi.⁸ EU Cultural Heritage prizes/Europa Nostra awards have also been established, to ‘celebrate excellence in cultural heritage work in Europe’.

The selection of ‘European capitals of culture’ is perhaps the best known project that involves labelling. In 1985, following an informal meeting of European ministers of Culture and in large measure at the initiative of the then Greek Culture Minister Melina Mercouri, certain cities were named as ‘European cities of culture’ (see Patel, 2013; Sassatelli, 2009: chs 3 and 4). Initially, the programme was highly inter-governmental, since the choice was decided by the Council of Ministers, but after Decisions in 1999 and then 2006 (EC 1999 and 2006), the EU dimension increased, with both national and EU-nominated actors participating.⁹ Member states can nominate cities and the final selection is made by the Council of Ministers. The criteria are divided into a ‘European dimension’, including “highlighting the richness of cultural diversity in Europe” and bringing the common aspects of European cultures to the fore” and the criteria of ‘City and citizens’, which relate to the participation and cultural and social development of the city (Article 4, EC 2006).

The strategy of creating an EU identity through public symbols and labels has had some results. Symbols such as the EU flag may become part of ‘banal Europeanness’ as they are

⁷ http://www.culture-routes.lu/php/fo_index.php?lng=en

⁸ For the list see http://ec.europa.eu/programmes/creative-europe/actions/heritage-label/discover_en.htm

⁹ There are national selections, which involve panels of which 6 members are nationally designated and 7 are designated by EU institutions (two by European Parliament, Commission and Council of Ministers and one by the Committee of the Regions) and chaired by one of the EU-nominated members

‘taken for granted’ (Cram 2009, cf. Billig 1995). In terms of numbers, it is estimated that up to 20 million people may take part in European heritage days, representing around 5% of the total population of the countries belonging to the Council.¹⁰ More than 50 capitals of culture have been selected since 1985¹¹ and selection has been a significant element in strategies to develop and regenerate certain cities such as Glasgow (1990), Lille (2004) and Liverpool (2008) (cf. Patel, 2013).

However, with respect to the top-down building of an EU policy identity (as distinct from other forms of identity creation, such as through citizen participation), the ‘unity in diversity’ strategy of public symbols and labels has suffered from important limitations. In terms of articulating certain values as fundamental, the claims made for EU symbols have relied on concepts such as ‘democracy’, a ‘common European heritage’, the ‘rule of law’ or ‘respect for human rights’ (cf. Shore, 2000: ch. 2). Thus for instance, the Preamble to the TEU and TFEU states that signatories act “drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”. But these terms are very abstract and not necessarily the preserve of the EU (Calligaro, 2014). Within the EU, these values have faced competition from others, such as economic growth and utility, including in cultural heritage (Schlesinger, 2018; Bruell, 2013; see also below).

In terms of a set of values shared across the EU, the meaning of ‘European heritage’ has been largely left undefined. There is no overarching EU legal definition of cultural heritage. The

¹⁰ <http://www.europeanheritagedays.com/Home/Content-page.aspx?id=33da673f-1180-4d50-ab55-db80f6b13d15> accessed 4 July 2015 and http://www.ecml.at/Portals/1/800_millions_en.pdf

¹¹ See http://ec.europa.eu/programmes/creative-europe/actions/capitals-culture_en.htm

Maastricht Treaty suggested that the EU was to “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.” (s1). But it did not define ‘the shared heritage’ (in the singular) and instead put it side by side with diversity. The Treaties offer only a non-definitive indication of ‘cultural heritage’ that includes artistic creations, languages and historical knowledge. Instead, the Commission provides specific areas and examples, including architectural and archaeological heritage, artistic objects, traditional skills and crafts, and audiovisual work and immaterial heritage such as languages and traditions of food and wine (eg Commission, 2014b, 2017). This is more of a list of rather diverse objects and practices than a coherent definition, making it difficult to find EU-wide values that can be communicated.

Perhaps the greatest difficulty of the ‘unity in diversity’ strategy for EU identity building has been the lack of differentiation from other European identities (cf. Shore, 2000). The European Commission has claimed that “there is no contradiction between national responsibilities and EU action: heritage is always both local and European.” (Commission, 2014b: 3). Yet many symbols seem linked to Europe in general and/or member states rather than the EU in particular- hence their EU distinctiveness is difficult to discern. Several of the EU’s symbols and labels are presented as ‘European’ rather than ‘EU’ and belong to non-EU members as well as EU ones- eg the heritage days and capitals of culture. Indeed, several were initially created by the Council of Europe, not the EU which adopted them later. Equally, labels of European heritage are more likely to be associated with national or subnational identities than the EU. Indeed, inclusion of the many and varied traditions of member states as well as the local and regional level within a ‘European identity’ leads

Calligaro to argue that the strategy should be seen as promoting Europeanness rather than a single European identity (Calligaro, 2013; cf Lähdesmäki, 2012, 2016).

Several factors can be adduced to explain the limits faced by the Commission's strategy of directly creating a political identity through symbols and labels. One may be limited legal powers, with EU action after 1992 being subject to subsidiarity. However, it is noteworthy that the Commission began policies well before any legal powers were given under the Treaty. Equally, those powers were greatly increased after 1992, and were stated in broad terms that could allow much interpretation and scope for Commission action.

Another factor may be that the boundaries and aims of cultural heritage are not clearly stated. This is exemplified within the Commission by Culture being part of a package of responsibilities given to Commissioners- eg Education, Culture, Youth, Media and Sport, 1999–2004, Education, Training, Culture and Multilingualism after 2004, or Education, Culture, Youth and Sport today. Whilst ambiguity and avoidance of explicit objectives may have aided 'covert integration' or 'integration by stealth', as the Commission pursued actions whose legal base was weak and then which might have aroused opposition (cf. Calligaro, 2013: ch2; Shore, 2000), they reduced the strength of an EU policy identity.

But perhaps the most important constraint has been the lack of a coalition of powerful supporters. Within the Commission, culture has not been a powerful directorate general. It has not enjoyed its own DG and has instead been combined with education, another domain in which the EU has few legal powers. Commissioners for Culture have rarely been drawn from large powerful member states.¹² In contrast to other domains such as regulation of

¹² Viviane Reding from Luxembourg was the Commissioner responsible for Education, Culture, Youth, Media and Sport, 1999–2004, while Jan Figel from Slovakia was Commissioner for Education, Training, Culture and Multilingualism 2004-9,¹² succeeded by another Slovak 2009-10 and then by Androulla Vassiliou from Cyprus

markets and general competition policy, the Court of Justice has played very little direct role, with few legal cases and rulings. Equally, culture ministers in the Council are frequently not the most powerful members of their national governments and also often have a combination of responsibilities, frequently including the media and/or education.

Relations with member states and other European bodies have also limited the emergence of a specific EU identity. Labelling a building, artistic object or food 'EU' offers few advantages to actors within member states. It may meet strong opposition if it appears to conflict with other discourses and narratives that link to local, regional or national identities, or to claims that heritage was of 'European' importance (as distinct from being EU heritage). National governments have given promotion of an EU cultural heritage identity low priority. They have kept EU spending on specifically cultural heritage programmes very small (eg the 2007-13 Cultural programme funded 130 projects in cultural heritage with c€40m). They have also blocked some EU initiatives. Thus for instance, they prevented the creation of 'European rooms' in national museums (Patel, 2013b: 6); although just one example, it is illustrative of the limits.

It has been difficult for the Commission to separate the EU from general European cultural heritage or appropriate the latter. This is illustrated by the role of the Council of Europe in some aspects of cultural policy such as European heritage days. Equally, the importance of attracting supporters in member states is shown by the most prominent and perhaps successful symbolic initiative, namely the Cities of Culture. The leaders of European cities have been participants in initiatives such as the selection of cities and given strong support.

2010-2104. The present Commissioner for Education, Culture, Youth and Sport is Tibor Navraacsics from Hungary.

But it is noteworthy that the label is ‘European’ rather than ‘EU’, that achieving it has offered material advantages based on promoting local identity, and finally, that the emphasis within the programme has increasingly become the economic benefits of the programme (Sassatelli, 2012).

Governing cultural heritage and markets

a) Limiting, linking and creating economic markets in cultural heritage

The EU’s second set of policies concern the economic aspects of cultural heritage. Their foremost explicit aims have been to govern markets and contribute to economic growth rather than create an EU political identity which therefore arises indirectly through processes such as EU institutions defining aims and values and setting out priorities.

Historically, cultural heritage policy was seen as normally operating outside markets and market mechanisms. Insofar as markets intruded, attention was focused on ‘l’exception culturelle’ - the ways in which culture should be protected through exceptions to rules about competitive markets. One prominent example was the audiovisual sector, especially in international trade negotiations. Another was state aid rules, for which the Maastricht Treaty altered the law: it accepted as compatible with the internal market “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest” (then 92(3)d, now Article 107(d) TFEU). Hence cultural heritage was seen as sufficiently valuable to be balanced

against the usual losses to the ‘common interest’ from state aid. These provisions were clarified and widened (to include natural heritage) in 2014 (Commission, 2014a).

However, linkage of cultural heritage and markets grew, especially after the Lisbon Strategy of 2000, as part of debates concerning competitiveness, development and markets (Littoz-Monnet, 2012). The Commission and more specifically DG Education and Culture, began to switch justifications for EU action away from underlining the specificities of culture that required non-market policies towards a strategy of arguing that culture brought economic benefits and could be combined with markets.

Thus, for instance, a Commission Communication in 2007 explicitly sought to ‘underline the value of culture, including heritage, for economic growth and the Lisbon strategy as well as international relations and dialogue (Commission, 2007: 3). The 2014-2020 Creative Europe programme saw an even more marked turn towards economic objectives (Littoz-Monnet, 2015; for highly critical views, see Schlesinger, 2018; Bruell, 2013). Its aims were to “strengthen competitiveness in the cultural and creative sectors, by strongly focussing on capacity building measures and support for transnational circulation of cultural works” as well as safeguarding the EU’s “legal obligations regarding the safeguarding and promotion of cultural and linguistic diversity. Key justifications also included “Ensuring a more level playing field in the European cultural and creative sectors” and wider economic growth as the “approach recognises the important contribution these sectors make to jobs and growth they trigger spill-over in other sectors of the economy such as tourism and fuelling content for ICT” (Commission, 2011: 2). Equally, a 2014 Communication underlined the direct and indirect economic value of cultural heritage thanks to its impact on other sectors (Commission, 2014b). The Commission linked heritage to the tourist industry- for instance,

the 2006 Decision about Cultural Capitals included the need to develop ‘culture and tourism’, while Commission documents underlined that heritage aided tourism which is one of Europe’s largest and growing sectors (Commission, 2017). Spending became increasingly connected to other programmes that had wider aims, including economic development. Thus the Creative Europe programme was broad, with culture being a subprogramme, while cohesion policy now includes a cultural heritage element, with the European Regional Development Fund allocating almost €6B for different forms of culture (Commission, 2017: 10).

A case that illustrates the combination of the application of general market principles, the presence of both economic and non-economic aims and issues of defining and protecting cultural heritage is cross-border trade in artistic objects. It shows how EU policies that shape economic market can also indirectly contribute to an EU identity.

b) Subcase study of markets and heritage: regulation of cross-border trade in artistic objects

The Treaty of Rome included an exception to free movement of goods for “the protection of national treasures possessing artistic historic or archaeological value”, although it also stated that “prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States” (Article 36). But the issue was not prominent and many countries passed or maintained existing legislation on art exports.

However, with the removal of physical border controls and the internal market in the 1990s, plus the internationalisation of the art market due to electronic technology which facilitates cross-border sales (eg through electronic viewing and bidding) and the expansion of large internationalised auction houses, debates on creating EU regulation grew. Member states accepted the need for EU legislation but differed about its content and extent. 'Art source' or exporting countries such as Italy and Greece pressed for stronger restrictions than art acquisition or importing ones such as the Germany, Belgium, the Netherlands and most of all the UK (Viantró, 1993). One issue concerned the length of the statute of limitations- ie how long after an object has been illegally exported under national law does it remain an illegal export- with source countries pressing for longer periods than acquisition ones. Another was the scope of any legislation- for instance, whether ecclesiastical objects were covered. A further question was the power of national courts. Finally, there were issues about restitution: countries were divided between civil law ones where sellers of stolen or illegally obtained goods acting in good faith can pass 'good title' and common law ones where this is very difficult, notably the UK (Viantró, 1993). These issues concerned both the market within Europe and also exports outside the EU.

Following debates and after having obtained agreement among member states, the EU passed two pieces of legislation in the early 1990s. Their provisions can be analysed to examine political identity creation.

One was the 1992 Council Regulation on the Export of Cultural Goods, which established an export certification system (Peters, 2016).¹³ Export certificates are issued by the country of

¹³ It was codified by Regulation 116/2009, which also made provisions directly applicable but their content was largely left unchanged.

origin but are valid throughout the whole of the EU. Hence a form of EU-wide but nationally-based export system was created. In order to define the parameters of licensing, the legislation sets out categories for cultural goods, notably in terms of type (ranging from archaeological objects to books, maps, toy games, photos and wallpaper) and age (mostly 50 or 100 years); it then applies minimum monetary values for different categories.¹⁴ However, a licence can be refused “where the cultural goods in question are covered by legislation protecting national treasures of artistic, historical or archaeological value in the Member State concerned” (Article 2).

The second piece of legislation was Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.¹⁵ It set up procedures for the return of objects unlawfully removed from the member state according to the national laws then in force. To do so, it defined ‘cultural objects’ (using the categories used in the 1992 Regulation on exports of cultural goods). It contained provisions that gave considerable place to national laws and decision makers. Thus legal action had to be undertaken by the member state rather than private individuals within a one-year time limit from when the member state became aware of the location of the object and its possessor; the national court of the member state in which the object is located makes rulings about restitution, and decides compensation to the holder of the object; the requesting member state had to pay the sum unless it could show that the purchaser had not taken “due care and attention”. Under EU rules member states were therefore highly dependent on others for policing their domestic protections on exports (Peters, 2016).

¹⁴ The Annex to the Directive establishes fourteen categories of objects which qualify as national treasures from archaeological ones to pictures, sculptures and archives.

¹⁵ Directive 93/7/EEC- OJ L74/74.

The 1993 Directive was assessed by a series of reports by the Commission which pointed out its limitations (Commission, 2000, 2005, 2009), followed by the establishment of a working group that included representatives of member states. Thereafter, a Commission review and public consultation took place in 2011 that looked at alternative measures, including adopting the 1970 UNESCO convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Górka, 2016). The Commission mostly decided to develop the EU's existing framework, embodied in a new Directive in 2014 (2014/60/EU). The 2014 Directive went considerably further than the UNESCO convention and instead drew on a 1995 convention on stolen or illegally exported cultural objects drawn up by the International Institute for the Unification of Private Law (UNIDROIT), an independent organisation based in Rome (Schneider, 2016). In particular, the 2014 Directive broadened the scope of the objects covered to “the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures within the meaning of Article 36 TFEU” (Article 2), removing category and financial limits. It also increased time limits to request return (to 3 years) and set up an inter-member state information system. Importantly, it reversed the burden of proof so that acquirers now have to show good faith to be entitled to compensation.

Whilst debates and decisions on the regulation of cross-border art markets concerned economic exchanges, they also involved features that relate to policy identity, notably definitions, values and aims. Certain cultural values have been articulated as taking priority over normal EU market rules. In particular, returning illegally-exported cultural property has been given great significance relative to other values such as the free movement and private ownership. Thus the 1993 Directive boldly stated that its objective was “to ensure the physical return of the cultural objects to the Member State from whose territory those objects

have been unlawfully removed...irrespective of the property rights applying to such objects” (Preamble, paragraph 8). Equally, in analysing the need for further changes after 2000, the Commission underlined the combination of protection of ‘national treasures’ with economic aims; for instance, it argued that the directive had “the aim of reconciling the operation of the internal market with a guarantee for the Member States that their cultural objects with the status of national treasures...will be protected” (Commission, 2009: 3).

Although national laws specify what is categorised as a ‘national treasure’ and of course vary across member states, a degree of EU-wide definition has been offered. Thus for instance, categories were established in the 1997 Directive and there have been discussions of a move towards an EU-wide definition of objects to be protected (European Parliament, 2013).

Although the EU incorporated national definitions of ‘treasures’, the legislation often differs considerably from national frameworks (for instance, in giving legal force to overseas definitions of treasures or through its provisions on ‘good faith’ purchasers) that point to a distinct set of EU values. Hence the EU categorisation has gradually become separate from national definitions and rules, offering a degree of differentiation from member states.

Equally, EU legislation for cultural objects involve adaptation of general rules and values on free movement, the rights of private property and restrictions on state action. The requirement on member states to enforce the differing legislation of other member states is particularly noteworthy. Thus internally, EU rules on the export of national treasures embody a distinctive set of values.

Externally, EU restrictions on art exports stand in contrast to those of other polities, especially the US. John Merryman (1986) distinguished between ‘nationalist’ and ‘internationalist’ approaches to trade in cultural objects- the US is close to the latter whereas

the EU is closer to the former. Moreover, the EU did not just adopt the 1970 UNESCO convention but developed its own rules which are sharper and more far-reaching.

Policies for cross-border trade in art exports thus have several features that are exceptions to or adaptations of strong and well specified market rules, including those of the EU internal market, such as protection of private property or free movement of goods. Justifying and articulating those provisions has aided the EU's political identity- notably setting out explicit aims and values through definitions and rules that apply across the EU and are distinctive- from member states and other polities.

Being able to craft specific rules for cultural heritage can be linked to several factors. One is the legal framework. Certainly Article 36 of the Treaty of Rome provided an important exception to usual market rules. Yet the Article had existed since 1958 without any action being taken.

What changed from the 1990s onwards was the context- notably the single market in the 1990s and the Commission's strategy of combining non-economic aims, notably such as preventing the export of prized national objects, with economic ones such as creating a EU-wide art market that had rules about ownership. The Commission was able to point to the need for improving the smooth running of the single market, in arguing for the original 1993 directive and for the 2014 revision (Commission, 2013b: 7). Crafting rules for cultural heritage in the single market required specificity- for instance, in legal definitions and in discussion and decisions about exceptions to general market rules.

A further factor concerns support from member states. EU elements (eg protecting cultural heritage over the property rights of an innocent acquirer) are combined with national elements such as nationally-defined treasures or the initiative for action lying with member states. The coupling has aided the Commission to assemble a coalition of supporters, notably public bodies in member states. Commission documents made repeated references to the desire of member states to increase the efficacy of the EU wide system. Thus for instance, in revising the 1993 Directive, it pointed to “the repeated demand made by representatives of the Member States for effective arrangements for the return of cultural objects classified as national treasures” (Commission, 2013b: 9) , as well as the group of national experts set up under the open method of coordination who looked at how to reform the system (eg Commission, 2005: 6-7; Commission, 2009: 5-6; Commission, 2013a: 5-6; Commission, 2013b). Indeed, the Commission enjoyed the support of national experts, national authorities for culture, national governments such as Germany, and also the European Parliament, for strengthening provisions (Gorka, 2018; Peters, 2018). It is noteworthy that the 2013 Consultation revealed that a majority of public organisations supported change, whereas only a minority of private ones did (cf. Commission, 2013b: 4; Gorka, 2018). The advantages of creating and shaping the market for art exports combined with important national elements led member states to find compromises between art exporting and art importing countries and also civil and common law ones.

Conclusion: the EU’s path to political identity in EU cultural heritage policy

The EU has recognised the dual character of culture and its importance for political identity. Its role in cultural heritage has indeed expanded since the 1970s.

But, important limitations on creating an EU policy identity can be seen. They are particularly evident in policies explicitly aimed at creating an EU political identity. Following the criteria set out in the Introductory essay (Saurugger and Thatcher, this issue), articulation of specifically EU values as fundamental and shared across the EU has been weak, as has differentiation from the values of other polities, notably member states or Europe as a whole. The EU's identity in this field has been an attempt to 'piggyback' on different national and sub-national identities as well as initiatives that are Europe-wide but not confined to the EU.

While policies that link cultural heritage and markets have also faced constraints, notably the need to adopt diverse national definitions and tensions about the relationship between cultural heritage and markets, they have been stronger in terms of top-down creation of an EU policy identity. This is especially visible in terms of exceptions to, or adaptations of, general rules about markets. Thus definitions of key matters such as what constitutes cultural heritage and why it is treated differently from many other sectors, are more specific and concrete compared with the abstract values and concepts used in the TEU/TFEU about cultural heritage or the lack of a list in the Commission's activities to directly promote cultural heritage. Market rules offer definitions that apply across the whole of the EU and have greater differentiation from those used by member states or other polities such as the US. Seeking to combine markets and protection of the specificities of cultural heritage- its 'dual nature'- has led to greater articulation of distinctive values and hence a stronger EU policy identity.

In terms of explanatory factors for the patterns found, institutional factors such as the weaknesses of DG Education and Culture have been longstanding and apply to both subcases. The legal Treaty basis for EU policy making in cultural heritage has grown greatly since 1992. However, linkage to the single market has been important, as creating and shaping market rules has involved defining terms, as well as debating and deciding how to balance or combine the dual nature of cultural heritage. Equally, the analysis suggests that a key factor in explaining the differences between the two subcases relates to the Commission's ability to build broad coalitions, especially with member states and national actors. Further research is needed to investigate the explanatory factors and to compare the domain with others which have a 'dual nature' such as education, welfare or justice.

Cultural heritage is an important part of political identity. But it may also shed light on other empirical and theoretical issues. In particular, it may aid in analysing the EU's path to a political identity. The literature on cultural nationalism has underlined the importance of heritage and related domains such as education, in nineteenth century nation building, by creating 'imagined communities' through a host of means such as symbols, commemorations and myths. The study here suggests that EU is following a different trajectory, in which its political identity is strongest when linked to market making.

If the conclusions from cultural heritage apply to other domains, they point to the constraints on policies to directly create an EU political identity, notably when using a 'unity in diversity strategy'. In contrast, the governance of markets may produce greater effects on policy identity, including by offering exceptions to rules about competition, private ownership and free movement. However, market making and shaping are often technical. They lack the popular appeal or participation of symbols and labels such as, for instance, heritage days.

Perhaps herein lies a paradox for EU political identity construction: it is limited, even for policies that aim at directly creating an EU heritage, which require relatively limited expenditure and have seen enhanced legal competencies. It is stronger in market making and shaping. But for citizens such activities are often technical and difficult to communicate and identify with. Market governance offers the EU a path to a distinctive set of articulated values, but its processes and content may have limited popular appeal.

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