Stolen Heritage
Multidisciplinary Perspectives on Illicit Trafficking of Cultural Heritage in the EU and the MENA Region
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The EU Contribution against the Illicit Trafficking of Cultural Goods
Recent Developments

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Abstract The present study focuses on the legal instruments – Regulation and Directives – governing at EU level the export of cultural goods, and the duty to return cultural goods stolen or illegally exported from a member State at EU level, with particular attention to Directive 2014/60/EU. The recent Regulation (EU) 2019/880 on the introduction and the import of cultural goods, will also be investigated. In the last section of the article, the (serious) effects of the Brexit on the struggle against the illicit traffic of cultural goods, in particular from areas of crisis, will be analysed.

Keywords Cultural property. Cultural heritage. Circulation of cultural goods. Internal market. Brexit. Unidroit 1995 Convention. Directive 2014/60/EU. Regulation (EU) 2019/880. Cut-off date. German Cultural Property Act.

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1 Premise

This article's topic, in itself a tough issue to deal with, has become more and more complicated owing to both the crises–mainly but not merely political – that have characterized Eastern and Southeastern Europe over the last decades, and the foreseeable effects of Brexit with regard to the illicit circulation of cultural heritage. The paper, owing to the limited space and time available to develop the argument, will not deal with the Council of Europe Nicosia Convention,[1] not yet into force. It will rather focus on European Union (EU) legal instruments (§ 2) before reflecting on their capacity to meet current challenges in the field of cultural heritage (§ 3).

2 The Evolution of the EU Legal Instruments

2.1 The Circulation of Cultural Goods. The Original EEC Treaty and the Opening of the Internal Market

In the original European Economic Community (EEC) Treaty, only provisions related to the free circulation of goods (arts 34-6) refer to the cultural heritage. Whereas the first two articles prohibit, inside the common market, quantitative restrictions on goods import and export and all measures having equivalent effects, art. 36 specifies that former provisions leave unprejudiced the "prohibitions on import, export and transit" justified, *inter alia*, "on grounds of […] the protection of national treasures possessing artistic, historic or archaeological value".

Art. 36, in other words, is a provision containing a derogation, which has been restrictively interpreted by the Commission and the Court of Justice of the EU (CJEU). It is not the purpose here to delve into this aspect, which will lead with the Maastricht Treaty in 1992 to the creation of cultural policy of the then EEC (for a deeper analysis, Cortese 2011, 2015; Zagato 2011, 2015). The imminent opening of the internal market, envisaged in January 1993, determined in 1992 a difficult problem to solve. If, on the one hand, in other fields of law, it was possible to elaborate legal instruments of approximation of laws – and in some cases of harmonization – which reduced the difference between domestic laws and regulations in force in EU Member States; on the other hand, with regard to the circulation of cultural heritage, the divide between common law and civil law countries was not avoidable. With regard to the former ones, a system of free circulation was in force with the consequence that, after the establishment

1 Convention on Offences Related to Cultural Property, Nicosia 19/05/2017, CETS n. 221, not yet into force.

of the internal market and the end of border control at national level (within the EEC), cultural goods that were illicitly exported from a 'protectionist' State, such as Italy, would have freely circulated in other Member States' markets, and through this way been exported towards third Countries. The EEC firmly responded to the situation, even though the adopted measures showed their limits quite soon.

2.2 Regulations (EEC) 1911/92 and (EC) 116/2009

The first instrument was Regulation 3911/92, which established a system of community licences for the export of cultural objects outside the customs territory of the EEC.[2] In other words the Regulation created a control system at the external borders of what was then the EEC. The authorisation measure (licence) was issued (art. 2.1), at the request of the concerned person, by the competent authorities of the member State in whose territory the cultural good was (lawfully and definitively) located on 1 January 2003, or by the authorities of the member State where the good had been (lawfully and definitively) transferred to after that date (art. 2.2). The Annex to the Regulation indicates the categories of cultural objects and the corresponding financial thresholds covered by the instrument. In the case of national legislation which protects the "national treasures of artistic, historical or archaeological value" inside the Country (art. 2.3), the licence can be refused.

The Regulation was amended several times and then replaced by Regulation 116/2009[3] which modified to some extent the text of the previous instrument, establishing uniform, effective measure of export control. Regulation 116/2009 provides for three types of licences: the standard licence, valid for a year; the specific open licence, employed for artworks which need to exit the EU for exhibitions, valid for up to five years; the general open licence, mostly employed for exchanges between Museums and other institutions, valid for five years.

2.3 Directive 93/7/EEC

The second instrument was Directive 93/7,[4] which aimed at the restitution of cultural objects illicitly removed from a Member State and relo-

2 Council Regulation (EEC) n. 3911/92 of 9 December 1992 on the export of cultural goods, in OJ L395 of 31/12/1992.

3 Council Regulation (EC) n. 116/2009 of 18 December 2008 on the export of cultural goods, in OJ L. 39 of 10/02/2009.

4 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural object unlawfully removed from the territory of a Member State, in OJ L 74 of 27/03/1993.

cated to another State within the EEC. The text is based on a draft, then modified, of the Unidroit Convention. Pursuant to art. 1, in the case of a cultural object illicitly removed from a Member State[5] and belonging to one of the (14) categories provided for in the Annex, or which forms an integral part of public collections listed in the inventories "of museums, archives and libraries' conservation collections", the Member State itself may request its restitution to a judge of the member State where the good currently is. Hence, it is the *lex situs* that regulates jurisdiction. The action must initiate within a specific time frame after the requesting State's becoming aware of the object's location and of the current possessor (or holder) identity, and provided that, since then, no more than a given amount of time has elapsed. The judge of the requested member State may establish a fair compensation for the current possessor, provided that the possessor acted with all due diligence.

Therefore, the Directive is looking for an equilibrium between civil law (*possession amounts to title*) and the common law's principle – (*nemo plus juris transferre potest quam ipse habeat*) according to which the presence of one irregularity in the chain of transfers is enough to invalidate any subsequent legal transaction. The removed cultural object must be returned (principle of common law); in exchange, had the possessor acted with due diligence – which shall be demonstrated, unlike the always presumed good faith – he is entitled to an equitable compensation by the requesting State (art. 9). Such provision appears to be completely extraneous to the common law tradition. The requesting State has the right (arts 10-11) to subsequently appeal against the ones responsible for the illicit export of the cultural object. The action is up to the member State from which the cultural object was removed. Each member State has to appoint one or more central authorities to carry out the tasks provided for in the Directive. The requesting member State, as the action begins, shall submit a document describing the illicitly exported object and declare its cultural relevance; furthermore, it shall issue a declaration by the competent authorities, stating that the object has been unlawfully removed from the national territory.

Directive 93/7 has weaknesses that make it quite unusable. Among these, a few stand out, as the extremely limited time barring period (30 years since the illicit removal of the cultural object from the requesting State) as well as forfeiture ("the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural good and of the identity of its possessor or holder": art. 7

5 The discipline also includes the cultural good exported in violation of Reg. 3911/92, therefore illegally exported from the community territory (after January 1 1993) and successively re-imported in a different member State. The possibility for individual States to apply the discipline taken into account to goods exported before said date still stands.

pt. 1). This may be seen as a victory by the States of Northern Europe, which were not in favour of an effective control on the circulation of cultural objects inside the EC/EU (Magri 2017). Furthermore, it needs to be emphasized the ambiguous nature of art. 9 cpv., according to which "the burden of proof shall be governed by the legislation of the requested Member State". Given that, in the majority of Member States, it is the civil law system that is enforced, the good faith principle reappears. It follows that even those who possess objects belonging to the requesting State's public domain or to its essential heritage, could, in hypothesis, be eligible for equal compensation. Therefore, the latter constitutes (Lanciotti 1997, 195) the price to pay in order to obtain the recognition and respect of the inalienability condition by the other member States. Along with the previously cited weaknesses, the disappointing outcome of the administrative cooperation between member States in implementing the Directive should also be added (Quadri 2014).

2.4 (EU) Directive 2014/60

Directive 2014/60[6] overcomes said weaknesses, drawing inspiration from the provisions of the Unidroit Convention in its final form.[7] When reflecting on the barrage it faced at the time it had been issued, (Lalive 2009; Prott 2009), we can talk of a 'comeback' of the Convention (Zagato, Pinton, Giampieretti 2019, 257). The new Directive aligns with such instrument for what concerns both forfeiture terms (3 years) and due diligence: art. 10 reproduces art. 4 of the Convention *verbatim*, so removing the ambiguities and weaknesses present in Directive 1993/7 (Cornu, Frigo 2015). This Directive is also innovative with regards to the administrative cooperation between States, establishing in detail (art. 5) an accurate consultation's procedure among Member States' central authorities.[8]

Moreover, all the instruments analysed up until now provide an Annex presenting a list – more or less broad – of the cultural objects it applies to. Directive 2014/60 goes further on, by abolishing, with the Annex, any limit to its objective area of application. Pursuant to

6 Directive 2014/602014/60 of the European Parliament and of the Council of 15 March 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, in OJ L 159 of 28/5/2014.

7 Unidroit Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, UNTS 2421, 457, entered into force on 24/07/1998.

8 Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the internal Market information System, in OJ L 316 of 14 November 2012.

art. 2.1, cultural objects means any object classified or defined by a member State, before or after its unlawful removal from the territory of that member State, among the "national treasures possessing artistic, historic or archaeological value" within the meaning of art. 36 TFEU, in accordance with national legislation or national administrative procedures.

The State may therefore request the restitution of whichever good it classifies as belonging to its "artistic, historic or archaeological national heritage", insofar as exported illicitly.

2.5 The New Regulation 2019/880

The most recent, and relevant to our purposes, EU instrument to be investigated, is Reg. 2019/880 on the import of cultural objects.[9] Until 2019 the EU law governed the circulation inside the EU and the export of illicitly removed cultural goods outside the customs borders of the EU, whereas the discipline of imports from outside the EU was left to individual States. Among them only Germany had provided for general import provisions in order to prevent the trafficking of movable cultural property. Regulation 2019/880 ends to such a situation, indicating in the Preamble the reasons guiding the EU institutions. In the light of the acts issued in the previous years on the fight against the financing of terrorism, the Council and the European Parliament adopted common rules on trade with third party States in order to guarantee an efficient protection against illicit trafficking of cultural goods and their loss or destruction. Thus, the Regulation favours the preservation of humanity's cultural heritage and aims at preventing the financing of terrorism, as well as the laundering of stolen cultural goods through their sale to buyers residing in the EU.

The third recital of the Preamble represents the key of the new instrument. It recognizes that illicit trafficking of cultural goods in many cases "contributes to a forced cultural homogenization or to the forced loss of cultural identity", whereas the pillage of cultural goods causes, among other effects, the disintegration of cultures. Furthermore, the same recital recognizes that, as long as a profitable trade of illicitly obtained cultural goods will be feasible without any notable risk, illicit excavations and pillage will continue. In particular the Regulation establishes that the introduction inside the EU of cultural goods, belonging to the categories listed in Part A of the Annex, and removed from the territory of the third Country where

9 Regulation (EU) 2019/880 of the European Parliament and of the Council. Of 17 April 2019 on the introduction and the import of cultural goods, in OJ L 151 of 07.06.2019.

"they were created or discovered in breach of the laws and regulations of that country", is prohibited (art. 3.1). As for the categories of cultural goods listed in Part B and C of the Annex (art. 3.2), their import "shall be permitted only upon the provision" of either an import license (issued in accordance with art. 4) or an importer's statement submitted in accordance with art. 5. Pursuant to art. 3.4, par. 2 shall not be applied in three distinct situations: goods reintroduced in the EU territory;[10] goods imported in the EU territory with the sole purpose of "guaranteeing its custody by a public authority or being under its supervision" – in other words a temporary circumstance, due to emergency situations, with the intent of returning the good later, when the situation will allow it; and finally, cultural goods imported for limited periods of time (exhibitions, exchanges between museums, etc.).

In the other cases, the import of cultural goods listed in Part B of the Annex requires an import license (art. 4). In particular, the license will be necessary for "products from archaeological excavations (either regular or illicit) and both terrestrial or underwater archaeological findings" (comprehensive of statues and liturgical icons, even if stand-alone). The importer's declaration will be sufficient for the import of cultural goods listed in part C of the Annex, being the goods older than 200 years and with a monetary value of at least 18,000 euros.

Some profiles of the instrument are questionable, or in any case leave space to uncertainties (Biasiotti 2019; Peters 2019). Among these profiles, the fact that with regards to goods in transit neither an import license nor an importer's declaration are required. Furthermore, the Regulation leaves freedom to the member States in the choice of sanctions, only requiring States to issue (art. 11) "effective, proportional and dissuasive" sanctions. The gradualness foreseen for the application of the Regulation 880 generates perplexities: some measures will not be applied before 2025. Although this can be seen as the poisoned fruit of the harsh debate which took place in the last years with the lobbies of the importers, it is nonetheless true that the instrument's enforcement mechanism requires gradual application times. Due importance must be attached to the fact that the Reg. 880 requires a high level of administrative cooperation between member States and EU authorities (art. 7) and the creation of a complex system of centralized electronic control (art. 8.1). This electronic system is supposed to become operational within four years since the entry into force of the first of the implementing Acts referred to in art. 8.

The choice of the date – April 24 1972, the day when the UNESCO

10 Regulation (EU) n. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, in OJ L 269 of 10 October 2013).

Convention of 1970[11] got into force – as "cut-off date" (Peters 2019, 105), raised a certain amount of criticism. As a matter of fact, if the Country where the cultural good was created or discovered cannot be reliably discovered, or if the good has been taken out from that country before April 24, 1972, it will be sufficient for the importer to present a declaration confirming that the cultural good had been exported in accordance with the law of the country where it had been located for a period of more than five years "for purposes other than temporary use, transit, export or trans-shipment" (art. 5.2).

Regulation 880/2019 was subject to a harsh debate involving not only lobbies and private groups and persons,[12] but also member States directly. On one side it was anticipated by a pioneering decision taken by the German government at the moment of the 2016 internal legislative reform,[13] and there was a subsequent pressure from that Government on the other MS in order to persuade them to take position in favour of the Regulation's enactment. On the other side, there was an open, strong opposition from the British government, even at the eve of Brexit. It is time to draw our attention on the Brexit's effects on the European and international trade of cultural heritage.

3 Post-Brexit Scenarios

Notwithstanding the decade-long crisis affecting the UE, the latter has adopted legal tools that, once in force – at domestic level when requested –, will be able to address the dramatic situations of illicit traffic of cultural objects coming from conflicts and situations under crisis. Among these legal tools are Directive 2014/602014/60 and the new Regulation 2019/880. Nevertheless and unfortunately, the consequences of Brexit could jeopardize these promising developments.

Since January 2021, when the s.c. transition period ended, the

11 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, UNTS 823 p. 231, entered into force on 24 April 1972.

12 See the affirmation P. Marchiset, Legal Adviser to Ilab' (International Leage of Antiquarian Booksellers) campaign against the Regulation of the EP and the Council on the import of cultural goods, according to whom "the text remains a major obstacle to trade, a major risk for the security of transactions and an undue limitation to the free diffusion of culture". The article, "EU regulation on the import of cultural goods adopted", published on 22 March 2019 and accessible online at `https://ilab.org/articles/eu-regulation-import-cultural-goods-adopted`, is no more available on the web.

13 Gesetz zum Schutz von Kulturgut (Act on the Protection of Cultural Property), Bundesgesetzblatt 2016, reported in Peters 2019, 99. He employs the term *German Cultural Property Act* to distinguish it from the *Canadian Cultural Property Act*, dated 1984.

United Kingdom has reached the status of a third-party State in respect to EU. Many indicators and elements foresaw a hard Brexit, that is an exit with no deal, or at least marked by a common friendly declaration but leaving the causes of dispute unchanged (Zagato 2020). This is the reason why some relief has been felt after an agreement on some key aspect has been reached (Ireland, finance-related issues, fishing, trade, status of citizens, some profiles of intellectual property).

Rather, the positive attitude manifested by EU negotiators regarding the just mentioned aspects should not hide the concerns. The long negotiation ended as the English authorities aimed for: that is without taking any relevant obligations on the issues concerning European residents, and moreover on the freedom of movement – issues that are at the heart of the European Union identity and spirit.

As to the matter at stake, it falls under the most complex problem of post-Brexit customs relations (see Sacerdoti 2018). In the directives dealing with the final negotiation dating February 2020, the EU backed the necessity of addressing, in compliance with EU norms, the issues related to the import and/or restitution of cultural goods, which were illicitly exported, back to their States of origin.[14]

Among the instructions/guidelines ordered by the English government to its negotiators, the just said priority was ignored. On the matter, the UK final position is the one about an agreement between the UK and EU that only recognizes the mutual restitution of illicitly transferred cultural good belonging to a named specific List, and holding a given monetary value. As to the restitution to States of origin of cultural goods illicitly exported from those territories, notwithstanding the pressure of pro-Brexit lobbies of art dealers, the United Kingdom will not grant any concession. And what if there is necessity of dealing with goods excluded from the Annex (not yet adopted), through a bilateral agreement? Or what if a British judge has to deal with cultural goods exported from a third State, where they have been created or discovered, "in breach of the laws and regulations" of that State (Reg. 880/2019, 3.1)? Considering the laws which, especially in Middle Eastern Countries, prohibit the exit from the territory of the State of archaeological goods, the UK judges will refer to the traditional international private discipline (for an overall consideration, Bertoli 2017), with consequences which cannot be examined in this article. This might put into risk the delicate cooperation between States against the web of illicit trafficking developed in recent years.

So, in the author opinion, the concern of those who believe that the UK could become the new Eldorado of illicit trafficking are justified

14 Camera dei deputati, Uff. rapporti con l'UE, *La Brexit e i futuri negoziati sul partenariato tra l'UE e il Regno Unito*, 24 giugno 2020.

(Veldpaus and Pendlebury already speculated on the risk of "potentially making the UK a centre for illicit trafficking" in their 2017 Report).

However, there is more. The UK has not taken part in the UNESCO Convention of 2003 on the protection of intangible cultural heritage,[15] nor in the Faro Convention of the Council of Europe.[16] As well as other States of the EU, it is not part of the Unidroit Convention either. Still, since Directive 2014/60 carefully follows the dictate of said Convention, thence, at least on a level of reciprocal relation between European States (therefore not only member States, but also associated States) this has not practical consequences. After Brexit completion, as the UK excluded the possibility of an association agreement with the EU, the 'core' of these instruments will cease to exist for that Country.

We just have to reiterate – however this topic will certainly be the object of a thorough investigation in the following months and years – how Brexit constitutes an authentic epistemological break "which involves the notion of cultural heritage itself in the European territory" (Zagato 2020).

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15 Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003, UNTS 2368 p. 3, in force at an international level on April 20 2006 (Zagato 2008; Scovazzi, Ubertazzi, Zagato 2012).

16 Framework Convention on the Value of Cultural heritage for Society, Faro, 16 October 2005, CETS n. 199, in force at an international level on June 1 2011 (for first considerations see: Pinton 2019).

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