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International and EU Measures for the Protection of Cultural Heritage: Towards Broader Use of Tax Breaks to Stimulate Private Engagement

This article discusses international and EU regimes providing incentives to finance cultural undertakings. It attempts to identify the scope of the concept of “cultural heritage”, which today embraces a wide range of expressions of human creativity and produces significant turnover. The author demonstrates that the current forms of public funding are insufficient to ensure adequate protection of cultural heritage and, due to inputs coming from EU institutions, the need to adopt tax breaks to stimulate funding from the private sector has become critical in recent years.

1. The Global Importance of Cultural Heritage and the Need for Universal Protection

The close link between cultural heritage and legal instruments protecting heritage is quite ancient, with the result that heritage protection is currently recognized in most national constitutions.¹ Supranational initiatives in this field are, however, relatively new and reflect the growing global importance of the matter.² There are numerous early examples of efforts to protect cultural heritage in a narrow sense, which focused only on material objects of an historical-artistic nature. This ultimately led, decades later, to a wider concept of heritage, in particular in the context of globalization.

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1. For example, art. 9 of the Italian Constitution provides that “the Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation”. This rule reflects the need to both promote and safeguard culture, functions that need to operate synchronically and harmoniously.
2. See J. Nederveen Pieterse, *Globalisation and culture: three paradigms*, 31 *Economic and Political Weekly* 23, p. 1389 (1996); *Global public goods: international cooperation in the 21st Century* (I. Kaul, I. Grunberg & M.A. Stern eds., Oxford University Press 1999); J. Musitelli, *World heritage, between universalism and globalization*, 11 *Intl. J. of Cultural Property* 2, p. 323 et seq. (2002); K.G. Siehr, *Globalization and national culture: recent trends toward a liberal exchange of cultural objects*, 38 *Vanderbilt J. of Transnational Law* 4, p. 1067 et seq. (2005); Y. Wang, *Globalization enhances cultural identity*, 16 *Intercultural Communication Studies* 1, p. 83 et seq. (2007); *La globalizzazione dei beni culturali* (L. Casini ed., Il Mulino 2010); *Heritage and globalization* (S. Labadi & C. Long eds., Routledge 2010); and L. Casini, *Ereditare il futuro. Dilemmi sul patrimonio culturale* pp. 61-96 (Il Mulino 2016).

On early example is the “Monuments, Fine Arts and Archives” (MFAA) group, comprising about 350 individuals from 13 different countries – known later as the “Monuments Men” – who, despite not having any specific military training,³ engaged in an operation in Europe during World War II, along with the Allied armies, to recover and preserve artistic masterpieces that were vulnerable to the destructive forces of war, efforts that included stealing such works from the retreating Nazis. Although the MFAA operated informally for about a year, it was only in 1943 that Franklin Delano Roosevelt implemented a request by the Chief Justice of the Supreme Court, Harlan F. Stone, to give it a formal role aimed at the “protection and conservation of works of art and of artistic and historic monuments and records in Europe”.

As the territories were being freed from totalitarian regimes in Italy (starting on 8 September 1943) and in occupied France (starting from D-Day, i.e. 6 June 1944), the MFAA carried out, as quickly and effectively as possible, its mission to rescue cultural heritage, recovering “movable” works of art (or carrying out investigations involving priests, museum directors, etc. in order to obtain information on where the Axis armies had likely hidden them). It also put up the infamous “off limits” signs on “immovable” objects with historical-artistic value (for example, churches, monasteries, convents, museums, libraries, etc.), to prevent them from being damaged or destroyed by the Allies.⁴

It was precisely this dramatic period that raised awareness of the need to preserve humanity’s treasures, the value of which is universal and timeless, from destructive (but contingent) conflict between nations.

Following the end of hostilities, the international community decided to develop a multilateral treaty to attempt to protect cultural goods in the event of future wars. Thus, in 1954, the Convention for the Protection of Cultural Property in the Event of Armed Conflict was concluded in The Hague, pursuant to which the contracting states acknowledged that “cultural property has suffered grave

3. It was, in fact, a group made up of men and women “of culture”, including university professors, museum directors (such as the director of the Louvre, Jacques Jaujard), art historians, architects, archivists, restorers, etc.

4. “To Allied Forces. National monument. Out of bounds. Off limits. It is strictly forbidden to remove stone or any other material from this site. Souvenir hunting, writing on walls or damage in any form will be dealt with as military offences”.

damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction". They were convinced that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".⁵ The Hague Convention is the first source of international law containing a definition of "cultural property".⁶

The approach of the Member States that developed after the end of the Second World War focused, therefore, on "human creativity", in all its manifestations, worthy of national and supranational protection.⁷ Lawmakers soon realized that there was also a need to protect world heritage through public finance measures, as well as tax incentives,⁸ since such heritage represents the legacy that living generations inherit from past civilizations. This implied adopting a new and wider concept of "cultural good".

This transition led to considering cultural heritage not only from a "moral" perspective, but also from an "economic" one.⁹ This is why cultural heritage is now regulated by the WTO¹⁰ and primary EU law.¹¹

But the list of goods worthy of legal protection also needs to include those that exist in nature, i.e. natural ones that are, to some extent, "shaped" through human intervention. This is why, from a definitional point of view, it is necessary to acknowledge that cultural heritage is part of a broader concept of the "heritage of humanity", which embraces both "tangible" heritage (which may be "cultural

stricto sensu"),¹² natural¹³ or mixed¹⁴ heritage), as well as "intangible heritage",¹⁵ which embraces:¹⁶

[T]he practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. [...] The 'intangible cultural heritage' ... is manifested *inter alia* in the following domains:

- a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- b) performing arts;
- c) social practices, rituals and festive events;
- d) knowledge and practices concerning nature and the universe;
- e) traditional craftsmanship.

2. International Instruments Used to Finance Cultural Heritage: The UNESCO Fund

The first significant international initiative for the protection of cultural heritage, which also includes support through funding mechanisms, is the UNESCO Convention (1972), which represented a significant shift in mentality in terms of enacting national legislation.¹⁷

5. Convention for the Protection of Cultural Property in the Event of Armed Conflict (7 Aug. 1954), Preamble [hereinafter Convention]. As of 11 Jan. 2019, there were 133 signatories.

6. Art. 1 Convention clarifies that the term refers to:
(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

On this issue, see S. Lieto, *Il sistema internazionale di protezione dei beni culturali*, in *Tutela e valorizzazione dei beni culturali. Aspetti sovranazionali e comparati* p. 19 et seq. (D. Amirante & V. De Falco eds., Giappichelli 2005).

7. See F. Francioni, *The human dimension of international cultural heritage law: an introduction*, 22 *European J. of Intl. Law* 1, p. 9 et seq. (2011).

8. See *Tax incentives for the creative industries* (S. Hemels & K. Goto eds., Springer 2017).

9. See B. Accettura, *I beni culturali tra ordinamento europeo e ordinamenti nazionali*, 6 *Aedon* 2 (2003), available at <http://www.aedon.mulino.it/archivio/2003/2/accettura.htm>; and U. Allegretti, *La dimensione amministrativa in un quadro di globalizzazione. Spunti di applicazione al patrimonio culturale*, 7 *Aedon* 3 (2004), available at <http://www.aedon.mulino.it/archivio/2004/3/allegretti.htm>.

10. WTO, General Agreement on Tariffs and Trade, art. XX(f).

11. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), art. 36, EU Law IBFD.

12. According to UNESCO, Convention concerning the Protection of the World Cultural and Natural Heritage, art. 1 (16 Nov. 1972) [hereinafter 1972 UNESCO Convention], which currently has 193 signatories, cultural heritage *stricto sensu* includes:

- (a) monuments (i.e. architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science);
- (b) groups of buildings (i.e. groups of separate or connected buildings that, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science); and
- (c) sites (i.e. works of man or the combined works of nature and man, and areas including archaeological sites that are of outstanding universal value from an historical, aesthetic, ethnological or anthropological point of view).

See <http://whc.unesco.org/archive/convention-en.pdf>.

13. Art. 2 1972 UNESCO Convention considers this to include:

- (a) natural features (i.e. physical and biological formations or groups of such formations, which are of outstanding universal value from an aesthetic or scientific point of view);
- (b) geological and physiographical formations (i.e. precisely delineated areas that constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; and
- (c) natural sites (i.e. precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty).

See <http://whc.unesco.org/archive/convention-en.pdf>.

14. According to UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, WHC 12/01, pp. 13-14 (July 2012), "properties shall be considered as 'mixed cultural and natural heritage' if they satisfy a part or the whole of the definitions of both cultural and natural heritage laid out in Articles 1 and 2 of the Convention".

15. In the literature, see L. Lixinski, *Intangible cultural heritage in international law* (Oxford 2013).

16. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2, paras. 1-2 (17 Oct. 2003).

17. For example, in 1974, Italy instituted the Ministry for Cultural and Environmental Heritage.

Besides contributing to the introduction of universal concepts on a subject that, by its very nature, cannot be regulated purely through national rules, the Convention introduced funding mechanisms. Article 15, in fact, established the World Heritage Fund, which receives funds through the following avenues:

- compulsory and voluntary contributions of the parties to the Convention;
- contributions, gifts or bequests by:
 - other states;
 - the UN Educational, Scientific and Cultural Organization, as well as other organizations under the UN umbrella (for example, the UN Development Programme and other intergovernmental organizations);
 - public or private bodies or individuals;
 - any *interest* due on the resources of the Fund;
- funds raised by collections and receipts from events organized for the benefit of the Fund; and
- all other resources authorized by the Fund's regulations, as drawn up by the World Heritage Committee.

This overview clearly shows the dichotomy between funding borne by the contracting states (only partially compulsory) and other forms of funding that are purely voluntary:¹⁸

- The former is a fixed percentage decided on periodically by the General Assembly, which cannot “exceed 1% of the contribution to the regular budget” of UNESCO (article 16). This limitation, established in 1972, is too restrictive given that the list of assets to be protected is constantly growing (as reflected in the World Heritage List).¹⁹ Looking at the accounts of the World Heritage Fund, it is evident that the funds are pretty exiguous: in November 2017, for example, compulsory contributions amounted to USD 1,461,245.²⁰
- On the other hand, the voluntary part is equally inadequate, amounting to just USD 700,357 at the end of 2017.²¹

These scarce resources are obviously insufficient in times of peace, but will be wholly inadequate in the event of a war.²² Take, for example, the emblematic cases of the

bombing of Bamiyan Buddhas in Afghanistan by the Taliban (12 March 2001)²³ and the collateral damage to the ancient city of Babylon (2003-2004) due to US military actions in Iraq.²⁴

3. The Role of the European Union in the Financing of Cultural Heritage

3.1. Introductory remarks

The cultural sector represents an area of “shared” competence between Member States and the European Union, the importance of which has grown exponentially in recent years not only for the obvious reason that cultural expression represents the culmination of civilizations past, but also due to the strong economic impact it has, in particular in terms of job creation.

Studies show that, in Europe, the cultural and (re)creative sector represents 4.3% of GDP,²⁵ making it the sector with the third highest number of employees, falling immediately under the construction and hospitality industries, with over 7 million people *directly* or *indirectly* involved. It should be noted that the cultural sector showed no sign of decline during the global economic crisis, but instead strengthened: the jobs in this sector, in fact, grew by 3.5% in 2000-2007 and rose further by 0.7% in each year of the 2008-2012 crisis period, in contrast to other sectors.²⁶

The old continent has over 1/3 of the world's heritage, including nine museums – i.e. the Louvre (Paris), Vatican Museums (Rome), British Museum (London), TATE Gallery (London), National Gallery (London), National History Museum (London), Reina Sofia (Madrid), Victoria & Albert Museum (London) and Centre Pompidou (Paris) – that alone attracted almost 47 million visitors in 2017.²⁷

18. See D. Zacharias, *The UNESCO regime for the protection of World Heritage as prototype of an autonomy-gaining international institution*, 9 German Law J. 11, p. 1833 et seq. (2008) and C. Bories, *Le patrimoine culturel en droit international. Les compétences des Etats à l'égard des éléments du patrimoine culturel* (Pedone 2011).

19. The list, which contained 478 goods in 1999, now includes (as of 11 Jan. 2019) 1092 (54 of which are “in danger”), divided as follows:
 – 845 cultural goods *stricto sensu*;
 – 209 natural goods; and
 – 38 mixed goods.
 In the literature, see B.S. Frey & L. Steiner, *World Heritage List*, in *Handbook on the economics of cultural heritage* p. 171 et seq. (I. Rizzo & A. Mignosa eds., Edward Elgar Publishing 2013).

20. See UNESCO, *Twenty-first session of the General Assembly of States parties to the Convention concerning the protection of the world cultural and natural heritage*, WHC/17/21.GA/INF.7 (10 Nov. 2017).

21. Id.

22. Frulli is in favour of greater protection of cultural heritage damaged in wartime, including through international criminal sanctions: M. Frulli, *The criminalization of offences against cultural heritage in times of armed*

conflict: *the quest for consistency*, 22 Eur. J. of Intl. Law 1, p. 203 et seq. (2011). See also E. McGeorge, *Prosecution of cultural heritage destruction: framework, precedents and recent developments in international criminal law*, 3 Public Interest Law J. of New Zealand 1, p. 204 et seq. (2016).

23. See F. Francioni & F. Lenzerini, *The destruction of the Buddhas of Bamiyan and international law*, 14 Eur. J. of Intl. Law 4, p. 619 et seq. (2003).

24. With regard to the need to revisit the role of the World Heritage Fund, see E.B. Keough, *Heritage in peril: a critique of UNESCO's World Heritage Program*, 10 Washington University Global Studies Law Rev. 3, p. 593 et seq. (2011) and L. Meskell, *UNESCO's World Heritage Convention at 40. Challenging the economic and political order of international heritage conservation*, 54 Current Anthropology 4, p. 483 et seq. (2013).

25. Eurostat, *Government expenditure on recreation, culture and religion*, Mar. 2018, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Government_expenditure_on_recreation_culture_and_religion calculates such a percentage by combining: 2.2% for “recreation, culture and religion”, 0.7% for “recreational and sporting services”, 0.9% for “cultural services”, 0.4% for “broadcasting and publishing services”, and 0.1% for “religious and other community services”. For the various indices adopted in respect of the methodology used to compile such statistics, see Eurostat, *Manual on sources and methods for the compilation of COFOG Statistics. Classification of the Functions of Government (COFOG)* para. 08.20, p. 175 (Publications Office of the European Union 2011).

26. Ernst & Young, *Creating growth. Measuring cultural and creative markets in the EU* (Studio EY France 2014), available at [https://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/\\$FILE/Creating-Growth.pdf](https://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf).

27. See AECOM-Themed Entertainment Association, *Theme index – Museum index 2017. Global attractions attendance report* pp. 18-19 (Burbank 2018).

Italy considers its cultural and creative industries to be strategic in terms of national economic development: in 2017, these industries (which also include all of the bodies of the third sector and public administration) produced about EUR 92.2 billion in gross profits, which, in addition to the “added value” this generates for the rest of the economy (EUR 163.3 billion) by virtue of the application of the “theory of inter-sectoral relations”,²⁸ has allowed the entire supply chain of culture to generate an impressive figure of EUR 255.5 billion.²⁹ Moreover, the trade name “Made in Italy”, which refers to all forms of expression of “new culture”, is now the “third most famous brand in the world after Coca-Cola and Visa”. It represents “a real intangible infrastructure, an ‘intangible carrier’, capable of projecting Italian companies onto new markets”.³⁰

3.2. Identification of activities belonging to the cultural and creative industries

The cryptic phrase “cultural and creative industries” includes contemporary entrepreneurial culture, which is highly influenced by new technologies and globalization. A 2006 study, carried out on behalf of the European Commission, proposed the following classifications:

- (1) the “cultural” sector, which includes:
 - (a) “non-industrial activities”, which are at the heart of the cultural sector and embrace:
 - visual arts (i.e. crafts, paintings, sculpture and photography);
 - performing arts (i.e. theatre, dance, circus and festivals);
 - heritage (i.e. museums, libraries, archaeological sites and archives),
 all of which are activities that are potentially capable of producing “copyrighted works”;
 - (b) “industrial activities”:
 - film and video;
 - television and radio;
 - video games;
 - music (i.e. recorded music market, live music performances, revenue from collecting societies in the music sector); and
 - books and press (i.e. book publishing, magazine and press publishing),
 all of which are activities aimed at mass reproduction and, therefore, the output of which is protected by copyright;

28. The theory (also known as *input-output analysis*) was originally elaborated on by the Russian economist Wassily Leontief in the 1960s and led him to receive the Nobel Prize for Economics in 1973. This theory starts from the assumption that every economic system is made up of several production sectors, each of which “requests” products from other sectors to generate its own product (referred to as “intermediate” demand). For example, to produce a certain quantity of sugar, it is necessary to supply a certain voltage of electricity: only once this interrelation between sectors is balanced will production be able to adequately satisfy market demand (“final demand”). See W. Leontief, *Input-output economics* (Oxford University Press 1966).

29. Fondazione Symbola-Unioncamere, *Io sono cultura – Rapporto 2018* (2018), in particular pp. 65-66.

30. KPMG, *Going global. Internazionalizzazione ed evoluzione dei modelli di business. Una priorità per le imprese italiane* p. 29 (KPMG Advisory S.p.A. 2011).

- (2) the “creative” sector, which includes:
 - (a) “creative industries” *stricto sensu*:
 - design (i.e. fashion design, graphic design, interior design, product design);
 - architecture;
 - advertising,
 all of which are activities that are not necessarily industrial, the products of which may be prototypes;
 - (b) “related creative industries” (for example, manufacturing PCs, MP3 players, mobile phones, etc.).³¹

This outline indicates that the industry is continually expanding, in particular thanks to increasingly sophisticated technological tools that allow, in real time, for new ideas and trends to circulate globally, some of which are able to take root in society and contribute to a sort of progressive consensus concerning their cultural diffusion.³²

At the same time, the interplay between “culture” and “economy”, which was predicted at the end of the 1960s,³³ is now consecrated in the phrase “cultural economics”, which is a global phenomenon.³⁴

3.3. The protection of culture by “primary” EU law and a mixed funding system for culture

The “identity” function that culture performs in respect of European populations,³⁵ together with the aforementioned repercussions in terms of jobs and tourism,³⁶ make

31. KEA European Affairs, *The economy of culture in Europe*, Study prepared for the European Commission (Directorate-General for Education and Culture) (Oct. 2006).

32. See *The heritage theatre. Globalisation and cultural heritage* (M. Halbertsma, A. van Stipriaan & P. van Ulzen eds., Cambridge Scholars Publishing 2011).

33. W.J. Baumol & W.G. Bowen, *Performing arts – The economic dilemma. A study of problems common to theater, opera, music and dance* (M.I.T. Press 1966). Such study brought about, in 1973, the birth of the Journal of Cultural Economics and, in 1979, the first international conference on cultural economics.

34. See W. Santagata, *Economia della cultura*, in VV.AA., *XXI Secolo* (Trecani 2009), available at [www.treccani.it/enciclopedia/economia-della-cultura_%28XXI-Secolo%29](http://www.treccani.it/enciclopedia/economia-della-cultura_%28XXI-Secolo%29/Economia-della-cultura); *Economia dell'arte. Istituzioni e mercati dell'arte e della cultura* (W. Santagata ed., UTET 1998); D. Throsby, *Economics and culture* (Cambridge University Press 2001); S. Settis, *Italia S.p.A. L'assalto al patrimonio culturale* (Einaudi Editore 2007); G. Guerzoni, *L'impatto economico degli eventi culturali in Italia* (Il Mulino 2008); *Beyond price. Value in culture, economics, and the arts* (M. Hutter & D. Throsby eds., Cambridge University Press 2008); C. Caliendo & P.L. Sacco, *Italia reloaded. Ripartire con la cultura* (Il Mulino 2011); A. Klamer, *The value-based approach to cultural economics*, 40 J. of Cultural Economics 4, p. 365 et seq. (2016); and A. Klamer, *Doing the right thing. A value based economy* (Ubiquity Press 2017).

35. In this sense, see P.L. Sacco, *Il patrimonio culturale come presente e futuro dell'Europa*, 9 Cartaditalia – Rivista di Cultura Italiana Contemporanea 1, p. 20 (2017).

36. According to European Commission, *Green Paper. Unlocking the potential of cultural and creative industries*, COM(2010) 183 final p. 2 (27 Apr. 2010), “if Europe wants to remain competitive in this changing global environment, it needs to put in place the right conditions for creativity and innovation to flourish in a new entrepreneurial culture. There is a lot of untapped potential in the cultural and creative industries to create growth and jobs. To do so, Europe must identify and invest in new sources of smart, sustainable and inclusive growth drivers to take up the baton. Much of our future prosperity will depend on how we use our resources, knowledge and creative talent to spur innovation. Building on our rich and diverse cultures, Europe must pioneer new ways of creating value-added, but also of living together, sharing resources and enjoying diversity”.

it easy to understand why cultural heritage is at the forefront of the EU agenda.³⁷

Article 167 of the Treaty on the Functioning of the European Union (TFEU) (2007) provides that the Union shall contribute to the flowering of the Member States' cultures, which are diverse but also an expression of a "common cultural heritage". Since culture is a matter that does not fall under the exclusive competence of the European Union, in order to achieve the goals of development and promotion, the Union encourages cooperation between the Member States (and also with third countries and international organizations).

The European Union provides a "mixed" funding system for culture, which is structured on three levels:

- (1) public support, which may be:
 - (a) "public 'direct' support", consisting in support for cultural activities by governmental and/or other public bodies through money transferred directly from a public fund to the recipients' accounts (for example, subsidies, awards, grants, etc.); and
 - (b) "public 'indirect' support", encompassing:³⁸ measures, adopted by governmental and/or public institutions, usually via legal acts, for the benefits [sic] of cultural organisations, that do not involve money transfer from the former to the latter. Indirect measures refer mainly to tax expenditures, that is, the income that local and national governments forego because of tax reductions and exemptions granted to cultural institutions, matching grants, and other financial or banking schemes whereby beneficiaries, rather than government officials, determine which organisations will benefit;
- (2) private support, consisting in "any financial support provided by investing, giving or spending at the individual or non-public level",³⁹ which can be divided into:
 - (a) "business support", which "denotes direct investment aimed at capital returns, including public-private partnerships and investments in arts collections, as well as sponsorship and corporate donations";⁴⁰
 - (b) "individual giving", which encompasses "all transactions made by individuals, with a purpose of donating or contributing to culture. Individual giving should be distinguished from household expenditure for culture, which falls under the category of earned income";⁴¹ and
 - (c) "support from foundations and trusts", i.e. "from intermediary institutions, usually founded by

- law, that serve special purposes and missions and are supported by private endowment";⁴² and
- (3) earned income, which is a residual category that "includes all individual spending for cultural purposes, such as, entry fees to cultural institutions, or the buying of cultural objects. Earned income therefore denotes all direct income made by cultural organisations on the market".⁴³

3.4. Recent European policies supporting culture and creativity: The "integrated approach" and the renewed role of taxation

In the 2014-2015 period, European institutions made significant efforts to promote and protect cultural heritage. The Commission asked for public input on the need for an "integrated approach" to cultural heritage that would make it possible to achieve three fundamental goals to enhance Community life:

- the *promotion of cultural diversity and intercultural dialogue*. Heritage, given its intrinsic and societal value, is a pivotal component of this goal;
- the *promotion of culture as a "catalyst" for creativity*. Heritage contributes to this goal through its direct and indirect economic potential, including the capacity to underpin cultural and creative industries and inspire creators and thinkers; and
- the *promotion of culture as a vital element of the Union's international dimension*. The Union's expertise in cultural heritage is highly respected internationally and is capable of informing *best practices* for other jurisdictions or supranational organizations.⁴⁴

Following this input, the European Parliament began to discuss suitable instruments that the Union, in particular Member States, should adopt to promote and protect the various forms of culture and creativity, starting from the assumption that European cultural heritage is in the hands not only of the *public*, but also *private* subjects. In this sense, greater involvement of the latter would undoubtedly give new impetus to achieving this goal.

Therefore, considering the various objectives – including strengthening the "cultural and touristic value of the Council of Europe's Cultural Routes in promoting a common European cultural heritage and developing sustainable cultural tourism" – the European Parliament:⁴⁵

considers it of paramount importance to use the available resources for supporting, enhancing and promoting cultural heritage on the basis of an integrated approach, while taking into account the cultural, economic, social, historical, educational, environmental and scientific components; believes that, with regard to the cultural heritage, an integrated approach is necessary if one wishes to achieve cultural dialogue and mutual understanding; is convinced that such an approach can lead to enhanced social, economic and territorial cohesion, while also

37. Treaty on European Union of 13 December 2007, OJ C 306 (2007), art. 3(3), EU Law IBFD, expressly provides that the Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

38. See European Parliament, Directorate-General for Internal Policies – Policy Department B: Structural and Cohesion Policies, Culture and Education, *Encouraging private investments in the cultural sector*, Study IP/B/CULT/FWC/2010-001/Lot4/C01/SC01, p. 11 (July 2011) [hereinafter the Study].

39. *Id.*, at p. 11.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*, at p. 12.

44. European Commission, *Towards an integrated approach to cultural heritage for Europe*, COM(2014) 477 final p. 6 (22 July 2014).

45. European Parliament, *Towards an integrated approach to cultural heritage for Europe (2014/2149(INI))*, Report A8-0207/2015, p. 6 (24 June 2015).

contributing to the fulfilment of the goals set in the Europe 2020 strategy.

Among the various measures that should be adopted for this purpose, the European Parliament has, in particular, invited the Member States “to look into possible fiscal incentives in relation to restoration, preservation and conservation work, such as reductions in VAT or other taxes, given that European cultural heritage is also managed by private bodies”.⁴⁶

3.4.1. *The Italian Art Bonus as a pilot project for private engagement in protecting cultural heritage through taxation*

Within the funding system envisaged at the European level, taxation is included in the category of public “indirect” support since it depends on a discretionary choice of the Member States and, in practice, results in mitigation of the tax burden. The European Parliament itself has noted that this is the “cornerstone” of encouraging private investment in the cultural sector. It has led to an increasing interplay between policy regarding tax and culture.⁴⁷

Irrespective of the technical instrument through which such a tax incentive materializes (for example, tax reliefs, tax breaks, tax deductions, tax exemptions, tax allowances, tax incentives, tax credits, etc.), the final choice remains in the hands of the Member States, which are competent in the field of income taxation.

Notwithstanding the recommendation of the European Union, only a few Member States introduced specific tax breaks to finance (indirectly) cultural heritage, including Estonia, France⁴⁸ and Poland.

Italy has the highest number of protected sites,⁴⁹ surpassing China, France, Germany, Spain, Mexico and the United States. This fact should, in itself, explain why it is critical for the legislator to develop new and additional tools to finance cultural heritage, particularly by enhancing the role of private subjects through tax breaks.

Italy has, in fact, applied EU guidance and has undertaken a comparative study of incentives in other countries. As a result, it introduced, through Law Decree no. 83 of 31 May 2014 (converted, with amendments, by Law no. 106 of 29 July 2014),⁵⁰ a 65% tax credit for charitable donations made

by individuals or companies to support culture (referred to as the “Art Bonus”), which represents a form of “hybrid” financing halfway between public “indirect” support and private support.⁵¹ The incentive does not fall under the first category of public “indirect” support because the recipients of the tax benefit are not cultural institutions, but taxpayers making donations. This mechanism also does not exactly fall within the second category, i.e. private support, since a private donation is incentivized by the tax advantage.⁵²

The 65% tax credit is granted to individuals, non-profit organizations and companies making charitable donations:

- for the maintenance, protection and restoration of public cultural goods (for example, monuments, historical buildings, works of art, etc.);
- in support of public cultural institutions (for example, museums, libraries, archives, archaeological areas, parks), opera houses, symphonic foundations, traditional theatres and other entertainment organizations; and
- for the construction, restoration and upgrading of facilities of public institutions dedicated to performances.⁵³

Beyond its conceptual framework, this tool has the merit of encouraging the rebirth of cultural patronage in the modern Italian society⁵⁴ and can be viewed as an expression of the interplay between tax and cultural policy.⁵⁵

places of culture (i.e. concert-orchestra institutions, national theatres, theatres of significant cultural interest, festivals, enterprises and theatrical production centres, dance and distribution circuits) by art. 5(1) of IT: Law no. 175 of 22 Nov. 2017 (referred to as the “Law on the show”). For a review of the other benefits applicable to the culture sector, written just before the Art Bonus was approved, see F. Solfaroli Camillocci, *Che cosa può fare il Fisco per la cultura: le agevolazioni fiscali dalla L. n. 512 del 1982 ad oggi*, 37 *Il Fisco* 27, p. I-4125 et seq. (2013).

51. See R. Lupi, *L'Art Bonus come sovvenzione pubblica in forma di “credito d'imposta”*, 17 *Aedon* 3 (2014, online); and C. Buccico, *Il volano fiscale dell'Art Bonus*, 13 *Innovazione e Diritto* 6, p. 51 et seq. (2016).
52. The Study, *supra* n. 38, at p. 12, considers that:

the cornerstone of the encouragement of private investment in the cultural sector is tax policy. The intersection between tax policy and cultural policy is evident, since tax regulation can have positive or negative implications on culture. Cultural policy and fiscal policy have always been and are increasingly becoming more and more intertwined. Tax legislation is important in terms of enlarging the financial independence of the cultural sector. As a mean of channelling public funding to the arts, the major advantage of tax policy is its neutrality in the sense that tax incentives do not relate to artistic contents [sic]. Rather, the criteria are general, and are linked to the field or types of beneficiaries. It is left to individuals, corporate businesses and non-profit foundations to make their own cultural decisions. Therefore, it is important to understand and promote tax policy that takes cultural aspects into account as a relevant instrument of cultural policy, thus allowing for individual decision making in supporting cultural projects.

53. An updated list of targets of such charitable contributions and of donors is available at <https://artbonus.gov.it>.
54. See A. Sacrestano, *Spinta al “mecenatismo” con il nuovo ‘Art-bonus’*, 37 *Corriere Tributario* 35, p. 2711 et seq. (2014).
55. In these terms, see L. Casini, *Ereditare il futuro. Dilemmi sul patrimonio culturale* p. 99 (Il Mulino 2016), who believes that the Art Bonus represents a chaotic element within the tax system, as it derogates from the Income Tax Consolidated Act. In essence, it functions as the first article of an entire Code dedicated to culture and tourism. He welcomes the Art Bonus as an important tax relief that has become integral to cultural policy. It compensates for a delay in regulation, under Italian legislation, of the relationship between the public and private sector.

46. *Id.*, at p. 8.

47. *Id.*, at p. 36. For literature, see S. Giorgi, *La fiscalità della cultura: il paesaggio dimenticato ed il ruolo della sussidiarietà. Spunti per un cambio di prospettiva*, 5 *Rivista Trimestrale di Diritto Tributario* 4, p. 846 (2016), who correctly considers that tax policies take on a central role, being called on to address the chronic lack of funds needed to finance culture.

48. See Ordonnance No. 2004-178 of 20 Feb. 2004, *relative à la partie législative du code du patrimoine*, *Journal officiel de la République française*, no. 46 (24 Feb. 2004). Since the very first version of the Code, this text contained specific tax provisions in Book I (*Protection des biens culturels*), Title II, Ch. 2; in Book V (*Archéologie*), Title IV, Ch. 3; in Book VI (*Monuments historiques, sites et espaces protégés*), Title II, Ch. 3, and Title IV, Ch. 3. The consolidated version, updated 1 Jan. 2019, is available at www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074236.

49. Italy has 49 cultural properties *stricto sensu* and mixed properties on the World Heritage List: see <http://whc.unesco.org/en/statesparties/IT>.

50. The Art Bonus, introduced as a temporary measure applicable during a 3-year period (2014-2016), has been made permanent by IT: Law no. 208 of 28 Dec. 2015. Its field of application was extended to all main

The Art Bonus could, however, be improved, in particular in order to broaden its scope to include a wider range of taxpayers making charitable donations. While the regime currently provides tax incentives with regard to *products* of art that are *publicly* owned⁵⁶ and located in the *national* territory,⁵⁷ it could be extended to (i) cultural heritage outside the national territory, (ii) contemporary art (encouraging the artists of today who are creating the cultural heritage of tomorrow),⁵⁸ as well as (iii) all cultural heritage owned by private subjects.⁵⁹

For decades this area was dominated by bilateral relationships between *private* owners of protected cultural goods and the *state* that safeguards them. Italian legislation, however, has always tried to introduce measures aimed at recognizing *trilateral* relationships (i.e. between private owners, public authorities and visitors) or *multilateral* relationships (i.e. also involving companies, patrons, etc.). The Art Bonus, therefore, defines a new scenario, within which intervention in respect of cultural heritage is more defined and, moreover, introduces a restyled concept of cultural heritage, which not only refers to a set of “things” and “objects”, but also the heritage of “subjects” of institutions (for example, museums, archives, libraries, theatres, etc.).

56. In fact, to be entitled to a tax credit, the donation must concern the following:
- the maintenance, protection and restoration of public cultural assets;
 - support for publicly-owned institutions and places of culture (for example, museums, libraries, archives, archaeological areas and parks, monumental complexes, as set out in IT: Legislative Decree no. 42 of 22 Jan. 2004, art. 101), lyrical-symphonic foundations, traditional theatres, concert-orchestra institutions, national theatres, theatres of significant cultural interest, festivals, enterprises and theatrical and dance production centers, as well as distribution routes);
 - the realization of new structures, as well as the restoration and renovation of existing structures of public bodies or institutions that, as non-profit entities, exclusively perform activities related to performances; and
 - the restoration and maintenance of public cultural assets owned by private parties.
57. In terms of geographical distribution, a worrying imbalance between the various parts of Italy has been noted. In Dec. 2016, out of 764 projects (which involved donations totalling EUR 122,735,089), 52% were undertaken in the north (EUR 102,189,235), 38% in the centre (EUR 18,569,819) and only 10% in the south (EUR 1,976,034). See, ALES Group, *Primo bilancio sull'Art Bonus*, research undertaken within the 10th Master in “Economics and Management of Art and Cultural Heritage”, Il Sole 24 Ore Business School, 15 Dec. 2016. Such a difference between the north and south – as remarked on by E. Chiurazzi, *Privati e pubblico in sintonia. Le tre chiavi oltre l'Art bonus*, Corriere del Mezzogiorno (Puglia), p. 5 (31 Oct. 2018), not only reflects the fact that certain businesses are not able to take advantage of this tax instrument, but also that some local administrations have simply not proposed projects that attract donations.
58. Without engaging in an in-depth analysis here, it should be noted that, from a comparative point of view, Italy, as well as many other countries, is certainly not in a leading position with regard to financial support for contemporary artists, unlike other jurisdictions (for example, the United States, the United Kingdom, France, the Netherlands, etc.) which have, at a legislative level, incorporated a broader and more far-sighted concept of “cultural heritage”. Although there are no living Botticellis or Michelangelos (just to mention two artists who represent classical art), this does not mean that the current forms of cultural creativity (for example, Banksy's street art, the satirical art of Maurizio Cattelan, etc.) should not also benefit from a financial point of view, as, over time, the most deserving artists will inevitably enrich global cultural heritage, constituting a new layer of cultural heritage.
59. On this point, the interpretative approach of the Italian tax authorities should be welcomed. It was endorsed by an opinion of the Ministry of Cultural Heritage to the effect that “institutes of culture having legal personality under private law, for example those constituted as a foundation, are essentially of a public nature and may therefore receive charitable donations for the support of their activities that benefit from the tax credit (subject to the condition that their collections are publicly owned)”. The opinion accepted that a private law foundation, specifically constituted by a public body for the management of a museum,

4. Giving Tax Breaks a More Decisive Role in the Cultural Sector

Member States' tax policies are generally limited to tax incentives to stimulate private investment. It is necessary, however, to also establish “cultural taxes”, which would allow for funds to be raised to promote and protect cultural heritage.⁶⁰ With regard to this second umbrella, according to Giorgi (2016),⁶¹ although mechanisms do exist to encourage “cultural patronage”, tax instruments do not appear to be a valid driver of patronage. Various intrinsic factors decrease their attractiveness, such as the high administrative burden associated with claiming an incentive, the lack of knowledge of incentives by potential beneficiaries, and the fact that, in the end, the charitable donation may not be profitable. This is compounded by the fact that preference is being given to other sectors, such as health, religion and social services. As such, there is a lack of “culture” surrounding cultural tax incentives, as well as a dearth of sensitivity to the collective value of artistic heritage.

Nevertheless, although the Italian Art Bonus and similar national initiatives represent a transposition (enforcement) by Member States of European soft law initiatives, the Union as a whole has not yet adopted much-needed secondary EU law (i.e. Directives, Regulations, etc.) in this regard.

A truly European regime would need to include VAT, which has a significant influence on the quality and development of cultural activities and industries. Due to the cultural value of goods produced, a reduced VAT rate may be justified, while maintaining the ordinary VAT rate in respect of the materials used in the production of such goods. From the standpoint of cultural policy:⁶²

the lowest possible rate of VAT represents one of the most significant measures of indirect public funding, thus making VAT policy an important instrument of cultural policy. The zero rate and extra reduced rates subsist in the current transitional European regime as an explicitly temporary derogation. If VAT continues to develop as [a] powerful fiscal instrument, long standing orientation towards harmonisation within the European Union is inevitable. The special VAT treatment enjoyed by distinctive cultural goods and services may thus appear as one of these inherited imperfections to be corrected. This only makes debate on fiscal policy as an indispensable instrument of cultural policy more relevant than ever.

The time is ripe for European lawmakers to enhance culture through decisive tax intervention. This is particularly true given that 2018 was proclaimed by the European Parliament and the Council as the “European Year

was entitled to the Art Bonus. See IT: Tax Authorities, Resolution no. 136/E of 7 Nov. 2017.

60. These taxes would have an “extra-fiscal” function, such as environmental taxes, which, “although their legal construction only matches tax parameters, also pursue extra-fiscal goals regarding environmental protection”. In this sense, see F. Gallo & F. Marchetti, *I presupposti della tassazione ambientale*, 42 *Rassegna Tributaria* 1, p. 118 (1999). For a complete theoretical analysis of this topic, see F. Fichera, *Imposizione ed extrafiscalità nel sistema costituzionale* (Edizioni Scientifiche Italiane 1973).
61. Giorgi, *supra* n. 47.
62. *Supra* n. 38, at p. 38.

of Cultural Heritage” (EYCH),⁶³ the aim being to “encourage the sharing and appreciation of Europe’s cultural heritage as a shared resource, to raise awareness of common history and values, and to reinforce a sense of belonging to a common European space”.⁶⁴

63. 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, p. 1 et seq. (20 May 2017).
64. Id, art. 1(2).



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