

Directive 2014/60/EU and Good Faith Acquisition of Cultural Goods in Italy

Geo Magri

(European Legal Studies Institute, Universität Osnabrück, Deutschland)

Abstract The international financial crisis seems to have no effect on global art market; as the TEFAF Report demonstrates art market has grown exponentially in the last ten years. The increasing economic value of this market attracts criminal organisations and it happens quite often that cultural property is object of illicit trade. For this reason, it seems interesting to focus the study on the international provisions regulating the duty to return stolen or illicit exported cultural property and their effects (if any) on the Italian rule protecting the *bona fide* purchaser also in case of stolen goods.

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1 Cultural Property Protection in a Growing Art Market

The expression *cultural property* was used, for the first time, by the Hague Convention (Zagato 2007). Following what occurred during WWII, the international community deemed it essential to protect cultural property from the devastating effects of war.

If protection of cultural property from armed conflicts could be considered as a primary form of protection, in recent times a new kind of protection is arising: the protection of cultural property from illicit import and from theft. This protection is becoming more and more meaningful on one hand because art market is growing continuously, on the other because this sector is of interest to criminal and/or terrorist-led organisations.¹ For this reason, it is important to adopt suitable rules to fight illicit trade of cultural property on both national and international level (Fiorentini 2013, 103 ff.; 2014a, 189 ff.; 2014b, 589 ff.).

1 See the Resolution 2347 (2017) of the UN SC adopted on 24 March 2017.

One of the easiest ways to appreciate new trends of the international art market is to analyse the TEFAF Art Market Report (Magri 2017), a yearly report issued by one of the world's most well-known art fairs. This fair takes place each year in Maastricht and is considered to be a highly significant annual meeting for art experts, sellers and collectors. Every year the TEFAF drafts a Report that examines global art market trends. The Report also examines specific market sectors, such as the increase in art fairs, online sales and the economic impact of the various segments of the art market. According to the TEFAF Art Market Report 2015,² in 2014 the global art market reached its highest ever-recorded level. Post-War and Contemporary art dominate the art market with modern art accounting for 28%. Old Master sales accounted for only 8% of the fine art auction market, even if this field has over 50% of the market share in terms of value. In 2013, the US held the greatest share of fairs (39%), with Europe in second place (38%),³ and Asia becoming a significant market (12%). The top 22 fairs and sales generated over a million visitors and art fairs accounted for an estimated €9.8 billion in sales. This amount is even higher if we consider that many sales took place after the fair as a result of new contacts between dealers.

The digital art market is also growing rapidly, as the Internet revolutionises this sector too. E-commerce in art objects has attained a significant place; online sales of art and antiques were estimated to have reached around 6% of all sales in terms of value, with the majority of sales being made in the so-called "middle market" (\$1,000-\$50,000).⁴

The 2015 report clearly sets out just how important the art market is from an economic point of view. It contributes to employment and positively influences adjacent industries. According to the TEFAF report,

it is estimated that 2.8 million people are employed globally by around 300,000 companies trading in art and antiques. The global art trade spent €12.9 billion on a range of external support services directly linked to their businesses in 2014.

In the TEFAF Art market report 2015,⁵ Dr. McAndrew focuses on the 2015 art market. According to this report, in 2015 the online space added new

2 The report (written by Dr. Clare McAndrew, a cultural economist specialising in the fine and decorative art market) is available at: <http://www.tefaf.com> (2017-12-15).

3 The US and UK accounted for a combined 62% of all world imports of art and antiques.

4 It should be noted that we should not consider only e-bay; there are websites dedicated to art auctions and sales, such as, for instance, Art.com, Artspace.com, liveauctioneers.com and Gagolian.com.

5 The report is available at: <http://www.tefaf.com> (2017-12-15).

intermediary phases to transactions, some of which are intermediaries to intermediaries in the offline market. The highest-spending top collectors of art do not, however, require any alternative to the old system of auction houses or galleries.⁶ Therefore, top purchases via online sales are still rare. However, without a doubt for those art buyers operating below the highest levels the online art space does make art more accessible. The report 2016 marks the first time since 2011 that the art market has decreased in value. This decrease however may be explained by the higher level of sales generated over the last ten years, making it harder to ensure consistent growth, particularly in a supply-limited art market. This has caused an unavoidable slowdown as some sectors have struggled to keep up the pace (Kinsella 2016). In 2015, only the US market enjoyed significant growth, with sales there attaining the best worldwide performance, registering a 4% increase over 2014. Other regions experienced a decline. In particular Chinese market sales dropped 23% and sales in the UK dropped by 9%. The economic context is particularly important for understanding the relevance of the cultural market and the need to regulate it accordingly. In this field, it would be particularly helpful to adopt a law and economics approach in order to better appreciate whether the rules introduced are adequate to regulate the market, or not. The economic value of art makes it evident why this sector is of interest to criminal and/or terrorist-led organisations (Kretschmer 2016, 308 ff.).⁷

The economic analysis also makes it clear that the art market is not confined to national boundaries. This feature of the market has effects on its regulation. As Professor Jayme (2015, 29) has pointed out, "Today art law is in itself an international subject". If someone goes to a local German flea-market and finds a Mozart autograph,⁸ he or she may be faced with a recovery claim from the Austrian National Library (Jayme 2015, 29). In countries like Switzerland there are even toll-free warehouses where high-priced art objects are stored, a no-man's-land of international commerce (Jayme 2015, 29).

In order to provide for the protection of cultural property as well as art commerce, the subject of art law as such is in urgent need of further development.

Examples of this development in international law can be found in the 1970 UNESCO Convention or the 1995 Unidroit Convention and, at Euro-

6 See the interview of Dr. McAndrew published on *Artnet News*, 9 March 2016, URL <http://news.artnet.com/market/clare-mcandrew-on-the-tefaf-report-274279> (2017-12-15).

7 See also the article "Culture and jihad, grimly connected through the art market's 'blood antiquities'". *Economist*, 30 November 2015, URL <http://www.economist.com/blogs/prospero/2015/11/antiquities-and-terror> (2017-12-15).

8 See Amtsgerichts AG Coburg, 24.04.1992. *Neue Juristische Wochenschrift*, 1993, 938.

pean level, in the Regulation 3911/92, amended several times and replaced by Regulation 116/2009⁹ and in the Directive 93/7/EEC,¹⁰ amended by the Directive 2014/60/EU.¹¹

In this paper, I will focus my attention on the duty of restitution of cultural property in case of illicit importation and theft (Magri 2011, *passim*; Stamatoudi 2011, *passim*; Frigo 2007, *passim*; Jayme 2006, 393 ff.). The duty arises from the deeply connection between cultural goods and their environment, there are no doubt that a simple modification of the place in which a cultural object is located could influence (and prejudice) its cultural value (Giannini 1976, 1 ff.; Magri 2011, 118). The duty of restitution has also an interesting implication in case of good faith purchaser, in particular in Italy, where art. 1153 of the Civil Code give a broad protection in case of acquisition *a non domino*.

2 The 1970 UNESCO Convention and 1995 Unidroit Convention

The 1970 UNESCO Convention is the first international instrument dedicated to the fight against illicit trafficking of cultural property. Its aim is to prevent activities threatening the conservation of CH like thefts, illicit excavations of archaeological sites and illicit circulation of cultural property. According to art. 1 of the Convention the term ‘cultural property’ means “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and which belongs to one of the categories listed in the same article. The Convention’s principles are generally considered crucial for their importance, however it is not so persuasive in regard to the measures it provides to guarantee their achievement (Frigo 2007, 12 ff.). In other words, the Convention introduces beautiful principles without effectivity, because the principles are not assisted by detailed provisions ensuring their achievement by member States.

To ensure greater effectiveness in the protection of cultural property from illicit trade, in 1995 the Unidroit adopted a Convention on Stolen or Illegally Exported Cultural Objects. The purpose of this Convention was to develop uniform rules regarding the international art trade. The Unidroit Convention contains minimal legal rules on the restitution and return of

9 Council Regulation (EC) no. 116/2009 of 18 December 2008 on the export of cultural goods, in OJ L. 39 of 22 February 2009.

10 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, in OJ EEC 74 of 27 March 1993.

11 Directive 2014/60/EU of the EP and the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a member State and amending Regulation (EU) 1024/2012, in OJ L 159 of 28 May 2014.

cultural objects and it regulates one of the most salient problems deriving from the restitution of cultural property: the protection of the *bona fide* purchaser. According to art. 3 of the Convention “the possessor of a cultural object which has been stolen shall return it”. However, if the possessor neither knew (nor ought reasonably to have known) that the object was stolen and he (she) can prove his (her) due diligence when acquiring it, the convention entitles him (her) to payment of a fair and reasonable compensation (art. 4). The same provision applies in case of illegally exported cultural property (art. 6; see also Wantuch-Thole 2015, 213). According to some scholars this duty means that “the States of the civil law tradition, which allow, in their legal traditions, the acquisition *a non domino* of property by the good faith possessor must modify their legislation in the superior interest of restitution of the stolen cultural object” (Borelli, Lenzerini 2012, 18). Such a consequence on the national legislation is maybe too broad, but it is clear that the duty foreseen by the Convention operates even if the national legal system protects the interests of the good faith purchaser.

The 1995 Unidroit Convention restates the same principles of the 1970 UNESCO Convention, but it is more detailed regulating the restitution of cultural property. Such a meticulous approach and the lack of the room for manoeuvre left to the contracting States are indeed the reasons why the 1995 Unidroit Convention is unsuccessful (Frigo 1996, 435 ff.; Jayme, Wagner 1997, 140 ff.; Gardella 1998, 997 ff.). To better understand the reason because States are reluctant to ratify the 1995 Unidroit Convention and its deep impact on the international art market it seems really meaningful to read what Mr. L.A. Lemmens, the Secretary General of TEFAF, wrote in regard to the Convention:

a dealer at a fair in any Unidroit country could be bankrupt by accusation from any visitor claiming that the dealer is handling stolen goods. Under Unidroit regulations, such accusation can lead swiftly to confiscation of paintings and objects even if his innocence is proved.¹²

It is quite obvious that art dealers started a fierce lobbying to ensure that the Convention is not ratified by national Parliaments (Lalive 2009, 324).

3 EU and the Protection of Cultural Property

Only in the 1990s did cultural property begin to be considered a subject of regulation by the EC. In fact, in the ECT cultural goods were considered

12 XXI Art Newsletter, no. 15, 19 March 1996.

as only one particular aspect of the common market (Barnard 2016, 163 ff). According to art. 36 of the TFEU (earlier art. 30 of the TEC):

The provisions of articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] protection of national treasures possessing artistic, historic or archaeological value.¹³

In the 1990s, the EC began to promulgate rules defending cultural property against illegal exportation and ensuring its return, such as Regulation 3911/92 or Council Directive 93/7/EEC.

Regulation 3911/92 was amended several times and later replaced by Regulation 116/2009. This Regulation provides uniform control measures on the export of cultural goods outside the European Union. According to Regulation 116/2009, an export licence is required to export a cultural good outside the European Union's customs territory. A person wishing to export such goods must address a licence request to the competent EU member state authority and an issued licence shall be valid throughout the Union. The country authority may reject an export licence only if the goods are protected by legislation covering national treasures of artistic, historical or archaeological value. The export licence foreseen by the Regulation must be presented, together with the export declaration, to the competent customs office when the customs formalities for export are being completed.¹⁴

In 1993, Council Directive 93/7/EEC was put in place in order to establish a mechanism for the return of cultural objects that had been unlawfully removed from the territory of an EU country. The Directive was aimed at securing the return of cultural objects that had been unlawfully removed from the territory of an EU country after 1 January 1993 and classified as national treasures possessing artistic, historic or archaeological value under national legislation or administrative procedures and fell within one

13 Frigo (2017, 75) underlines that the "comparison between the various (equally authentic) language versions of the TFEU (as well as of the former EEC Rome Treaty) shows some significant differences among them as to the scope of art. 36. At first glance, the margin of discretion of Member States appears wider under the Italian, Spanish and Portuguese versions, in that arts. 34 and 35 do not preclude prohibitions or restrictions on imports or exports of goods on the grounds of protecting a Member State's artistic, historic or archaeological heritage. Conversely, the French and English versions".

14 According to the Regulation 116/2009 there are three types of licence: a *standard licence* (normally used for each export subject to Regulation 116/2009 and valid for one year); a *specific open licence* (particularly useful in the case of an exhibition in a third country and valid for up to five years) and a *general open licence* (issued to museums or other institutions to cover the temporary export of goods belonging to their permanent collection; this licence is valid for up to 5 years).

of the categories listed in the Annex to the Directive or formed an integral part of a public collection (art. 1(1)). Under art. 1(2), unlawful removal was considered as any removal in breach of the legislation in force in the State or in breach of the conditions under which temporary authorisation was granted.

In order to ensure the return of cultural objects, the Directive specified the procedures regarding the return proceedings. According to the Directive these proceedings could not be brought more than one year after the requesting EU country became aware of the location of the cultural object and the identity of its possessor or holder (art. 7(1)). This limitation period was considered one of the most problematic aspects of the Directive and was generally considered too short to guarantee the possibility to bring an action for restitution (Magri 2011, 60 f. and 123 ff.).

In addition, restitution proceedings could not be commenced if more than 30 years had elapsed from the time of unlawful removal of the object from the territory of the requesting Member State. The only exception in this regard was for objects that are part of public collections or ecclesiastical goods, where the time-limit for bringing a restitution action was regulated by national legislation or bilateral agreements between EU countries (art. 7).

It is quite important to note that the Directive was neutral in regard to the ownership of the returned good. Its purpose was exclusively to secure the return of the cultural object to the requesting Member State, not to regulate its ownership after the restitution. According to art. 12, "Ownership of the cultural object after return shall be governed by the law of the requesting Member State". However, the possessor was to be awarded compensation in the event of loss of possession if he or she exercised due care and attention when acquiring such object. The compensation was to be paid by the requesting Member State, which could then claim reimbursement from the persons responsible for the unlawful removal.

For lawyers engaged in private law, the provision for compensation was perhaps the most interesting part of the Directive because of its intrinsic link to the protection of a good faith purchaser. Indeed, as we will see, this topic has been thoroughly discussed, particularly by Italian scholars (Sacco, Caterina 2014, 445 ff.; Comporti 1995, 395 ff.; Magri 2015, 741 ff.).

Council Directive 93/7/EEC was clearly in need of amendment in order to improve its effectiveness (Magri 2011, 115 ff.). According to reports from the EC to the Council, the EP and the Economic and Social Committee, the Directive's problematic areas could be listed as follows:¹⁵

¹⁵ Fourth Report from the EC to the EP, the Council and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. Bruxelles, 30 May 2013; Third Report. Bruxelles, 30 July 2009; Second Report. Bruxelles, 21 December 2005; and

- a. lack of administrative cooperation between Member States (also taking into consideration language barriers);
- b. in the case of archaeological goods taken from illegal excavations it was too difficult to prove the object's provenance and/or the date when it was unlawfully removed;
- c. the Directive alone did not suffice for combating illegal trade in cultural goods;
- d. the Directive was only rarely applied, mainly due to administrative complexities, high costs, and the restrictive limitations and the short time periods for initiating return proceedings;
- e. the Annex needed to be amended to include new categories of goods and/or to modify the financial threshold or the reporting rate.

Even though the Directive had numerous limitations, it cannot be considered to have been useless. Member States started to develop and use administrative cooperation to search for cultural objects and to notify each other of their discovery in another EU Member State's territory. In my opinion, there is no doubt that the most important result was the increase in the number of amicable returns of cultural objects carried out after the Directive entered into force.¹⁶ The second influential result secured by the Directive was to increase awareness between EU countries and international traders concerning the need to improve the protection of cultural goods at the European level.¹⁷

3.1 Directive 2014/60/EU of 15 May 2014

In 2014, the Council Directive 93/7/EEC was recast by Directive 2014/60/EU, which came into force on 19 December 2015. The recast process began back in 2009 and the recast Directive aims at better reconciling the free circulation of cultural objects with the need for more effective protection of CH in light of the TFEU (Frigo 2017, 72).

The purpose of this Directive is to improve the previous one providing a cooperation mechanism and return proceedings securing the restitution of cultural objects unlawfully removed from the territory of a Member State after 31 December 1992. In order to safeguard the achievement of

Report from the EC to the Council, the EP and the Economic and Social Committee of 25 May 2000 on the implementation of Council Regulation (EEC) no. 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State.

¹⁶ See in particular the Third Report on the application of Council Directive 93/7/EEC.

¹⁷ See the Report from the EC to the Council, the EP and the Economic and Social Committee of 25 May 2000.

this goal, a considerable number of innovations are introduced compared to the previous Directive. Among others, they include the elimination of the Annex in Council Directive 93/7/EEC, the extension of the limitation periods, improved cooperation between Member States thanks to the IMI and changes in the allocation of the burden of the proof in cases of compensation to the possessor. The new Directive may be applied to all cultural objects identified as “national treasures possessing artistic, historic or archaeological value under national legislation” (art. 1 and 2(1), Directive 2014/60/EU). This provision expands the range of objects that may become subject to recovery and puts an end to the debate between the so-called importing and exporting Member States. According to Southern European countries (so-called exporting States) the European provisions should protect any cultural good, independent of its economic value. However, according to the Northern European States (so-called importing States) only cultural goods with a significant economic value should be protected (Magri 2011, 21 f.). Council Directive 93/7/EEC opted for a halfway solution and therefore listed in its Annex those goods that could be considered cultural, while the new Directive recognises the identification of goods of cultural value, as classified by a Member State. In other words, to determine whether a good has a cultural value is now the task of each Member State.

In order to improve cooperation between national central authorities, the Directive provides for the possibility to use the IMI.¹⁸ The IMI should simplify the search for a specific cultural object that has been unlawfully removed; aid in identification of its possessor; simplify the notification of discovering a cultural object; enable a check on the cultural object; and act as an intermediary for its return (Roodt 2015, 196 ff.).

Under the new Directive, return proceedings shall be enacted no later than three years after the central authority of the requesting EU Member State became aware of the location of the object and of the identity of its possessor (art. 8). This longer time frame should facilitate the return and discourage the illegal removal and trade in national treasures. Three years, rather than the previous one, may be considered as a sufficient time to file a return proceeding.¹⁹

18 Provided by Regulation (EU) no. 1024/2012 of the EP and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (IMI Regulation), in OJ L 316 of 14 November 2012.

19 It could be interesting to compare the former provision - art. 7 Council Directive 93/7: “Member States shall lay down in their legislation that the return proceedings provided for under this Directive may not be brought more than one year after the requesting Member State has become aware of the location of the cultural object and of the identity of its possessor or holder” - with art. 8 Directive 2014/60: “Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than

The new Directive is of further importance because it clarifies that the possessor of a cultural object who claims compensation, when its return has been made, shall provide proof that he/she acted with due care and attention (art. 10). The former Directive was unclear, and according to art. 9 it was questionable if the possessor had such a duty or not (Magri 2011, 21 ff., Marletta 1997, 98). At the same time however, the precise meaning of the term ‘fair compensation’ remains unclear. Generally, a “fair compensation seems to correspond with the market value” but it is not unrealistic that in some situation the ‘fair compensation’ will be a different value: for instance, the payment of the market value could be an unjust enrichment for the possessor who paid the object a cheaper price (Magri 2011, 65 ff.).

4 The Implementation of the Directive in Italy

Directive 2014/60 has been implemented in Italy under the Leg. D. 7.1.2016, no. 2.²⁰ The Leg. D. has modified art. 75 ff. of the 2004 Code.²¹ The 2004 Code is the main national act on the protection of CH and contains also provisions regarding the international circulation and restitution or return of stolen or illegally exported objects. Its conformity with obligations arising from international and EU law is therefore essential (Frigo 2017, 73).

According to the 2004 Code (art. 76), the central authority foreseen by art. 4 dir. 2014/60 is the MIBAC (since 2013 MIBACT). When a restitution request is filed, the Ministry ensures that the requiring member State receives the administrative cooperation under art. 4 Directive 2014/60. The Ministry shall be called to cooperate and to exchange information relating to unlawfully removed cultural objects or their possessor. The MIBAC must also take the necessary measures to preserve such cultural object and to prevent any action aimed at evading the return procedure, plus it may also act as an intermediary between the possessor and the requesting Member State with regard to return. In particular, the Ministry may facilitate the implementation of an arbitration procedure, without prejudice to the restitution request filed under art. 77 2004 Code.

One of the most relevant consequences of the implementation of the Directive in the Italian legislation is that restitution requests can be submitted for the return of items of paleontological, numismatic and scientific

three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder”.

20 D. Leg. 7 January 2016, no. 2, Attuazione della direttiva 2014/60/UE relativa alla restituzione dei beni culturali usciti illecitamente dal territorio di uno Stato membro e che modifica il regolamento (UE) no. 1024/2012, in *Gazzetta Ufficiale*, 7, 11 January 2016.

21 D. Leg., 22 January 2004, no. 42, in *Gazzetta Ufficiale*, 45, 24 February 2004.

interest, even if they do not belong to collections listed in inventories of museums, archives, libraries, or ecclesiastical institutions (Frigo 2017, 74).

Art. 77 regulates the restitution request before the court. The filing shall be addressed to the *tribunale ordinario* where the object is located. The procedural act to request the restitution is pretty much a standard writ of summons (*atto di citazione*) and it shall contain, in addition to all requisites foreseen in art. 163 c.p.c., also a description of the object being requested, a certification stating that it is a cultural object and a declaration that the object has been unlawfully removed from its territory. The writ of summons must be notified to the possessor of the good and to the Ministry and listed in a special registry.

If the possessor can demonstrate that he/she purchased the good with due diligence, he/she may file for compensation (art. 79 2004 Code). In such case, the court can award him/her with a fair compensation that shall be paid by the requesting Member State upon return of the object (art. 80).

Directive 2014/60/EU – unlike Directive 93/7/EEC – contains a definition of the elements of due diligence (art. 10). The definition is almost identical in form to art. 4(4) of the 1995 Unidroit Convention. The EU legislator has made the pragmatic choice to give illustrative criteria,²² instead of drafting a general and abstract definition of due diligence (Frigo 2017, 77). Implementing the Directive, the Italian legislator has reproduced the wording of art. 10 of the Directive. To determine whether the possessor exercised due diligence art. 79(2) of the 2004 Code states that all circumstances of the purchase shall be taken into consideration. In particular, whether documentation on the object's origin is available, if the authorisation for removal (required under the law of the requesting Member State) was given, the nature of the parties (for example if they were professional or not), the price paid, the consultation of any accessible register of stolen cultural objects by the possessor, if the possessor took any relevant information which he/she could reasonably have obtained, or if he/she took any other step which a reasonable person would have taken under the circumstances. It is quite clear that the article, like the directive, entails a heavy burden of proof for the possessor. Even for a diligent purchaser it is quite unrealistic to demonstrate that all these requisites were fulfilled at the moment of acquisition.

²² The wording of art. 10(2)(3) is: "In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances. In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by those means".

5 Duty to Return and Good Faith Acquisition of Cultural Goods Under Italian Law

Arts. 79 and 80 of the 2004 Code are particularly interesting for lawyers engaged in private law. As opposed to the common law *nemo dat quod non habet* principle, in Italy a good faith purchaser is, in the case of movable property, protected under art. 1153 c.c.

Protection of the *good faith purchaser* has its origin in the Medieval Germanic rule *Hand wahre Hand* (Hübner 2000, 407 ff.) and the purpose of the rule is to protect freedom to trade and the circulation of property: to ensure legal relations, in case of movables, law allows the purchaser to enter into a transaction without complex researches concerning title (Prott 1990, 270).

Art. 1153 Ital. c.c. states that:

He to whom movable property is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership. Ownership is acquired free of rights of others in the thing, if they do not appear in the instrument or transaction and the acquirer is in good faith. (Merryman 2007, 5)

Under Italian law, in the triangle between A, who steals from B a cultural good, that C acquires without knowing about the previous theft, C can be protected because he/she acted in good faith.

In case of theft, protection of the good faith purchaser is normally excluded (see para. 935 BGB and art. 2276 French Civil code). Italy is one of the few Countries where the purchaser is protected also in case of purchase of a stolen good. Such a provision could make (and has made) Italy a very attractive country for dealers of stolen cultural goods (Francioni 2017, 384). Art. 1153 of the Italian c.c., together with the *lex rei sitae* rule, may legitimise, through an auction, the circulation of a stolen treasure. This risk is only partially prevented thanks to the strict regulation of the Italian art market, which makes Italy not really attractive for international buyers or dealers (art. 65 ff. 2004 Code; Magri 2015; Rivetti 2015).²³

In Italy, whether art. 1153 c.c. may also be applied to cultural goods or if their particular features exclude them from being considered as movables, is a subject of intense dispute (Comporti 1995, 395 ff.; Fiorentini 2014c, 249 ff. and Magri 2013, 741 ff.). According to some scholar, cultural goods

²³ Rivetti, Ermanno (2015). "Are Italy's export laws about to change?". *The art newspaper*, 25 September 2015.

should be considered as registered movables (*beni mobili registrati*) and therefore excluded from good faith purchase (art. 1156 c.c.; Comporti 1995, 395 ff.). This opinion is based on the general duty to register all transactions regarding this kind of property (art. 128 TULPS), but not always dealers comply with such duty and thus it seems quite difficult to invoke art. 1156 c.c. in order to exclude the application of art. 1153 c.c., at least in absence of a registration.

There are cases in which art. 1153 c.c. was applied to cultural goods.²⁴ In general, according to Italian courts, art. 1153 c.c. is applicable also to cultural property. However, the purchaser's good faith is normally harder to prove than usual when he/she is a professional.²⁵

The way the statute works is clearly illustrated in the *Winkworth case*:²⁶ some Japanese artworks were stolen from a private collection in England and taken to Italy, where they were sold to an Italian collector (the *marchese* Paolo del Pozzo). Later the Italian buyer wanted to sell them again and therefore he sent them to Christie's in London. The old British owner filed an action to claim his property back (Merryman 2007, 5). According to the *lex rei sitae* principle (Favero 2012, 38 ff.), the British court held that the legal effects of the sale in Italy were regulated under Italian law and therefore the Italian good faith purchaser became the owner according to art. 1153 c.c., because he acquired the possession in good faith and through a *titolo idoneo*, i.e. a valid contract (Merryman 2007, 5).

The *Winkworth case* demonstrates how *lex rei sitae* and *bona fide* principles taken together can have "very destructive effect on efforts to protect the cultural heritage" (Prott 1989, 268). It is true that both principles are grounded on the free circulation of goods policy, though the question that has to be answered is: do we need a free circulation of cultural goods or would it be better to protect the cultural interest of such goods rather than their value and circulation? According to international rules and European directives, the answer seems to be that, in the field of cultural property, there is no particular need to protect free circulation of goods.

Art. 1153 c.c. was also applied in the case *Stato francese v. Ministero per i beni culturali ed ambientali e De Contessini* (Cass. 24/11/1995, no.

²⁴ Cass. 24/11/1995, no. 12166. *Foro italiano*, 1996, 1, c. 907; Cass. 14/09/1999, no. 9782. *Mass. Giust. civ.*, 1999, 1968 and Tribunale Prato, 16/12/2008. *Foro italiano*, 2009, col. 1934 ff.

²⁵ In the case where ten years had passed since two paintings dating from the second half of the seventeenth century, allegedly drawn by Brugnoli and rather unknown in the art world, had been stolen, by its judgment of 16/12/2008, the Prato Court of First Instance held that the person that had bought the paintings with the aid of a broker (both of them being respected individuals) at a rather high price had acted in good faith and that the existence of bad faith of the buyer could not be inferred from the fact that he was also in possession of a third stolen artwork (Tribunale Prato, 16/12/2008. *Foro italiano*, 2009, col. 1934 ff).

²⁶ *Winkworth v. Christie Manson and Woods Ltd.*, [1980] All ER 1121.

12166; see Biondi 1997, 1173 ff.; Favero 2012, 46 ff.; Magri 2013, 751 ff.). In this case two tapestries were stolen in the *Palais de Justice* of Riom, in France. Two years later, they were sold in Italy and bought in good faith by the antiquarian De Contessini. The French government claimed for the restitution of the tapestries, but the Italian Corte di Cassazione²⁷ held that under Italian law (art. 1153 c.c.) the good faith purchaser had become the owner, even though under French law, given their cultural value, the tapestries were classified as *res extra commercium* and therefore inalienable (some remarks in Castronovo, Mazzamuto 2007, 109).

Indeed, the implementation of the Directive 2014/60 by art. 79 of the 2004 Code does have an effect on art. 1153 c.c. In fact, in case of a restitution filing from a Member State, the buyer must return the item even if he/she has acted in good faith and due diligence. According to some Italian scholars, the principle stemming from the Directive should be considered as a reason to reconsider, in a restrictive way, the Italian regulation of a *non domino* purchase (Sacco, Caterina 2014, 445 ff.). The Directive has demonstrated that when cultural goods are concerned, there is no general need to protect the purchaser and there is no need to ensure their circulation. On the contrary, circulation of cultural goods must be limited in consideration of the protection of the cultural interest of the State (Magri 2013, *passim*). The main effect of this principle is that, to avoid discrimination and irrationality of the judicial system, all provisions facilitating cultural goods' circulation must be interpreted cautiously and in a restrictive manner.

Even if courts apply art. 1153 c.c. also to cultural goods, a part of Italian scholars is reluctant. The reason lays in the particular nature of such property. Even when belonging to a private person, cultural goods fall under collective interest. They are tangible items representing the CH of a community or a Nation. It is indeed the existence of this general interest that makes them cultural. This cultural and general interest seems to conflict with the free circulation principle on which art. 1153 Ital. c.c. is founded. On the contrary, if the good is connected with a general interest, the free circulation regime should be replaced by a *sure circulation regime* in which the protected interest is not the interest of the market or of the purchaser, but the general interest of the community to enjoy the good, or, at least, to preserve the good into the national CH.

²⁷ See Cassazione 24/11/1995, no. 12166, in Riv. dir. internaz. priv. e proc. 1997, 427; see also Tribunale di Roma, 1987-06-27 and Corte d'Appello di Roma decision no. 2107/92.

6 Cultural Heritage as Commons

The particular nature of the cultural good has also influenced the application of other rules of private law. For instance, if a person finds an archaeological object of cultural interest, the object belongs to the State and not to the finder as it would normally be (art. 826 c.c.). If a person wishes to sell a good, which has been declared as *bene culturale*, the Italian State has a right of pre-emption (art. 59 ff. 2004 Code). The same happens if the owner of a cultural good wants to export it to another country. In this case, the State can reject export authorisation and it is also possible to enact compulsory purchase (*acquisto coattivo*), when the good is of particular relevance to national heritage (art. 70 2004 Code).

Such provisions are expressly addressed to ensure a general interest in the conservation and growth of national CH. We can identify at least two consequences of this general interest. The first one is that cultural goods cannot be considered as normal wares (art. 64*bis* 2004 Code). The second is that the application of private law provisions, in relation to CH, are limited by a general public interest.

Unsurprisingly in its project, the Commissione Rodotà, which was appointed to revise book III of the Italian c.c., has introduced cultural property in the commons' category.²⁸ According to the Oxford Dictionary, 'commons' are "land or resources belonging to or affecting the whole of a community". Commons belong to all of us, so they must be protected and managed in the general interest (Mattei 2011, *passim*).

Even if the Rodotà's project was not approved and the definition of commons or *beni comuni* has not been expressly introduced in the Italian legal system yet, the case of cultural property and its regulations prove that this category does already exist and is operating in our legal system.

The application of private law is deeply limited when considering cultural goods. This limitation has its grounds in art. 9 of the Italian Constitution, according to which: "The Republic shall promote the development of culture" and it "shall safeguard the [...] historical and artistic heritage of the Nation". The limitations of private law, that are expressly foreseen shall also be extended in an analogical way, if such extension is necessary to secure the protection of the cultural interest of the Nation. Furthermore, if there are private law provisions contrasting with the purpose of art. 9 Cost., their effect must be restricted and corrected to adopt a so-called constitutional oriented interpretation (Perlingieri 2006, *passim*).

It is not only in Italy that cultural goods can be considered as commons. This seems to be true also at a European level. The Communication of

²⁸ See Commissione Rodotà - for the amendment of the provisions of the *Codice Civile* related to public property - "Relazione", art. 1(3) lett. c): "commons are among others goods... archaeological finds, cultural property, landscape".

the EC *Towards an integrated approach to cultural heritage for Europe* (COM 2014, 477), for instance, underlines that heritage resources, independently from their owner, bear a value that is held in common, and are in this sense common goods. The Communication expressly declares that CH “is a shared resource, and a common good”. As commons, the heritage resources require an evolved framework of collective governance, that can (and sometimes must) derogate ordinary provisions of private law.

Bibliography

- Barnard, Catherine (2016). *The Substantive Law of the EU. The Four Freedoms*. 5th ed. Oxford: Oxford University Press.
- Biondi, Andrea (1997). “The merchant, the thief and the citizen: The circulation of works of art within the European Union”. *Common Market Law Review*, 34, 1173-1195.
- Borelli, Silvia; Lenzerini, Federico (eds.) (2012). *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International law*. Leiden: Martinus Nijhoff Publishers.
- Castronovo, Carlo; Mazzamuto, Salvatore (2014). *Manuale di diritto privato europeo*. Vol. 2. Milano: Giuffrè.
- Comporti, Marco (1995). “Per una diversa lettura dell’art. 1153 c.c. a tutela dei beni culturali”. *Scritti in onore di Luigi Mengoni*. Milano: Giuffrè, 395-426.
- Favero, Diego (2012). “Lex rei sitae e traffico illecito di reperti archeologici”. *Archeomafie*, 4, 38-61.
- Fiorentini, Francesca (2013). “The Trade of Cultural Property. Legal Pluralism in an Age of Global Institutions”. Sánchez Cordero, Jorge A. (ed.), *La convención de la UNESCO de 1970. Sus nuevos desafíos*. Mexico D.F.: UNAM, 103-133.
- Fiorentini, Francesca (2014a). “New Challenges for the Global Art Market. The Enforcement of Cultural Property Law in International Trade”. *Property Law Perspectives III*. Belgium: Intersentia, 189-216.
- Fiorentini, Francesca (2014b). “A Legal Pluralist Approach to International Trade in Cultural Objects”. Nafziger, James (ed.), *Handbook on the Law of Cultural Heritage and International Trade*. Cheltenham: Edward Elgar, 589-621.
- Fiorentini, Francesca (2014c). “Good Faith Purchase of Movable in the Art Market. Comparative Observations”. *Pravni život, Pravo i načelo savesnosti i poštenja, 27 godina kopačkičke škole prirodnog prava, Borj 11*. Vol 3. Belgrade, 249-266.
- Francioni, Francesco (2017). “Cultural property in international law”. Graziadei, Michele; Smith, Lionel (eds.), *Comparative Property Law. Global Perspectives*. Cheltenham: Edward Elgar Publishing, 374-392.

- Frigo, Manlio (1996). "La Convenzione dell'UNIDROIT sui beni culturali rubati o illecitamente esportati". *Rivista di diritto internazionale privato e processuale*, 32, 435-468.
- Frigo, Manlio (2007). *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*. 2a ed. Milano: Giuffrè.
- Frigo, Manlio (2017). "The Implementation of Directive 2014/60/EU and the Problems of the Compliance of Italian Legislation with International and EU Law". *Santander Art & Culture Law Review*, 2, 71-84.
- Gardella, Anna (1998). "Nuove prospettive per la protezione internazionale dei beni culturali. La Convenzione dell'UNIDROIT del 24 giugno 1995". *Diritto del commercio internazionale*, 20, 997-1030.
- Giannini, Massimo Severo (1976). "Beni culturali". *Rivista trimestrale di diritto pubblico*, 26, 3-38.
- Hübner, Rudolf (2000). *A History of the Germanic Private Law*. New Jersey: The Lawbook Exchange.
- Jackson, Sarah (2006). "The Art Loss Register. A Tool for Due Diligence". *Kur*, 5, 123-126.
- Jayme, Erik; Wagner, Florian (1997). "Kulturgüterschutz und Privatrecht: Die UNIDROIT-Konvention von 1995. Tagung des Ludwig Boltzmann Instituts für Europarecht in Wien". *IPRax*, 17, 140-1.
- Jayme, Erik (2006). "Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums. The Altmann Case as a Model for Uniform Rules?". *Uniform Law Review*, 11, 393-398.
- Jayme, Erik (2015). "Narrative norms in private international law, the example of art law". *Recueil des cours/Collected Courses*, 375, 9-35.
- Kardel, Philip (2006). "Die Lost Art-Datenbank auf www.lostart.de". *Kur*, 5, 128-129.
- Kinsella, Eileen (2016). "What Does TEFAF 2016 Art Market Report Tell Us About The Global Art Trade?". *Artnet News*. URL <https://news.artnet.com/market/tefaf-2016-art-market-report-443615> (2017-12-15).
- Kretschmer, Bernhard (2016). "Transnational Organised Crime and Cultural Property". Hauck, Pierre; Peterke, Sven (eds.), *International Law and Transnational Organised Crime*. Oxford: OUP, 308-33.
- Lalive Pierre (2009). "A Disturbing International Convention. The UNIDROIT Convention on Cultural Objects". Prott, Lyndel (ed.), *Witnesses to History. A Compendium of Documents and Writings on the Return of cultural objects*. Paris: UNESCO Publishing, 322-326.
- Magri, Geo (2011). *La circolazione dei beni culturali nel diritto europeo. Limiti e obblighi di restituzione*. Napoli: Edizioni scientifiche italiane.
- Magri, Geo (2011). "Beni culturali". *Digesto delle discipline privatistiche. Sezione civile*, 6. Torino: UTET, 117-135.
- Magri, Geo (2013). "Beni culturali e acquisto a non domino". *Rivista di Diritto Civile*, 59, 741-66.

- Magri, Geo (2015). "Alcune considerazioni sul mercato del libro antico dopo la legge 6 agosto 2015, n. 125". *Aedon*, 3. URL <http://www.aedon.mulino.it/archivio/2015/3/magri.htm> (2017-12-15).
- Magri, Geo (2017). "Directive 2014/60/EU and Its Effects on the European Art Market". *Santander Art & Culture Law Review*, 2, 195-210.
- Marletta, Marilù (1997). *La restituzione dei beni culturali. Normativa comunitaria e Convenzione Unidroit*. Padova: CEDAM.
- Mattei, Ugo (2011). *Beni comuni. Un manifesto*. Bari: Laterza.
- Merryman, John Henry (2007). "The Good Faith Acquisition of Stolen Art". *Stanford Law and Economics Olin Working Paper*, 364, 2-26.
- Perlingieri, Pietro (2006). *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*. Napoli: Edizioni scientifiche italiane.
- Prott, Lyndel (1989). "Problems of Private International Law for the Protection of the Cultural Heritage". *Recueil des Cours/Collected Courses*, 217, 223-316.
- Roodt Christa (2015). *Private International Law, Art and Cultural Heritage*. Cheltenham: Edward Elgar.
- Sacco, Rodolfo; Caterina, Raffaele (2014). *Il possesso*. 3a ed. Milano: Giuffrè.
- Shauna, Isaac (2006). "Swift-Find Looted Art Project". *Kur*, 8, 2006, 130-131.
- Stamatoudi, Irini (2011). *Cultural Property Law and Restitution*. Cheltenham: Edward Elgar.
- Wantuch-Thole, Mara (2015). *Cultural Property in Cross-Border Litigation. Turning Rights into Claims*. Berlin: De Gruyter.
- Webber, Anne (2006). "Central registry of information on looted cultural property 1933-1945". *Kur*, 5, 127.
- Zagato, Lauso (2007). *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999*. Torino: Giappichelli.