

A close-up photograph of a hand holding a European Union flag. The hand is painted with a face, featuring a large, detailed eye with a brown iris and black eyelashes. The background of the hand is blue with yellow stars, matching the EU flag. The overall image has a textured, painterly quality.

Culture and tax in Europe: how harmony can triumph over cacophony



**FORUM
D'AVIGNON**
Culture is future



EY
Société
d'Avocats

Contents

- 1** **10 proposals for a European taxation policy to promote cultural diversity**
- 2** **EY and the Forum d'Avignon**
- 3** **Editorial**
- 5** **A call for harmony**
- 7** **A cacophony inherent to the diversity of European Culture**
- 15** **A fiscal policy for European culture: respect for national cultures impedes harmonization of policies**
- 25** **A fiscal policy to support the global spread of European cultures in response to the commercialization of cultural products**

10 proposals for a European taxation policy to promote cultural diversity

22 A three-fold approach to harmonizing European fiscal policy

PROTECTING



Include a cultural policy within the project for a Common Consolidated Corporate Tax Base



Harmonize practices with respect to tax credits and cultural patronage at EU level



Create a consistent EU-wide policy for conserving Europe's heritage

CREATING



Develop a common European ruling for cultural industries



Consider introducing a cultural fiscal passport

DISTRIBUTING



Accomplish harmonization of VAT, both in respect of definitions of cultural goods and services and of rates applicable

23 Create a body to oversee European cultural fiscal policy

CREATING, PROTECTING, DISTRIBUTING



Set up an informal "Council for Cultural Affairs" to design a harmonious fiscal policy for culture

30 A tax system that can help European culture triumph globally

CREATING



Create a favorable tax regime for enterprises in the cultural sector to support creativity and innovation

PROTECTING



Promote a new cultural right to tax that takes account of the use of European culture for profit by non-EU tax residents.

31 Create an international governance body for cultural fiscal policy

CREATING, PROTECTING, DISTRIBUTING



Set up a G20 for Culture to tackle the issues and divergent views (between the WTO and UNESCO) arising from the global trade in cultural goods and services.



EY and the Forum d'Avignon

***"Culture is what makes
man something
other than an accident
of the universe"***

A. Malraux

Launched in 2007, the Forum d'Avignon is a hotbed of ideas for culture and the cultural and creative sector and an international opportunity for this sector to meet and exchange with the economic and digital world.

EY and the Forum d'Avignon have been working jointly to bring these spheres together since 2008, developing ways for the artistic and creative industries to respond to the critical issues that confront them. EY's widely-recognized expertise and experience in the sector provides major lessons and concrete solutions to the industry's challenges.

Year after year, the Forum d'Avignon and EY have observed and interpreted the forces at work in the cultural field as it is swept by a digital revolution that has redistributed power amidst an ever-changing fiscal landscape.

Editorial

Culture is a defining component of the identity of peoples. It is the origin of the idea of the nation and has guided the notion of the State to its contemporary form. History and the organization of the modern world show too that the atoms knitted into our cultures form the basis of international understanding, both between countries and between international organizations working towards a precise objective.

This is reflected in systems of taxation, which exhibit the same characteristics and objectives.

- ▶ Culture is an industry, organized into sectors.
- ▶ Culture is also a market, though one with highly-specific characteristics.
- ▶ Culture and some of the players involved in it have dramatically changed in scale.
- ▶ The digital revolution now underway is exacerbating the challenges to the cultural sector.
- ▶ As a result of these factors, culture needs a taxation regime in line with its objectives

The aim of this study is to propose concrete measures needed to build a European tax system for culture that is in step with the issues of our age. We are thus following in the path set by others who have done so much to shape cultural policy, such as the pioneering French broadcaster Pierre Lescure.

The eight-year partnership between EY and the Forum d'Avignon testifies to our shared commitment, alongside the leading players in the media and entertainment world.

Bruno Perrin

linkedin.com/company/ernstandyoung
#UE
#culture
#PrixStartupFA
forum-avignon.org
@EYFrance
#FAbdx
ey.com/fr
@forumavignon
ey-avocats.com
#fiscalité
@Bordeaux
young-soci-t-d'avocats

A call for harmony

It is clear from any analysis of fiscal policy for culture in Europe that it is far from being harmonized, or even converging; indeed, some European Union countries simply have no policy at all.

That's partly a consequence of the nature of culture, which is defined by its very history and diversity – as the European treaties recognize. But it seems a poor foundation from which it must rise to meet today's global challenges.

Today's prevailing fiscal cacophony, inevitable in a Europe under construction, calls for damaging tax competition to be transformed into a harmony that better respects the strands of European culture and its diversity. Current international developments in taxation are driving this natural trend.

Pending a future G20 for culture, the EU Member States should urgently establish frameworks that encourage a harmonized approach to taxation if they are to promote European cultural diversity around the world...

*Jean-Pierre Lieb, Éric Verron
& Nicolas Genestier*



A cacophony inherent to
the diversity of European Culture





The origins of the cacophony: foundation of the nation states

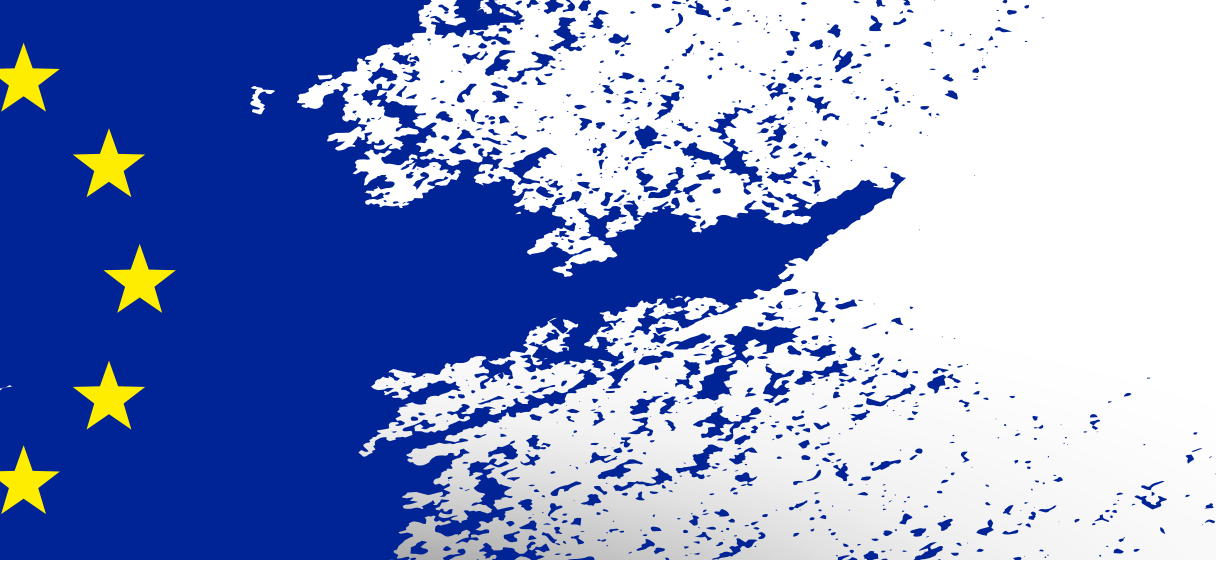
Culture has proved a powerful instrument of the ambition and ideology of states throughout both the brightest and the dimmest moments of European construction.

Giving birth to European nations and nourishing their wealth, culture rapidly became a state affair, not only because a cultural product is a collective asset, which enables us to build a shared foundation and legacy for future generations, but also because culture needs to be financed in order to exist. Public intervention made it possible to safeguard culture by preventing and correcting the inherent risks of economic markets,

In Europe, cultural policies expanded at the same time as nation states. Cultural issues formed part of the drive to develop a common national culture. In France, for example, the Villers-Cotterêts Order of 1539 established French as the official language throughout the country. François 1st later placed the many Italian artists at his court under his protection, while the royal patronage of Louis XIV gave rise to the founding of the Paris Opera and the Comédie Française. This alliance of country and culture was common among European states, and enshrined in the Treaty of Westphalia which in 1648 marked the foundation of modern states and the concept of sovereignty. A defining characteristic of these states was the unifying factor of language. This early agreement based upon a shared conception of culture was a preliminary step towards the advent of a cultural policy. Agreement on the nature of the state and sovereignty was underpinned by a shared understanding that it was founded on two profoundly cultural cornerstones: language and religion.

However, governmental protection of culture came later. In France it was only after the Revolution (1789-1799) that the goal of protecting culture became policy - despite the desire to break with the past. Cultural policies included the legal concept of intellectual property and the development of a national heritage. France was the first country to legislate to support its heritage for the public good, with the aim of protecting the legacy that earlier generations had strived to build.

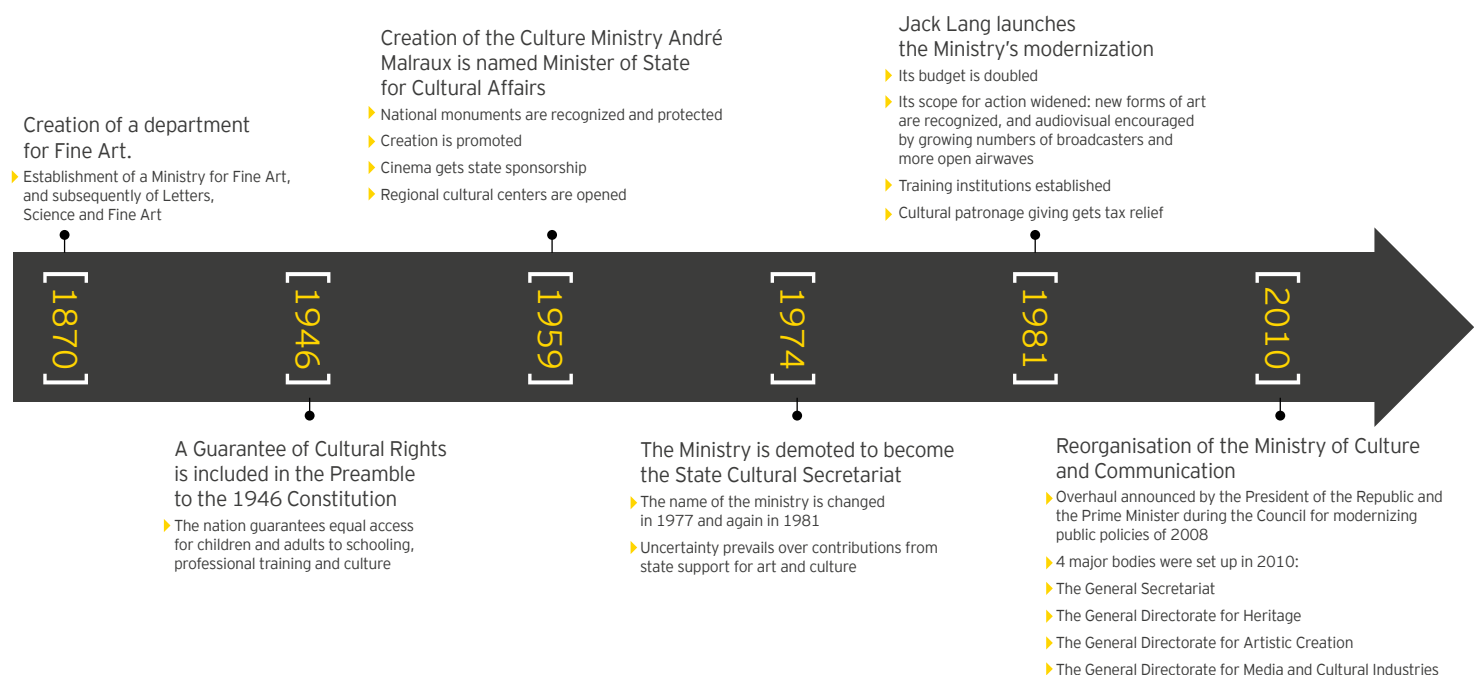
More democratic cultural distribution didn't appear until later, during the Third Republic (1870-1940). Knowledge was seen as a source of stability for both the state and the nation. The establishment, in August 1870, of a Ministry of Letters, Science and Art was a world-leading step towards a freestanding cultural policy. The Third Republic was also a period when mass culture, powered by the new technologies of photography and cinematography, began to develop. At first the state merely regulated these communication tools. Most importantly, from the end of the 19th century on, there grew the idea of developing culture in the service of the state. This idea was a cross-border phenomenon. Countries began to develop in line with standardized rules that formed national "identity kits". Nationalism mounted, as the former hatred and rivalries between royal dynasties was transposed to the people. These national groupings, anchored in concepts of language and History that were often reinvented, drew populations into irreconcilable conflicts and opened the way to oppression of minorities. In the wake of the First World War there emerged fascist states in which culture served to perpetuate racial or national differentiation. The world's first Ministry of Culture was none other than the infamous MinCulPop, the strong arm of national identity under Mussolini's fascist regime in Italy.



However, it was not until the 20th century that a state used taxation to achieve other aims than to cover public expenses in the strictest sense. But then, tax policy gradually became a preferred tool for the implementation of economic, social and cultural policies.

The Second World War and the crimes against humanity then perpetrated were a turning point, both in the use of cultural policies to pursue government aims, and in the broadening of purely state-driven cultural policies to achieve wider goals.

Development of France's Culture Ministry





The history of an autonomous cultural policy for all

Resulting from the desire for lasting peace, **the period from 1946 can be seen to have given birth to French and international cultural policy reinforced, from the 1980s onward, by support for events and festivals.**

In France, the Preamble to the 1946 Constitution is a historical turning point in the role played by culture, establishing it as both a right and a freedom, and conferring the same fundamental guarantees as schooling. Access to culture became a general principle of French law, alongside human rights.

The establishment of a Ministry of State responsible for cultural affairs, headed by André Malraux, was a second decisive stage in the emergence of an independent cultural policy. **The objectives of this new policy were three-fold: preserving** (protecting,

and enhancing of national monuments), **promoting** (support for cinema and contemporary creative arts) and **democratizing** (decentralizing culture with the opening of Cultural Centers in the different regions of France).

Jack Lang reinvigorated the Ministry of Culture from 1981 onwards. It became a major element of government policy and its budget was doubled. The presidencies of Georges Pompidou and François Mitterrand were marked by the creation of cultural monuments such as the Bibliothèque nationale de France, the Institut du monde arabe, and the Cité de la musique, comparable in scale to the **patronage** of Louis XIV. A law introduced on 23 July 1987 excluded art works from the taxable base of Wealth Tax. And finally, **events and festivals were newly heralded** as part of French culture¹.

1. Establishment of a nationwide Music Festival, Cinema Festival, national Heritage Days, etc.

Europe's culture of diversity as opposed to America's culture of dominance

A different cultural model has emerged on each side of the Atlantic, giving rise to a fundamental debate about cultural policies.

The United States: homogenous and dominant

In France the state plays an active role in defending and promoting culture for all. The United States, by contrast, leaves private philanthropy to play a considerable role and draws upon multiple cultural forces, in line with its pluralist traditions.

Cinema highlights many of the differences. French cinemas are subsidized so that they can modernize with digital equipment, whereas in the US, cinemas that cannot afford to modernize are doomed to close. The US has always seen culture as a popular, commercial product or service, whereas France has sought to relieve it of free-market pressures². The US takes the view that favorable tax regimes encourage film producers to make movies for their peers, reducing the pressure to achieve box-office success, undermining economic forces. From an American perspective, although the French system eliminates risk, it does not encourage cultural vitality and misguidedly jeopardizes the long-term prospects of the industry.

The US cultural policy is in step with the principle that the Federal Government should not intervene, and that neither Congress nor President have any role in culture under the US Constitution. Culture is a matter for local initiative, whether private sector or individual, though the Federal authorities can support and encourage such initiatives. So this does not mean there is no cultural policy in the US, but simply that the Federal government

has a policy of non-intervention, and leaves the field open to state governments.

Nonetheless, on 29 September 1965 the *National Foundation on the Arts and Humanities* was set up, steered by the *National Endowment for the Humanities* (NEH) and the *National Endowment for the Arts* (NEA). This foundation has all the characteristics of a French-style Ministry of Culture, though they are financed differently³.

The US has also made money spent on philanthropic endeavors tax deductible, and provided tax relief for cultural foundations.

The US starts with a market philosophy for culture and for cinema in particular, giving competition free rein in the domestic market. However, cinema is perceived as an instrument of cultural policy in international markets, and private funds are encouraged specifically to finance exports of US films.

2. In contrast, the US Jobs Act of 2004 made investments in the US film industry tax deductible.

3. The NEA had a budget of US\$146 million in 2013, compared with US\$7.3 billion for the French Culture Ministry. The NEA employs 170 people, but the French ministry has 80 people employed in the US simply to promote French culture and aid its distribution. Culture in the US is largely driven by market demand. **In 2013 the NEA President expressed the desire for a new model in the US, half way between the French and American models.**



A European culture of diversity intended to help culture to flourish

The European Union clearly sets out the belief that culture is one of the roots of European identity⁴, *“drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”⁵*, that should be preserved.

The Union, *“desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”⁶*, seeks to *“respect its rich cultural and linguistic diversity”* and to *“ensure that Europe’s cultural heritage is safeguarded and enhanced”* (Article 3 of the Treaty on European Union)

In Title XIII of the Treaty on the Functioning of the European Union (TFEU), on culture, Article 167⁷ provides that *“The 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”*.

Thus, according to the letter of the text⁸, although culture falls well within the scope of European action, there is no desire to

harmonize the cultural identities of the Member States, but on the contrary, rather to preserve their diversity.

The EU does not therefore strive to create a European Culture, but to promote the Union’s many cultures. For Europe, this is an existential question which has never been central to concerns in the United States.

Thus, Europe upholds a model of cultural development that rejects standardization and rather promotes diversity based upon its “proactive cultural willpower”⁹. But alongside support for diversity, the EU also strives to “assert the common cultural heritage” and “contribute to the flowering of cultures”¹⁰. **The long-term objective seems to be to encourage culture to flourish naturally.**

The two models seem diametrically opposed: the American drive for hegemonic uniformity is in stark contrast to Europe’s philosophy of diversity encouraging cultures to flourish.

In other terms, a country’s history can materialize in its cultural policy...

4. The preamble to the un-ratified draft European Constitution stated: “Drawing inspiration from the **cultural**, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”. It continued: “Believing that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to **culture**, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world”.

5. Second sentence of the Treaty on European Union

6. Sixth recital of the TEU

7. Formerly Article 128

8. Article 3 of the Treaty on European Union states that the Union “shall respect its rich cultural and linguistic diversity”

9. *Pour une politique culturelle Européenne*, (“Call for a European cultural policy”) Jean Miguel Pire (Fondation Robert Schuman).

10. *Pour une politique culturelle Européenne*, (“Call for a European cultural policy”) Jean Miguel Pire (Fondation Robert Schuman).









2

A fiscal policy for European culture: respect for national cultures impedes harmonization of policies





“Culture is based on a paradoxical pact: diversity must be the grounds for the principle of unity; we must explore and enhance differences... not in order to divide, but rather to enrich this unity. Either Europe is a culture or it does not exist.”
Denis de Rougemont,
Conférence européenne de la Culture, 1949

Europe's cultural diversity at a crossroads

The Maastricht Treaty of 1992 opened the way to European Union action on culture by extending its powers into this field. But the Union still doesn't have all the necessary attributions to pursue a cultural policy, because the European Constitution was never adopted.¹¹ Since powers were never transferred, the European Union can only make recommendations. So the cultural sphere remains subject to the principle of subsidiarity enshrined in Article 167 of the Treaty on the Functioning of the European Union (TFEU)¹².

This situation is clearly the logical result of Europe's attitude to cultural policy. Though its culture has long been recognized as one of the Union's foundations, its role was seen as protecting diversity, as shown by TFEU Title XIII on Culture¹³ “The 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.”

Thus, the Union has encouraged the multiplicity of its cultures by setting up diverse programs with the shared goal of preserving the differences among Member States. This commitment is reflected in international agreements, such as the UNESCO Convention of 2005¹⁴, in which the EU promises to protect and promote the diversity of cultural expression.

The draft European Constitution provided for the transfer of powers to the European Union that would have enabled it to help protect cultural diversity and draw up European laws or legal frameworks to introduce measures of support. But today, the EU can only issue recommendations.

14. Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005

11. Article III-280 of the draft European Union Constitution provided for a transfer of powers to the EU: “1. The 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. 2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas: (a) improvement of the knowledge and dissemination of the culture and history of the European peoples; (b) conservation and safeguarding of cultural heritage of European significance; (c) non-commercial cultural exchanges; (d) artistic and literary creation, including in the audiovisual sector. 3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe. 4. The Union shall take cultural aspects into account in its action under other provisions of the Constitution, in particular in order to respect and to promote the diversity of its cultures. 5. In order to contribute to the achievement of the objectives referred to in this Article: (a) European laws or framework laws shall establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions; (b) the Council, on a proposal from the Commission, shall adopt recommendations.”

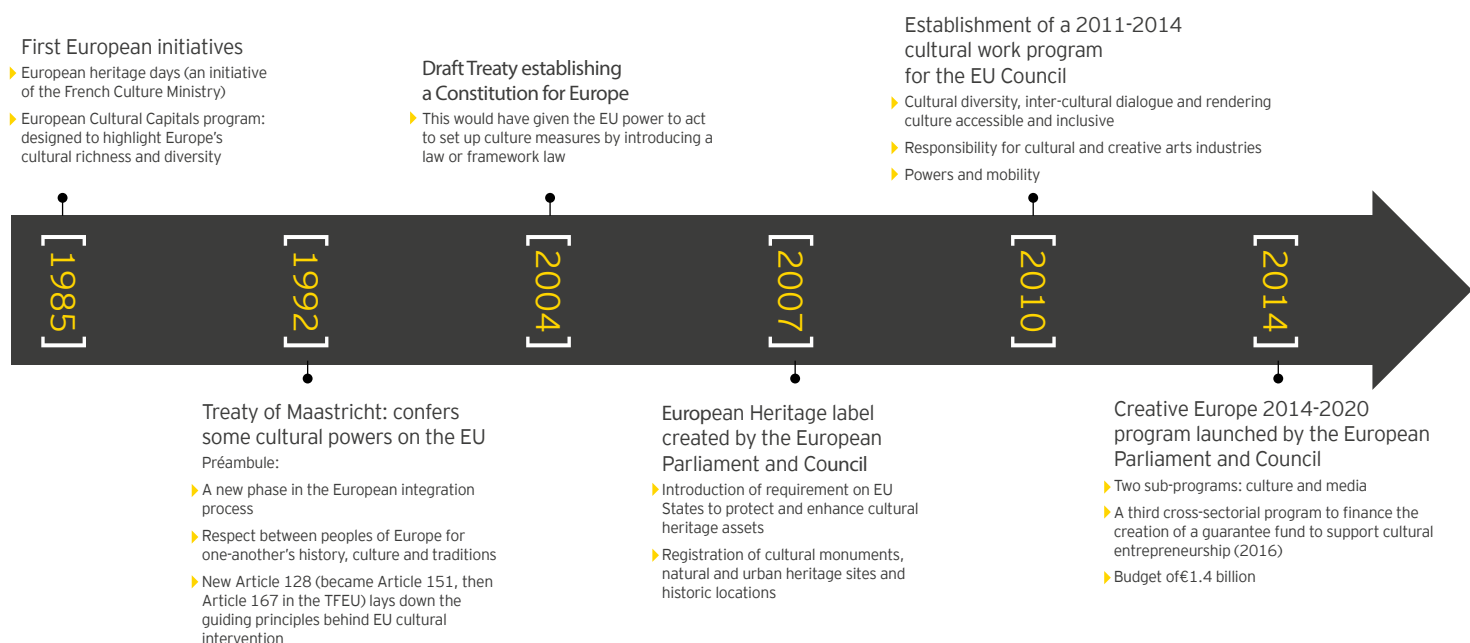
12. This article provides that the role of the Union in the cultural sphere is to support, coordinate and complete actions of the Member States that are designed to strengthen Europe's common cultural heritage.

13. Article 167, formerly Article 128.





European Union cultural initiatives



Direct taxation and culture are therefore in the same situation: both are subject to the principle of subsidiarity which impedes the development of a real common European cultural policy.

But the EU has launched initiatives in the two exclusive preserves of States, thus testifying to the key roles they play in the construction of Europe.

It is thus clearly essential to examine whether the current situation with regard to tax and culture in the EU is desirable.

Wide disparities in tax policy within the European Union are a threat to cultural diversity

A comparative study of cultural fiscal policies in legislation effective in the various EU countries concerning heritage protection, cultural creation and access to culture has revealed the lack of overall consistency in Europe's national approaches to culture. This position based on a cultural policy of non-intervention has caused each country to develop its own policies according to national traditions. The introduction of taxation in the field of culture has followed this individualistic approach, resulting in an increasing number of general or specific, short-term or long-term measures.

The study of the main trends in cultural taxation among EU countries shows that it is not harmonized, and that some countries have no national policy in the sectors identified¹⁵.

The study focused on eight sectors: plastic arts, historic monuments, music and performing arts, cinema and audiovisual production, the press and distribution, books, video games and fashion and design. Despite countries sharing common concerns, the study brought to light a patent lack of harmonization.

It is clear that across the board, reduced corporate income tax rates do not act as an incentive for the cultural sector: rather, lower rates only apply to selected cultural sectors as part of a wider set of incentives, notably to encourage start-ups (as in France and the Netherlands).

Historic monuments benefit from tax incentives in several European countries, but not in the mainstream. Only four of the 13 countries studied have tax regimes that aid historic monuments. Furthermore, such incentives largely target individuals, providing tax deductions for costs arising from the restoration or maintenance of historic monuments, (for example, deductions range from 50% to 100% in France and can reach 80% in the Netherlands).

The cinema sector, however, is more favored, in terms of both the number of countries that have introduced supportive measures and the diversity of the instruments used. Eight European countries have favorable tax measures for the sector, along with all three of the non-EU countries studied. Measures include tax credits for costs incurred filming on national territory. In France, these are typically about 20%, in addition to the opportunity to create special investment vehicles (SOFICAs). In Italy, tax relief ranges from 15% to 25%, (in most cases, provided that Italian

nationals are employed), and in Spain 15% (or 35% for filming in the Canary Islands). Among non-EU States Quebec, in Canada, offers 20% tax credits (plus 16% for movies with special effects or computer-generated images), Mexico 10% and Massachusetts, in the US, provides for a credit of up to 50% on tax due. These regimes are driven by the desire to encourage labor-intensive activities and attract investment and orders from other countries or regions.

Targeted measures are proactively set up by some countries, revealing tax competition between governments in these areas. For example, Italy's "Art bonus" gives a 65% tax credit for donations to organizations engaged in the protection, maintenance, or renovation of cultural entities. In Belgium, a "Tax shelter" allows investors to deduct 310% of the taxable base for amounts invested in audiovisual works against their taxes. And in the United Kingdom, "Creative industry tax relief" allows production costs of films, animated films and television programs, video games, theater productions and orchestral performances to obtain a 100% deduction and a tax refund if amounts are not recovered from sales.

The sector-by-sector study shows that European Union countries act like countries anywhere else in the world: there is no harmonized policy between them. Each country acts in isolation, thus resulting in as much disparity between European countries themselves as between EU and non-EU countries.

Fiscal harmonization within the EU is limited to indirect taxation, in the form of Value Added Tax, the only tax with a truly Europe-wide framework. Yet even this harmonization is inconsistent, since rates vary, as does the sector to which they apply.

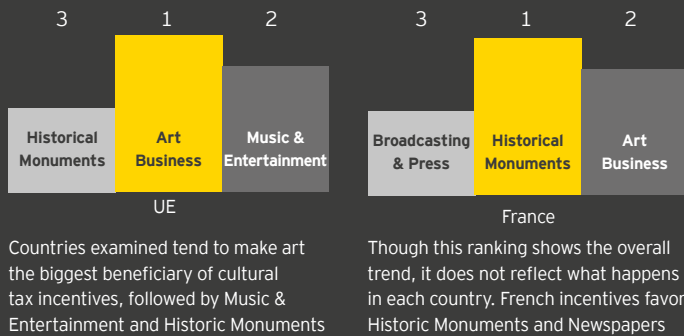
That is evident in the publishing sector. Normally, printed books may be subject to a lower VAT rate (as in 12 of the 13 EU countries studied). But the applicable rates vary between countries:

- ▶ United Kingdom: 0%
- ▶ Italy, Spain 4%
- ▶ Poland: 5%
- ▶ France 5.5%
- ▶ Portugal, Netherlands, Belgium: 6%
- ▶ Latvia: 12%

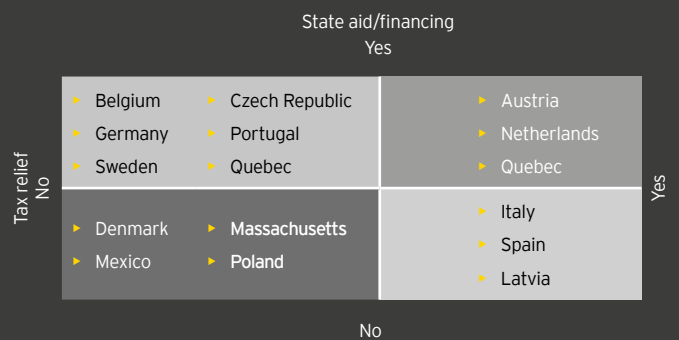
15. Study of cultural taxes in 13 EU countries (France, UK, Germany, Belgium, Spain, Portugal, Poland, Latvia, Netherlands, Italy, Austria, the Czech Republic and Sweden) and three non-EU States: the US, Mexico and Quebec.

Fiscal diversity in figures

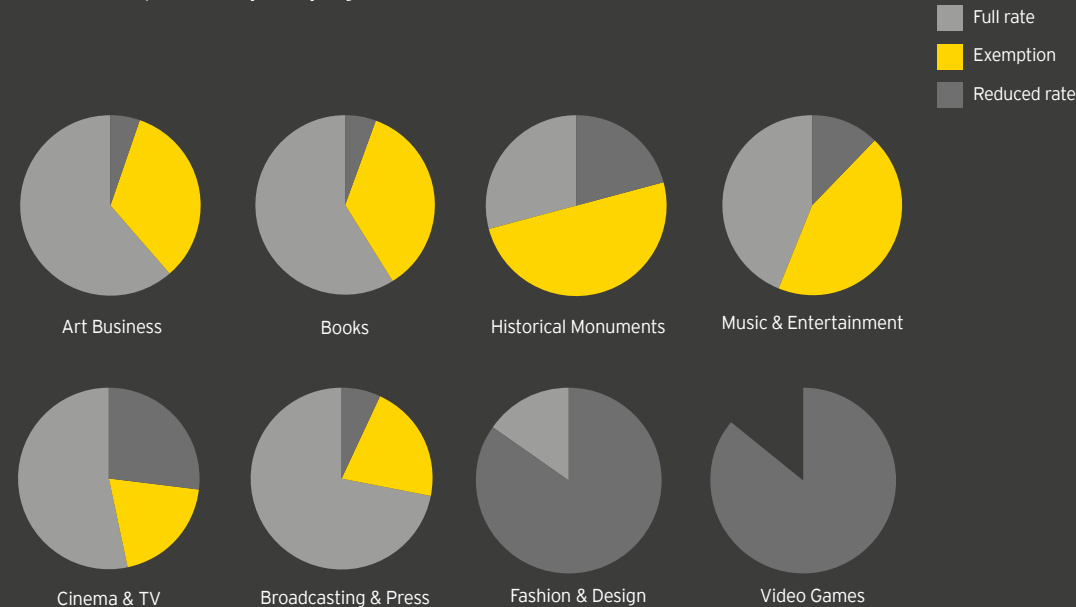
Sectors that benefit



Incentive measures: Tax relief versus State aid



VAT in Europe: widely-varying rates



Tax ruling and incentives practices



Varying incentives across the EU

SECTORS	INCENTIVES						
	Reduced Corporate tax rate	Reduced VAT rate	VAT exemption	Tax credit	Tax relief	State aid	Public financing
Art Business	8%	92%	46%	92%	38%	0%	31%
Historical Monuments	0%	38%	54%	92%	31%	0%	46%
Music & Entertainment	8%	61%	54%	80%	31%	0%	23%
Cinema & TV	8%	69%	23%	80%	31%	8%	46%
Broadcasting & Press	8%	85%	31%	54%	23%	0%	23%
Books	8%	85%	46%	80%	23%	0%	31%
Video Games	8%	0%	0%	31%	31%	0%	23%
Fashion & Design	0%	15%	0%	31%	15%	0%	15%



Comprehensive cross-sector cultural tax policies are no more common outside the EU than within. Elsewhere incentives also vary by sector, depending upon their job creation potential. Fiscal instruments seem to rely more upon expected economic benefits than broader objectives such as facilitating access to culture, safeguarding know-how or preserving cultural traditions.

Quebec is a typical example of this. Culture is widely present

This tax credit is refundable and determined based on labor costs during production. The tax credit rate ranges from 26.25% to 37.5% according to the type of multimedia¹⁶. Fiscal competition between the various Canadian states in this sector is intense. The Canadian state of Ontario offers the most successful multimedia tax credit since it is broader in scope than that of Quebec.

In the face of all these variations, there is an opportunity for Europe to seize – by creating a coherent and easily-understood cultural tax policy. Whilst confirming the lack of coherence among current national approaches within Europe, the study also gives food for thought on possible ways to develop a common European tax policy for culture.

16. Articles 1029.8.36.0.3.8 to 1029.8.36.0.3.17
of the Quebec Tax Code

Proposals for harmonization enhancing European cultures

With this aim in mind, certain principles could be identified as grounds for a harmonized European Union tax policy, hand-in-hand with the necessary creation of a "*Council for Cultural Affairs*".

The founding principles of harmonized tax policy

Transparency is the first principle. The discussion on fair taxation generated in the Base Erosion and Profit Shifting (BEPS)¹⁷ reports produced by the Organization for Economic Cooperation and Development (OECD) and the debates within the EU, together with studies by the European Commission on fiscal competition¹⁸ show that citizens are increasingly aware of tax issues and want clearer links between the incentives given and the benefits achieved for the community. Distinct objectives need to be set and the results of incentives deployed within a cultural tax policy need to be made public.

Coherence must be a cardinal principle of a harmonized EU cultural tax policy. This applies both to the areas benefiting from fiscal incentives and to the coordination of national policies arising from the European framework. A European cultural tax policy must not exacerbate tax competition, but must result in a cooperative approach to achieve common objectives.

Finally, **Transparency and coherence cannot thrive without efficiency.**

Efficiency requires the right balance between the advantages given and the results obtained. A system of reporting and

statistical analysis are thus necessary, based upon simple, objective criteria, enabling an **objective evaluation of the return on investment so as to maximize the effects of the financial support afforded.**

Towards a common framework ensuring coherent cultural policies

A policy favoring cohesive European investments in the cultural field already exists, backed by EU structural funds. Fiscal incentives could reinforce this cohesion policy via harmonized tools. Setting up a common fiscal policy within EU actions would create an attractive center towards which the rest of the world would be drawn, and avoid damaging competition between EU countries.

The European Union therefore needs to take action to avoid Member States adopting defensive fiscal strategies. Where tax policy has traditionally been a decisive factor in national competitiveness, it could be harmonized so that this competitiveness may extend beyond the borders of the European Union. Putting an end to disparate tax regimes with respect to culture could be a further step towards a consensual and cooperative approach in this area by Member States.

17. Base Erosion and Profit Shifting Report, OECD, Paris

18. See the Communication of 18 March 2015 from the Commission to the European Parliament and Council on the need for fiscal transparency to fight tax fraud and tax evasion. Also the "packet of measures" in the OECD's BEPS Action Plan presented to the Commission on 28 January 2016 by Pierre Moscovici, European Commissioner for Economic and Financial Affairs, Taxation and Customs.



A three-fold approach to harmonizing European fiscal policy

PROTECTING

Protecting implies ending the piecemeal structure of existing taxation and promoting a homogenous protection policy

Include a cultural policy within the project for a Common Consolidated Corporate Tax Base



The recent new momentum behind the project for a common corporate tax base¹⁹ at European level offers a unique opportunity to homogenize cultural support measures. Rather than leave countries free to create specific tax niches, this project provides a rare opportunity to introduce a single common framework that would foster and support cultural activities.

Harmonize practices with respect to tax credits and cultural patronage at EU level



To end competition which is damaging in the long term, it would be useful to move towards harmonizing tax credits, both in terms of financial effects and sectors targeted. It is notably worth considering the harmonization not only of patronage practices, by legal entities and individuals, especially from a cross-border viewpoint, but also of the various existing private wealth tax mechanisms.

Create a consistent EU-wide policy for conserving Europe's heritage



Europe's heritage is what indisputably constitutes its richest asset. It is essential to continue to invest in conserving this heritage and harmonizing fiscal policies both on account of its inestimable value and of its present and future economic impact. In doing so, it will be necessary to pay particular attention to countries where conservation is weak because resources are scarce. Heritage must remain a powerful tool for economic development which can help maintain and leverage quality for many cultural industries within the EU.

19. The CCCTB is a single set of rules to determine the taxable profit, to be used by companies operating within the European Union. A company would therefore only have to comply with a single regime within the Union to calculate its taxable profit, rather than with each of the different regimes in the Member States where it operates.

CREATING

Develop a common European ruling for cultural industries



It would be useful to work towards a consensus on the laws and rules needed to enhance stakeholders' confidence in any new tax instruments introduced. The aim would be to avoid States creating more specificities, and rather create a common European framework of rules overriding national differences. Doing so would require existing European and international constraints to be taken into account and integrated in a new ruling.

Consider introducing a cultural fiscal passport



To encourage creativity in the cultural domain, the introduction of a "fiscal passport", valid within Europe, could be explored. A harmonized European regime

for a given activity or a particular domain could help artists' mobility within Europe. This would enhance understanding of the European legal framework and hugely simplify the burden of administrative formalities that artists have to bear.

DISTRIBUTING

Accomplish harmonization of VAT, both in respect of definitions of cultural goods and services and of rates applicable



The widespread use of reduced VAT rates to improve access to culture must be improved. First, definitions of cultural goods and services need to be harmonized throughout the Union, which should be followed by harmonization of rates.

Create a body to oversee European cultural fiscal policy

CREATING, PROTECTING, DISTRIBUTING

Set up an informal "Council for Cultural Affairs" to design a harmonious fiscal policy for culture



Just as EU economic and finance ministers have the now widely respected Economic and Financial Affairs Council (ECOFIN), culture is a worthy enough issue to warrant

bringing together the culture ministers (or their counterparts) of all Member States and of relevant European Commissioners. This working group would have the task of developing a harmonious cultural policy.

This Cultural Affairs Council (CAC) could begin as an informal body, like the Eurogroup, without the need for any legislation.



663

3

A fiscal policy to support the global spread of European cultures in response to the commercialization of cultural products



"If you really look closely, most overnight successes took a long time"

Steve Jobs



This study, carried out in 16 countries, including 13 within the EU, shows that taxation remains essentially a tool of economic competition even if cultures are supposed to belong to humanity as a whole. However, although taxation may encourage particular behaviors²⁰, these incentives quickly reach their limits, as culture cannot be off-shored without side-effects, as other economic activities can.

The opportunity to consider taxation as a tool to spread the influence of European culture worldwide is a positive and dynamic way to make the most of this asset. The European Union could see it as a way to promote and protect its cultures beyond its borders, and thereby complete the construction of a European cultural policy addressing both a local and a global audience.

20. Notably in the field of cinema: the film *Exodus: Gods and Kings* by Ridley Scott (2014) was filmed on the isle of Fuertaventura (Spain) in order to benefit from a 35% tax credit, having originally been scheduled to be filmed in Marseille (France).



The global competition for cultural influence requires a real European strategy

Now that the phenomenon of cultural industrialization²¹ is firmly established, public stakeholders are compelled to organize their efforts to encourage creativity internally and thereby broaden their cultural influence.

Culture: between commercialization and heritage - UNESCO versus the WTO

Are cultural products and services tradable goods subject to WTO rules or free trade and investment treaties, or are they manifestations of cultural diversity, and a common heritage under the auspices of UNESCO?

Most cultural goods and services now fall within the scope of WTO rules.

The WTO was established following the 1994 Marrakesh Agreement, replacing the General Agreement on Tariffs and Trade, set up in 1947, as the global supervisor of the multilateral trading system.

The GATT had a selective approach to the national treatment of internationally-traded goods, known as the **“positive list” approach. Liberalization was achieved sector-by-sector, and each country was free to choose which sectors to open up.** But the WTO, in agreements such as the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted the opposite approach. In principle, all goods and services are concerned by the drive to liberalize, provided they are traded. The objective is to liberalize “any service in any sector” (Article 1:3 (b) of the GATS).

The WTO imposes a principle of non-discrimination on traded goods and services. But national cultural policies are inherently discriminatory, and sometimes include quotas for the distribution of films, music, and so on.

Thus, when cultural goods and services are subject to the WTO rules, all national policies intended to ensure the preservation of cultural diversity inevitably become incompatible with those rules.

Debate has focused on the audiovisual sector, leaving aside many other questions on the role of cultures.

During the GATT Uruguay Round of 1993, Jacques Toubon, then France’s Culture Minister, put forward the idea of a “cultural exception”, subsequently replaced in 1998 by the concept of “cultural diversity” to make explicit the objective being pursued in the talks. It is seen as a non-negotiable means to achieve the goal of cultural diversity and ensure that the WTO has no right of scrutiny over cultural policies. The concept of “cultural diversity” emerged from discussions at UNESCO’s Stockholm conference in 1998. This positive concept expresses the desire to protect all of the world’s cultures, not only that of France, against the threat of standardization.

“Cultural diversity” seeks to make culture an exception within free-trade areas to avoid preferential policies being banned in the name of free trade. In other words, this is not a rejection of the idea that culture is universal but a way of protecting against dominant cultures that aim to achieve uniform culture everywhere.

These cultural exemptions end automatically after 10 years, so have to be renegotiated in each negotiation cycle, and can only be accorded to a country when it joins the WTO.

The EU Member States and most WTO members have refused to agree to liberalize their audiovisual sector, believing it essential to retain the right for states to intervene in the event of being challenged at the WTO. 27 states opted out of the GATS for audiovisual services. Only 19 of the 134 states negotiating were willing to liberalize their audiovisual sectors. But new members of the WTO, such as Albania, Armenia, Georgia, Kyrgyzstan and Panama do not have this protection.

The **“cultural exception”** or **“cultural diversity”** protection, which has been criticized by states seeking complete removal of trade barriers, is nonetheless very limited in its scope, and essentially covers only the audiovisual sector.

Meanwhile, the preservation of our cultural heritage is the competence of UNESCO since the Convention Concerning

21. See La culture, un business désormais comme les autres, (“Culture, now the same as any other business”) Les Echos, 4 December 2015.



the Protection of the World Cultural and Natural Heritage was adopted in Paris on 16 November 1972.

The Convention, identifies as “cultural heritage”:

“1. monuments: 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;

2. groups of buildings: groups of separate or connected buildings which, 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;

3.sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

The definition of cultural heritage adopted in 1972 appears narrow, in that it fails to consider the preservation of intangible heritage which is so important today.

But the French-speaking world has given rise to a project that aims to shift negotiations on matters of culture from the WTO to UNESCO, with a view to protecting cultural goods and services from trade liberalization. This effort, driven by Quebec and Canadian politician Louise Beaudoin, is underpinned by a study by Yvan Bernier of the University of Laval. With the support of some non-French-speaking countries, including Germany, this project gave rise to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by a majority vote at UNESCO’s 33rd General Conference on 20 October 2005. 148 countries voted in favor, two voted against (the United States and Israel) and four countries abstained.

This Convention makes the cultural exception the norm worldwide, with the following objectives:

“(a) to protect and promote the diversity of cultural expressions; (b) to create the conditions for cultures to flourish and to freely

interact in a mutually beneficial manner; (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace; (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples; (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels; (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link; (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning; (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory; (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.”

Thus, while the WTO sees cultural goods and services as undifferentiated (except for a few specific cases) UNESCO seeks rather to preserve cultural diversity by viewing it as the world heritage of humanity.

The opposition of the United States to this alternative vision triggers debate between states at every negotiation.

Whilst multilateral negotiations have stalled at the WTO, bilateral agreements are reached increasingly. Bilateral Investment Treaties (between two countries) and Free Trade Agreements (between more than two countries) are now negotiated separately between states around the world in order to achieve economic liberalization.

Today, cultural goods and services are therefore at the crossroads of these two visions and two opposing forces.



Europe: a common mandate without a common strategy

The Lisbon Treaty (Article 207) transferred responsibility for trade treaties from Member States to the European Union²². Free trade agreements are therefore negotiated by the European Union in place of the bilateral investment agreements previously negotiated individually by Member States. The issues has been shifted from State-to-State discussions to talks between economic zones.

The replacement of bilateral investment treaties between Member States (190 for France alone) and non-EU countries by European treaties is underway. It is a long-term process, requiring a transition phase, for which, on 7 July 2010, the Commission adopted a proposal for a regulation establishing transitional arrangements for bilateral investment agreements between Member States and non-EU countries..

On the same day the European Commission published a Communication entitled "Towards a comprehensive European international investment policy" in which it set out investment protection standards. Investment agreements, it said, should be concordant with the other policies of the Union and Member States including those on cultural diversity. It is noteworthy that the Council of Europe must agree unanimously on the negotiation and conclusion of agreements on cultural and audiovisual services when these agreements risk harming the Union's cultural and linguistic diversity.

Current free trade negotiations particularly with the United States over a Transatlantic Trade and Investment Partnership (TTIP) are therefore a critical test for the protection of European cultural diversity.

Though this diversity objective was partly instigated by France, it is now championed by the European Union. It was France's Culture Minister, Aurélie Filippetti, who argued the case for the


"European Cultural Exception" at the beginning of the TAFTA/ TTIP negotiations in order to exclude the audiovisual sector from free trade.

The United States, in the meantime, has signed increasing numbers of bilateral trade treaties in which the parties agree not to increase the preferences or support which each gives to its cultural industries. Some countries have agreed substantial limits to their capacity to implement cultural policies, including South Korea, Morocco, Australia and Chile.

The European Union has been given a responsibility for cultural policy without being given a clear strategy. It needs one which goes beyond the single issue of the preservation of European cultural diversity limited to the audiovisual sector alone.



22. In the United States such treaties are subject to the regime of International Treaties (Article 2:2 of the Constitution)



A tax system that can help European culture triumph globally

CREATING

Create a favorable tax regime for enterprises in the cultural sector to support creativity and innovation




Europe, the birthplace of the renaissance, now needs to attract talent and artists once again. Creating a favorable tax regime, identical in all Member States and capable of attracting talent from non-EU countries, could be a way to achieve this objective.

PROTECTING

Promote a new cultural right to tax that takes account of the use of European culture for profit by non-EU tax residents.



Building upon the ideas of the OECD on both intangible assets and the fair allocation of tax bases, it looks possible to work towards the recognition of a new cultural nexus. This connection to a state would allow culture to be acknowledged as an intangible asset whose use for profit gives rise to a fair tax obligation of the country from which it originates (source country).



Create an international governance body for cultural fiscal policy

CREATING, PROTECTING, DISTRIBUTING

Set up a G20 for Culture to tackle the issues and divergent views (between the WTO and UNESCO) arising from the global trade in cultural goods and services.



Given the issues and divergent views (between the WTO and UNESCO) it would be extremely beneficial to add culture to the agenda of the G20.

The Group of Twenty (G20), comprises 19 countries plus the European Union. Ministers, central bank governors, and heads of state meet regularly to aid international collaboration, whilst including the principle of a broader dialogue to take into account

the growing economic weight of certain countries.

Though initially focused on economic and finance issues, its scope was broadened to social questions in 2010 and agricultural issues in 2011. Culture should be added pre-emptively... The G20 was set up in 1999 following a series of financial crises during the 90s. It would be advisable not to wait for a serious global cultural crisis to take into account this important factor of global policy.

The 2013 Saint Petersburg G20 summit initiated the construction of a new global tax order. A global cultural policy, given its importance, now calls for some much-deserved, benevolent attention... .

A “Council for Cultural Affairs” could be one of these fairy godmothers.



Ernst & Young Société d'Avocats

EY Société d'Avocats is one of the French leading firms in tax and law. Through our membership in a global organization, we put our expertise to serve a sustainable and responsible performance. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our clients, for our people and for our communities.

Ernst & Young Société d'Avocats
Registered with the Hauts-de-Seine Bar (France)
Member of Ernst & Young Global limited
EY refers to the global organization and may refer to one or more of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit www.ey.com.

© 2016 Ernst & Young Société d'Avocats.
Tous droits réservés.
Studio EY France - 1603SG576
SCORE France N° 2016-016
Photos : © Fotolia - © Gettyimages

In line with EY's commitment to minimize its impact on the environment, this document has been printed on paper with a high recycled content.

This material has been prepared for general informational purposes only and it is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey-avocats.com

Contacts

Jean-Pierre Lieb

*Attorney at Law, Partner,
EMEIA Tax Policy & Controversy Leader,
Ernst & Young Société d'Avocats*
Direct: +33 1 55 61 16 10
Mobile: +33 6 34 16 72 80
jean.pierre.lieb@ey-avocats.com

Eric Verron

*Attorney at Law, Partner,
TMT sector Tax Leader,
Ernst & Young Société d'Avocats*
Direct: +33 1 55 61 13 31
Mobile: + 33 6 72 84 30 43
eric.verron@ey-avocats.com

Nicolas Genestier

*Attorney at Law,
Ernst & Young Société d'Avocats*
Direct: +33 1 55 61 18 58
Mobile: +33 7 78 20 02 49
nicolas.genestier@ey-avocats.com

The following contributed to the study:

**Charline Schmit, Clémence Boissonnat, Guillaume Exerjean,
Kevin Guillou, Louisa Melbouci, France de Roquemaurel,
Nicolas Salmon, Eliza Mason, Alison Claizergues,
Heather Jones Hessas**