Chapter 5

Financing the Protection of Cultural Heritage in the European Union: The Legal Framework for Tax and Non-Tax Instruments

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5.1. Introduction

The protection of cultural heritage touches upon a variety of areas, from education to tourism, from occupation to digital innovation, from social inclusion to peace-keeping and reconciliation in zones of conflict. As the European Commission has said, "our cultural heritage and the way in which we preserve and enhance it is a key factor in defining Europe's position in the world and its attractiveness as a place to live, work and visit".[1] It has further added that:

> Europe's rich cultural heritage and dynamic cultural and creative sectors strengthen European identity, creating a sense of belonging. Culture promotes active citizenship, common values, inclusion and intercultural dialogue within Europe and across the globe. It brings people together, including newly arrived refugees and other migrants, and helps us feel part of communities. Culture and creative industries also have the power to improve lives, transform communities, generate jobs and growth, and create spill over effects in other economic sectors.[2]

Preserving European cultural heritage is, therefore, a policy that brings multiple benefits to the European Union in the economic, social and cul-

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1. Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an integrated approach to cultural heritage for Europe, COM(2014) 477 final (22 July 2014), available at https://ec.europa.eu/assets/eac/culture/library/publications/2014-heritage-communication_en.pdf (accessed 3 Oct. 2021).

2. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A New European Agenda for Culture, COM(2018) 267 final (22 May 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0267&from=EN (accessed 3 Oct. 2021).

tural areas.[3] Fundamental changes have recently affected public policies in this area. There has been an increase in and diversification of cultural consumption, which implies the adoption of a multi-tiered approach to the actions aiming to promote and preserve cultural heritage. Globalization (before the COVID-19 pandemic) has dramatically increased tourism, not only within the European Union, but also from outside of it. The growing number of visitors to cultural sites, each coming with different backgrounds and expectations, has also led to more diversification. Another element of disruption is the digitalization of cultural products and experiences, ranging from the possibility to buy cultural products online, like books, music and movies, to the organization of virtual tours of exhibitions and monuments. Digitalization offers immense opportunities to increase the number of people consuming cultural goods and participating in cultural life, while, at the same time, protecting cultural heritage from potential damage due to high number of physical visitors. This trend has dramatically intensified because of the COVID-19 pandemic. Lockdowns affected the viability of cultural sites, and digital visits were the only option left to keep them accessible to the public.[4]

Another dimension affecting cultural heritage policies is sustainable development, i.e. ensuring that cultural heritage is managed in a sustainable way, by avoiding any risks of loss or destruction of heritage sites. For example, everyone has images in mind of the city of Venice being repeatedly flooded in the last years. To that end, the protection of certain cultural sites require not only significant investments, but also tough political decisions, in particular, with regard to the management of the flow of visitors. Moreover, the protection of cultural heritage is key to the achievement of the UN 2030 Agenda for Sustainable Development (2030 Agenda). Culture is explicitly mentioned in several of the Sustainable Development Goals of the 2030 Agenda, in particular, Goal 11 (cities-heritage), Goal 4 (education) and, in relation to tourism, Goal 8 (sustainable growth) and Goal 12 (consumption patterns). As pointed out by the Horizon 2020 Expert Group on Cultural Heritage:

> [I]n many places across Europe, the contribution of cultural heritage to sustainable development has been crucial: particularly in the regeneration of cit-

3. *See* Cultural Heritage Counts for Europe (CHCfE) Consortium, *Report 2015*, available at https://www.europanostra.org/our-work/policy/cultural-heritage-counts-europe/ (accessed 3 Oct. 2021) [hereinafter CHCfE Report].
4. *See*, for example, the virtual tours organized by prestigious European museums, such as the Louvre in Paris (https://www.louvre.fr/en/visites-en-ligne (accessed 3 Oct. 2021)) or the Uffizi in Florence (https://www.uffizi.it/en/special-visits (accessed 3 Oct. 2021)).

ies and landscapes. Cities recycling buildings, using historic street-patterns and exploiting historic synergies have improved quality of life and reduced carbon emissions. In the countryside, more holistic management of the environment, bringing cultural and natural heritage together in single systems, has resulted in greater efficiencies and improved quality of life.[5]

The European cultural sector also faces challenges of tackling the illicit trafficking of cultural goods, as well as the risk that pieces belonging to European cultural heritage are sold and transferred outside the European Union.

This chapter aims to give an overview of the EU legal framework for the protection of cultural heritage, with a focus on the financing of those policies.[6] The overall stagnation at the EU level and, sometimes, the steady decrease in public investment in culture in some Member States due to budget constraints, as well as a reduced cultural participation in the visit of cultural sites,[7] render the intervention of other actors even more necessary, whether they be international organizations (like the European Union) or private contributors.[8] Particular attention will be devoted to the interaction between the financing and tax dimensions of the European Union's role in the protection of cultural heritage, namely the EU framework for tax incentives in favour of culture.

5. Horizon 2020 Expert Group on Cultural Heritage, *Getting cultural heritage work for Europe, DG research and Innovation*, p. 7 (2015), available at https://ec.europa.eu/programmes/horizon2020/en/news/getting-cultural-heritage-work-europe. *See also* Council conclusions of 21 May 2014 on cultural heritage as a strategic resource for a sustainable Europe, OJ C 183/36, p. 36 (14 June 2014), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0614(08)&from=EN (accessed 3 Oct. 2021).

6. For a more detailed analysis, *see* M-S. de Clippele, *Protéger le patrimoine culturel: à qui incombe la charge?* (Presses universitaires de Saint-Louis 2020); and A. Jakubowski, K. Hausler & F. Fiorentini (eds.), *Cultural Heritage in the European Union* (Brill 2019).

7. KEA and PPMI, *Research for CULT Committee: Culture and creative sectors in the European Union – Key future developments, challenges and opportunities*, EP Policy Department for Structural and Cohesion Policies Directorate-General for Internal Policies, PE 629.203, p. 44 (2019), available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=%20IPOL_STU(2019)629203. (accessed 3 Nov. 2021).

8. P. Almeda, A. Sagarra & M. Tataret, *Public spending on culture in Europe 2007-2015* p. 4 (2018), available at https://www.europarl.europa.eu/cmsdata/139228/ALMEDA_Public%20spending%20on%20culture%202007-2015%20-%2021F%20-%20EP%20-Cuture%20Commission%2021%20FEB.pdf (accessed 3 Nov. 2021).

5.2. EU competences in the area of culture and the protection of cultural heritage

Despite the fact that the protection of cultural heritage lies at the core of what constitutes European identity, the European Union has been granted limited competence to promote and carry on cultural policies, and only since 1993 with the Maastricht Treaty (Treaty on European Union, or TEU).[9] However, other traditional EU policies have a cultural heritage dimension.[10]

The initial lack of cultural considerations can be explained by several factors. First, the primary goal of European integration was economic, not cultural. Second, some states were not inclined to dilute their national culture into a unique European culture. Finally, other established international institutions were already competent in cultural matters (the Council of Europe and the United Nations Economic and Social Committee).[11]

A provision of a cultural nature was, however, inserted into the Treaty of Rome, namely article 36 of the Treaty on the European Economic Community (now article 36 of the Treaty on the Functioning of the European Union, or TFEU),[12] providing an exception to the free movement of goods for national treasures. One might consider that the cultural policy of the European Union has its origins in the *Commission v. Italy* judgment of 10 December 1968,[13] in which the Court of Justice of the European Union (ECJ) confirmed that the free movement of goods also applies to cultural goods and services. This was, however, a negative cultural policy; it was not until the Maastricht Treaty that the new European Union developed a positive cultural policy. Some initiatives had, nevertheless, already been taken by the European Community, such as the support given to the "European City of Culture" programme (initially an intergovernmental initiative

9. *Treaty on European Union* (7 Feb. 1992), Treaties & Models IBFD. *See also* C. Romainville (ed.), *Droit européen et politiques culturelles* (P.I.E. Peter Lang 2015).
10. E. Psychogiopoulou, *Cultural Heritage in European Union Law and Policies*, 45 Legal Issues of Economic Integration 2, pp. 177-198 (2018).
11. C. Romainville, *La multidimensionnalité des politiques culturelles à l'épreuve du droit européen*, in *Droit européen et politiques culturelles* p. 47 (C. Romainville ed., P.I.E. Peter Lang 2015); R. Craufurd Smith, *The evolution of cultural policy in the European Union*, in *The Evolution of EU Law* p. 870 (2nd ed., Oxford University Press 2011).
12. *Treaty on the Functioning of the European Union* (13 Dec. 2007), Treaties & Models IBFD.
13. IT: ECJ, 10 Dec. 1968, Case 7/68, *Commission of the European Communities v. Italian Republic*, pp. 424 et seq., Case Law IBFD.

to which the Community gave its financial support; it is now a European programme that has been renamed "European Capital of Culture").[14,15]

The legal basis for action in the area of culture at the EU level are article 3 of the TEU and article 167 of the TFEU. According to article 3(3) of the TEU, the European Union shall "ensure that Europe's cultural heritage is safeguarded and developed". Article 167(1) of the TFEU similarly states that "[t]he Union 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".

Article 6 of the TFEU lists culture among the policy areas in respect to which the European Union has competence "to carry out actions to support, coordinate or supplement the actions of the Member States". According to article 167(2) of the TFEU:

> Union action shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas:
> - improving the knowledge and dissemination of the culture and history of the European peoples,
> - *conservation and safeguarding of cultural heritage of European importance,*
> - non-commercial cultural exchanges,
> - artistic and literary creation, including the audiovisual sector. [Emphasis added]

However, any harmonization is excluded: the European Parliament and the Council may only adopt "incentive measures", and the Council may adopt recommendations. Member States firmly retain exclusive competence in respect of cultural policy, while the European Union's role is to encourage cooperation and support and complement Member States' actions.

14. Decision 1419/1999/EC of the European Parliament and of the Council of 25 May 1999 establishing a Community action for the European Capital of Culture event for the years 2005 to 2019, OJ L 166/1 (1 July 1999), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D1419&from=EN (accessed 4 Oct. 2021); and Decision No 445/2014/EU of the European Parliament and of the Council of 16 April 2014 establishing a Union action for the European Capitals of Culture for the years 2020 to 2033 and repealing Decision No 1622/2006/EC, OJ L 132/1 (3 May 2014), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0445&from=EN (accessed 4 Oct. 2021).

15. A. Vandenbulke, *Le financement public des arts de la scène en Belgique, en France et aux Etats-Unis: Aspects juridiques*, PhD thesis (U Liège), pp. 203-205 (forthcoming).

However, article 167(4) of the TFEU, the cultural mainstreaming clause also provides that "the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". This allows the European Union to indirectly pursue cultural objectives in other areas of its competence.[16]

Few other EU Treaty provisions refer to cultural heritage. As already mentioned, article 36 of the TFEU justifies domestic restrictions under the free movement of goods for "national treasures possessing artistic, historic or archaeological value". Moreover, other EU Treaty provisions can apply to cultural goods and events or to persons active in the cultural sector, such as the free movement of workers and the freedom to provide services.

The European Union also grants significant aid to the cultural sector through its structural funds. However, the primary objective is not cultural, but economic and social (such as the European Regional Development Fund). Most of the aid granted to the cultural sector in this context are allocated to heritage in order to develop tourism and territorial attractiveness, which, therefore, primarily pursues economic development objectives.[17]

It is worth noting that there is no clear definition in the TFEU of the notion of "cultural heritage", nor of the concept of "national treasure".[18] This is understandable, since the concept of cultural heritage is bound to evolve with time and cannot, by its very nature, be crystallized in a legal definition. According to the Council:

> [C]ultural heritage consists of the resources inherited from the past in all forms and aspects – tangible, intangible and digital (born digital and digitized), including monuments, sites, landscapes, skills, practices, knowledge and expressions of human creativity, as well as collections conserved and managed by public and private bodies such as museums, libraries and archives. It originates from the interaction between people and places through time and it is constantly evolving.

16. B. de Witte, *Market Integration and Cultural Diversity in EU Law*, in *Culture and International Economic Law* pp. 193 and 195 (V. Vadi & B. de Witte eds., Routledge 2015).
17. J-C. Barbato, *Les règles européennes applicables à l'action culturelle locale: principes et actualités*, Communication during a conference on the new European regulations organized by La Nacre, Villeurbanne, p. 1 (1 Apr. 2014).
18. Only one case gives a restrictive interpretation of the notion, which is clearly an exception to the general freedom of circulation: *see Commission v. Italy* (Case 7/68).

Moreover, the Council adds that, "as a non-renewable resource that is unique, non-replaceable or non-interchangeable [cultural heritage] is currently confronted with important challenges related to cultural, environmental, social, economic and technological transformations that affect all aspects of contemporary life".[19] These statements seem to show the willingness of EU institutions to maintain a wide and open interpretation of the notion of EU cultural heritage. The European Year of Cultural Heritage in 2018 also clearly demonstrated the extensive interpretation of cultural heritage.

5.3. The principles of the EU framework for action on cultural heritage

Although EU institutions have shown an early interest for cultural heritage,[20] it is only in the last decade that the European Union has fully integrated heritage protection into its policies. The Council's 2010 Bruges Declaration advocated for a "specific, long-term plan which searches for possibilities to ensure that the potential of cultural heritage is better incorporated in the general policy of the European Union".[21] Since then, EU institutions have developed global strategies in terms of cultural policy, contained in pluri-annual action plans.[22] The institutions have also included cultural relations in their diplomatic strategies.[23]

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19. Council conclusions of 21 May 2014 on cultural heritage as a strategic resource for a sustainable Europe, OJ C 183/36, p. 36 (14 June 2014), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0614(08)&from=EN (accessed 3 Oct. 2021).

20. *See*, for example, EU Parliament resolution on measures to protect the European cultural heritage, OJ C 62/1, p. 6 (30 May 1974), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_1974_062_R_0001_01&from=EN (accessed 3 Nov. 2021).

21. Bruges Declaration, *Cultural heritage: a resource for Europe – The benefits of interaction* (7 Dec. 2010). *See also* Commission Green Paper, *Unlocking the potential of cultural and creative industries* (27 Apr. 2010).

22. Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a Work Plan for Culture (2015-2018), OJ C 463, pp. 4-14 (23 Dec. 2014), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.463.01.0004.01.ENG. (accessed 3 Nov. 2021). *See also* the European Commission's dedicated website, available at https://ec.europa.eu/culture/cultural-heritage/funding-opportunities-cultural-heritage (accessed 3 Oct. 2021).

23. Joint Communication to the European Parliament and the Council, Towards an EU strategy for international cultural relations, JOIN(2016) 29 final (8 June 2016), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016JC0029&from=EN (accessed 3 Oct. 2021).

In a comprehensive document issued in 2014 and updated in 2017, the Commission listed all the measures, whether in the form of legislative initiatives, policy initiatives or support actions, adopted with a view to protect and valorize EU cultural heritage. It shows how, over the years, this objective has influenced almost all EU policies, such as education, cohesion, digitalization of culture, research and innovation, science, internal market, industry and tourism, competition, environment, international trade and even agricultural and maritime policies, not to mention external relations and development.[24]

The importance of cultural heritage in EU policies was highlighted in the Rome Declaration of 25 March 2017 and further strengthened when the European Parliament and the Council adopted a decision to make 2018 the European Year of Cultural Heritage. As its main objectives, this initiative would:

(a) contribute to promoting the role of Europe's cultural heritage as a pivotal component of cultural diversity and intercultural dialogue. While fully respecting the competences of the Member States, it shall highlight the best means to ensure the conservation and safeguarding of Europe's cultural heritage as well as the enjoyment thereof by a wider and more diversified audience, including through audience-development measures and heritage education, thereby promoting social inclusion and integration;

(b) enhance the contribution of Europe's cultural heritage to society and the economy, through its direct and indirect economic potential, which includes the capacity to underpin the cultural and creative sectors, including small and medium-sized enterprises, and to inspire creation and innovation, to promote sustainable development and tourism, to enhance social cohesion and to generate long-term employment;

(c) contribute to promoting cultural heritage as an important element of the relations between the Union and third countries, building on the interest and needs in partner countries and on Europe's expertise in cultural heritage.[25]

More specifically, actions were taken to (i) encourage innovative, sustainable and integrated approaches to cultural heritage; (ii) promote new models of participatory governance and management of cultural heritage; (iii)

24. COM(2014) 477, *supra* n. 1; and European Commission, *Mapping of Cultural Heritage actions in European Union policies, programmes and activities* (2017), available at https://ec.europa.eu/assets/eac/culture/library/reports/2014-heritage-mapping_en.pdf (accessed 3 Oct. 2021).

25. Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018), OJ L 131/1, pp. 1-9, art. 2 (20 May 2017), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0864&from=EN (accessed 3 Oct. 2021).

foster the exchange of good practices towards the conservation and valorization of cultural heritage, facilitating access to cultural heritage; (iv) encourage synergies between cultural heritage and other polices, such as environment and tourism; (v) develop skills and knowledge and promote research; (vi) integrate the cultural heritage dimension into education and lifelong learning programmes; (vii) use cooperation in matters of cultural heritage for developing stronger ties with third countries; and (viii) prevent the illicit trafficking of cultural goods.

Although the organization of events and initiatives within the European Year of Cultural Heritage were the responsibility of the Members States, the European Union played a coordination role, provided for (limited) funding and ensured the visibility of the initiative at the global level.

In 2018, the Commission issued a Communication setting "A New European Agenda for Culture",[26] in which it emphasized the three dimensions of culture:

- the social dimension, which aims at insisting on the power of culture and cultural diversity for social cohesion and well-being within communities. According to the Culture Heritage Counts for Europe Report, "[c]ultural heritage contributes to the quality of life, providing character and ambience to neighbourhoods, towns and regions across Europe and making them popular places to live, work in and visit – attractive to residents, tourists and the representatives of creative class alike";[27]
- the economic dimension, which consists of supporting culture-based creativity in education and innovation, as well as for jobs and growth, developing arts, culture and creative thinking in education and training and support for creative industries, including the development of professional skills. As the Culture Heritage Counts for Europe Report indicates, "cultural heritage is a key component and contributor to the attractiveness of Europe's regions, cities, towns and rural areas in terms of private sector inward investment, developing cultural creative quarters and attracting talents and footloose businesses – thereby enhancing regional competitiveness both within Europe and globally";[28] and
- the external dimension, which, by strengthening international cultural relations, is to be seen as an integral part of EU foreign and development policy.

26. COM(2018) 267 final, *supra* n. 2.
27. CHCfE Report, *supra* n. 3, at p. 28.
28. Id., at p. 19.

This document was followed by a Workplan for Culture 2019-2022, established by the Council,[29] which particularly insisted on the sustainability dimension of the preservation of cultural heritage. Key areas of intervention – necessitating a comprehensive, strategic approach – were presented as (i) conservation; (ii) preservation and safeguarding; (iii) research, educational activities and knowledge transfer; (iv) financing; (v) participatory governance; and (vi) contemporary interpretation. The Workplan also announced the setting up of an Action Plan for Cultural Heritage by the Commission in order to ensure the legacy of the European Year of Cultural Heritage.

In December 2020, the European Parliament and the Council reached political agreement on the Creative Europe programme (2021-2027). A new Regulation was adopted, with a view to support economic and non-economic cultural actors, in particular, with regard to cultural heritage "artists, creators and artistic craftspeople skilled in the traditional trades related to cultural heritage restoration" and audiovisual archives and libraries, since they "contribute to the preservation, re-use, and new market developments for heritage works".[30]

5.4. EU direct and indirect funding and tax incentives for private financing: The ambiguous EU legal framework

The European Union supports culture and the protection of culture heritage through a variety of funds. The most important EU fund specifically dedicated to culture is the "Creative Europe" programme, which finances initiatives such as the European Heritage Label and the European Heritage Days and has been increased to EUR 2.4 billion within the 2021-2017 multiannual financial framework.[31] Cultural projects are also financed through EU structural and investment funds, such as the European Regional Development Fund, the European Social Fund, the European Maritime

29. Council conclusions on the Work Plan for Culture 2019-2022, p. 12, OJ C 460/12)(21 Dec. 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XG1221(01)&from=EN (accessed 3 Oct. 2021).
30. Regulation (EU) 2021/818 of the European Parliament and of the Council of 20 May 2021 establishing the Creative Europe programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013, OJ L 189/34 (28 May 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0818&from=EN (accessed 4 Oct. 2021).
31. Id.

and Fisheries Fund,[32] the Cohesion Fund, as well as the Solidarity Fund (providing relief for natural disasters) and EU research programmes, such as Horizon 2020.

As regards third countries, financial assistance programmes have been used for cultural purposes, like the pre-accession (to the EU) assistance (Ljubiana Process I and II), the European Neighborhood policy (Med Culture), the Development Co-operation Instrument for developing countries or the Instrument Contributing to Stability and Peace for unstable regions, as well as the various agreements with ACP countries.[33] Limited support may also come from the European Investment Bank, for example, for initiatives like the "7 Most Endangered Programme" cooperation initiative launched in 2013 by Europa Nostra.[34]

Those funds, however are largely insufficient to meet the needs of the sector. The support from private actors is fundamental to ensure the sustainable financing of the protection and enhancement of EU cultural heritage. There are a number of tools available to involve companies and individuals, including sponsorships and foundations, crowdfunding, public-private partnerships and, of course, tax incentives.

The Horizon 2020 Expert Group on Cultural Heritage recommends bigger involvement of the private sector in the management of cultural heritage. It advocates an alternative approach, getting the private sector more involved in cultural heritage, with specific incentives such as "tax breaks, differentiated VAT rates, well designed grant or loan programs, public private partnerships (PPP) schemes, rights releases etc.".[35] Therefore, taxation is not only an instrument to generate revenues to fund public cultural initiatives, but also a tool to foster the private-sector financing of culture, mainly through the adoption of targeted tax incentives and preferential tax

32. Fisheries are considered vital to the cultural heritage of serval communities in the European Union. *See* https://ec.europa.eu/newsroom/mare/items/629527 (accessed 3 Oct. 2021).

33. Organization of African, Caribbean and Pacific Group of States. *See*, in particular, JOIN(2016) 29 final, *supra* n. 23; and Council conclusions on an EU strategic approach to international cultural relations and a framework for action, pp. 6-10, OJ C 192/6 (7 June 2019), available at https://op.europa.eu/en/publication-detail/-/publication/da766854-8907-11e9-9369-01aa75ed71a1/language-en/format-HTML/source-106512600 (accessed 4 Oct. 2021).

34. *See* https://www.europanostra.org/our-work/campaigns/7-most-endangered/ (accessed 1 Feb. 2020). *See also* G. Clausse, *Funding sources for preserving Cultural Heritage Monuments and Sites*, EIB Institute (25 Nov. 2013), available on the same website.

35. Horizon 2020 Expert Group on Cultural Heritage, *supra* n. 5.

regimes. The European Parliament has also encouraged the Member States to introduce tax incentives as regards restoration, preservation and conservation work, such as reductions in VAT or other taxes.[36]

Although that would appear to make sense from a cultural policy perspective, one should treat such recommendations with caution, considering the debate around the efficiency and suitability of tax incentives to pursue extra-fiscal goals and the relationship between their cost and effects, whether taken in isolation or compared to other (regulatory) policy instruments.[37] The determination of their cost is extremely difficult, considering, first, that it implies the ability to determine the general system or the framework of reference, and, second, that taxpayers adapt their behaviour to the existing tax framework and tend, therefore, towards (unnecessarily) privileged behaviour favoured by tax incentives in situations in which those tax incentives would normally not exist (or would be removed).

The substitutability of tax incentives and direct spending has also been subject to academic discussion. This apparently perfect interchangeability between those policy instruments has proved to be empirically far less obvious than had been assumed in the past, not only in respect of the economic effects, but also concerning the profound differences in the political decision-making process[38] regarding the net cost or benefit of those measures for public authorities, taking into account the tax revenues generated by the economic activity they contribute to creating or the lesser public expenses they permitted to avoid. More recently, growing attention has been paid to the adequacy of tax incentives in environmental policies and the

36. *See* Report of the European Parliament of 24 June 2015, *Towards an integrated approach to cultural heritage for Europe* (2014/2149(INI)), available at https://www.europarl.europa.eu/doceo/document/A-8-2015-0207_EN.html (accessed 3 Oct. 2021).
37. *See*, e.g. R.B. Davies & C.J. Ellis, *Competition in taxes and performance requirements for foreign direct investment*, 52 European Economic Review pp. 1423-1442 (2007); L.L. Batchelder, F.T. Goldberg, Jr. & P.R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 Stanford Law Review 1, pp. 23-76 (2006); A.E. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 Tex. L. Rev., p. 973 (1985); and P.D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harvard Law Review, pp. 377-468 (1996).
38. On the difference between tax expenditures, direct spending and subsidies, *see* V. Thuronyi, *Tax Expenditures: A Reassessment*, Duke Law Journal p. 1156 (1988); D.A. Weisbach & J. Nussim, *The Integration of Tax and Spending Programs*, 113 Yale Law Journal, p. 955 et seq. (2004); and D. Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. Chi. L. Rev., pp. 405 and 411-417 (1997).

question of whether they should be preferred over regulatory instruments.[39] Moreover, tax incentives may conflict with the constitutional principle of equality or principles deriving from it, such as equality in taxation, ability to pay or equality in competition (*Wettbewerbsgleichheit*).[40]

Moreover, preferring tax incentives over direct public funding (mainly through subsidies) represents a very precise ideological choice, since this indirect funding (i.e. through tax expenditure) shifts the power to choose the projects that deserve to be funded away from public authorities and embodies an option for a decentralized cultural policy, in which the allocation of public resources is mainly based on the interactions of private operators.

Tax incentives for culture may also have different effects depending on whether they are adopted in respect of income taxes or VAT.[41] From an EU perspective, tax incentives or preferential regimes are subject to very different legal constraints depending on whether they are adopted in harmonized or non-harmonized areas. In harmonized areas, particularly in the area of VAT,[42] EU directives limit the autonomy of Member States to treat certain types of activities favourably, both in domestic and cross-border situations. For example, the EU VAT Directive[43] provides for the possibility (not the obligation) to apply reduced rates (normally above 5%) for certain cultural services and goods, such as the sale of books and publications (digital

39. P. Menanteau, D. Finon & M-L. Lamy, *Prices versus quantities: choosing policies for promoting the development of renewable energy*, 3 Energy Policy 8, pp. 799-812 (2003); J. Baveye & C. Valenduc, *Are 'environmental' tax incentives efficient?*, 71 Bulletin de Documentation du SPF Finances 2, pp. 139-166 (2011); J.M. Cansino et al., *Tax incentives to promote green electricity: An overview of EU-27 countries*, 38 Energy Policy 10, pp. 6000-6008 (2010); and K.S. Gallagher & E. Muehlegger, *Giving green to get green? Incentives and consumer adoption of hybrid vehicle technology*, 61 Journal of Environmental Economics and Management 1, pp. 1-15 (2011).

40. *See* W. Schön, *Besteuerungsgleichheit und Subventionsgleichheit*, in *Festschrift für Wolfgang Spindler zum 65. Geburtstag: Steuerrecht im Rechtsstaat* pp. 189-202 (W. Schön, R. Mellinghoff & H-U. Viskorf eds., Dr Otto Schmidt 2011).

41. S. Hemels, *Influence of Different Purposes of Value Added Tax and Personal Income Tax on an Effective and Efficient Use of Tax Incentives: Taking Tax Incentives for the Arts and Culture as an Example*, in *Value added tax and direct taxation. Similarities and differences* pp. 35-57 (M. Lang et al. eds., IBFD 2009), Books IBFD, available at https://ssrn.com/abstract=1959993 (accessed 3 Oct. 2021).

42. EU harmonized excise duties concern tobacco, alcohol and energy products and are, therefore, less relevant in the area of cultural policy. On excise duties, *see* B. Terra & P.J. Wattel, *European Tax Law* p. 463 et seq. (6th ed., Kluwer Law International 2012).

43. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1 (11 Dec. 2006), Primary Sources IBFD, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0112&from=EN (accessed 4 Oct. 2021).

and physical) or "admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities", as well as the renovation of dwellings (annex III of the VAT Directive). Member states may also apply a reduced rate to the importation of works of art, collectors' items and antiques (article 103 of the VAT Directive). The VAT Directive also provides for exemptions for "certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned" (article 132(1)(n)) (which the ECJ did not recognize as having direct effect).[44] However, even if reduced tax rates and exemptions are compatible with EU law, it remains to be seen whether there are suitable instruments to favour private investments in culture or to democratize access to culture, despite the favourable perception of the public towards them.

According to Wharpole and De la Feria:

> [I]n practice therefore, reduced rates of VAT, to the extent that they are passed through in lower prices, effectively subsidise the consumption of the households at the higher levels of the income distribution. This in turn means that, contrary to intuition, reduced rates of VAT, as with any other exclusions from the base, do not necessarily reduce the regressivity of the tax, but can, on the contrary, increase it. This will be particularly the case where reduced rates of VAT apply to services where there is a choice between private and public services, as is often the case with medical services or education – as principally high-income households tend to opt for private services – or where they apply to meritorious items, such as books or cultural events – as principally high-income households consume these products.[45]

In non-harmonized areas – in particular, direct taxation – Member States have more room for manoeuvre in adopting tax incentives in favour of cultural heritage. However, there are some constraints. These take the form of general rules/principles of EU law, such as the fundamental freedom of movement (non-discrimination) and the prohibition of State aid.[46] Fundamental freedoms prohibit unjustified differences in treatment between

44. UK: ECJ, 15 Feb. 2017, Case C-592/15, *Commissioners for Her Majesty's Revenue and Customs v. British Film Institute*, Case Law IBFD.
45. R. de la Feria & M. Walpole, *The Impact of Public Perceptions on General Consumption Taxes*, 67 British Tax Review 5, pp. 637-669 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723750 (accessed 3 Oct. 2021); and R. de la Feria (ed.), *VAT Exemptions: Consequences and Design Alternatives* pp. 3-35 (Kluwer Law International 2013).
46. On the application of the prohibition of State aid to the cultural sector, *see* chapters 6 and 7 in this book.

domestic and cross-border situations in general. Since 1986, the ECJ has repeatedly tested domestic tax measures against those freedoms, regularly declaring some of them incompatible with EU law.[47]

Although a general analysis of ECJ case law is beyond the scope of this chapter, three ECJ decisions are worth pointing out, namely, the *Q* and *X* cases, decided on 18 December 2014,[48] and the *Huijbrechts* case, decided on 22 November 2018, which concern the EU compatibility of two domestic tax incentives in the area of cultural heritage. These cases are of particular interest because they deal with territorial restrictions on domestic tax incentives and show how the Court aims to strike a balance between, on the one hand, the objectives of the internal market and the abolition of fiscal barriers and, on the other hand, the allocation of powers and responsibilities between the European Union and the Member States as regards the protection of cultural heritage and the environment.

The *Q* case dealt with an individual who was resident in the Netherlands for tax purposes, owning a property located in the United Kingdom that was listed as historical under the relevant legislation in the United Kingdom. She intended to pass the property on to her son as a gift. Dutch gift tax legislation provided for an exemption applicable to estates within the meaning of the law on nature protection, which excludes any property situated outside the Netherlands from its benefit. The taxpayer was denied the exemption on those grounds.

The *X* case concerned a Dutch national residing in Belgium, where he lived in a country house protected in Belgium as a historic building. Since he had not received any earned income in Belgium, he was subject to the Dutch tax regime applicable to residents and claimed a deduction in respect of the maintenance and depreciation costs for the country house. The Dutch tax administration refused the deduction, since the country house was not listed in the registers instituted by the Dutch law on historic buildings.

In both cases, the Court acknowledged that Dutch legislation constituted a restriction on free movement but did not amount to prohibited discrimination because it did not address similar situations.

47. For a review, *see* E. Traversa, *Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States*, 6 World Tax J. 3, pp. 315-340 (2014), Journal Articles & Opinion Pieces IBFD.
48. NL: ECJ, 18 Dec. 2014, Case C-133/13, *Staatssecretaris van Economische Zaken, Staatssecretaris van Financiën v. Q*, para. 22, Case Law IBFD.

In *X*, the Court considered that the domestic measure at stake was compatible with EU law because Dutch and foreign historical properties could not be considered comparable as regards the objective of the Dutch domestic legislation. The Court, however, added the following caveat:

> [I]f the taxpayer were to establish that, although the historic building of which he is the owner is situated in the territory of a Member State other than the Kingdom of the Netherlands, it nevertheless forms part of the Netherlands cultural and historical heritage and that such a circumstance would render it capable of being protected under the Netherlands Law on historic buildings but for the fact that it is situated outside national territory.

This can be seen as a rather awkward statement, because one may wonder who would be more suitable than the Dutch legislature to establish the connection with Dutch cultural and historical heritage.

In *Q*, the Court said that "the tax advantage associated with the transfer of a '*landgoed*' thus has the aim, as the referring court itself noted, of conserving the national natural heritage, which includes the aim of conserving the cultural and historical heritage". This objective was considered legitimate, and the territorial restrictions an almost inevitable consequence of thereof. The Court went on repeating the exception of a property that, although situated outside national territory, would still form part of the Dutch cultural and historical heritage.

In her conclusions in both cases,[49] Advocate-General Kokott gave a more detailed explanation of the Court's reasoning, which may appear at odds with previous case law:

> 41. Therefore, I consider that in each individual case a balance must be found between the nationally-orientated objective pursued by the Member State through a tax incentive scheme, and the effects on the objectives of the European Union which are enshrined in the Treaties, in particular the fundamental freedom that is restricted. This applies in any event if the objective pursued by the Member State is, at least in general terms, also among the objectives of the European Union. Provided that this does not affect the fundamental freedom in a disproportionate manner, the Member State is therefore allowed to use the resources available to it to promote an objective that has a link to its society, from which the resources used for that incentive are also derived. Moreover, this counters the risk of a Member State failing to use its resources

49. NL: Opinion of Advocate-General Kokott, 4 Sept. 2014, Case C-87/13, *Staatssecretaris van Financiën v. X*; and NL: Opinion of Advocate-General Kokott, 2 Oct. 2014, Case C-133/13, *Staatssecretaris van Economische Zaken, Staatssecretaris van Financiën v. Q*.

to promote an EU objective solely because EU law allows it to offer that incentive throughout the European Union only.

42. Such a weighing up generally has a clear outcome if the objective pursued by the Member State is precisely respected by the Treaties in its national limitation, as is the case with regard to the conservation of national cultural heritage.

By referring to "the intensity of the prejudice to the Internal market"[50] to justify the basis of the conservation of national natural heritage and cultural heritage and the application of favourable tax regimes limited to estates situated in the Netherlands, the Advocate-General implicitly acknowledged that some territorial restrictions are more harmful to the functioning of the internal market than others and that a graduated approach is necessary.

The outcome of these two cases has to be put into perspective, taking a look at a more recent decision that deals with a similar issue. In *Huijbrechts*,[51] a Dutch tax resident, Mr Huijbrechts, inherited, among others, a woodland located in the Netherlands. The woodland was subject to Dutch legislation regarding the protection of natural sites, as well as to the sustainable management requirements defined by the Dutch authorities. As the deceased person was a Belgian tax resident, the applicable law was the Belgian – more specifically, Flemish – inheritance tax code, which provided for a tax benefit for qualifying woodlands, to be spread over 30 years, if they were subject to a sustainable management plan that was compliant with Flemish law and approved by the relevant Flemish authorities. Consequently, Mr Huijbrechts applied for this tax benefit in Belgium, although it was rejected because the woodland was located abroad.

The Court considered that subjecting the granting of an inheritance tax benefit to the condition that the inherited property be located within the territory of the granting state constitutes a prohibited restriction of the free movement of capital. Referring to the *Q* case,[52] the ECJ noted that

50. NL: Opinion of Advocate General Kokott, 2 Oct. 2014, Case C-133/13, *Staatssecretaris van Economische Zaken, Staatssecretaris van Financiën v. Q*, para. 47.
51. BE: ECJ, 22 Nov. 2018, Case C-679/17, *Vlaams Gewest, represented by the Vlaamse regering in the person of the Vlaamse Minister van Begroting, Financiën en Energie, and Vlaams Gewest, represented by the Vlaamse regering in the person of the Vlaamse Minister van Omgeving, Natuur en Landbouw v. Johannes Huijbrechts*, Case Law IBFD (request for a preliminary ruling from the Court of Appeal of Antwerp was lodged on 16 July 2018).
52. *Q* (Case C-133/13), para. 22. To assess whether the different treatment concerns situations that are not objectively comparable, account must be taken of the object and content of the national provisions at issue in the main proceedings.

the favourable tax provisions served an environmental purpose, i.e. the sustainable management of Flemish forests and woodlands. However, it also remarked that such an objective could not be confined to the domestic territory, as woodlands could extend to the territories of several Member States – as seemed to be the case in the situation at hand – and typically show cross-border features within the EU territory, entailing common responsibilities.[53] The ECJ therefore found that the distinction made between adjoining parts of a single woodland according to whether they are located in the Flemish region or in the Netherlands is artificial and does not correspond to any objective difference.[54]

Comparing those cases, the Court seemed to make a clear distinction between the cultural environment and the physical environment. Although this distinction finds some support in the TFEU, the question can be asked as to whether the notion of common European cultural heritage could not, in some cases, lead the Court to expand the scope of the exception laid out in the *X* and *Q* cases.

A last issue to be considered is whether the TFEU would allow the European Union to, even in direct taxation, adopt measures aimed at coordinating – if not harmonizing – tax incentives in favour of culture and cultural heritage. It does not seem to be the case that article 115 of the TFEU could constitute a suitable legal basis for such policy, considering the weak link with the internal market. However, although article 167 of the TFEU expressly excludes harmonization in the area of culture, article 167(5) refers to incentive measures. By analogy to the interpretation made by scholars as regards article 168 of the TFEU, which is drafted in a similar way and concerns health policy, there may be a possibility to justify EU measures in that area.[55]

53. The ECJ refers, by analogy, to AT: ECJ, Case C-507/04, 12 July 2007, *Commission v. Austria*, para. 87; and PL: ECJ, Case C-192/11, 26 Jan. 2012, *Commission v. Poland*, para. 23.
54. The ECJ refers, by analogy, to DE: ECJ, 14 Sept. 2006, Case C-386/04, *Centro de Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, para. 40, Case Law IBFD; and DE: ECJ, 27 Jan. 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, paras. 48-50, Case Law IBFD.
55. *See* ch. 8 of this book, citing A. Alemanno, *Testing the Limits of EU Health Emergency Power*, VerfBlog (18 Apr. 2020), available ... testing-the-limits-of-eu-health-emergency-po...

5.5. Future perspectives: Common cultural heritage, common institutions, common taxes?

The protection of cultural heritage is a multifaceted policy with strong economic, ecological and social dimensions. Despite limited competences in the TFEU, the European Union has developed a strategy over the years to support the Member States in their domestic policies through direct EU funding, as well as by integrating the cultural dimension into other EU policies.

From a tax perspective, despite the lack of harmonization in that area, there may be room for a common initiative as regards the framing of efficient tax incentives to be implemented across all Member States, along with an increase in EU direct funding.

In the long run, increasing direct EU financing of the protection of cultural heritage through an extension of the EU budget thanks to additional tax-based own resources would certainly be welcome.[56] Considering how the history and culture of the different Member States of the EU are intertwined, leaving each Member state with the task of protecting its own cultural heritage, gives the misleading impression that there is no common European culture and heritage to protect. Pooling financial means would be an excellent manner in which to show how a common approach based on solidarity may lead to more efficient results also in that area.

56. *See* E. Traversa & G. Bizioli, *Solidarity in the European Union in the Time of COVID-19: Paving the Way for a Genuine EU Tax?*, 48 Intertax 8/9, pp. 743-753 (2020).