

**Study on preventing and fighting  
illicit trafficking in cultural goods  
in the European Union**

**by the CECOJI-CNRS – UMR 6224**

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## List of abbreviations

|             |  |
|-------------|--|
| AACU.....   | Art and Antiques Crime Unit (Netherlands)  |
| AAM.....    | American Association of Museums  |
| AAMD.....   | Association of Art Museum Directors (United States of America, Canada, Mexico)   |
| AAU.....    | Art and Antiques Unit (Metropolitan Police, United Kingdom)  |
| ABGB.....   | Allgemeines Bürgerliches Gesetzbuch (Civil Code, Austria)  |
| ACCG.....   | Ancient Coin Collectors Guild  |
| AcP.....    | <i>Archiv für die zivilistische Praxis</i> (Germany)   |
| Aff. ....   | affaire (case)   |
| All ER..... | All England Law Reports  |
| ATF.....    | <i>Arrêts du Tribunal fédéral</i> (Federal Court Judgements, Switzerland)  |
| NBC.....    | National Central Bureau (INTERPOL representation in each member country)   |
| BGB.....    | <i>Bürgerliches Gesetzbuch</i> (Civil Code, Germany)   |
| BGBI.....   | <i>Bundesgesetzblatt</i> (Federal Legislative Bulletin, Germany)   |
| BGE.....    | <i>Bundesgerichtssentscheidungen</i><br>(Decisions of the Federal Court, Germany)  |
| BGH.....    | <i>Bundesgerichtshof</i> (Germany)   |
| BGHZ.....   | <i>Entscheidung des Bundesgerichtshofes in Zivilsachen</i> (Decision of the Federal Court in Civil Matters, Germany)             |
| BKA.....    | <i>Bundeskriminalamt</i><br>(Federal Criminal Police Office, Germany, Austria)   |
| BKM.....    | <i>Beauftragter für Kultur und Medien</i> (Commissioner for Culture and the Media, Germany)                                      |
| BSGS.....   | <i>Bayerische Staatsgemäldesammlungen</i> (Bavarian State Picture Collections, Germany)  |
| c. ....     | <i>contre</i> (vs.)  |
| CA.....     | <i>Cours d'appel</i> (Court of Appeal, France)   |
| Cass.....   | <i>Cour de cassation</i> (Court of Cassation – Supreme Court, France)  |
| CBCP.....   | <i>Codice dei beni culturali e del paesaggio</i> (Code for cultural heritage and landscape, D.Lg 22 January 2004, No. 42, Italy) |
| CCTPC.....  | <i>Comando Carabinieri Tutela Patrimonio Cultural</i> (Carabinieri Division for the Protection of Cultural Heritage, Italy)      |
| CEPOL.....  | European Police College  |

|                   |   |
|-------------------|---|
| CINOA.....        | <i>Confédération internationale des négociants en oeuvres d'art</i><br>(International Confederation of Art Dealers) |
| CJEC.....         | <i>Cour de justice des communautés européennes</i> (now CJEU – Court of Justice of the European Union)              |
| Clunet .....      | <i>Journal de droit international</i> (Journal of international law)  |
| CoPAT.....        | Council for the Prevention of Art Theft (United Kingdom)  |
| Cour de cass..... | <i>Cour de cassation</i> (Court of cassation – Supreme Court, France)   |
| CPU.....          | Cultural Property Unit, United Kingdom)   |
| CSAC .....        | <i>Conférence suisse des archéologues cantonaux</i> (Conference of Swiss Cantonal Archaeologists)                   |
| DCMS.....         | Department for Culture, Media and Sport (United Kingdom)  |
| DMSG .....        | <i>Denkmalschutzgesetz</i> (Monument Protection Act, Austria)   |
| EAA .....         | European Association of Archaeologists  |
| ECCO.....         | European Confederation of Conservator-Restorers' Organizations  |
| ECR.....          | European Court Reports  |
| AFSJ.....         | Area of freedom, security and justice   |
| EUROJUST.....     | <i>Unité de coopération judiciaire de l'Union européenne</i> (judicial cooperation body of the European Union)      |
| Europol .....     | European Police Office  |
| EWCA .....        | England and Wales Court of Appeal   |
| EWHC.....         | High Court of England and Wales   |
| Fedpol.....       | Federal Office of Police (Switzerland)  |
| FFCR .....        | <i>Fédération française des conservateurs-restaurateurs</i> (French federation of conservators and restorers)       |
| GRULAC.....       | Group of Latin American and Caribbean Countries   |
| ICA.....          | International Council on Archives   |
| ICEFAT.....       | International Convention of Exhibition and Fine Art Transporters  |
| ICOM .....        | International Council of Museums  |
| INTERPOL.....     | International Criminal Police Organization  |
| IPOL.....         | Department of International Police Information (Netherlands)  |
| IPRax .....       | <i>Praxis des Internationalen Privat- und Verfahrensrecht</i> (Germany)   |
| JHA .....         | Justice and Home Affairs  |
| JdT.....          | <i>Journal des Tribunaux</i> (Switzerland)  |
| OJ C.....         | Official Journal of the European Union, Information and Notices   |
| OJ L .....        | Official Journal of the European Union, Legislation   |

## List of abbreviations

|                   |  |
|-------------------|--|
| JORF.....         | <i>Journal officiel de la République française</i> (Official journal of the French Republic)   |
| OJEU .....        | Official Journal of the European Union   |
| Jpdce .....       | Jurisprudence (case law)   |
| JZ.....           | <i>JuristenZeitung</i> (Germany)   |
| KultgSchG .....   | <i>Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung</i> (German Act to Prevent the Removal of Heritage from the Territory)  |
| KultGüRückG.....  | <i>Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 97/7/EWG des Rates vom 15. März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern</i> (Act on the Implementation of the UNESCO Convention of 14 November 1970 and on the Transposition of Council Directive 93/7/EC of 15 March 1993, Germany) |
| LDIP .....        | <i>Loi fédérale sur le droit international privé</i> (RS 291) (Federal Act on Private International Law (RS 291), Switzerland)   |
| LKA .....         | <i>Landeskriminalamt</i> (Federal Criminal Police Court of the Länder, Germany and Austria)  |
| LPHE.....         | Spanish Historic Heritage Act  |
| LTBC .....        | <i>Loi sur le transfert des biens culturels</i> (RS 444.1) (Act on the Transfer of Cultural Property (RS 444.1), Switzerland)  |
| MLA.....          | Museums, Libraries and Archives Council (United Kingdom)   |
| MNR.....          | <i>Musées Nationaux Récupération</i> (National Museums Recoveries Register, France)  |
| OMC [Group] ..... | Expert Working Group on the Mobility of Collections (European Union)   |
| NID.....          | <i>Narodowy Instytut Dziedzictwa</i> (National Heritage Board of Poland)   |
| NIMOZ.....        | <i>Narodowy Instytut Muzealnictwa i Ochrony Zbiorów</i> (National Institute of Museology and Collections Protection, Poland)   |
| NJW .....         | <i>Neue Juristische Wochenschrift</i> (Germany)  |
| NMAR.....         | <i>Muzeul Național de Artă al României</i> (National Museum of Art of Romania)   |
| OCBC .....        | <i>Office central de lutte contre le trafic de biens culturels</i> (Central Office for the Fight against Traffic in Cultural Goods, France)  |
| OFC .....         | <i>Office fédéral de la culture</i> (Federal Office for Culture, Switzerland)  |
| PAS .....         | Portable Antiquities Scheme (United Kingdom)   |

|                     |  |
|---------------------|--|
| QB.....             | Queen’s Bench  |
| QE.....             | <i>Question écrite</i> (written question, Geneva, Switzerland)   |
| Rec. CJCE.....      | <i>Recueil des arrêts de la Cour de justice des communautés européennes</i>  |
| Rev. Crit. Dr. .... | <i>Revue critique de droit international privé</i><br>int. priv  |
| RGZM.....           | <i>Römisch-Germanisches Zentralmuseum</i> (Central Romano-Germanic Museum, Germany)  |
| EJN.....            | European Judicial Network  |
| RS.....             | <i>Recueil systématique du droit fédéral</i> (Classified Compilation of Federal Legislation, Switzerland)                                  |
| SAEI.....           | <i>Service des affaires européennes et internationales</i> (Department of European and International Affairs, Ministry of Justice, France) |
| SFAA.....           | Society of Fine Art Auctioneers  |
| SJ.....             | <i>Semaine judiciaire</i> (Switzerland)  |
| SPK.....            | <i>Stiftung Preussischer Kulturbesitz</i> (Prussian Cultural Heritage Foundation, Germany)   |
| ETS.....            | European Treaty Series   |
| SVV.....            | <i>Société de vente volontaire</i> (France)  |
| TFEU.....           | Treaty on the Functioning of the European Union  |
| ICTY.....           | International Criminal Tribunal for the Former Yugoslavia  |
| EEC Treaty.....     | Treaty establishing the European Economic Community (Rome, 25 March 1957)  |
| TREIMA.....         | <i>Thésaurus de recherché électronique et d’imagerie en matière artistique</i> (Electronic search and fine-art images thesaurus, France)   |
| TEU.....            | Treaty on European Union   |
| VAT.....            | Value Added Tax  |
| UEHHA.....          | Union of European Historic Houses Associations   |
| VHOK.....           | <i>Vereeniging Handelaren in Oude Kunst</i> (Association of Fine Art Dealers, Netherlands)   |
| WCO.....            | World Customs Organization   |
| ZRP.....            | <i>Zeitschrift für Rechtspolitik</i> (Germany)   |

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All websites were last consulted in September 2011.



# Introduction

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The trafficking in cultural goods is among the biggest criminal trades, estimated by some to be the third or fourth largest, despite the fact that, as INTERPOL notes, there are hardly any instruments for measuring this trade or any data on illicit commerce. The information dossier that UNESCO produced for the 40th anniversary of the 1970 Convention observes that, together with the drugs and armaments trades, the black market in antiquities and culture constitutes one of the most firmly rooted illicit trades in the world.<sup>1</sup> Despite the difficulty of obtaining statistics,<sup>2</sup> the scale of this phenomenon calls for concentrated and convergent efforts on the part of States and at the European and international levels. At stake is the safeguarding of the heritage of States.<sup>3</sup>

The European Union can today take a more active approach to preventing and combating the trafficking in cultural goods. As the Council of the European Union recalls,<sup>4</sup> “one of the objectives of the European Union is to protect Europe’s public and private cultural heritage by combating trafficking in cultural goods”, and it further emphasizes that “in view of the economic and commercial dealings which characterise it and the artistic and cultural heritage which it contains, the territory of the European Union is a favoured target for criminal organizations”. Hence the need to launch a specific reflection on developing more effective means within Europe, in close relation with the instruments developed at international level. It was with this in mind that the process of reflection in the context of this study, entrusted by the Commission to CECOJI, was undertaken.

## 1. KEY CONCEPTS

To understand the means of preventing and combating the trafficking in cultural goods, a number of concepts need to be clarified with regard to what is opposed – trafficking – the cultural objects that are trafficked and the nature of the resources utilized.

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<sup>1</sup> The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future, information kit, 15 and 16 March 2011, Paris, CLT/2011/CONF.207/6/Rev.

<sup>2</sup> INTERPOL notes on its website that “the INTERPOL General Secretariat asks all member countries for statistics on theft of works of art, information on where the thefts took place, and the nature of the stolen objects. On average, we receive 60 replies a year (out of 188 member countries), some of which are incomplete or inform us that no statistics exist”.

<sup>3</sup> See France Desmarais, “An ordinary crime? Why illicit traffic in cultural goods is a threat to the world’s cultural heritage”, *ICOM News*, No. 1, 2011, pp. 14-15.

<sup>4</sup> Conclusions of the Council of the European Union on preventing and combating illicit trafficking in cultural goods, Brussels, 3 November 2008, Council of the European Union, 14224/2/08, REV2 CRIMORG 166, ENFOPOL 191.

❖ The concept of trafficking

Although trafficking in cultural goods has won a place in European texts alongside other forms of trafficking (narcotics, armaments, etc.), there is no exact legal definition of the acts that this term penalizes. A broad definition of trafficking may be considered to be any *movement, transport, import, export, keeping or commerce in cultural goods carried out in violation of the rules governing ownership or circulation of those goods or of their status*.<sup>5</sup> This study will essentially be conducted with regard to the commerce and the various hypotheses of the illicit movement and transfers of goods.

❖ Concepts of cultural goods

The concept of cultural goods retained in this study is variable in scope and in fact covers several categories of goods,<sup>6</sup> in the knowledge that these concepts are prevalent in international law, European Union law and domestic legislation. Although in general it may include works of art, art objects, elements of cultural heritage or any object of historical, artistic or archaeological interest, etc., several coexisting circles of goods may be observed that are of greater or lesser cultural interest<sup>7</sup> and so subject to differing rules.

In an initial highly selective sense, cultural goods are understood to be goods that States identify as belonging to their cultural heritage, the criteria for and importance of which may vary. Their protection is of public interest and leads to e.g. highly protective regulations (protective restrictions, non-availability, export prohibition, special criminal provisions, etc.). This acceptance is close to the concept of national treasure in the sense of Article 36 of the Treaty on the Functioning of the European Union. Among these categories some cultural goods receive distinctive treatment because of their specific nature or the particular risks to which they are exposed. Examples include archaeological goods or cultural heritage goods. We shall pay particular attention to those categories that we have designated as heritage at risk. One part of this study is devoted specifically to them.

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<sup>5</sup> Definition drawn from the Dictionnaire de droit comparé du patrimoine culturel et du droit de l'art (Dictionary of comparative law of cultural heritage and art law), CNRS Editions, forthcoming in 2012.

<sup>6</sup> See below for a more sophisticated analysis of the various views of these concepts in Member States.

<sup>7</sup> For this representation of the concept of differing circles ranging from the tightest to the broadest, see contract No. 30-CE-0102617/00-49, *Analyse des structures et mécanismes de diffusion des données nécessaires aux autorités afin de garantir l'application de la directive relative aux biens culturels, Extension aux 12 nouveaux États membres depuis 2004, Rapport final (Analysis of the structures and mechanisms of data distribution that the authorities require to guarantee application of the directive on cultural goods, Extension to the 12 new Member-States since 2004, Final Report)*, M. Cattelain, JC Deheneffe, 31 Oct. 2007, p. 20 (cited in the follow-up to this report "2007 Report"). This study defines three circles: national treasures considered commercially unavailable, commercially restricted goods and freely available goods. Between these last two circles we add a further circle consisting of cultural goods governed by consumer law and sometimes by criminal law.

The circle of cultural goods subjected to commercial restrictions is expanding. This emerges from the Council's Regulation (EC) no. 116/2009 of 18 December 2008 on the export of cultural goods.<sup>8</sup> The cultural goods concerned are subject to control and where necessary this control enables important elements to be identified. It is understandable that this second circle should be drawn more widely. The 1970 Convention and the UNIDROIT Convention, whilst they touch on the importance of these goods, also retain a liberal view in most experts' opinion.<sup>9</sup> A number of States hold similar views.

Still more broadly, cultural goods include objects and works of art even when they are not recognized as part of the cultural heritage. This concept may prove useful in determining the responsibilities (vigilance, diligence, duty of information) and obligations (maintaining registers) incumbent upon the various actors dealing in works of art<sup>10</sup> and in certain criminal provisions (European arrest warrant). This meaning will doubtless underlie the elaboration of a provision relating to the on-line sale of works or objects of art.

The reason for this gradation of cultural interest lies in the legal approach to and treatment of this category of goods. In fact, the method of definition usually obeys a functional logic. Depending on the goal pursued, the concept of cultural goods may be more or less selective, at times relating to national treasures to be preserved and transmitted to future generations and at others to any work of art, etc., when the interests of the purchaser and so of the consumer are at stake.

In the context of this study, either of these meanings may be used depending on the provision at issue.

### ❖ Means of preventing and combating trafficking in cultural goods

The discussion of trafficking must include both prevention<sup>11</sup> and combating.

At the technical level, means of prevention notably include access to rapid, reliable information on the level of trafficking and the provenance of cultural goods. Consequently, the question of traceability, meaning the availability of reliable information on the object's provenance, is central and essential to a secure market.

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<sup>8</sup> This is suggested in particular by Article 2.2, which states: "The export licence may be refused, for the purposes of this Regulation, where the cultural goods in question are covered by legislation protecting national treasures of artistic, historical or archaeological value in the Member State concerned", or by Article 2.4 which states that "direct export from the customs territory of the Community of national treasures having artistic, historic or archaeological value which are not cultural goods within the meaning of this Regulation is subject to the national law of the Member State of export" (OJ L 39 of 10 February 2009, pp1-7).

<sup>9</sup> See below.

<sup>10</sup> The question of stolen goods will be left aside inasmuch as, if the market can be supplied with stolen goods and faced with recriminations, that is part of the overall problem of preventing and combatting illicit trafficking.

<sup>11</sup> For the importance of preventive factors, see S. Théfo, in the Round Table *Sécurité des biens culturels (Security of cultural goods)* of 20 December 2007 organized by the French Ministries of Culture and Justice.

Prevention also involves raising awareness among market actors and developing their diligence in respect of researching provenance. A transparent art market unquestionably depends on the conduct of purchasers, sellers and intermediaries.

As to the means of combating trafficking, the criminal dimension is clearly of the utmost importance, as well as consideration of such offences as theft, receiving or illicit exporting and importing, and the means of closer cooperation and to procedural aspects. Customs work and the methods used to control circulation (import and export) are equally fundamental.

These preventive and counter measures may be of several kinds. The factors that trigger or aggravate the trafficking in cultural goods must be studied in order to determine what kind of measures should be applied.

A number of factors that stimulate or aggravate trafficking in cultural goods have been highlighted. They stem from various sources.

- **Legal factors**

A major factor relates both to the imbalance of legal provisions (especially civil and criminal provisions) from one State to another and to the resulting inequalities in treatment of the question of the protection of the cultural heritage.<sup>12</sup>

- **Operational and technical factors**

A number of obstacles arise from the difficulties in the practical application of the various tools and the lack of sound operational coordination. Where it is difficult to access information on the material and legal situation of goods and the relevant regulations, there may be a corresponding increase in trafficking. And as the Council of Europe recalls, “there are marked differences between legal doctrines in the different countries, producing marked distortions also in the functioning of the market in works of art”,<sup>13</sup> an analysis which is shared by the European Union which notes that “there are differences between Member States in the legal definition of a “cultural good”, in establishing the “bad faith” of a dealer, broker any other holder of a cultural good and in the legal classification of behaviour which consists in holding or passing on an object in the knowledge that it has been obtained through a criminal offence”.<sup>14</sup>

- **Political factors**

War or crisis situations clearly weaken the protection of heritage and so call for specific protection. This particular perspective led to a study of the situation in Iraq and more generally the inclusion of a special study of heritage at risk.

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<sup>12</sup> As several reports emphasize: OMC Report on Mobility of Collections, final report, June 2010, “Protection of cultural property and movement of cultural goods”, report produced for the research mission “Droit et Justice”, 2008; [+ original English].

<sup>13</sup> Recommendation 1072 (1988) on the international protection of cultural property and the circulation of works of art, Parliamentary Assembly, Council of Europe.

<sup>14</sup> Conclusions of the Council of the European Union on preventing and combating illicit trafficking in cultural goods, Brussels, 3 November 2008.

- **Factual factors**

Some kinds of heritage are more exposed to the risk of trafficking by their very nature or by virtue of the conditions in which they are protected (heritage at risk, especially archaeological or religious heritage).

Since trafficking in cultural goods is driven by so many different factors, several schemes must be applied. There are requirements as much in terms of legal means as of operational, technical or financial means. All of these measures will be considered in this study.

The question of trafficking has led many States to adopt legislation of varying effectiveness, a movement that UNESCO has strongly encouraged notably through the adoption of the 1970 Convention and its extension, the Convention initiated by UNIDROIT and signed in 1995, which triggered a second wave of ratifications of the 1970 Convention. Dealing with trafficking requires internal rules to be developed in criminal, customs and civil matters as well as in the specific law relating to cultural goods. However, trafficking cannot be effectively combated without the essential thought being given to the means of preventing and combating trafficking within the European Union and in the international arena. This context of plurality of sources (internal, international and European) lends a particular thrust to the conduct of this study. The desire to improve these means of preventing and combating must in effect be conceived with a view to connection and complementarity so as to avoid overlapping rules, duplication of action or waste of resources, all of which dysfunctions may generate trafficking. The Union possesses means of enhancing the preservation of legitimate circulation of goods, a role which should be linked to the action that for many years has been carried out by institutions recognized for their expertise in this field (UNESCO, UNIDROIT, ICOM, INTERPOL or the WCO).

## **2. STUDY OBJECTIVES AND METHODOLOGY**

The specification for this study listed three objectives: to produce a status report, to analyze the obstacles and difficulties and to put forward suitable solutions for overcoming those difficulties.

With this in mind, we have reviewed and drawn upon the available data sources, which are rich in analyses and proposals.

Moreover, particular attention has been paid to the understanding that the various participants in this project have of preventing and combating trafficking, something which greatly influenced the methodology adopted in the three phases of the study. We identified a number of target groups from whom information was gathered and some of whom were closely involved.

- ❖ Identification and use of available data

The work undertaken in the context of this tender invitation built on existing data and on the results and recommendations already identified on these various items, and it continued and complemented those studies.

### Studies and reports used

- Études sur la traçabilité des biens culturels (Studies on the traceability of cultural goods) (2004 and 2007), the Commission-DG Enterprise.
- Évaluation des actions de l'Unesco en matière de lutte contre le trafic illicite de biens culturels (Evaluation of UNESCO's actions in combatting trafficking in cultural goods)", Evaluation Section report to UNESCO, Frédéric Lefebvre-Naré, Marie Cornu, Delphine Rivière, 14 October 2005 (available at <http://unesdoc.unesco.org/>).
- Cultural Heritage Crime – the Nordic Dimension", Swedish National Council for Crime prevention, information and publication, 2006.
- Protection de la propriété culturelle et circulation des biens culturels (Protection of cultural property and commerce in cultural goods)" funded as part of the French Law and Justice Research Mission in which several members of the CNRS's International Research Group were involved (2008).
- Cultural heritage cooperation in the Baltic Sea States", Monitoring Group on Cultural Heritage in the Baltic Sea States, chaired by Helena Edgren 2008 (particularly heritage crime).
- Comparative Law study on trafficking in cultural goods, by the Comparative Law Bureau of the European and International Affairs Service at the French Ministry of Justice, 2008, (survey covering all European Union states and Switzerland with regard to good faith, the rule of indemnity for the owner in good faith, keeping of a register of traders, existence of a register of stolen goods, legal definition of cultural goods, definition of the offences of theft and receiving, the penalties and the question of time limits).
- Prévention et lutte contre le trafic illicite de biens culturels (Preventing and combating trafficking in cultural goods)", Ridha Fraoua, Beirut Regional Workshop, summary report produced in the context of the EUROMED programme (November 2009).
- Dictionnaire de droit comparé du droit du patrimoine culturel (A comparative legal dictionary of law on cultural heritage): a work covering six European countries, to be completed in 2010, under the responsibility of CECOJI with the support of the International Research Group
- Proceedings of the International Academy of Comparative Law, in T. Kono (ed.), *The impact of uniform laws on the protection of cultural heritage and the preservation of cultural heritage in the 21st century*, Leiden/Boston: Martinus Nijhoff, 2010, published in June 2010 following the congress in Mexico City.

### Other data repositories

- The UNESCO database of legislation.

- UNIDROIT's documentary resources
- The Herein database.
- IFAR.org.
- Documentary resources of the Swiss Institute of Comparative Law (Lausanne).
- UNESCO documentary resources and bibliographies.
- ICOM documentary resources and bibliographies.

### **Liaison and coordination with ongoing projects**

In the context of the Open Method of Coordination (OMC), France is coordinating the sub-group on the trafficking in cultural goods and has already gathered a quantity of data through questionnaires sent to all Member States. This data must be matched up and supplemented through contacts and discussions with the various target groups which have been identified.

Through the Working Sub-group on the Development of the Restitution Directive of the Committee on the Export and Return of Cultural Goods (Directorate-General of Taxation and Customs Union of the European Commission) information exchanges have taken place with, in particular, its members C. Chastanier, designated as a national expert, and Mr Mercier-Baudrier.

Studies under the auspices of Euromed on trafficking have been followed up by several partners.

Work on the circulation of collections under the auspices of the Cultural Heritage Committee of the International Law Association, with which several members of the international research group are associated, has also been utilized.

#### ❖ Involvement of target groups

Five target groups have been identified:

1. administrations and institutions responsible for protecting the cultural heritage (e.g. ministries of culture, national or regional administrations and also international bodies);
2. police and customs services;
3. museum and heritage institutions (notably museums);
4. the market (purchasers, sellers, intermediaries, shippers);
5. private owners (and particularly representative groups such as the Union of European Historic Houses Associations, UEHHA).

These target groups were involved throughout the study and at each of its stages. The practical and operational aspect is in fact fundamental in the quest to improve methods of preventing and combating trafficking in cultural goods.

#### ❖ Country surveys

This phase of the study consisted of collecting information from Member States on the treatment of trafficking. This was supported by several tools, in particular the

preparation of targeted questionnaires based on an analytical grid for each topic and addressee, enabling:

- technical, practical, legal and operational difficulties to be highlighted;
- good practice to be identified;
- suggestions for improving the system to be harvested.

#### ❖ Questionnaires

Responses from the various target groups *inter alia* enabled bottlenecks to be identified and analysed.<sup>15</sup>

On the basis of responses given in direct discussion by various private or public actors, information was gathered and combined in a study of practices and perceptions of trafficking, to bring out difficulties in the twin areas of prevention and punishment.

#### ❖ Testing the solutions: trial workshops

Trial workshops attended by the target groups were used to test the relevance of the solutions both in principle and as to the appropriateness of the tools in decision-making (nature of the standard, level of the standard: international, European or national). Particular attention was paid to the various actors' expectations and responses to such rules.

Four trial workshops were held with the active assistance of UNESCO and of the French Museums Service at the French Ministry of Culture.

Three workshops were held at UNESCO, two of them on the occasion of the 17th session of UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (a workshop for police and customs services, a workshop for experts on matters related to cultural goods and a workshop open to market actors including private owners). The workshop on museums and heritage institutions was held at the French Ministry of Culture. These workshops were run in close collaboration with the Borghese legal practice and the UEHHA.

#### ❖ Production of the Final Report

##### • [Status report on legal and operational instruments](#)

On the basis of information gathered during the surveys and trial workshops, the Final Report consists of three parts.

The status report covers civil and criminal legislation at international, European and national levels and also reviews operational means for preventing and combating trafficking at those levels (e.g. specialist or generalist police units, methods for tracing and identifying cultural goods).

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<sup>15</sup> For methodological tools, see Annexes.



- **Identification of legal and operational obstacles**

A number of observations have already been identified with regard to the development of trafficking:

- A negative distortion arises from the diversity of civil and criminal legislation, which enables actors to choose the least risky market place as prompted by commercial facilities.
- There is a problem regarding the reliability of national databases on stolen goods and connectivity among the various databases.
- There are difficulties in organizing cooperation among the various services involved.

- **Outlook for change**

This part of the project is central because its purpose is to identify and put forward specific solutions for combating trafficking, on the basis of analysis of contexts and difficulties and envisaging methods that the European Union can develop by coordinating action taken both at the international level and in domestic legislation.

This work was undertaken by CECOJI, all members of the International Research Group coordinating the sub-groups, the Criminal Law Centre of the University of Nanterre and the Borghese legal practice.

The study identified those advances and improvements (with regard to basic regulations, procedures, cooperation and technical instruments) which are needed in the system in order to prevent and combat trafficking . The study considered the following items in particular:

- review of options for coordinating and harmonizing the different legal and deontological instruments;
- the possible ratification of international instruments;
- reinforcement of methods for identification and traceability of cultural goods in order to make transactions more secure. Development of exchanges between databases;
- improving conditions for improved cooperation among the various actors involved in combating trafficking both at the institutional level and from the viewpoint of mainstream society. Study of good practice.

### **3. PARTNER TEAMS**

- ❖ Organization of the network

- Research centres

The research centres drawn into the study make up the network of researchers working with CECOJI on numerous research projects.

- The International Research Group, an international network of experts in cultural property law.

- The Centre for Criminal Law and Criminology at the Paris West University, an international network of experts on criminal law.
- The Centre for Arts Law at the University of Geneva.
- The Italian Society for International Organization (SIOI), Milan.

- Institutional and professional partners

Several institutional partners and international organizations were closely involved in the study:

- UNESCO;
- INTERPOL;
- UEHHA (Union of European Historic Houses Associations);
- UNIDROIT;
- The French Ministry of Culture;
- The Borghese legal practice.

- ❖ Distribution of work

### **CECOJI**

- \* Coordination of the study: Marie Cornu
- \* Scientific contributions: Jihane Chedouki, Jérôme Fromageau, Antoinette Dominicé, Vincent Négri and Catherine Wallaert
- \* Gathering available sources and data: J. Chedouki and Antoinette Maget-Dominicé
- \* Country studies: J. Chedouki, A. Maget-Dominicé and Anita Vaivade
- \* Heritage at risk: V. Négri

### **Geneva Centre for Arts Law headed by Marc-André Renold**

- \* Scientific monitoring of the study as a member of the Monitoring Committee, participation in the various phases (status report, identification of obstacles, search for solutions)
  - Analysis in international law of relationship between internal and international law in respect of protection of cultural goods: inventory of texts and application methods (bilateral agreements, etc.); comparative law; recognition of foreign public law.
- \* Country studies: Raphael Contel, Sotiria Kechagia
- \* Contributor to the final report.

### **University of Milan and Italian Society for International Organizations (SIOI) Lombardy headed by Manlio Frigio**

- \* Scientific oversight of the study as a member of the Monitoring Committee, participation in the various phases (status report, identification of obstacles, search for solutions)
- \* Country studies: Lorena Diaz-Perdomo, Vittorio Mainetti and Sabrina Urbinati
- \* Thematic studies:

- Analysis of community law and comparative law
- Case studies in conjunction with the Borghese legal practice
- \* Contributor to the final report.

#### **Criminal Law Centre headed by Élisabeth Fortis**

- \* Scientific monitoring of the study as a member of the Monitoring Committee, participation in the various phases (status report, identification of obstacles, search for solutions)
- \* Country studies: Aurélie Binet-Grosclaude, Valérie Debien and Vissarion Giannoulis with the collaboration of Daphné Voudouri.
- \* Thematic studies:
  - Criminal law at the Community level in conjunction with the University of Milan, criminal law at the national and international level
  - Judiciary and police cooperation
- \* Contributor to the final report.

#### **University of Berlin headed by Christian Armbrüster**

- \* Country studies: Sophie Engelhardt and Katarina Lorenz
- \* Thematic study: private international law in conjunction with the Geneva Centre for Art Law and the University of Milan
- \* Contributor to the final report.

#### **The Borghese legal practice: Anne Sophie Nardon and Corinne Hershkovitch with the assistance of Mathilde Roellinger**

- \* Formulation of questionnaire and its circulation among actors in the French art market and via the networks of the Borghese practice, of M.A. Renold in Geneva and of M. Frigo in Milan (including the USA)
- \* Drafting of a 40-page document providing a status report of problems encountered in practice, drawing on the questionnaire responses.
- \* Participation in the trial workshop.
- \* Contributor to the final report.

#### **UEHHA : Rodolphe de Looz-Corswarem (UEHHA president), Delphine Dupeux, Pauline Ringoot**

- \* Formulation of questionnaire and its circulation among members
- \* Analysis of answered questionnaires
- \* Recommendations
- \* Participation in the trial workshops

#### **French ministry of culture, coordination of OMC working group on mobility of collections subgroup “prevention of theft and illicit traffic” (2010) : Claire Chastanier, Jean- Paul Mercier-Beaudrier**

- \* Work on questionnaires on traceability, online sales and due diligence
- \* Formulation of recommendation n°2 : creation of a European web portal

\* Organization of the “museums and heritage institutions” trial workshop and participation in the workshop

**UNESCO : Edouard Planche**

\* Reception of 3 trial workshops : police and customs, cultural goods, art market

\* English translation of the report

# I. Current state of play

# I. Current state of play

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## 1. OVERVIEW OF INTERNATIONAL, COUNCIL OF EUROPE AND EUROPEAN UNION LEGAL INSTRUMENTS

### 1.1. Overview of the various international legal instruments

Trafficking in cultural goods covers the import, export and transfer of what is held to be unlawful property, primarily in reference to the domestic law of a given State. It is therefore a phenomenon that now has considerable economic implications, first and foremost affecting the interests of individual States and breaching their domestic legislation. Beyond specifically national interests, there exists a corpus of binding multilateral international rules to prevent and combat trafficking in cultural goods. The question is how to conceive and shape a genuine international interest that would be protected by these rules.

#### 1.1.1. The 1954 Hague Convention and its Protocols

The first instrument of international law dealing exclusively with protection of cultural goods was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>16</sup> It was this convention and its two Protocols (of 1954 and 1999) that established the term “cultural property” as a legal category in international law, which was subsequently adopted by national legislation implementing the Convention. The Convention provides for both “general” protection and “special” protection (to which the Second Protocol then added “enhanced” protection) through measures to ensure respect for and safeguarding of cultural property. The First Protocol also contains important rules to “prevent the exportation, from a territory occupied [...] during an armed conflict, of cultural property”.

#### 1.1.2. The 1970 UNESCO Convention

In the field of multilateral international cooperation, special mention should be made of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>17</sup> When adopting this Convention, States Parties undertake, *inter alia*:

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<sup>16</sup> This Convention, signed in The Hague on 14 May 1954, has been in force since 7 August 1956 with 123 States Parties; the First Protocol of 14 May 1954 has been in force since 7 August 1956 with 100 States Parties; the Second Protocol of 26 March 1999 has been in force since 9 March 2004 with 60 States Parties (September 2011).

<sup>17</sup> This Convention, signed in Paris on 14 November 1970, has been in force since 27 April 1972 with 120 States Parties (September 2011).

(a) to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party after the entry into force of the Convention (Article 7(a));

(b) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument after the entry into force of the Convention (Article 7(b)(i));

(c) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported (Article 7(b)(ii)) and to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners (Article 13(c)).

It should be noted that the UNESCO Convention did not succeed in striking at the root of some of the most serious problems raised by international movement of cultural property – in particular the return of property stolen or illegally exported from the State of origin. Solutions vary according to point of view. Movement held to be unlawful in the State of origin may, conversely, be considered perfectly lawful by other States to which the property is exported, unless it breaches certain provisions of their domestic legislation.

Although the Convention may rightly be regarded as a fundamental step towards international cooperation in combating trafficking, it should be noted that its mechanisms – in particular those referred to in Articles 7(b)(ii) and 13(c) – are limited in scope and, above all, cannot guarantee the success of a request for return if the applicable substantive law offers significant protection to an innocent purchaser. Such is the case in French law, for example, where the purchaser is presumed to act in good faith, and in Italian law, in varying ways.

Where return of cultural goods is concerned, the procedures laid down in the UNESCO Convention are ill-adapted to overcoming the difficulties raised by the enforcement of ordinary civil law and private international law, since it is an international instrument designed mainly to be used in the field of diplomatic cooperation.<sup>18</sup>

### 1.1.3. The 1995 UNIDROIT Convention

In order to meet the above difficulties, in the late 1980s UNESCO decided that, instead of revising the 1970 Convention, it would ask UNIDROIT – the International Institute for the Unification of Private Law – to prepare a new and independent international instrument to establish “common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in

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<sup>18</sup> See C. Armbrüster, ‘La revendication de biens culturels du point de vue du droit international privé’, in *Revue critique*, 2004, pp. 723 ff., and M. Frigo, *La circolazione internazionale dei beni culturali*, 2nd edn, Milan, 2007, pp. 12 ff.

the interest of all”.<sup>19</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 thus laid down uniform legal rules for “restitution” and also the more complex case of “return” of cultural objects, entailing significant departures from existing law (especially regarding the question of bona fide possession for the owner who is required to engage in restitution). It also created a specific ground of jurisdiction for the courts.

The distinction between “restitution” (Article 1(a)) and “return” (Article 1(b)) was not unfamiliar, although the content of these concepts in the UNIDROIT Convention is appreciably different from that generally accepted in legal theory or the practice of international organizations: the consensus was that “restitution” applied in cases of transfer of cultural objects contrary to the laws of the State of origin and/or rules of international law, while “return” concerned cases of transfer at a time prior to the adoption of rules for protection of the cultural objects concerned in the State of origin. The latter would therefore tend to apply in the case of a request concerning an object belonging to the national heritage of a State which had been deprived of it mainly, but not solely, through colonial domination or foreign occupation.

In the UNIDROIT Convention, however, the two concepts are more narrowly defined: according to Article 1(a), “restitution” concerns stolen objects, whereas “return”, in Article 1(b), relates to illegally exported objects or, more specifically, objects transferred “from the territory of a Contracting State” in breach of its cultural heritage protection rules concerning export of cultural objects.

As regards its substantive scope, the UNIDROIT Convention restates the definition in Article 1 of the 1970 UNESCO Convention, with the latter’s list being annexed in full in the UNIDROIT Convention. This is a very similar model to that contained in Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, which does in fact share many items with the UNIDROIT Convention. It may here be noted that, unlike the European Directive, neither Article 2 of the Convention nor its Annex refers to financial thresholds as criteria for including objects in the list of goods that may be subject to restitution or return. It should also be added that the UNIDROIT Convention does not give States the actual power to determine which objects are protected by the Convention, since Article 2 stipulates the twofold condition of falling within the general definition set out in the Convention and belonging to one of the categories listed in the annex.

The obligation to *return stolen objects* laid down in Articles 3 and 4 is one of the Convention’s most distinctive aspects both for its statement of the principle and its solutions to the issues of forfeiture and limitation. The provisions of the Convention cannot be analysed in detail here; however, it must be stressed that the

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<sup>19</sup> See Preamble to the UNIDROIT Convention, signed in Rome on 24 June 1995. The Convention has been in force since 1 July 1998 with 32 States Parties (September 2011).



rule requiring the possessor of a stolen object to return it irrespective of his or her good faith in itself constitutes a significant exception to the principle of innocent purchase that characterizes a number of legal systems in continental Europe.

In comparison, the Convention reverses the burden of proof for good faith, which is no longer presumed to exist but must be proved by the possessor. Proof of good faith entitles the possessor to payment of “fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object” (Article 4(1)). It is worth noting that in order to prevent successive transfers from neutralizing the obligation to return stolen goods, the Convention provides – in Article 4(5) – that the possessor cannot be in “a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously”.

The question of *return of illegally exported cultural objects* is naturally more complex, since statute law has to acknowledge the limitations imposed by foreign public law concerning the movement of and trade in certain categories of object. According to Article 5(5), the request for return must – by analogy with the rules for restitution of stolen objects – be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned. The request will be accepted if the competent authority recognizes that the conditions laid down in Articles 5(3) and 5(4) have been fulfilled, in particular the object’s “significant cultural importance” for the requesting State.

As in the case of restitution governed by Article 4, return entitles the possessor to payment of fair and reasonable compensation – in this case payable by the requesting State – provided that the criteria of due diligence set out in Articles 6(1) and 6(2) have been met. In order to determine whether the possessor knew or ought reasonably to have known that the object had been illegally exported, the Convention provides that “regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State” (Article 6(2)).

Lastly, an alternative to the obligation to pay fair and reasonable compensation is provided for in Article 6(3), whereby the possessor, in agreement with the requesting State, can retain ownership of the object or transfer ownership against payment or gratuitously to a person of the possessor’s choice residing in the requesting State, provided that person offers the necessary guarantees. The “necessary guarantees” would here probably be such as to prevent the object from being re-exported.

#### 1.1.4. The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage

There are a number of rules in international conventions on protection of cultural heritage which, although designed for “terrestrial” objects, can also apply to underwater objects, especially if those objects are in the territorial waters of a coastal State (i.e. under national jurisdiction).

Two sets of legal rules relate more specifically to international protection of underwater heritage: the Law of the Sea (particularly Articles 303 and 149 of the 1982 United Nations Convention on the Law of the Sea),<sup>20</sup> which is concerned only very marginally with cultural heritage and does not cover objects found on the continental shelf (i.e. in the area between the deep seabed and the contiguous/archaeological zone), and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, which, on the contrary, covers a specific field of cultural heritage law.<sup>21</sup> Although it is clearly stated in Article 3 that it is flexible in relation to any other rules of “international law, including the United Nations Convention on the Law of the Sea”, the Convention has as its aim the prevention of looting of underwater cultural heritage. Its first major contribution was to define the heritage being protected. Under Article 1, the latter covers “*all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 year*” (there follows a non-exhaustive list of cultural objects). This undeniably represents progress by comparison with the term “archaeological and historical objects” used by the Convention on the Law of the Sea.

The 2001 UNESCO Convention lays down heritage protection rules for all maritime areas. It covers not only territorial waters but also the contiguous zone, the exclusive economic zone, the continental shelf and the international seabed area. It should here be noted that the 2001 Convention, unlike the Convention on the Law of the Sea, provides rules to protect cultural goods and applies the principle of protection of underwater cultural heritage in the interests of humanity as a whole to all maritime areas, preventing some of the adverse consequences for protection of cultural goods arising from application of the law of salvage (or the right to recover wrecks) and excluding the principle of “finders, keepers” (Article 4). Underwater cultural heritage in the contiguous zone, the exclusive economic zone, the continental shelf or the international seabed area is safeguarded through systems of reporting (Article 9) and protection (Article 10) based on a “coordinating State”. Far from extending the jurisdiction of the coastal State, the Convention provides that

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<sup>20</sup> Article 303 regulates archaeological and historical objects found at sea, and its second paragraph introduces special rules for objects found within 24 nautical miles of the coast; Article 149 lays down special rules for archaeological and historical objects in the deep seabed area beyond the 200 nautical miles constituting the limit of the exclusive economic zone.

<sup>21</sup> The Convention, signed in Paris on 2 November 2001, has been in force since 2 January 2009 with 40 States Parties (September 2011).

the coordinating State – which is not necessarily the coastal State – must act in the collective interest of the Contracting Parties, having the right to take all necessary emergency measures to prevent looting of cultural heritage as well as any other immediate danger to it (Article 10).

In the absence of general provisions regarding state vessels and aircraft, arrangements will depend on the area in which the wreck is found, but it should be added that, rather than treating them in the same way as other wrecks, the Convention has opted for the principle of sovereign immunity. Lastly, the Convention refers to certain concepts – such as “State of cultural origin” and “preferential rights” – which are of key importance to this field but nowhere defined in the Convention itself.

This brief overview has outlined the international regulatory framework for protection of cultural goods worldwide. To this must, of course, be added some major multilateral instruments at the regional level (such as, in Europe, the 1985 Delphi Convention on Offences relating to Cultural Property and the 1992 Valletta Convention on the Protection of the Archaeological Heritage), which are treated at greater length below. In addition to these conventions there are numerous bilateral agreements (such as between Italy and China in 2003, Switzerland and Italy in 2006 and Switzerland and Egypt in 2010). A description and analysis of these agreements is beyond the scope of this initial overview.

#### **1.1.5. The Delphi Convention of the Council of Europe**

The European Convention on Offences relating to Cultural Property, known as the Delphi Convention, has never entered into force. However, it is worth considering its substance. Its text is based on the fact that cultural property has become the victim of pillage, theft and destruction whether in museums, in churches, in private collections or on archaeological sites. This property reaches the market through illegal channels, a situation which puts the common cultural heritage of Europe at serious risk. The Convention was doomed to failure at the time of its drafting, since States were determined to preserve their powers in the field of criminal law. This situation has now changed, and this instrument could provide a very pertinent point of departure, particularly in relation to the question of how best to define key offences (theft, receiving, etc.).

To combat trafficking, the Parties undertake to promote public awareness of the need to protect cultural goods as well as to cooperate in the prevention of relevant offences and in the pursuit and restitution of dishonestly obtained goods and to apply sanctions appropriate to the seriousness of these offences. An appendix provides a comprehensive list of offences covered by the Convention, which include every sort of unlawful act (theft, receiving, other forms of unlawful appropriation, destruction, damage, handling, alienation, acquisition with knowledge of the object’s dishonest origin, concealment, etc.). This Convention, which was opened for signature on 23 June 1985, has been signed by only four Member States (Cyprus, Greece, Italy and Portugal), most of which are very vulnerable to

trafficking. However, no State has ratified it and it has therefore never entered into force (three ratifications are necessary for this purpose). Inasmuch as other bodies were dealing with the question of trafficking (UNIDROIT, UNESCO), and since these matters were also being addressed within the European Union, the Council of Europe seems to have retreated from these aspects of heritage protection. Yet problems still persist concerning differences in criminal legislation and regarding the international cooperation needed to combat large-scale trafficking. As a Council of Europe Recommendation (Recommendation 1372 of 26 May 1998 on the UNIDROIT Convention on stolen or illegally exported cultural property) points out, the UNIDROIT Convention cannot solve all the problems posed by the unlawful transfer of cultural objects, in particular the question of international crime rings dealing in cultural property. The Recommendation was intended as a step on the road to adoption of the UNIDROIT Convention, but it also states that “further international efforts are necessary to go beyond the Convention”.

#### **1.1.6. Council of Europe Valletta Convention – European Convention on the Protection of the Archaeological Heritage (revised)**

The European Convention on the Protection of the Archaeological Heritage (revised) was adopted by the Council of Europe in Valletta on 16 January 1992. It entered into force on 25 May 1995.

This Convention updates the provisions of the European Convention on the Protection of the Archaeological Heritage adopted in London on 6 May 1969. It replaces the latter once a State Party to the 1969 Convention has deposited its instrument of ratification, acceptance or approval of the 1992 Convention, which is possible only if it has already denounced the 1969 Convention or denounces it simultaneously (Article 14(2), 1992 Convention).

As at 30 August 2011, 41 States were Parties to the 1992 Convention, including the Holy See, which is not a member of the Council of Europe. The 1969 Convention is still in force in five States (Austria, Iceland, Italy, Luxembourg and Russia) which have neither acceded to nor ratified the 1992 Convention.

While the 1969 Convention expounded principles for managing and regulating research, exploitation of its findings and protection of archaeological heritage (site conservation by establishing reserve zones, preventing illicit excavations and regulating the circulation of movable remains), the 1992 Convention, while adopting and building on this prescriptive basis, applies the principle of integrated conservation to archaeological heritage.

The general principles of the 1969 Convention derived from a Recommendation on international principles applicable to archaeological excavations, adopted by UNESCO in New Delhi on 5 December 1956. This Recommendation provided the legislative framework that still underlies virtually all domestic laws in the field of archaeology. The 1969 Convention therefore underlined the scope of this common framework for Council of Europe Member States and encouraged the latter to

create effective legislation to control archaeological research and combat illicit excavation and its corollaries: looting and trafficking of archaeological objects.

The 1969 Convention emphasizes the principle of international cooperation, particularly with regard to international circulation of archaeological objects and museum acquisition policy.

The institution of national measures is thus covered by a principle of cooperation between States Parties for the identification and authentication of archaeological objects of suspect origin.

These objectives reappear in the 1992 Convention. However, the European Convention on the Protection of the Archaeological Heritage (revised) offers fresh concepts of protection, placing the study, conservation and enhancement of the archaeological heritage among the goals of town- and regional-planning policy. Seen from this angle, the principle of integrated conservation implies various types of cooperation between archaeologists, town planners and regional planners to ensure that the archaeological heritage is preserved as effectively as possible. Following this strategy, the 1992 Convention articulates guidelines for financing of excavations, research and publication of findings. It also deals with public access, especially to archaeological sites, and the educational work needed to develop public awareness of the value of the archaeological heritage. The 1992 Convention also lays down a framework for pan-European cooperation in the field of archaeological research, built on exchange of experts and experience between States Parties.

The impact of the 1969 and 1992 Conventions in preventing trafficking has taken two forms: cooperation strategy and alignment of national legislation.

❖ Alignment of national legislation

To avoid dispersal of the archaeological heritage, these Conventions invite States to adopt legislation instituting public control of archaeological research. Such control depends on establishing procedures for the authorization and supervision of excavations and other archaeological activities. The purpose is to prevent any illicit excavation or removal of elements of the archaeological heritage and to ensure that archaeological excavations and prospecting are undertaken in a scientific manner by specially authorized qualified persons. Furthermore, use of metal detectors or any other detection equipment or processes for archaeological investigation must be subject to specific prior authorization.

All these measures are intended to preserve the archaeological heritage and guarantee its scientific significance (Article 3 of both the 1969 and 1992 Conventions).

Once this system of supervising excavations has been introduced into domestic law and its provisions are in force in each State, a distinction can be drawn between two categories of archaeological object: objects deriving from earlier excavations or research (prior to the passing of national laws regulating archaeological research), whose circulation is lawful subject to the provisions regulating import and export of

cultural goods ; and objects recently removed from the ground or from rivers, lakes or seas and whose lawful circulation depends primarily on the lawfulness of the archaeological research that brought them to light. Otherwise, archaeological objects are assumed to come from illicit excavations, which the European Conventions on the protection of the archaeological heritage urge States to prohibit and restrain (1969 Convention, Article 3) or prevent (1992 Convention, Article 3).

These Conventions also target museums. Using much the same wording, both Conventions provide that museums and similar institutions whose acquisition policy is under state control shall not acquire elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations. As for museums and similar institutions whose acquisition policy is not under state control, States are urged to spare no effort in ensuring that the said museums and institutions respect these principles for prevention of suspect acquisitions (1969 Convention, Article 6; 1992 Convention, Article 10).

It should be noted that Austria, which is party to the 1969 Convention, has entered a reservation concerning the latter Article. It considers that its provisions are not applicable on its territory whenever, by the acquisition of objects by museums and institutions subject to the control of public authorities, such objects can be saved from decay or destruction and placed under public surveillance or state protection.

This declaration ensures that the principle of not acquiring objects of suspect origin will not apply to archaeological elements that are at risk because, for example, they come from war zones or areas of high risk. This arrangement is reflected in the Code of Ethics of the International Council of Museums (ICOM), which specifies in Article 2.11 that a museum can, as a *depository of last resort*, act as an authorized repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility. However, ICOM permits museums to act only as repositories rather than allowing them to acquire such objects.

❖ A cooperation strategy

In addition to cooperation in the shape of mutual technical and scientific assistance through the pooling of experience and exchanges of experts in matters concerning the archaeological heritage (1992 Convention, Article 12), there is cooperation to prevent trafficking of archaeological objects.

Article 6 of the 1969 Convention emphasizes cooperation between States Parties in order to ensure that the international circulation of archaeological objects in no way prejudices the protection of the cultural and scientific interest attaching to such objects.

Both European Conventions on protection of the archaeological heritage provide for exchange of information on authorized and illicit excavations and for implementation of all possible measures to ensure that the competent authorities in

the States of origin, Contracting Parties to the Convention, are informed of any offer suspected of coming either from illicit excavations or unlawfully from official excavations, together with all necessary details (1969 Convention, Article 5; 1992 Convention, Article 10).

It is worth noting that the 1992 Convention lays down the institutional framework in which this exchange of information is to take place. Article 13 gives to a committee of experts, set up by the Committee of Ministers of the Council of Europe pursuant to Article 17 of the Statute of the Council of Europe, the task of monitoring application of the Convention.

## **1.2. Overview of European Union legal instruments**

### **1.2.1. European Union competences regarding cultural goods**

#### **1.2.1.1. Legal Basis**

It must first be pointed out that the European Union deals with cultural goods under several headings. First, it regulates some particularly important aspects of movement of and trade in this property on the basis of a broad area of competence regarding the internal market. The result is an approximation of laws.

Secondly, it helps to fund activities relating to cultural goods, including under its subsidiary competence for cultural matters as set out in Article 167 of the Treaty on the Functioning of the European Union (TFEU). The latter is not an exclusive competence (Article 3 TFEU) or a shared competence (Article 4 TFEU) but simply a complementary competence in relation to the competences of Member States, intended to supplement their action (Article 6 TFEU).

In fact, it was exclusively with reference to Article 100a of the EC Treaty on approximation of laws and Article 133 of the EC Treaty on commercial policy<sup>22</sup> that the European Union's most important secondary legislation in our field was adopted, namely Regulation No. 3911/92 of 9 December 1992 on the export of cultural goods – repealed and replaced by Regulation No. 116/2009 of 18 December 2008 – and Council Directive 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.<sup>23</sup>

#### **1.2.1.2. Do cultural objects count as goods?**

The reason why the answer to this question is important is bound up with the general rules of European Union law concerning movement of goods. The gist of

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<sup>22</sup> Article 133 of the EC Treaty corresponds to Article 207 TFEU.

<sup>23</sup> Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, repeated and replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 (OJ L 39 of 10 February 2009) and Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 74 of 27 March 1993).

these rules regarding customs union and the single market are to be found in Articles 26,<sup>24</sup> 28<sup>25</sup> and 34-36 of the TFEU.<sup>26</sup>

Free movement of goods is one of the four main freedoms of movement already proclaimed by the EC Treaty. It was always a key objective for the European Community, as it is now for the European Union. In order to achieve it, the EC Treaty had three main provisions aimed at prohibiting or limiting national obstacles that might hinder it. First, the Treaty prohibited customs duties on imports and exports – including charges having equivalent effect and customs duties of a fiscal nature – between Member States.<sup>27</sup> Secondly, the Treaty also prohibited quantitative restrictions on imports and exports, including measures having equivalent effect, between Member States.<sup>28</sup> Thirdly, with regard to tax, the Treaty made the European Community responsible for harmonizing legislation on indirect taxation in Member States to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market.<sup>29</sup>

The Treaty of Lisbon has not changed the above approach. European Union law holds cultural objects to be goods. This equivalence, implicit in the Treaty's entry into force, became explicit with a famous judgment of the Court of Justice in 1968 when the Court confirmed their inclusion in this category.<sup>30</sup> Goods are objects which can be valued in money. "Articles possessing artistic or historic value", as the Court put it, are products which can be valued in money. It therefore follows that cultural objects "are goods" and that "the rules of the common market apply" to them, i.e. all rules relating to free movement of goods within the single market. The most practical effect of this equivalence was the inclusion of cultural objects in the common customs tariff when it was created in 1968 (Chapter 97 is specifically given over to them). Subsequently, whenever Community law has had to rule on such objects, it has always done so with reference to the common customs tariff nomenclature, whether for objects subject to export controls (Council Regulation No. 116/2009 on the export of cultural goods), objects subject to a request for return (Council Directive 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State) or objects subject to the common system of value added tax when traded (Council Directive 94/5 of 14 February 1994 supplementing the common system of value added tax and then

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<sup>24</sup> Article 26 TFEU corresponds to Article 14 of the EC Treaty.

<sup>25</sup> Article 28 TFEU corresponds to Article 23 of the EC Treaty.

<sup>26</sup> Articles 34-36 TFEU correspond to Articles 28-30 of the EC Treaty.

<sup>27</sup> See Articles 23 and 25 TEC, which correspond to Articles 28 and 30 TFEU.

<sup>28</sup> See Articles 28 and 29 TEC, which correspond to Articles 34 and 35 TFEU.

<sup>29</sup> See Article 93 TEC, which corresponds to Article 113 TFEU.

<sup>30</sup> CJEC, 10 December 1968, *Commission v. Italy*, Case 7-68, ECR, p. 423. Prior to this judgment, this equivalence could be inferred from the inclusion of cultural objects among possible national exceptions to free movement of goods. Recognition of special rules for this category of good implied that such objects were usually treated as goods.



Council Directive 2006/112 of 28 November 2006 on the common system of value added tax).<sup>31</sup>

### 1.2.1.3. Applicability of Article 36 TFEU to movement of cultural goods

It should be explained that Article 36 TFEU<sup>32</sup> is actually the only Article in the Treaty which specifically deals with movement of works of art. We must here bear in mind that: i) Article 36 belongs to Part 3 of the TFEU, “Union policies and internal actions”, under Title 2, “Free movement of goods” and Chapter 3, “Prohibition of quantitative restrictions between Member States”, and that ii) Articles 34 and 35 particularize the principles contained in Article 26 (on gradual establishment of the internal market) and Article 28 (on customs union covering all trade in goods) by setting out two general rules whereby quantitative restrictions on both imports and exports, as well as all measures having equivalent effect, are prohibited.

In this respect Article 36 seems to represent an exception to these general principles and provisions by stating: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; [...] the protection of national treasures possessing artistic, historic or archaeological value [...].”

One initial problem of interpretation here may arise from the actual purport of Article 36 TFEU in the various authentic texts regarding exceptions to quantitative restrictions on imports, exports or goods in transit, and the varying repercussions for powers accorded to Member States. Thus, while in the Italian (and Spanish and Portuguese) text of Article 36 TFEU, the provisions of Articles 34 and 35 do not preclude prohibitions or restrictions on imports, exports or goods in transit on the grounds – *inter alia* – of protection of the “patrimonio artistico, storico o archeologico nazionale” (Spanish: “patrimonio artístico, histórico o arqueológico nacional”; Portuguese: “património nacional de valor artístico, histórico ou arqueológico”), other authentic texts (most obviously the English and French texts) refer to protection of “national treasures of artistic, historic or archaeological value” or “trésors nationaux ayant une valeur artistique, historique ou archéologique”.<sup>33</sup>

In other words, it would seem that “patrimonio nacional” (“national heritage”) and “national treasures” clearly refer to two different concepts. Consequently, the Italian, Spanish and Portuguese texts seem at first sight to allow national authorities more discretion as to the categories of goods that can be covered by national protective legislation while strictly respecting the limitations on their movement,

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<sup>31</sup> See F. Lafarge, “Droit communautaire”, in *Dictionnaire du droit comparé du patrimoine culturel*, forthcoming.

<sup>32</sup> See ex-Article 30 of the EC Treaty.

<sup>33</sup> The German text of the Article is slightly different, since it refers to ‘Kulturgut von künstlerischem, geschichtlichem oder archäologischem Wert’.

while in authentic versions in other languages these categories appear much more restrictive in their scope.

The fact that an international treaty authenticated in two or more languages can actually reveal notable differences between its various texts is not exactly a surprise, since it is confirmed by the existence of an ad hoc rule for interpreting customary international law, codified in the 1969 Vienna Convention on the Law of Treaties. It is common knowledge that, under Article 33(4), of the Vienna Convention, except where the treaty specifically provides that a particular text shall prevail in the event of divergence, when a comparison of the authentic texts discloses a difference of meaning which the application of the other important Convention rules (Articles 31 and 32) does not remove, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.<sup>34</sup>

If we construe Article 36 TFEU in the light of this rule of interpretation from the Vienna Convention, there is little doubt we must draw the conclusion that, unlike the French and English texts, the Italian, Spanish and Portuguese texts do not strictly comply with the requirements of Article 33 of the Vienna Convention, since Article 36 TFEU contains a limited number of exceptions to the general rules laid down by Article 34 on eliminating quantitative restrictions on imports and all measures having equivalent effect, and by Article 35 concerning elimination of quantitative restrictions on exports and all measures having equivalent effect. In other words, Article 36 is a legal rule which, in that it is an exception to the usually applicable rules, cannot be interpreted broadly without contravening both the rules of the TFEU and the balance between obligations arising out of the TFEU and the prerogatives of Member States.

It may be objected that, even if it is assumed that the above rules of interpretation apply, it could be held that, according to the same Treaty, there is only one institution that can legitimately interpret its provisions, namely the European Court of Justice. Thus, in an established line of decisions, the Court has substantively taken and enforced the position of the Vienna Convention, stating that: (i) one language version of a multilingual text of Community law cannot alone take precedence over all other versions, since the uniform application of Community rules requires that they be interpreted in accordance with the actual intention of the person who drafted them and the objective pursued by that person, in particular in the light of the versions drawn up in all languages;<sup>35</sup> and (ii) the various language versions of a provision of Community law must be uniformly interpreted, and thus, in the case of divergence between those versions, the

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<sup>34</sup> Emphasis added.

<sup>35</sup> See, for example, Case 29/69 *Stauder* (1969), ECR p. 419, para. 3; Case C-219/95 *Ferriere Nord v. Commission* (1997), ECR p. I-4411, para. 15; Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* (2001), ECR p. I-08615, para. 47.

provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.<sup>36</sup>

In the light of the general principle laid down in Article 28 TFEU concerning free movement of goods and the customs union underpinning the European Community, as well as the above-mentioned TFEU Articles expressly outlining the goal of eliminating obstacles to free movement of goods (i.e. Articles 34 and 35), exceptions such as those laid down in Article 36 TFEU can apply to restrictions on imports, exports or goods in transit only in the narrower construction of the French and English texts. Therefore extension of such exceptions to national restrictions and prohibitions on categories of object coming under the definition “national heritage” but not the narrower concept “national treasures” would clearly not be sufficiently warranted in the light of the object and purpose of the Treaty.

Lastly, it might be argued that works of art and cultural objects cannot be held to be goods under the terms of the EC Treaty. Here again, it should be noted that the Court of Justice has had occasion to find that cultural objects are held to be goods as provided for in Articles 34, 35 and 36 TFEU inasmuch as they can be valued in money and be the subject of commercial transactions; according to the Court, the rules of the common market therefore apply to these goods, subject only to the exceptions laid down in the TFEU.<sup>37</sup>

It should be added that the European Union further confirmed this approach in the rules subsequently adopted to strengthen protection of cultural goods at the European level. In this respect, both Regulation No. 116/2009<sup>38</sup> on the export of cultural goods and Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State declare their applicability by reference to an annex listing categories of cultural object falling within their scope.

The Regulation introduced uniform controls at the European Community’s external borders for the prevention of exports of cultural goods, allowing the competent authorities (culture and Customs) of the Member State from which the cultural goods were to be exported to a third country to take the interests of the other Member States into account.

Thus the Commission has stated that “...in the absence of such controls, abolishing checks at the physical borders within the Community would have meant that a national treasure unlawfully removed from a Member State could be presented at a customs office of another Member State and exported easily to a

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<sup>36</sup> See, for example, Case C-449/93 *Rockfon* (1995), ECR p. I-4291, para. 28; Case C-236/97 *Skatteministeriet v. Codan* (1998), ECR p. I-8679, para. 28, Case C-257/00 *Nani Givane v. Home Department* (2003), ECR p. I-345, para. 37.

<sup>37</sup> See Case 7/68, *Commission v. Italy* (1968), ECR p. 428.

<sup>38</sup> OJ L 395 of 31 December 1992; Regulation repealed and replaced by Council Regulation (EC) No. 116/2009 (OJ L 39 of 10 February 2009).

third country”.<sup>39</sup> The Directive complements this preventive instrument by providing mechanisms and a procedure for restoring national treasures when these have been unlawfully removed from the territory of a Member State. It should be emphasized that while the aim of the Regulation is to avoid national treasures being taken out of the European Community territory without controls, the Directive, for its part, deals with the arrangements for restoring such treasures to the Member State of origin when they have been unlawfully removed from it.<sup>40</sup>

With regard to scope, it should be specified that Regulation No. 116/2009 applies to the cultural goods listed in its annex; these are divided into 15 categories, including archaeological objects, paintings, engravings, books and photographs. The criteria for an article to qualify as a “cultural object”, which vary according to the category, are age (over 100, 75 or 50 years, depending on the case), and minimum financial value (from 0 euros for certain cultural goods, up to 150,000 euros for pictures).<sup>41</sup> As far as the Directive is concerned, it covers cultural goods which, as they belong to the categories referred to in its annex (which are the same as those listed in the annex to the Regulation), are classified as national treasures possessing artistic, historical or archaeological value under the terms of the legislation or administrative procedures of the Member States. Apart from public collections and the inventories of ecclesiastical institutions, national treasures which are not “cultural goods” within the meaning of the annex are excluded from the Directive and thus governed by the national legislation of the Member States in accordance with the rules of the Treaty.<sup>42</sup>

The decision to make reference to a minimum financial value has been criticized for a number of reasons which we would be inclined to share.

Thus the regular reports submitted by the Commission to the Council, European Parliament and European Economic and Social Committee since 2000 show criticism from Member States concerning a number of serious problems arising from implementation of the Directive. In particular, the complexity of administrative cooperation and the cost of applying the Directive were pointed to as major reasons for the fact that it was seldom used. Moreover, in the latest 2009 report, a number of States have emphasized the difficulties inherent in return proceedings owing to different interpretations of the concepts of “due care” and

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<sup>39</sup> See Report from the Commission to the Council, the European Parliament and the Economic and Social Committee pursuant to 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, Brussels, 25.5.2000, COM (2000) 325 final, p. 3 (hereinafter, “the 2000 Report”).

<sup>40</sup> See Report, *ibid.*

<sup>41</sup> The annex of Directive 93/7 specifies that the financial value is that of the cultural object in the requested State.

<sup>42</sup> See 2000 Report, p. 4.

“fair compensation” by the national jurisdictions involved in the proceedings.<sup>43</sup> A similar criticism is made, in all the reports, of the small number of legal actions brought for return of cultural objects; in particular, the third report seems to confirm that the reasons lie in the scope of the Directive (the date of 1 January 1993 and the categories of objects listed in the Annex) and the deadline of one year from the time the applicant Member State discovers the place where the object is located, as provided for in Article 7.<sup>44</sup> What is also interesting from our point of view is the indication that several Member States prefer to use other legal instruments, such as the 1970 UNESCO Convention, for the recovery of cultural objects.<sup>45</sup>

On the other hand, it should not be forgotten that even when the Regulation and the Directive are applicable, the TFEU provides that Article 36 of the Treaty cannot be disregarded.<sup>46</sup> Article 1 of Regulation No. 116/2009 is quite clear on this point when it states that the term “cultural goods” is to refer, for the purposes of the Regulation, to the items listed in the Annex “without prejudice to Member States’ powers under Article 36 of the Treaty”.

In this respect, the question of the scope of Article 36 still seems to be a matter of doubt.

### **1.2.2. European Union competence for combating trafficking in cultural goods under criminal law**

Since the European Union has no general competence but only conferred competences, the Treaty on European Union and the Treaty on the Functioning of the European Union, which both resulted from the Lisbon Treaty, must be examined to determine whether there is any legal basis for adopting new criminal rules on trafficking in cultural goods. The European Union’s competence may be considered substantively (What is its material scope?) and practically (What powers does it have?).

#### **1.2.2.1. Competence *ratione materiae* to lay down rules for combating trafficking in cultural goods**

Trafficking in cultural goods is a particularly serious type of crime against property, since it affects not only property but also the cultural heritage of Member States. It represents a threat to the safeguarding of priceless national treasures. It often takes the form of organized crime, sometimes with the complicity of

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<sup>43</sup> See Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Third report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, Brussels, 30.7.2009, COM (2009) 408 final (hereinafter “2009 report”).

<sup>44</sup> See 2009 report, para. 4.2.2; it should be pointed out that, under Article 13, the Directive applies only to cultural objects unlawfully exported after 1 January 1993.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Article 1 of Regulation (EC) No. 116/2009 and Article 1 of Directive 93/7/EEC.

professionals, bringing with it serious disruption to cultural policies and art markets. Consequently, combating trafficking in cultural goods entails enforcing the law.

*Ratione materiae*, combating the trafficking in cultural goods is not a specific competence of the European Union, that is, it is not laid down as such in the treaties. It could come under several fields of competence:

- Internal market: TFEU, Part Three, Title I
- Area of Freedom, Security and Justice (AFSJ): TFEU, Part Three, Title V
- Culture: TFEU, Part Three, Title XIII.

As regards the internal market, the trafficking in cultural goods forms part of the European Union's competence regarding free movement of goods, and particularly the limitations on the latter (national treasures).

Taking the AFSJ as its basis, the European Union could legislate within its competences to ensure a high level of security and combat transnational or organized crime – the latter to be considered in the light of the Palermo Convention against Transnational Organized Crime.

As for cultural policy, Article 167 TFEU provides as follows: “Action by the Union shall be aimed at encouraging cooperation between Member States and [...] conservation and safeguarding of cultural heritage of European significance”. In addition, it promotes “cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe”. However, paragraph 5 of this article merely states that the European Union may “adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States”.

#### **1.2.2.2. Capacity of the Union to enact criminal rules against trafficking in cultural goods**

Following the entry into force of the Treaty of Lisbon, the regulatory powers of the Union in criminal matters laid down in chapters 4 and 5 of Title 5, concerning the AFSJ were significantly extended. By virtue of Article 67 of the TFEU, the general policy objective of the Union is to ensure a high level of security through preventive measures and by combating crime, including organized crime.

On this basis, we can consider standards for harmonizing basic criminal law and proceedings and standards for cooperation .

##### **(a) Harmonization of basic criminal law**

The new Article 83.1 TFEU seeks to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension (resulting from the nature or impact of such offences or from a special need to combat them on a shared basis), such as organized crime. To the extent that organized gangs of criminals are involved, the trafficking in cultural goods could therefore fall within the jurisdiction of the Union. Furthermore, the Council can now adopt, on a unanimous vote and after approval

from the European Parliament, a decision to extend the areas of crime already listed, which could concern the non-organized trafficking in cultural goods.

Article 83.2 TFEU could also serve as a legal basis for alignment in criminal matters. Indeed, according to this new provision of the Treaty, directives could establish minimum rules regarding the definition of offences and sanctions in sectors where alignment of criminal legislation proves to be indispensable for the effective implementation of a Union policy where harmonization measures have been carried out.

On this basis, then, harmonization is possible if it is considered that cultural goods fall within a Union policy that has been the subject of harmonization measures. From this point of view, cultural policy is, on its own, not a sufficient element, as Article 167.5 TFEU states that the Union can “*adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States*”.

Finally, to the extent that it is necessary to facilitate mutual recognition of legal judgements and decisions, together with police and judicial cooperation in criminal matters with a cross-border dimension, Article 82.2 TFEU provides for the alignment of certain national rules of procedure (admissibility of evidence, individual rights in criminal proceedings, rights of victims of crime).

#### **(b) Cooperation in criminal matters**

By virtue of Article 82.2, the Union has the competence to lay down standards regarding cooperation in criminal matters, notably:

- to ensure the recognition, throughout the Union, of all forms of legal judgement and decision in criminal matters;
- to facilitate cooperation between the judiciary or equivalent bodies in Member States in the framework of criminal proceedings and the enforcement of decisions.

Particularly in matters of serious crime affecting two or more Member States, or that require prosecution on common grounds, the new Articles 85 TFEU, regarding *Eurojust*, and 88 TFEU, regarding *Europol*, offer the European legislator a legal basis for reinforcing the mandates and powers of coordination of these bodies in inquiries and prosecutions.

Finally, by virtue of Article 87.2, TFEU, regarding police cooperation, the European Parliament and the Council are empowered to establish measures regulating: “a) the collection, storage, processing, analysis and exchange of relevant information.”

#### **(c) Respect for the principle of subsidiarity**

The adoption of rules on criminal matters appears to be in conformity with the principle of subsidiarity. It emerges from the national reports and Chapter II of the present report that, by reason particularly of their diversity, national criminal laws on the trafficking in cultural goods, are no longer sufficient to provide a forceful

response that is equal to the scale and range of the phenomenon. Indeed, the transnational nature of trafficking complicates matters and makes prosecutions, investigations and judgement of these offences more difficult. Differences in national legislation impede the fight against the trafficking in cultural goods and therefore coordination and mutual assistance between Member States are required.

Combating the trafficking in cultural goods will be more effective if the Union is able to align substantive criminal law and rules of procedure in the Member States. First, this alignment is an expression of a commitment and common policy for combating this epidemic. Secondly, it avoids perpetrators of crimes being able to choose to commit these crimes in those Member States with the least severe regulations. Thirdly, the use of common definitions helps to increase mutual understanding and confidence between the systems and therefore to promote international cooperation.

### **1.2.2.3. Range of instruments for cooperation in criminal matters in the European Union applicable to the trafficking in cultural goods**

#### **(a) Palermo Convention**

In addition to the instruments for cooperation in criminal matters under European Union law, there are also international, bilateral and multilateral conventions, to which those involved in combating the trafficking in cultural goods can, in theory, refer, notably the **2000 Palermo Convention** against organized transnational crime,<sup>47</sup> given the international nature of the trafficking in cultural goods, and the frequent involvement of organised crime. The provisions of this Convention that are relevant to combating the trafficking in cultural goods include:

- the obligation of States Parties to take all necessary measures to enable the identification, localisation, freezing or seizure of property that constitutes the “proceeds” or “instrument” of organized crime with a view to possible confiscation, and this, also, within the framework of a request for cooperation by a petitioning State party;
- the obligation of States Parties to take all necessary measures to enable the confiscation of property that constitutes the “proceeds” or “instrument” of organized crime with a view to possible confiscation, and this, also, within the framework of a request for cooperation by a petitioning State party;
- the obligation of States Parties to empower tribunals or other competent authorities to order the production or seizure of bank, financial or commercial documents;
- when States Parties act on the request of another State Party, they must, to the extent that their domestic law allows and if they are requested to do

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<sup>47</sup> The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000.



- so, place a priority on returning the proceeds of the crime or the confiscated property to the State Party making the request, so that the latter may compensate the victims of the crime or return the proceeds of the crime or the property to their legitimate owners;
- the States Parties must grant each other mutual legal assistance that is as extensive as possible during investigations, prosecutions and legal proceedings concerning transnational organized crime, notably in order to:
    - carry out searches and seizures, as well as to freeze assets;
    - examine objects and visit sites;
    - furnish information, incriminating evidence and expert estimates;
    - identify or locate the proceeds of a crime, the properties, instruments or other items in order to gather evidence;
  - the States Parties may conclude bilateral or multilateral agreements or arrangements on the basis of which they would set up joint investigation bodies.

**(b) General instrument for mutual legal assistance<sup>48</sup>**

Within the European Union, mutual legal assistance regarding the trafficking in cultural goods is based first of all on the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (Council of Europe),<sup>49</sup> amended by the Protocols of 13 March 1978 and 8 November 2001 and supplemented by Articles 48 to 53 of the 1990 Convention implementing the Schengen Agreement.<sup>50</sup> The 1959 Convention is flexible and used widely in practice. Its object is the execution of rogatory commissions, which may be involved in *all measures*, with no pre-established list, that may be used as part of criminal proceedings.

The European Union Convention of 29 May 2000,<sup>51</sup> and its 2001 Protocol, aims to supplement, and sometimes substitute for the Convention of the Council of Europe of 1959. Several provisions of this Convention, which increases the effectiveness of mutual assistance, could be of interest in proceedings relating to the trafficking in cultural goods :

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<sup>48</sup> See on this subject the proceedings of the symposium on mutual legal assistance regarding cultural property, Centre du droit de l'art, University of Geneva, Schulthless 2011.

<sup>49</sup> European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, STE 030.- First additional protocol to the European Convention on Mutual Assistance in Criminal Matters of 13 March 1978, STE 099. Second additional protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001, STE 182.

<sup>50</sup> Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990, OJ L 239 of 22 September 2000.

<sup>51</sup> Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000. OJ C 197 of 12.07.2000.

- on the one hand, requests for mutual assistance are made in conformity with the laws of the requested State, which facilitates the subsequent use of evidence obtained in legal proceedings by the requesting State;
- on the other hand, the requests are made directly from one legal authority to another, and in the shortest time possible.

Above all, Article 8(1) of the Convention provides for the possibility of “placing articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.” While this provision, which is potentially useful for the victim of trafficking in cultural goods, is optional (it is initiated by the requesting State but depends on the agreement of the requested State), it does nevertheless offer a legal framework, attached to criminal proceedings, for the return of stolen goods to its rightful owner.

### **(c) Instruments of cooperation based on the principle of mutual recognition**

The instruments of cooperation established in the framework of freedom, security and justice can be of use in combating the trafficking in cultural goods. These instruments, in principle, have a certain effectiveness, since they are based on the principle of mutual recognition of court orders in criminal matters, which aims to ensure the “free movement” of these orders within the Union. According to this principle, a court order made in one Member State in conformity with its national law must be considered, in all Member States, as *equivalent* to a domestic decision and be effected without undue jurisdictional controls. In other words, these instruments have the advantage of being automatic, to a certain extent, in that they are subject to a minimum of control by the judicial authorities. They provide, in effect, for the settlement of the whole procedure through the courts and for limitation restriction of grounds for refusing to grant requests for mutual assistance. In particular, all of these instruments share the essential characteristic of no longer providing for the classic requirement of double criminality as a condition for cooperation for a list of categories of offence, which expressly includes the trafficking in cultural goods. In other words, combating the trafficking in cultural goods already benefits, in principle, from the most integrated legal systems for cooperation in criminal matters in the European Union.

#### **• Surrender of an individual**

National procedures regarding cross-border trafficking in cultural goods can make use of a European arrest warrant. By virtue of the framework decision of June 2002,<sup>52</sup> in relations between Member States of the European Union, the European arrest warrant entirely replaces the traditional extradition procedure. The European arrest warrant permits the arrest and surrender of a wanted person who is on the territory of another Member State. The European arrest warrant covers the full range of offences related to the trafficking in cultural goods, throughout the Union,

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<sup>52</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States -OJ L 190 , 18/07/2002 .

since it can be issued for the prosecution of all acts punishable by the law of the issuing Member State where there is a sentence or minimum detention period of at least twelve months. When it is issued in order to carry out a sentence or as a security measure, this can only be for sentences of at least four months. The European arrest warrant presents a number of advantages in terms of the effectiveness of the cooperation: the procedure is entirely judicial, with limited time frames and reasons for refusal. In particular, it no longer stipulates the traditional requirement of double criminality as a condition for surrender for a list of categories of offence, including the trafficking in cultural goods, where antiques and works of art are expressly included.

- **Acts of investigation**

Within national criminal proceedings on cross-border trafficking in cultural goods, the competent authorities can make use of two instruments of cooperation of the European Union based on the principle of mutual recognition, and which should, in principle, make it possible to act swiftly to obtain and seize evidence or assets situated in the territory of another Member State:

- The framework decision of 22 July 2003 on the execution of orders freezing property or evidence in the European Union
  - The purpose of the framework decision of 22 July 2003 on the execution of orders freezing property or evidence in the European Union is to enable the recognition and execution by a legal authority of a Member State of freezing orders issued by the legal authorities of another Member State within the framework of criminal proceedings.<sup>53</sup> *A priori*, this instrument of cooperation is applicable to investigations into the trafficking in cultural goods because freezing orders are defined as “any measure taken by a competent judicial authority in the issuing State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence” (Article 2c of the Framework decision). This instrument does not constitute a complete procedure since it provides for only a *temporary* freezing in the executing State. As for the European arrest warrant, the procedure for executing a freezing order is entirely judicial and the reasons for refusal are limited. And it does not stipulate the traditional requirement of double criminality as a condition of surrender for the trafficking in cultural goods, mentioned expressly. However, unlike the European arrest warrant, the expiry of the limitation period for an action in public law in the executing Member State is not a cause for refusal.
  - In addition there is the Council framework decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and

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<sup>53</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003).

confiscation of instrumentalities and the proceeds of crime<sup>54</sup> which requires States to take necessary measures to ensure that all requests from other Member States regarding the identification, tracing, freezing, seizing and confiscation of assets are treated with the same degree of priority as those granted for similar measures within domestic proceedings (Article 4).

- The framework decision of 18 December 2008 on the European Evidence Warrant.

- The evidence warrant, provided for by the Framework decision of 18 December 2008 is defined as “a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in criminal proceedings”.<sup>55</sup> The competent authority of the executing State has an obligation to respond by virtue of the principle of mutual recognition. The warrant for gathering evidence is an instrument for cooperation that can be used as part of national criminal proceedings regarding the cross-border trafficking in cultural goods. It is nevertheless limited to objects, documents and data that constitute *existing* evidence and not yet *to be discovered*. As in the case of the freezing of assets, and unlike the European arrest warrant, the evidence warrant does not replace mechanisms for mutual legal assistance such as rogatory commissions. As with both the European arrest warrant and the freezing of assets, the procedure for gathering evidence is entirely judicial and the reasons for refusal are limited. And it expressly does not stipulate the traditional requirement of double criminality as a condition for surrender for the trafficking in cultural goods. Notwithstanding, unlike the European arrest warrant, and like the freezing of assets and evidence, the expiry of the limitation period for an action under public law in the executing Member State is not a reason for refusal to cooperate.

- **Confiscation (sanctions)**

Among the various criminal sanctions, confiscation, which consists of the permanent deprivation of property, is especially relevant with regard to the trafficking in cultural goods. The European Union, on the one hand, imposes obligations on States to facilitate measures to ensure the recognition and execution of confiscation measures throughout the Union. First, the Council Framework decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (which is a criminal

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<sup>54</sup> Council framework decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001.

<sup>55</sup> Council framework decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72 of 30 December 2008.

extension of Community directives on money laundering and the Convention of the Council of Europe on money laundering, tracing, seizing and confiscation of the proceeds of crime, of 1990)<sup>56</sup> obliges States to take the necessary steps to ensure that their legislation and procedures on the confiscation of the proceeds of crime also allow, at least in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State (Article 3).

As stated above, Member States shall also take the necessary steps to ensure that all requests from other Member States which relate to asset identification, tracing, freezing or seizing and confiscation are processed with the same priority as is given to such measures in domestic proceedings (Article 4). The Council Framework decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property<sup>57</sup> stipulates a general obligation for Member States to enable the confiscation, either wholly or in part, of the instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

Finally, the Framework decision of 6 October 2006 provides for the recognition and execution of confiscation orders issued in a competent criminal court in another Member State.<sup>58</sup> The order has to involve a final decision in relation to a criminal offence. The confiscated property must be either the “proceeds” or the “instrumentalities” of the offence. If the confiscation order concerns a specific item of property, the order will be passed on to the State in which the competent authority of the issuing State “has reasonable grounds to believe that property covered by the confiscation order is located”. If there are no reasonable grounds, the confiscation order may be transmitted to the competent authority of the Member State where the natural or legal person against whom the confiscation order has been issued is normally resident or has its registered office. The procedure is expressly not subject to the verification of double criminality for the trafficking of cultural property if the acts are punishable in the issuing State by a custodial sentence of a maximum of at least three years.

#### **1.2.2.4. Bodies for cooperation on criminal matters in the Union**

In the first place, within the framework of criminal proceedings concerning cross-border trafficking in cultural goods, liaison judges seconded from one

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<sup>56</sup> Council framework decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001.

<sup>57</sup> Council framework decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. OJ L 068 of 15/03/2005.

<sup>58</sup> Council framework decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders OJ L 328 of 24/11/2006.

Member State to another can facilitate reciprocal contacts and knowledge regarding their respective judicial systems. The European Judicial Network (EJN),<sup>59</sup> which brings together national authorities with specific responsibilities regarding international cooperation in criminal matters, can also act as “advisor”: the members of the EJN provide the necessary legal and practical information to establish a request for judicial cooperation effectively or to improve judicial cooperation generally. Where police cooperation is concerned, it is the liaison officers, seconded from one Member State to another, whose function it is to facilitate cooperation between national police forces<sup>60</sup> by developing direct contacts with their foreign colleagues, with the aim of improving reciprocal understanding of the national law enforcement systems.

#### **(a) Eurojust**

Eurojust plays a similar role, as intermediary between the judicial authorities.<sup>61</sup> The trafficking in cultural goods is expressly mentioned among the material competences of Eurojust. In this type of case, a judge from a Member State may therefore quite well contact the national member of Eurojust to obtain technical support to issue or execute acts of judicial cooperation. Far from working in a strictly reactive manner, responding to cases as they arise, Eurojust has a genuine power to take the initiative. Whether it intervenes as a College or through a national member, Eurojust can address reasoned requests to the competent authorities of the Member States in order that they carry out an investigation or initiate a prosecution on the basis of precise facts; that they designate the best-placed authority to do so; that they ensure coordination between the competent authorities; that they establish a joint investigation team. Through its national members, Eurojust can also request the competent authorities of Member States to carry out special investigations or any other measure that is justified by an investigation or prosecution. It has the ability to make a ruling in case of a conflict of competence, or recurrent difficulties or refusals concerning the execution of acts of judicial cooperation. Article 85 of the Treaty on the Functioning of the European Union (TFEU) regarding Eurojust empowers the legislator to widen its sphere of competence, particularly by entrusting it to open criminal investigations, to suggest the initiation of criminal proceedings – which, it seems, aims at a referral to the trial court -; the coordination of investigations and prosecutions; finally the resolution of conflicts of jurisdiction.

#### **(b) Europol**

Combating the trafficking of goods falls specifically within the remit of the European Police Office, Europol. This body serves primarily as an intermediary

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<sup>59</sup> Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network., OJ L 348 of 24 December 2008.

<sup>60</sup> Council decision 2003/170/JHA of 27 February 2003, OJ L 67 of 12 March 2003.

<sup>61</sup> Council decision 2002/187/JHA of 28 February 2002, amended by the Council decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, OJ L 13 of 4 June 2009.

between national police forces.<sup>62</sup> In concrete terms, relations between national police forces and Europol are mediated through national Europol units, which each Member State is required to establish within its police services. The Office mainly lends support to national investigations, including facilitating cooperation in criminal matters through the exchange of information and the coordination of prosecutions. Following the Council decision of 6 April 2009, Europol can request that the competent authorities of Member States concerned open, carry out or coordinate inquiries on the basis of information that may be in its possession concerning the existence of serious offences or links between various national investigations being carried out in parallel. If these competent authorities decide not to follow up a request made by Europol, they must give reasons for their decision. In certain cases, Europol can also request them to establish joint investigation teams. As far as the future of Europol is concerned, Article 88 TFEU states that the European Parliament and the Council can extend the functions assigned to it, in particular by entrusting it with the coordination, organization and execution of investigations and operations carried out jointly with the competent authorities of Member States or in the framework of joint investigation teams. Its operational action could be even more direct, since Europol will have the possibility of organizing and even carrying out investigations itself.

### **(c) Joint investigation teams**

Joint investigation teams<sup>63</sup> are set up for a specific period and case, and so are not permanent structures. Joint investigation teams are reserved for complex investigations requiring concerted action and sharing of resources. In principle they could be set up as part of a prosecution for trafficking in cultural goods. They are designed to be deployed in the territories of the two States that have set up the team. Team members who are not nationals of the country on whose soil the team is operating are designated “seconded” members. Within the Framework decision, these members are entitled to be present during investigations being undertaken in the Member State of operation. They can also be entrusted with “the task of taking certain investigative measures” so long as the law of the Member State of operation allows it but, *a priori*, they may not be given powers that they could not exercise in their own territory.

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<sup>62</sup> Europol was created by a Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) (95/C 316/01) OJ C 316 of 27.11.1995. It has been an agency of the European Union since the Council decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L of 15.05. 2009.

<sup>63</sup> Convention cited above regarding Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000, and the Council Framework Decision of 13 June 2002 on joint investigation teams, OJ L 162 of 20/06/2002.

## 2. COMPARISON OF THE VARIOUS INSTRUMENTS AND THEIR INTERCONNECTIONS

A comparative analysis of the various international instruments and those of the European Union enables us to check for the existence of possible coordination problems. First of all it must be emphasized that the 1970 UNESCO Convention poses no specific problems, as it is a convention under public law which lays down obligations for Member States, but which is not considered directly applicable within domestic legal systems; as a result, the risk of conflict with other rules of national law, of the European Union or arising internationally but affecting relations between individuals, is very improbable.<sup>64</sup>

It is, however, more interesting to look at relations between the UNIDROIT Convention of 1995, the other conventions and legal rulings of the European Union, in consideration of the partial overlap between States Parties and Member States of the Union, which thus find themselves simultaneously the recipients of rulings arising from international conventions as well as European rulings. Hence the need to check whether or not the coexistence of such rulings and their respective obligations for States could raise problems of compatibility.

Coexistence with the conventions of the Council of Europe poses fewer problems of compatibility, not only because each convention includes a clause that aims to ensure compatibility with other conventions in force between the same Member States,<sup>65</sup> but also because, in cases of conflict, the said conventions attempt to avoid any problems by means of specific provisions; this is especially so as regards the European Convention on the Protection of the Archaeological Heritage of 1969 which, in Article 8, states that the measures provided for in the Convention cannot restrict lawful trade in or ownership of archaeological objects, nor affect the legal rules governing the transfer of such objects. Regarding the UNIDROIT Convention, it should be pointed out that, in order to allow the widest possible access, the Convention states in Article 16(4) that its provisions do not affect bilateral or multilateral agreements on mutual judicial assistance in civil and commercial matters “that may exist between Contracting States”. In this respect it is not clear whether the aforementioned rule should be interpreted in an extensive manner – by allowing future agreements signed by Member States to enter its realm of application – or in a restrictive manner, by limiting its effects to agreements already in force. If the letter of the provision is considered – as envisaged by Article 31 of the Vienna Convention of 1969 on the Law of Treaties – it is the second interpretation that prevails. It should be added that the problem is unlikely to be

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<sup>64</sup> See the Italian supreme court, 24 November 1995, n: 12166, *Foro italiano*, 1996, I, p. 907, Appeal Court Paris 5 April 2004; Supreme court., 20 September 2005, Federal Republic of Nigeria c.of Montbrison.

<sup>65</sup> See Article 8 of the European Cultural Convention of 1954, Article 8 of the European Convention on the Protection of the Archaeological Heritage of 1969, Article 34 of the European Convention on Offences relating to Cultural Property, Article 11 of the European Convention on the Protection of the Archaeological Heritage, Revised in 1992.



significant in concrete terms, given that Article 18 of the Convention provides for the inadmissibility of reservations and that its Article 13(2) allows contracting States to conclude future agreements with other contracting States that aim to facilitate the application of the Convention.

The compatibility and, more generally the relations with other conventions are dealt with in Article 13 of the UNIDROIT Convention which, besides that which has already been highlighted, deals with other aspects of the problem.

First, Article 13(1) considers the problem in a general manner by reproducing in large part the text of Article 57(1) of the Brussels Convention of 1968 concerning the Jurisdiction and Execution of Decisions on Civil and Commercial Matters and of Article 21 of the Rome Convention of 1980 on the Law in Respect of Contractual Obligations. It should also be noted that Article 13 states only that the Convention does not affect any international instrument by which any Contracting State “is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument”; it is a matter, then, only of existing conventions and not of all conventions as in the two examples mentioned.

Secondly, Article 13(3), concerning the safeguarding of the rules of regional bodies or economic integration organizations of which the contracting States are members, is a new, abridged version of Article 57(2) of the Brussels Convention of 1968 and Article 20 of the Rome Convention of 1980. In fact, with an implicit reference to the problem of the application of Community rules on the movement and restitution of cultural goods, the said standard enables Member States of regional organizations to apply, in their mutual relations, the internal standards of these organizations, excluding the corresponding standards of the Convention, every time their respective areas of application coincide.<sup>66</sup>

In this respect one may raise the question of the power of the UNIDROIT Convention to interfere regarding the functioning of 93/7/EEC, naturally exclusively regarding Member States of the European Union that are simultaneously Contracting States of the Convention.

At a formal level it would be hard to find problems of compatibility since the Convention, as we have just seen, provides in its Article 13 for the explicit regulation of relations with the internal rules of regional organizations; the Directive, according to its Article 15, allows Member States and/or owners to pursue their objective of obtaining the return of cultural goods through any civil or

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<sup>66</sup> According to Article 13(3), “In their relations with each other, Contracting States which are Members of organizations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.”

criminal legal action admissible under their domestic law or international conventions to which the States are party.

In concrete terms, however, several areas of application of the Directive and the Convention do not totally coincide, and the possibility should not be excluded of having to choose between recourse to one or the other of these two instruments. It is useful to point out that, albeit in theory, the possibilities of obtaining the return of goods appear easier through the Convention and that the Directive is a more limited instrument for the following reasons.

- The request for return, according to Article 1(3) may be issued vis-à-vis the owner or holder through proceedings before the judge of the requested Member State, but the body bringing the legal action is only the Member State whose goods have been illicitly removed from the territory, independent of whether that good is in private or public ownership.
- The Directive does not touch on aspects more directly concerning the rights *in rem* over the object for which a request for return has been made, respecting the (current) Article 345 TFEU, Article 1(5) of the Directive states, consistently with the said rule, that in the event of a successful outcome of the legal action proposed by the State, return means “the physical return of the cultural object to the territory of the requesting Member State”, which, however, raises problems of a different nature concerning the law governing ownership once the object has been returned. In this respect the Directive makes a provision, in its Article 12, which has been criticized for its ambiguity; in fact the standard stipulates that after the good has been returned it should be governed by the legislation of the requesting Member State, which raises the problem of determining the scale of referral to the law, notably concerning the alternative of either a referral that is limited to substantive law alone, or, on the contrary, a referral that also concerns the conflict-of-law rules in question.<sup>67</sup>
- Apart from the shorter time limits for forfeiture or limitation provided for under Article 7 of the Directive, compared to Articles 3(3) and 5(5) of the Convention,<sup>68</sup> the category of goods for which one can request return is considerably more limited compared to provisions under the Convention. In fact, it concerns goods, before or after illegally having left the territory of a

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<sup>67</sup> See Jayme, “Aknüpfungsmaximen für Kulturgüterschutz im Internationalen Privatrecht”, in C. Dominicé, R. Paty, C. Raymand (dir.), *Etude de droit international en l’honneur de Pierre Lalive*, Basel/Frankfurt-am-Main, Helbing & Lichtenhalim, 1993, p. 724 ss., p. 729, E. Jayme, C. Kohler, “L’interaction de règles de conflit contenues dans le droit dérivé de la Communauté européenne et des conventions de Bruxelles et de Rome”, in *Rev. crit. int. privé*, 1995, p. 35. This problem was recently examined by the English High Court in the well-known case of *Islamic Republic of Iran v Berend*, [2007] EWHC 132 (QB), which, in order to determine whether the *lex situs* could be applied to the purchase in good faith of a cultural good, considered the applicability of domestic law (in this case French law) as law that includes the rules of private international law.

<sup>68</sup> One year and 30 years, respectively, compared to 3 years and 75 years.

Member State, classified as “national treasures possessing artistic, historic or archaeological value”, in line with national legislation of administrative procedures within the meaning of Article 36 of the Treaty and belonging to one of the categories listed in the Annex or not belonging to one of these categories but forming an integral part of public collections listed in the inventories of museums, archives, libraries’ conservation collection or the inventories of ecclesiastical institutions.<sup>69</sup>

- It should be added that the Annex also contains categories of goods that are different from those in the Convention and especially that the Annex to the Directive is derived from a different basic concept, particularly regarding the qualification of certain properties as “returnable” on the condition that their commercial value is above a given threshold.

On the basis of these considerations it appears that recourse to the mechanisms provided for by the UNIDROIT Convention – even when the different legal nature of the two texts is taken into consideration – is likely to guarantee the return of the goods, even in circumstances not anticipated by the Directive and may, therefore, be considered preferable.

This conclusion is not supported by any substantial judicial practice, and is therefore not yet verifiable. It should be added that both the European Parliament and the Council in 2001 and 2002 respectively, had emphasized that the mechanism of the Directive was insufficient, notably as regards the one-year prescription period, and they called on Member States and institutions to encourage alignment with the three-year period provided for by Article 5(5) of the UNIDROIT Convention.<sup>70</sup>

In addition, in the three reports on the application of the Directive published so far by the Commission and which assess the application of the Directive by EU countries up until 2007, it is the positive effects that are emphasized; it is particularly perceived as a useful tool for the return of goods that has illegally left the territory of a European Union country and for the protection of cultural heritage. According to the Commission’s analysis, European Union countries seem to recognize that the Directive has a deterrent effect that discourages cultural goods from leaving the country illegally. However, the Directive is not sufficient to combat illegal trade in cultural goods. During the reference period the Directive was applied only rarely in the context of administrative cooperation or a return action, “mainly because of the administrative complexity and cost of applying the Directive, its limited scope and

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<sup>69</sup> Cf. Article 1 of the Directive.

<sup>70</sup> Cf. Resolution A5-0122/2001 of the European Parliament on the Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 and the Council resolution of 21 January 2002, 2002/C32/03 concerning the report of the Commission on the application of Regulation No 3911/92.

the brief period within which a restitution action must be made, as well as the interpretation of associated concepts.”<sup>71</sup>

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### **3. TECHNICAL TOOLS OF INTERNATIONAL AND EUROPEAN LAW**

The identification and traceability of cultural goods are made possible through the use of established technical tools. These include several initiatives developed or encouraged by international organizations involved in the prevention and combating of illegal trafficking in cultural goods, such as UNESCO, ICOM, INTERPOL, World Customs Organization. In these cases the tools include databases of stolen goods (INTERPOL),<sup>72</sup> databases covering national legislation (UNESCO, the HEREIN database, Council of Europe).<sup>73</sup> And for the purposes of information and awareness raising on the risks of illegal trafficking, ICOM has drawn up red lists representing the categories or types of objects protected by law (e.g. the red list of African archaeological objects at risk, the red list of Latin American cultural objects at risk, the emergency red list of Iraqi antiquities at risk, etc.). These lists alert institutions and the market about the categories of object that might be in an illicit situation and can also serve as a useful tool for customs services. Technical tools can also take the form of recommendations aimed at the commercial market, such as the International Code of Ethics for Dealers in Cultural Property,<sup>74</sup> or again, and more specifically regarding online trading, the “Basic actions concerning cultural objects being offered for sale over the Internet.”<sup>75</sup> Finally, the technical tools also include standardized documents such as model export certificates for cultural property (UNESCO-WCO) and the Object ID standard, which is a minimum international description standard for cultural property.

#### **3.1. Attempts at standardization – the UNESCO-WCO certificate**

Considering the essential role played by the export certificate in combating the trafficking in cultural goods, UNESCO and the WCO developed a model export certificate in 2005.<sup>76</sup> The 1970 UNESCO Convention and the UNIDROIT

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<sup>71</sup> See the 2000 report, the Commission report to the Council, the European Parliament and the Economic and Social Committee of 21 December 2005 – “Second Report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State” (COM (2005) 675 final – not published in the Official Journal (hereinafter the 2005 report)).

<sup>72</sup> Cf. on databases, below.

<sup>73</sup> Cf. on databases, below.

<sup>74</sup> The Code was adopted by the UNESCO General Conference on 16 November 1999 at its 29th session, and officially launched on the 30th anniversary of the Convention at UNESCO on 15 November 2000.

<sup>75</sup> List drawn up in the the framework of a recommendation by the INTERPOL Group of experts on stolen cultural property, during its third annual meeting on 7 and 8 March 2006, when participants examined the problems of monitoring internet sales. See online sales below.

<sup>76</sup> The model certificate and explanatory notes are available at :

convention both refer to the need to introduce an export certificate. This model certificate was aimed at use in countries that do not have an “appropriate” certificate of their own (Article 6 of the 1970 UNESCO Convention) for cultural objects. The idea was also to promote an international standard to facilitate the task of customs and allied services.<sup>77</sup>

One of the advantages of having this kind of model certificate available is the guarantee that a customs officer, whatever his or her mother tongue, will be able to find the same kind of information in the same place. The introduction of the model certificate, combined with lexicographic and linguistic tools developed in other domains (such as the thesaurus of specialist terms developed by the Council of Europe in its HEREIN programme<sup>78</sup>) enables better controls to be carried out and reduces the risk of false certificates and authorizations.

The involvement of professional experts in developing the certificate was a considerable advantage, although no request was put forward by Member States, thus compromising its adoption and, as a result, take-up.

It is not currently being shown to be used in countries of the Union, most of which, before the model certificate was published, had working documents of their own. None of those contacted as part of the present study mentioned use of the UNESCO-WCO model certificate.

Meanwhile, there is very widely shared appreciation of the value of standardizing documents within Europe (cf. recommendations).

### **3.2. The Object ID international standard for registering cultural objects**

Object ID is an international standard for the description of cultural objects, including a photograph, and was created on the initiative of the J. Paul Getty Trust in 1993 and launched in 1997.<sup>79</sup> Its use is encouraged by several supranational and national organizations. It was initially controlled by the Getty Trust, before being entrusted to the Council for the Prevention of Art Theft (CoPAT). In October 2004, the International Council of Museums (ICOM) signed a non-exclusive agreement with the J. Paul Getty Trust for worldwide use of the Getty Object ID standard.

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<http://www.unesco.org/culture/laws/illicit>.

<sup>77</sup> Legal and Practical Measures Against Illicit Trafficking in Cultural Property, UNESCO Handbook, International standards section, Division of Cultural Heritage, 2006.

<sup>78</sup> cf. [http://www.coe.int/t/dg4/cultureheritage/heritage/Herein/thesaurus\\_fr.asp](http://www.coe.int/t/dg4/cultureheritage/heritage/Herein/thesaurus_fr.asp).

<sup>79</sup> The document <http://archives.icom.museum/object-id/final/index.html> outlines the development and creation of the standard [consulted 8 September 2011].

### **3.2.1. Outline of the standard**

Object ID is a descriptive standard. It emphasizes the need to begin any description of cultural goods with a good quality photograph and to complete the following categories with as accurate details as possible:

- Type of object;
- Materials and techniques;
- Measurements;
- Inscriptions and markings;
- Distinguishing features;
- Title;
- Subject;
- Date or period;
- Maker.

The standard finally recommends adding a short description of the object and keeping these details in a secure place.

It is therefore a supplement to documentation on a cultural good, aimed at all users. Its use is in no way restricted to a single target group and may easily be adopted by an individual collector or owner of a stately home with period furniture, a museum or a cultural organization.

### **3.2.2. Reality of its integration with national inventories**

Among the many individuals met and questioned during the study, few said they had used the Object ID standard for their inventories. A certain number of States had nevertheless used it for inspiration and had adapted it. This was the case for museums (notably in Bulgaria, Poland and Finland for most of their collections) while certain States use it for individuals (Poland).

In the Czech Republic certain of the Object ID variables serve as minimum variables in all of the database programmes underpinning registers of cultural goods.

The award of grants by the Ministry of Culture is subject to the adoption of basic rules on digitalization, which include the minimum requirements for describing objects (the minimum basis is the RLG Reach element set). In Romania, the Object ID standard was taken into account when setting up the PHARE SMI BC platform. In the United Kingdom, it is widely used, notably by the Metropolitan Police Arts and Antiques Unit. In Belgium, the national form was designed on the basis of the Object ID standard. In Cyprus, all the Object ID standard categories are included in the Department of Antiquities inventories. The norm is also promoted for use in programmes for digitizing museum inventories. Since 2009 use of the standard has also been promoted in private museums. In Greece, the standard is used by the Ministry of Culture and Tourism in cases of illegal trafficking or theft, as a rapid means of communicating information. In the Netherlands, the standard serves as the basis for most inventory forms and is implemented in the “Delta Plan for Cultural Heritage Preservation (1990-2000)” programme. Estonia has also adopted this standard. In Norway, the Object ID standard has been translated into

Norwegian. The system used by museums (Primus programme) corresponds to the minimum requirements of Object ID. The only weakness is the absence of any mention of “identifying features” in the Norwegian inventories. Church employees and relevant associations have also adopted the Object ID standard.

However, some countries do not use the standard. This is the case of Sweden, where it is perceived as being poorly adapted to national requirements. Although Italy contributed to discussions around the creation of the Object ID standard, the country uses its own standard document, which may be downloaded from the *Carabinieri* website. The description of stolen goods that appears in the *Carabinieri* database is compatible with the Object ID standard and thus also the INTERPOL database.

While they are not based on the Object ID standard, a large number of States use inventory standards in both national public collections and inventories of “national treasures”, which overlap with the standard developed by the Getty Information Institute (in Germany and France).

With regard to international organizations, INTERPOL has incorporated the Object ID standard into its database of stolen cultural goods.

ICOM, which now controls the standard, no longer directly displays information about the Object ID standard on its new website,<sup>80</sup> but gives links to archived pages on the website.<sup>81</sup> Nevertheless, ICOM is pursuing its mission of promoting the standard, by collaborating with UNESCO and INTERPOL in the organization of capacity-building workshops to train government delegates and police and customs officers in the use of the Object ID standard.

Finally, through the revisions to the HEREIN database and preparations for the HEREIN 3 database, new and particularly precise data on the inventories currently in use in the States may come to light.<sup>82</sup>

### **3.3. Core data sets for inventories and indexes developed and disseminated by the Council of Europe**

On 11 January 1996 the Council of Europe adopted Recommendation R(95)3 on Co-ordinating Documentation Methods and Systems Related to Historic Buildings and Monuments of the Architectural Heritage.<sup>83</sup> The Recommendation “recognizes the need to take steps to co-ordinate documentation methods and systems

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<sup>80</sup> See <http://icom.museum/what-we-do/programmes/fighting-illicit-traffic/object-id.html>.

<sup>81</sup> See <http://archives.icom.museum/object-id/index.html>.

<sup>82</sup> Cf. [http://www.coe.int/t/dg4/cultureheritage/heritage/Herein/Herein3DatabaseQuestions2011\\_en.pdf](http://www.coe.int/t/dg4/cultureheritage/heritage/Herein/Herein3DatabaseQuestions2011_en.pdf).

<sup>83</sup> Cf. <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=535441&SecMode=1&DocId=517730&Usage=2>.

conducive to communication and the exchange of information between European countries”. In this way, the Council of Europe supports and encourages steps towards the standardization of data sheets for the identification of immovable cultural goods.

These standards should therefore be approached more from the perspective of a desire to strengthen and facilitate cooperation. In this respect, they effectively come close to the approach launched by the Getty.

The core data sets require information under four headings: name of the building and reference, location, architectural function and category, dating. Five headings are optional: persons and organizations associated with the building, building materials and techniques, physical condition, protection/legal status, notes.

The requirements mentioned in recommendation R(95)3 under the first four headings provide complete and structured information on architectural sites. Even though the files concern immovable property, they could strengthen the identification of property that has become movable as a result of plundering, for example, of a building by the removal of architectural or decorative elements.

### **3.4. National initiatives supporting the creation of inventories**

Besides the international and European initiatives to encourage greater harmonization of standards and the development of standards for inventories, some States have established tools for use by holders of cultural goods.

Several examples may be cited. Poland, for example, has created a website from which forms may freely be downloaded, serving as templates for drawing up inventories of collectors’ items, as well as providing information guides to help the collector fill out the forms.<sup>84</sup> While these were initially aimed at the individual, the “*Bezpieczne zbiory – bezpieczne kolekcje*” project can also be useful for private museums. It is the responsibility of the owner of the object to store the data that are entered, thus resolving any difficulties regarding the protection of personal data. Recommendations on the optimal means of keeping the data files are also available on the web site.

A similar approach has been developed in Latvia. The “*Kultūras objektu apraksta veidošana*” project<sup>85</sup> offers a trilingual website in Latvian, English and Russian. Exhaustive documents provide relevant information on the ways to describe different types of object, the best way to photograph them, etc. In this case also, the data entered into the templates provided by the site are also stored by the users themselves.

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<sup>84</sup> May be consulted at <http://www.bezpiecznezbiory.pl/>.

<sup>85</sup> See <http://ic.iem.gov.lv/ko/index.php>.



France has also developed a similar initiative. On the *Circulation des biens culturels* website,<sup>86</sup> pertinent information may be found about the movement of cultural goods as well as recommendations on photographing valuable objects.<sup>87</sup> The site also provides access to the *Guide to the use by public and private owners – Security of cultural property, prevention of theft and return of stolen objects*.<sup>88</sup> The creation and use of an inventory is one of the measures recommended to prevent theft (p. 16 of the guide).

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#### 4. SUMMARY OF ISSUES IN PRIVATE INTERNATIONAL LAW

Are we approaching a new regulation in private international law of restitution or return of cultural goods?

Territoriality, the application of the principle of *lex rei sitae*, currently very widespread in comparative private international law, often nullifies those regulations of a State that protect its cultural goods, particularly those that declare the goods to be inalienable, because where those goods are acquired by a purchaser in good faith according to the law of the new place of keeping, that purchase will be recognized. Examples of this may be found in for example French,<sup>89</sup> English<sup>90</sup> and Swiss<sup>91</sup> case law.

However, there are today a number of instances in which the territoriality of laws does not prevent the protection of a cultural object or its inalienability<sup>92</sup>. The topical example is that of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (4.1), but there are also bilateral agreements that allow the inalienability of a cultural object to be upheld on the basis of the law of the State of origin of the object (4.2). Further, exception procedures drawn from the general provisions of private international law may also be destined to play a part (4.3). Lastly it will be seen that, in our view, we have reached a point where the paradigm should probably be changed and when it is appropriate that the *lex originis*, the law of the place of origin of the cultural object, should play a more significant role (4.4).

##### 4.1. International multilateral conventions

The 1970 UNESCO Convention does indeed encourage States “to facilitate recovery of such [inalienable] property by the State concerned in cases where it has

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<sup>86</sup> See <http://www.circulation-biens.culture.gouv.fr/>.

<sup>87</sup> See <http://www.circulation-biens.culture.gouv.fr/pdf2/Photographier.pdf>.

<sup>88</sup> See <http://www.culture.gouv.fr/culture/securite-biensculturels/appli.htm>.

<sup>89</sup> See the now familiar case *Duc de Frias v. Baron Pichon*, Tribunal civil de la Seine, 17 April 1885, J. Clunet, 1886, p. 593.

<sup>90</sup> *Winkworth v. Christie's*, Chancery Division, [1979] 1 All ER 1121.

<sup>91</sup> See the case known as *Pièces d'or anciennes (Old Gold Coins)*, Decision of the Federal Tribunal of 8 April 2005, ATF 131 III 418, JdT 2006 I 63.

<sup>92</sup> See the very important English ruling *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*, Court of Appeal, [2007] EWCA Civ 1374.

been exported” (Article 13(d), final clause). To date that provision has had little impact and is rarely invoked.

For its part, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>93</sup> has had a double impact on the inalienability of national and especially archaeological treasures for States that have ratified it.

First, the Convention in principle assimilates an unlawfully excavated object to a stolen object “when consistent with the law of the State where the excavation took place” (Article 3(2) of the UNIDROIT Convention). The result is that for the 32 States that have ratified the Convention to date, an illegally excavated object is assimilated to a stolen object and can therefore not be purchased, even in good faith. This stems from the application of the other rules of the Convention, in particular Article 3(1) under which “the possessor of a cultural object which has been stolen shall return it”, whether or not it was bought in good faith.

Even where the State does not consider itself to be the owner of the illegally excavated object – an option specifically envisaged by the final words of Article 3(2) of the Convention – it is still able in the case of illicit export to demand its return on the basis of the Convention’s specific provisions on illegally exported cultural goods (Articles 5 to 7 of the Convention). In such a case, return shall not be automatic and the State of origin is required to prove that the object’s physical conservation, its context or information relating to it are at risk of significant damage. The State may also establish that the object has for it a significant cultural importance (Article 5 of the UNIDROIT Convention). This factor allows the court which is hearing the case, if it accepts the request, to take account of the public law of the State of origin of the archaeological object and, if necessary, apply the rule of inalienability and prohibition of export.

#### **4.2. International bilateral conventions**

Application or consideration of the rules of the State of origin of the archaeological object is allowed not only under multilateral conventions such as the UNIDROIT Convention. In a number of cases bilateral agreements also allow it.

Thus the bilateral agreement between Switzerland and Italy concluded on 20 October 2006, in force as of 27 April 2008,<sup>94</sup> imposes import controls on a wide range of cultural goods, particularly antiquities. Where objects are illicitly imported into one of the two States, the other may demand its return and thus secure the application of its rules on inalienability and the prohibition of export of goods originating in its soil.

To bring a case for return of goods, the co- contracting State must be able to show that the object in question falls within the Annex and is protected by national

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<sup>93</sup> <http://www.unidroit.org/french/conventions/1995culturalproperty/main.htm>.

<sup>94</sup> RS 0.444.145.21.

legislation on protection of heritage (Article 7 Swiss LTBC).<sup>95</sup> Thanks to the bilateral agreements, national legislation governing the export of cultural goods is considered and applied by the co-contracting State. Thus bilateral agreements remedy the problem of non-recognition of foreign public law.

### 4.3. Exception procedures in private international law

There exist yet more ways of enabling rules on inalienability and export prohibition of excavated objects to be considered, this time stemming from codified private international law. We shall cite two here that are based on the rules of the Swiss Law of Private International Law (LDIP), but similar procedures may be found in other texts.

#### 4.3.1. Exception clause (closer links)

Under Article 15 of the LDIP, entitled “exception clause”, a law other than the usually applicable law may be applied if in the light of all the circumstances it is clear that the action has only a very tenuous link with that law and is far more closely related with another law.<sup>96</sup> The English judge who decided the *Winkworth* case asked himself whether exceptionally the English law of the place of theft should be applied in place of the Italian law of the location of the goods at the time of purchase, but in the final analysis his answer was negative: Italian law was genuinely more relevant than English law.

#### 4.3.2. Special attachment of foreign mandatory provisions

Judges have developed devices that enable them to take account of foreign mandatory law in particular circumstances. For instance, the German Federal Court of Justice held that an insurance contract was invalid in German law because it concerned Nigerian statuettes illegally exported from Nigeria.<sup>97</sup>

National or even unified private international law also allows for this kind of procedure. In Switzerland the LDIP enshrines the procedure in its Article 19(1): *When required by legitimate interests that are obviously preponderant in the Swiss concept of law, a mandatory provision of a law other than that designated by the present law may be taken into consideration, if the situation concerned presents a close link with that law.*<sup>98</sup> This provision has never led to rules conferring inalienability on foreign cultural goods being taken into consideration. On the contrary, the ruling on the old gold coins reviewed the applicability of Indian law in the light of this provision, but it concluded that the

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<sup>95</sup> Federal law on the International Transfer of Cultural Goods of 20 June 2003 (LTBC; RS 444.1).

<sup>96</sup> Federal Law on Private International Law of 18 December 1987 (LDIP; RS 291).

<sup>97</sup> BGHZ 59 p. 82 (1972).

<sup>98</sup> Paragraph 2 of Article 19 of the LDIP makes this consideration dependent on other conditions: in judging whether such a provision should be taken into account, consideration will be given to its avowed purpose and the consequences that its application would have in order to reach a decision appropriate to the Swiss concept of the law.

restrictive conditions for exception in Article 19 of the LDIP were not met in that case.

In conventional law, Article 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations<sup>99</sup> provides a similar exception. However, it has not, to our knowledge, been applied with respect to cultural goods.

#### **4.4. Towards a change of model: the growing role of *lex originis***

Careful analysis of some national and international texts and of current practice may suggest that we have perhaps reached a change of model in this regard and that we are approaching a more regular application of the law of the State of origin either instead of or in conjunction with the law of the object's current location.

Several texts are of interest in this regard: a resolution dating back several years of the Institute of International Law at its 1991 session in Basel (1) and the Belgian Code of Private International Law of 2004 (4.4.2).

##### **4.4.1. The resolution of the Institute of International Law (Basel, 1991)**

In a ground-breaking text, the Institute of International Law dwelt on the law applicable to the international sale of art objects. Article 2 of this important text which dates from 1991 provides that “the transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country”.<sup>100</sup>

This text stems from a notable debate held under the auspices of this prestigious Institute.<sup>101</sup>

It may further be likened to some extent to the UNIDROIT Convention which, in all matters regarding the return of illicitly exported cultural objects, provides for the law of the State of origin to be taken into account (see Articles 1(b) and 5 of the UNIDROIT Convention).

##### **4.4.2. The Belgian Code of Private International Law (2004)**

More recently a national legislator, that of Belgium, took a close interest in this issue. Indeed the Article 90 of the Belgian Code of Private International Law contains the following rule :

“When an object that a State includes in its cultural heritage has left that State's territory in a manner regarded as illicit under that State's law at the time of its export, that State's claim for its return is determined by the law of the said State in force at the time or, at the latter's discretion, by the law of the State on whose territory the object is located at the time of the claim.

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<sup>99</sup> Official Journal L 266 of 9.10.1980

<sup>100</sup> Yearbook of the Institute of International Law, Basel session, 1992, Vol. 64-II p. 402 ss.

<sup>101</sup> Yearbook of the Institute of International Law, Basel session, 1992, Vol. 64-I pp. 278 ss and 64-II pp. 90 ss. (rapporteur: A Ferrer-Correia).

However, if the law of the State which includes the object in its cultural heritage gives no protection to the owner in good faith, the latter may invoke the protection afforded by the law of the State on whose territory the object is located at the time of the claim.”

This provision seems to us to offer a very relevant and original compromise between the *lex originis* (applicable abroad if the State of origin so desires) and protection of the purchaser in good faith who can invoke, if needed, the law of the current location. It is however a little early to evaluate the practical impact of this provision

We therefore see that a development is taking place. Whilst the principle of the application of the *lex rei sitae* appears to be still firmly established, hypotheses of the primacy of the inalienability of cultural goods in line with the *lex originis* are increasingly frequent.<sup>102</sup> The time may have come to refrain from considering the principle contained in Article 13(d) of the 1970 UNESCO Convention (recognition abroad of regulations on the inalienability of some cultural objects) to be a dead letter, and this through a greater recognition of the role of the *lex originis*.

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## 5. PRESENTATION OF DOMESTIC LEGISLATION

### 5.1. Means of prevention

#### 5.1.1. Identifying goods and national treasures

##### 5.1.1.1. Coming to terms with a multiplicity of legal notions

When it comes to identifying cultural goods, great diversity can be seen not only in legal definitions, but also in the approaches to categories and notions, as well methods of definition.

Several States have adopted their own legal definition of cultural goods (this is the case of Austria, Croatia, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Romania, Slovakia, Spain, Sweden, Switzerland and the United Kingdom). For others, the pertinent notion may be different, without there necessarily being a precise or specific definition of the cultural object (Sweden, Finland and Denmark). Such systems either refer to similar categories in their protective legislation (archaeological objects, historical monuments, etc.), recognize thresholds of value at which protection comes into effect (see below), or define property in relation to the cultural interest it holds (scientific, artistic, historical, etc.).

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<sup>102</sup> In addition to the German ruling cited in footnote 97 above, reference in jurisprudence will also be made to the famous English *Barakat* decision (footnote 92).

The criteria for defining goods are equally diverse. While the criterion of artistic and historical value seems to be a common denominator, it varies from one country to another. Additional, more objective, criteria are sometimes used (notably the technique of financial and value thresholds). In fact, we can identify several categories of cultural goods whose level of protection varies depending on the importance given to them by States. Furthermore, States may sometimes establish provisions specific to different categories of heritage, such as those most at risk of dispersal (underwater heritage, items recovered from archaeological excavations, religious heritage).

Lastly, methods vary depending on cultural and legal traditions. Some States operate on the basis of listings of categories of cultural objects or property (method frequently used in common law systems), while other States refer to global notions – with variable content – drawing, for example, on framework notions such as artistic and historical interest. In some instances, both methods coexist in one system.

These specificities are not compressible, although it can be seen that international law and Community law have been conducive to a certain harmonization, through conventions that define their scope by explaining cultural property (notably the 1970 UNESCO Convention and the UNIDROIT Convention).

For convenience, we shall use the term cultural goods in the wider sense, meaning the full range of goods of cultural interest whose legal and physical transfer is regulated, bearing in mind that within this whole, some goods can be identified as being more or less significant.

#### **5.1.1.2. Establishing notions: most significant cultural goods and other cultural goods**

In the corpus of legal texts which contribute to the prevention of and fight against trafficking, there is no uniform definition of the notion of cultural goods, insofar as the purpose of the text determines in how wide a sense the notion is to be understood. Three groups of cultural goods are identifiable in the different instruments which have been implemented.

First is the most significant cultural good, considered part of States' heritage and, as such, subject to the protections and guarantees that ensure that it remains in the territory. These refer, in particular, to national treasures and other valuable cultural goods. A number of notions can coexist within this category of national heritage, and in some cases, there will be a gradation of the concept, according to the public interest in protecting such cultural goods.

Secondly, a number of instruments have a broader scope, encompassing not only cultural goods of high value, but a wider range of cultural goods. This is particularly true of the rules governing the movement of cultural goods. Such rules benefit protected property, but should not be confined to cultural goods already regarded as being part of the national heritage.

For example, control over the movement of cultural goods has a broader scope because it is vital to prevent national treasures or significant cultural goods not yet identified as such from being taken out of the country. This is why it is important to control this second threshold of goods. Indeed, export applications can indicate goods of great significance, which then require protection.

Lastly, the approach is different in supervision of transactions involving works of art as an even wider range of cultural goods is taken into account. It may be thought that both the rules governing transactions of works of art (in particular online sales, a market that contributes to an increase in trafficking) or cultural goods and criminal law, should impose heavy penalties on the illicit transfer of cultural goods, including when such property is in private hands and thus does not necessarily enjoy heritage protection.

It is therefore necessary to deploy these three perspectives in a number of European legal systems in order to understand the economics of systems of protection.

#### **(a) Significant cultural goods**

Among significant cultural goods, we can distinguish two categories that are subject to different regimes. Most significant cultural good is that which is identified as part of a country's heritage and is therefore protected to ensure that it remains in the territory. In general, the export of such good is either forbidden or subject to very strict authorization.

It is this category of goods that Council Directive 93/7/EEC addresses in terms of establishing a right of return of national treasures to their territory of origin. This notion of national treasure within the meaning of the Directive is effective only for the application thereof. The Directive leaves to Member States the right to define the cultural objects that are part of their national heritage, and, among those, the most significant goods.

Once again, the methods of defining this are extremely varied.

Some European States have been able to draw on Community law and introduce the notion of national treasure in their domestic legislation. This has been the case in France and Belgium. While similar to the definition contained in Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, the notion of national treasure in French law is clearly wider insofar as its scope is not reduced by any financial thresholds or age constraints (Article L. 111-1 of the French Heritage Code). With the exception of cultural objects forming an integral part of public collections or inventories of ecclesiastical institutions, the Directive restricts national treasures that qualify for return to objects which are classified by States as national treasures and which also belong to one of the categories in the Annex stipulating financial thresholds and age constraints.

In Belgian law, Article 4 of the Decree on Movable Cultural Goods and the Intangible Heritage of the French Community of 11 July 2002 stipulates that national treasures must be of considerable interest for the French Community because of their historical, archaeological, ethnological or scientific value.

In the Czech Republic, national treasures are cultural and national monuments, museum collections, private collections, archives and goods whose cultural value has been recognized by administrative decision.

The notion of national treasure also exists in both Hungarian and Lithuanian domestic law (Lithuania has a register of national treasures).<sup>103</sup>

However, it would seem that few States drew on Community law for the methods of determining most significant goods. We note great reluctance on the part of Member States to even integrate in domestic law the notion or even the term national treasure, which is perceptible from the various language versions of the treaty. While some States translate the term literally (notably English law), others use their own categories. Thus, national treasure is translated as *patrimonio histórico* in Spanish, *patrimonio storico* in Italian, and *national Kulturgut* in German. There are many reasons behind this resistance. For one, the notion of national treasure seems, above all, to designate a limited group of goods that are deemed most valuable and this restrictive view is inconsistent with the approach of States that devise more demanding policies for protecting cultural heritage. Furthermore, the definition of cultural good falls under the sovereignty of Member States, which regard with some mistrust the introduction of a Community-defined notion of cultural heritage given that it is a matter within the jurisdiction of Member States.

Bearing this in mind, in States which do not refer to the notion of national treasure, there is a great diversity of names for goods that could be regarded as equivalent to national treasures: cultural goods which has the status of national good (Bulgaria, Article 54 of the Law of 13 March 2009), monuments (within the meaning of Greek Law 3028/2002 that includes in the movable monuments category monuments that are automatically protected on account of dating criteria and monuments classified by an administrative act), classified objects (Luxembourg, Article 26, para. 2 of the Law of 18 July 1983 concerning the conservation and protection of national sites and monuments), cultural monuments protected by the State (Estonia, Article 2 of the Heritage Conservation Act of 27 February 2002; Latvia, Law on Protection of Cultural Monuments, 1992; Lithuania, Law on Protection of Movable Cultural Property of 23 January 1996, cultural monuments being considered treasures of national heritage), ancient monuments and antiquities within the meaning of Article 2, paragraph 1 of the Cypriot law on antiquities (Chap. 31, 1959), cultural heritage or cultural property in Malta (Article 2 of the Cultural Heritage Act, 2002, Chap. 445 of the Laws of Malta). One might also think that the notion of cultural heritage as established by the National Council of the

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<sup>103</sup> <http://kvr.kpd.It/heritage>.



Slovak Republic in Declaration 91/201 refers, to a large extent, to national treasures (historical collections, museum and gallery collections, works of art, craftwork and folklore).<sup>104</sup>

While not always defined, most significant cultural goods can also be identified insofar as such goods are included in lists or inventories (see inventory techniques below). This is particularly the case in Germany, where there is a list of cultural goods and of archives of national importance (*Verzeichnis national wertvollen Kulturgutes*, *Verzeichnis national wertvoller Archive*), and in Hungary, which has a list of goods included in the list of the National Office of Cultural Heritage. Their importance may also be evidenced by the fact that they are part of public collections (in Portugal, goods owned by museums within the meaning of Law No. 107/2001 on Cultural Heritage are considered national treasures; Latvia adopted a similar solution for national museum collections considered national treasures in the Law on Museums, 2005) or, more generally, belong to public entities (see the issue of public cultural goods below) or are identified as very significant by the protection they receive which may render them inaccessible. Italian law distinguishes three such categories of goods. For two of these, verification (for certain public cultural goods, Article 12 of the Code of the Cultural and Landscape Heritage – CBCP) and declaration of cultural interest (private cultural property, Article 13 CBCP) is compulsory, while the other category including public property is considered to have cultural interest *ex se*. This includes collections of museums and picture galleries, book collections of libraries or archives (Article 10, para. 2 CBCP).

In Belgium's Flemish Community, the notion of national treasure is not used – unlike legislation in the French Community – but texts refer to the idea of the exceptional nature of cultural heritage to designate the most significant goods (Decree on the Protection of Movable Cultural Heritage of Particular Interest of 24 January 2003). Such goods, which can undoubtedly be equated with national treasures, is inscribed in a list. This notion of particular, or outstanding value is also present in Romanian legislation which establishes a movable national cultural heritage thesaurus, including items of outstanding value for humanity such as public collections in the inventories of museums, archives and libraries, the collections of religious bodies and ecclesiastical institutions, goods belonging to the State, local authorities or public entities (Article 4, para. 1 of Law No. 182 of 25 October 2000 regarding the protection of the movable national heritage). Cultural items of significant value for Romania are on a separate list – the movable national cultural heritage basic items.

As a rule, national treasures or elements of cultural heritage are subject to protective legislation rendering them mostly inaccessible, and to the constraints of cultural heritage protection, mostly prohibited from being taken out of the territory.

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<sup>104</sup> Cited in “The trafficking of cultural property in Member States of the European Union and Switzerland”, further questions, European and International Affairs (SAEI)-Bureau of Comparative Law, Ministry of Justice (France), 2008.

The notion can also be applied in criminal law. French law stipulates that the theft of cultural goods such as goods classified as historical monuments, goods in collections, and classified archives (these are national treasures) constitutes an aggravating circumstance. Similarly, Polish criminal law contains a notion of “goods of considerable importance for culture”.<sup>105</sup>

- Important goods warranting controls on movement

This second category of cultural goods is more wide-ranging. Again, the sources of inspiration differ.

A first group of States follows Community law in controlling by means of a licence the export and shipping of categories of cultural goods included in a list. However, the solutions adopted by States vary. Some copy the systems of value thresholds or dating criteria applicable to different categories of goods. This is the case in France, which has adopted the system in the annex to Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, codified in 2008 by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods, and England. Finland has also adopted the definition of cultural goods laid down in Community law. Others, while drawing partly on the principle of a detailed enumeration, differ from Community law. Under Estonian law governing the intra-Community movement of cultural goods, the cultural object is defined as in Council Regulation (EC) No. 116/2009, but is customized by a list of types of objects adapted to the country’s history and current situation. Moreover, the law does not refer to financial criteria, but draws only on criteria concerning the “historic, archaeological, ethnographic, artistic, scientific or other cultural value” (Article 2 of the Intra-Community Transport, Export and Import of Cultural Objects Act).

It should be noted that unlike the 1970 UNESCO Convention, the Council Regulation makes no particular reference to the importance of the goods, merely reserving the power of Member States to prevent their national treasures leaving the territory.

A second group of States draws on international instruments, notably the definition in Article 1 of the 1970 UNESCO Convention. For the purposes 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 the following categories ...”. This comprehensive definition is followed by a list of 11

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<sup>105</sup> Article 294, paragraphs 2 and 295 of the Criminal Code, cited in “The trafficking of cultural property in Member States of the European Union and Switzerland”, further questions, European and International Affairs Service (SAEI) – Bureau of Comparative Law, Ministry of Justice (France), 2008.

categories of objects (or 14 if the subcategories of property of artistic interest are taken into account).<sup>106</sup>

Despite the reference to the requirement of importance in the definition of cultural property, a number of authors consider that the notion should be used in its wider sense, which would vary depending on how States interpret it.<sup>107</sup>

Following on from the 1970 UNESCO Convention, the UNIDROIT Convention uses the same method,<sup>108</sup> except that the requirement of importance is expressed differently. While the UNESCO Convention refers to property designated by States as being important, the UNIDROIT Convention speaks only of property “of importance”, in a more objective approach.

A number of States draw on these texts and have adopted a broad notion of the importance of cultural property. This is the case in Switzerland (Article 1 of the Federal Act on the International Transfer of Cultural Property [CPTA]),<sup>109</sup> and, according to the report in Finland, Poland, Portugal, Germany and Belgium.

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<sup>106</sup> “(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;  
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;  
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;  
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;  
(e) antiquities more than 100 years old, such as inscriptions, coins and engraved seals;  
(f) objects of ethnological interest;  
(g) property of artistic interest, such as:  
(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);  
(ii) original works of statuary art and sculpture in any material;  
(iii) original engravings, prints and lithographs;  
(iv) original artistic assemblages and montages in any material;  
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;  
(i) postage, revenue and similar stamps, singly or in collections;  
(j) archives, including sound, photographic and cinematographic archives;  
(k) articles of furniture more than one hundred years old and old musical instruments.”

<sup>107</sup> Here, L.V. Prott, P. O’Keefe, *Law and the Cultural Heritage*, vol. 3 “Movement” Butterworths, London, 1989, p.731.

<sup>108</sup> For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

<sup>109</sup> On the discussion of the notion of cultural property within the meaning of the Swiss law and the application of the criteria of importance, P.Gabus; M.A. Rémond, CPTA commentary, Federal Act on the International Transfer of Cultural Property, Schulthess, 2006, p. 32, No.11.

**(b) Other cultural goods**

Among the measures to prevent and combat trafficking, certain texts have an even broader scope. This is particularly true of rules for controlling transactions involving works of art and of criminal law.

In English law, the Dealing in Cultural Objects (Offences) Act 2003, whose purpose is to criminalize the trafficking in objects illegally exported from or excavated in the United Kingdom or elsewhere, covers, in a very wide-ranging approach, any object of historical, architectural or archaeological interest regardless of its age or value.

From this perspective, it can be considered that texts relating to the European arrest warrant also approach the notion of cultural good in a very broad sense.

**(c) Specific categories of cultural goods**

These cover more restricted categories which, because of their context, require specific measures. This is especially the case with regulation on goods from archaeological excavations or religious heritage (see the discussion on heritage at risk).

**5.1.1.3. Multiplicity of criteria for classifying cultural goods**

**(a) Inherent criteria: standardized content on the basis of artistic and historical interest**

The heritage values underlying this notion in domestic law are established according to a wide range of criteria dominated by history and art, while allowing for a quantity of complementary cultural interests, the formulation and content of which vary from country to country. Some legal systems refer to the notion of public interest.

The German conception of cultural goods is the most wide-ranging and least specified – a cultural object is tied to a cultural value, the meaning of which remains more or less undefined as the notion of culture itself is not determinable.

In the other States, the notion of cultural goods is anchored, first of all, on artistic and historic characteristics. Furthermore, the general definition by most of the countries studied is also founded on movable objects of archaeological (e.g. England, France, Greece, Italy, Spain), paleontological (e.g. England, Spain, Malta), scientific (e.g. France, Switzerland, Spain, Estonia, Greece), technical (e.g. France, Switzerland, Greece), or sociological interest (e.g. Germany), or of social (Greece), genealogical or literary (Ireland), and industrial (Greece) importance. England's definition also refers to the architectural interest of a good, Switzerland's refers to goods of religious or social interest, and, finally, Italy's definition mentions goods of ethno-anthropological, archival or bibliographic interest. These few examples illustrate the open approach that most States are adopting with regard to determining what goods falls under cultural heritage and warrants special protection.

**(b) Extrinsic criteria**

- Subjective criteria

A number of criteria concern the link between the good under consideration and the State or community claiming possession or ownership thereof. These criteria can take many forms.

The recognition of the relationship to heritage as a criterion for identifying cultural goods varies from State to State. In a number of States, the fact that the goods are of foreign origin, without any particular link to the State does not prevent the goods from being considered to be part of national heritage – in such cases, the adjective “national” refers more to the owner or holder than to the “nationality of the cultural goods”. This is not to say that ties to national or regional history are not relevant in implementing protection – they are often cited to support a protective measure and may be mentioned in the wording of the criteria for protection (e.g. in one of the Waverley criteria in the English system,<sup>110</sup> in German law,<sup>111</sup> in Dutch law, which deems a good to be indispensable when it is a symbol of Dutch history, or Romanian law, which identifies cultural heritage items of particular value for Romania). However, as a rule, the recognition of ties to national or regional history is not an exclusive and unique criterion in protective measures. The admission of external elements to cultural heritage, the fact that the good is of foreign origin, does not preclude its inclusion in national heritage. The European Court of Human Rights in the case of *Beyeler v. Italy* recognized “that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture”, a view that is also reflected in international conventions (1970 UNESCO Convention, UNIDROIT).

Other States seem to have greater regard for the question of nationality in defining the most valuable elements of their heritage. Luxembourg law stipulates that an export licence issued by the Ministry of Arts and Sciences is required for all goods of cultural interest.<sup>112</sup> There are exemptions for goods of cultural interest created outside Luxembourg by non-national artists and which have been in the territory for less than 100 years – in a concession to the art trade, no licence is required and goods can move freely. However, the limitation opens the door to the possibility of an “adopted heritage” since goods that have been in the country for 100 years can no longer be freely exported.

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<sup>110</sup> The Waverley criteria identify cultural objects, with the exception of museum collections, on the basis that they satisfy one or more of three criteria: is it so closely connected with British history and national life that its departure would be a misfortune?; is it of outstanding aesthetic importance?; is it of outstanding significance for the study of some particular branch of art, learning or history?

<sup>111</sup> Act to Protect German Cultural Property against Removal (*KultgSchG*, para .1, subpara. 1).

<sup>112</sup> Act of 21 March 1966 concerning (a) the excavation of sites of historic, prehistoric, paleontological or other scientific significance; (b) protection of the movable cultural heritage.

In this regard, in French and English law, we observe limitations on control of movement based on the fact that the goods have been in the country for less than 50 years (example of French law borrowing from English law). The same rule is seen in the Hungarian system, where any cultural good over 50 years old and identified in Hungary can be recognized as a national treasure. This connecting factor is considered too weak to justify a ban on removal.

The condition of nationality sometimes serves to make a distinction between different categories of cultural goods. This is the case in Swedish law which, in Act No. 950 of 1988 on cultural monuments, distinguishes between cultural heritage goods, goods could have been created outside Sweden by non-Swedes, and national treasures, defined as objects of significant historic interest created in Sweden by Swedish artists.<sup>113</sup>

Another criterion also challenges the link that consists of measuring the consequences of the loss or removal of a cultural good on a nation's heritage. If the loss of a good is likely to be detrimental to national heritage, its export is prohibited. This mechanism is quite common in both Italian and German legislation.

Among the criteria in German law, the following are mentioned under heritage: important objects by artists of international renown, objects of outstanding importance for German art or history (including natural history) or of outstanding importance for the history of a *Land* (state) or historical regions. The Act refers in particular to cultural goods "whose removal from the territory [...] would constitute a significant loss for German cultural heritage".

In Dutch law, the Cultural Heritage Preservation Act of 1 February 1984 defines cultural property as: "moveable property of such cultural-historical or scientific value that it should be preserved as part of the Dutch cultural heritage and should thus be placed on the list, if it may be regarded as irreplaceable and indispensable".

This link can also be reflected in references to a country's history, and lead to protection of only those objects created before certain periods, or automatic protection for certain objects created before a given period. In Estonia, 1945 – the start of the Soviet era in the country – is a benchmark year with regard to legislation governing the trans-border movement of cultural goods. Certain types of goods are considered to be cultural goods only if they were created before that date (fine jewellery, Estonian ethnographic objects, including national costumes, works of visual art, weapons and ships manufactured in Estonia, art. 2, Intra-Community Transport, Export and Import of Cultural Objects Act of 2007). In Denmark, cultural goods created before 1660 is protected, bearing in mind that other criteria also come into play (notably the application of financial thresholds). In Greece, among the movable monuments classified under Article 20 of Law No. 3028/2002,

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<sup>113</sup> Source: "The trafficking of cultural property in Member States of the European Union and Switzerland", European and International Affairs Service (SAEI), Bureau of Comparative Law, Ministry of Justice (France), 2008.

automatic protection applies to monuments dating up to 1453, monuments dating after 1453 and up to 1830 (foundation of the Hellenic State) which constitute finds from excavations or other archaeological research, or have been removed from immovable monuments, as well as icons and other religious objects used for worship, dating from the same period.

The issue of connection can again be seen in the link between an object and a whole, a collection, site, etc. – a view that is present in both Greek and French legislation, with the notion of the interest or oneness of collections.

- Objective criteria

Thresholds relating to value and age are often used in texts governing control of the movement of cultural goods, and sometimes, more generally in the definition of cultural goods. Seen thus, Community law has sometimes influenced domestic law in Member States, which have drawn on the annex systems and financial and date ceilings.

Under Italian law, for example, a good cannot be considered cultural good if it is the work of a living author or was produced less than 50 years ago (Article 10(5) CBCP). This reflects the criteria outlined in the annexes of the European instruments.

Initially, French law was aligned with Community law, with a scope that was identical to that of the Regulation to issue an export licence. However, French law has modified some financial thresholds, which now are quite different from those provided for in European law. These modifications remain marginal, however.

Factoring in the economic value is not always relevant in controlling the movement of goods. To cite the example of Estonia, control can be determined only by cultural value, for example “historic, archaeological, ethnographic, artistic, scientific value” (Intra-Community Transport, Export and Import of Cultural Objects Act of 2007).

#### **5.1.1.4. Identifying cultural goods by means of lists**

The report on the movement of cultural goods (2004/2007) shows that in some States, cultural goods of public interest are inventoried and listed, their inscription on lists meaning that they cannot be permanently exported.<sup>114</sup> This is the case in Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. In Malta, an inventory, a legal obligation, is being created for cultural goods belonging to the State, public institutions and museums, the Catholic Church and other religious bodies and to private owners. In Croatia, there is a register of cultural goods of national interest. Switzerland has also laid down a provision in the CPTA whereby cultural goods of the Confederation of significant importance for the cultural heritage can be registered in a Federal Registry (Article 3), in a more

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<sup>114</sup> 2004 Report, p.20.

restrictive sense than the generic notion of important goods reflected in the CPTA for application thereof.

In Germany, once a good has been entered on the registers of cultural goods and of archives of national importance (*Verzeichnis national wertvollen Kulturgutes*, *Verzeichnis national wertvoller Archive*) it cannot be removed from Germany unless a licence is first obtained. However, entry on the registers does not bring with it any rules regarding the applicability of statutory limitations or inalienability. Such goods, which are small in number, can be equated to national treasures and, as a rule, are meant to stay within the territory.

Bulgarian law provides for a register of museums (Article 32, Law of 13 March 2009) and a register of cultural goods identified by the Ministry of Culture at the national level (art. 102, Law of 13 March 2009). Owners of goods that fall within the definition of cultural goods must declare them to a cultural goods identification committee, which either declares the goods inscribed, or recognizes them as national treasures.

In Greece, all cultural goods classified as monuments are registered and documented in the National Archive of Monuments (Article 4 of Law No. 3028/2002). All goods held in museums are listed in the museum inventory as well as in the National Archive of Monuments.

In Slovakia, there are several registers, the effects of which vary, a central register of monuments and heritage elements, which offers substantial protection for the goods included therein, and a register of most significant cultural goods.

The central register, in Croatia, is arranged in three lists: inscribed cultural goods, cultural property of national importance, and cultural property under preventive protection.

Poland has established a central register of objects and antiquities, but objects in museums and libraries are not included in this.

It would be worthwhile analysing in further detail the scope of these list systems. While some registers do provide protection for cultural goods, others are mere informative inventories (e.g. list of movable cultural goods in Austria). Furthermore, the very terms list, register and listing may have different meanings. In France, from first denoting a list of buildings, a listing came to designate a form of protection, a public easement that constrains ownership of the property. The resulting terminological and translation difficulties call for particular caution to be used when dealing with these notions.

#### **5.1.1.5 Identifying cultural goods by reference to public ownership**

The regime of public ownership in ordinary law is, for a number of States, a vital element in the protection of heritage, particularly for movable goods. This is the case in several of the civil law countries studied. A number of cultural goods are, in fact, protected because they are owned by a public body and thus fall under the



regime of public ownership which applies in a number of Member States. As a rule, this implies the inalienability and/or imprescriptibility of goods covered by that regime. Some States have established a legal presumption of protection for public cultural goods (Austria<sup>115</sup> and Italy).

However, the way in which goods in the public domain are defined sometimes depends on a number of different rationales. In most systems, the public domain is an aspect of ordinary property law, the main criterion being that the property must be used for the public good. In certain systems, States specify which public cultural goods fall within the public domain. For example, Article 822 of the Italian Civil Code on the public domain stipulates that: "...Constitute part of the public domain, where they are the property of the State (...) buildings of recognized historic, archaeological and artistic interest by measures having the force of law; museum collections, picture galleries, archives, libraries; and, lastly, other property subject to the regime of public domain by law". The Italian Code of the Cultural and Landscape Heritage refers to Article 822 of the Civil Code.

Spanish heritage law mentions the condition for belonging to the public domain for a number of protected goods. The value of the goods is the most important factor in the decision to include such goods in the public domain classification. Article 44 of the Law on Spanish Historical Heritage states that "all objects and material remains possessing the values of the Spanish Historical Heritage that are discovered as a result of excavations, earth moving or works of any type or by chance are considered of the public domain". In addition, pursuant to Article 5 of Law No. 33/2003, buildings owned by the Government and which house museums, archives or libraries are considered to fall within the public domain. The same applies to movable goods of the Spanish Historical Heritage and held in museums, archives and libraries.

In Swiss law, levels of competence must be taken into account. The laws of some cantons provide for regimes of public ownership by determination of law, for example with regard to public archives.

France adopted a unique solution by defining movable public property according to the historic, artistic, aesthetic, archaeological, scientific and technical interest of public property.<sup>116</sup> Once such an interest is recognized, movable public property falls *de lege* in the public domain without it being necessary to identify the condition of social benefit.

It should be noted that the public nature of a good does not necessarily mean it is owned by a public entity. German legislation recognizes a category of goods for public use which may be privately or publicly owned (*Öffentliche Sache*).

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<sup>115</sup> Law on the protection of the heritage, *Denkmalschutzgesetz* of 2000; DMSG, BGB 1.I No. 170/1999.

<sup>116</sup> Art. 2112-1 of the general code on public property.

### 5.1.2. Databases for preventing and combating the illicit movement of cultural goods

There are several different types of databases of cultural goods. While they are all used as channels of information for the prevention of trafficking in the cultural goods identified therein, some of them are more specifically used for combating trafficking in cultural goods.

First, it should be stated that there is a wide range of databases, both public and private, that identify and list the cultural goods of a State, a community, a museum and so forth, as well as databases with inventories of goods of a certain kind, such as the photo library of the Royal Institute for Cultural Heritage in Brussels, for example, which is well known for its inventory of the movable heritage of Belgian sanctuaries.<sup>117</sup> There are also, in some States, databases on “national treasures” or, more broadly, cultural property that is categorized as being under protection, being listed for instance, or considered to be heritage at risk.<sup>118</sup> All of these databases concern us insofar as they can identify the good that has restrictions placed on its movement, but they will not be examined in detail here,<sup>119</sup> as they do not directly concern the illicit movement of cultural goods, only its status. They are tools for knowledge of cultural good<sup>120</sup> but not tools for tracking the movement of this good.<sup>121</sup>

The current situation shows that databases on cultural goods and the movement of cultural goods are highly varied. This situation is well known and has begun to be understood by international institutions. In 1990, on the initiative of Canada, the United Nations General Assembly requested the United Nations and UNESCO to

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<sup>117</sup> See [www.kikirpa.be](http://www.kikirpa.be). Another example is the database of the Church of Cyprus:

(a) for cultural property in the Greek Cypriot-controlled area there is a computerized database;

(b) for cultural property in the Turkish-occupied area the database is under construction. It will include a search engine and photographs of cultural property.

<sup>118</sup> In the United Kingdom the Portable Antiquities Scheme (PAS), established in 1997, is a voluntary scheme that records archaeological objects found by members of the public in England and Wales. Every year many thousands of objects are discovered, many of these by metal-detector users, but also by people whilst out walking. Such discoveries offer an important source for understanding the United Kingdom's past.

The PAS is managed by a consortium of bodies. The data collected by the PAS is made available to the Historic Environment Records, which hold the largest amount of information on the United Kingdom's historic environment, and are published on the PAS website (<http://finds.org.uk>).

<sup>119</sup> These databases have already been analysed in the 2004 Report.

<sup>120</sup> In Latvia, for example, the Electronic Service “Creation of description of cultural objects”, (<http://ic.iem.gov.lv/ko/>) has been accessible since May 2011 with the primary goal of providing a qualitative description in the case of stolen or missing property. The public service proposes a descriptive methodology, while preserving the owner's privacy. Any person or institution can describe an object according to this methodology, then keep the electronic file of the description on a server or other electronic medium. The visibility of this instrument is favoured, given the trends in trafficking of cultural property. Churches, in particular, are therefore encouraged to use the tool. It is also designed for private collectors, although the difficulty, highlighted by the Ministry of Internal Affairs, is that there is no association of collectors to contact.

<sup>121</sup> Although inventories may mention the status “stolen” or “missing” (see below).

promote international cooperation for the coordination of computerized databases on stolen cultural goods.<sup>122</sup> Since then, a number of meetings have been held, but the project remains unfinished. INTERPOL is nevertheless particularly active in this field. In addition to its database on stolen cultural goods, the international organization regularly holds international conferences and meetings of expert groups on stolen cultural goods, and the conclusions that are reached systematically reiterate the importance of reliable documentation and the establishment of databases of stolen cultural goods.<sup>123</sup>

At the European level there is a thematic network called Europeana, which has been accessible to the public since the end of 2008. Europeana is an online multimedia library funded by the European Union through the eContentplus programme, under the initiative “i2010 – A European information society for growth and employment”. Europeana.eu is a partnership between 100 prominent institutions that are representative of European heritage<sup>124</sup> and expert groups on information technology from across Europe, working on technical questions and accessibility. Over 1,500 cultural organizations have provided material to Europeana. Fifteen million goods are accessible, but Europeana is not intended to be a database on the illicit movement of cultural goods.

More specifically, the Council of the European Union gave its conclusions on preventing and combating trafficking in cultural goods<sup>125</sup> in which it noted that the free movement of cultural goods requires greater traceability of such goods in order to better prevent trafficking, and supported INTERPOL’s action in improving its database and designing to that end an automatic data exchange system. This study therefore falls within the scope of these conclusions.

We should therefore describe the main databases that, whether exclusively or not, help to track the licit and illicit movement of cultural goods. In relation to the distinction between stolen goods and illicitly exported goods, we find that there are databases essentially for stolen cultural goods and not for illicitly exported goods. The reason is simple and concerns the traceability of the goods. It is easier to note a theft than the illicit export of a good, because in the latter case, the export is

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<sup>122</sup> UNESCO information document on the databases concerning the illicit traffic in stolen cultural property 30 C/INF.5 of 16 September 1999 in follow-up to Recommendation No. 4 of the tenth session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (25-28 January 1999).

<sup>123</sup> See conclusions of the meetings of the INTERPOL Expert Group (IEG) on Stolen Cultural Property, held in Lyon, France on 23-24 February 2010 and 5-6 April 2011: <http://www.interpol.int/Public/WorkOfArt/Conferences/DefaultFr.asp>.

<sup>124</sup> They include the British Library in London, the Rijksmuseum in Amsterdam and the Louvre in Paris. Europeana is managed by the European digital library foundation, which brings together the main European associations representing libraries, archives, museums, audiovisual archives and cultural institutions, and is hosted by the National Library of the Netherlands, the *Koninklijke Bibliotheek*.

<sup>125</sup> Council of the European Union on Justice and Home Affairs, 2,908th meeting in Brussels, 27 and 28 November 2008.

inherently clandestine while a theft is normally reported to the authorities. It is only at the end of the chain, upon the acquisition or sale of the goods, that the matter of the illicit nature of its export may come to light. In addition, the databases do not concern only stolen goods. Depending on the history of the State concerned, such databases may include other cultural goods such as goods that have been despoiled or are missing.<sup>126</sup> Finally, institutions such as ICOM issue alerts, especially on property endangered by natural disaster (Haiti) or war (Afghanistan), as a preventative measure.

We shall therefore give an overview of the databases of stolen, despoiled, lost or missing goods, and property at risk.

#### **5.1.2.1. Databases of stolen, despoiled, lost and missing cultural goods**

There are currently several databases of stolen, lost and despoiled cultural goods. They are compiled at the international or national level and may be public or private.

##### **(a) International institutional databases**

*INTERPOL [www.interpol.int](http://www.interpol.int): International Criminal Police Organization*

INTERPOL's website has several channels of information relating to stolen cultural goods:

- A database of around 35,000 stolen cultural objects, primarily works of art ([www.interpol.int/Public/WorkOfArt/dbaccess.asp](http://www.interpol.int/Public/WorkOfArt/dbaccess.asp)).
- Posters showing the most sought after works of art.
- Photos of recently stolen works of art.
- Photos of works of art recently recovered by the police and whose owners have not been identified. (<http://www.interpol.int/Public/WorkOfArt/Search/Owner.asp>).
- A CD-Rom entitled "INTERPOL – Stolen Works of Art" is available on subscription.
- News of recently stolen works of art reported to INTERPOL.

The database itself is updated by the INTERPOL National Central Bureaus of the Organization's member countries. It is not systematically and regularly updated, which makes it an underexploited tool.

It is consulted directly by the member countries, and since 2009, it has been available to anyone requesting access.

The photo libraries on works of art that have been recently stolen or recovered by the police are directly accessible to the public.

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<sup>126</sup> In Central Europe in particular, countries such as Germany and Poland have databases on property looted by the Nazis during the Second World War.

## Current state of play

The national reports show frequent consultation of this database, which appears to be the most well-known database, not only to the police but also to cultural institutions.

Example of information on a recently stolen work of art (source: INTERPOL website):

Type: Painting  
Title (English): Acts and a Cable Car  
Period: 1987  
Artist(s): Nowosielski



### Description

Material: Canvas/Cotton/Fabric/Linen , Wood  
Technique: Oil  
Height (cm): 27  
Width (cm): 22

### Administrative Information

Case happened in: Poland  
Folder: 2011/45200-1.3

*ICOM Red List: <http://icom.museum/what-we-do/resources/red-lists-database.html>*

The International Council of Museums (ICOM) publishes on its website a database of Red Lists, comprising various categories of particularly vulnerable archaeological objects, or endangered works of art, to prevent their sale and illegal export.

The Red Lists are drawn up by ICOM in cooperation with experts from the world museum community.

Access to the Red Lists is public and free of charge.

ICOM has already published the following:

- Red List of African Archaeological Objects (2000)
- Red List of Latin American Cultural Objects at Risk (2003)
- Emergency Red List of Iraqi Antiquities at Risk (2003)
- Red List of Afghanistan Antiquities at Risk (2006)

- Red List of Peruvian Antiquities at Risk (2007)
- Red List of Cambodian Antiquities at Risk (2009)
- Red List of Endangered Cultural Objects of Central America and Mexico (2010)
- Emergency Red List of Haitian Cultural Objects at Risk (2010).

Each Red List is accompanied by a description of the context in which it was established, along with the current legislation.

The Red Lists are known to the police and art trade professionals. They have a preventative purpose in warning of the risk of trafficking in particular property. They thus contribute indirectly to due diligence without playing the same role as databases of stolen goods.

Example of objects on the Red List of Afghanistan Antiquities at Risk (source: ICOM website):



Note:

Material: Ceramic

Type: Tools and weapons

Details: Of these ceramics, we note especially the green and yellow Bamiyan bowls, decorated in sgraffito (incised).

Red List: Red List of Afghanistan Antiquities at Risk

Countries: Afghanistan

Period: Islamic.

## (b) National databases

*European Union Member States*

- **GERMANY**

### II Database of stolen goods – Federal Police

Section SO41-24 of the BKA (Bundeskriminalamt: Federal Criminal Police Office) maintains and uses the central database of cultural goods that has been stolen and/or proposed in suspicious circumstances (NNSACH). The database is only accessible to the police. Information for the database is provided by the BKA

and the Länder Criminal Police (LKA), who have access to the database and for the past two years have been able to enter and withdraw information. The BKA insists on quality control of the dates and information recorded.

In addition to the BKA database, some of the LKA have their own databases, such as the Bavarian database of cultural goods that has been stolen and/or whose origin is uncertain (Bavarian LKA in Munich).

The BKA and the LKA enter data according to the main criterion, which is the object's precise and obvious identification and provenance. In general there is no limitation with regard to value.

In principle, only the police services (BKA and LKA) have direct access to the central database of cultural goods that has been stolen and/or proposed in suspicious circumstances (NNSACH). However, according to the LKA of Berlin, some information is accessible to the public. All stakeholders in the art market have indirect access to information contained in the BKA database (NNSACH).

## II Lost Art Database ([www.lostart.de](http://www.lostart.de)): despoiled goods

The Lost Art database contains data on cultural goods that has been removed or relocated, stored by or taken from its rightful owner, especially from Jews, in connection with Nazi persecution or as a direct result of the Second World War. The database is managed by the Koordinierungsstelle Magdeburg (Magdeburg Coordination Office for Lost Cultural Assets), which is Germany's central office for the documentation of cultural heritage and the loss of cultural goods. It is a public institution financed by the Federal Government and all the German Länder, and provides information and cooperation for all stakeholders in the protection of cultural goods and the art market.

The database is divided into two parts:

– 1. Search requests

Registration of cultural goods lost by public or private institutions or individuals as a result of Nazi rule and the Second World War. The owners of goods of uncertain or incomplete provenance may search the database to see whether or not the objects have been sought elsewhere.

– 2. List of recovered objects

Registration of illegally seized or relocated cultural goods as a result of war and of property whose provenance is uncertain or incomplete but suggests illegal dispossession.

### Search request – details

|                      |  |
|----------------------|--|
| Class of object      | Museum   |
| Artist               | Renoir, Auguste  |
| Title                | Still life of roses                                      |
| Type of object       | Painting   |
| Generic terms        | Still-life / Still-life with flowers                     |
| Measures             | Height: 35.00 cm Width: 45.00 cm                         |
| Material / Technique | Oil : Canvas /   |
| Provenance           | Bignou, Paris; Sammlung Max Silberberg, Breslau; Auktion |

Circumstances of loss      bei Graupe, Berlin 1935; Privatbesitz, Zürich  
Berlin (Auktion Graupe) 1935



- **AUSTRIA**

- II Database of stolen goods – Ministry of the Interior

The BKA (Federal Criminal Police Office) uses the database of the Federal Ministry of the Interior (Bundesinnenministerium). Information for this database is provided by the police and INTERPOL's Austrian National Central Bureau. However, the subordinate police services (the Länder police and local police) and the judiciary also have access to all of this information.

- **BELGIUM**

- II ARTIST (Art Information System) – Art TeamResearch – Federal Police

The ARTIST database of the Belgian Federal Police registers stolen cultural goods (works of art, antiquities, jewellery). It holds records of around 20,000 objects. All works of art are concerned. There are few items of jewellery (only those considered to be unique, comprising around 1,000 items of jewellery out of the 20,000 items recorded in the database). There are multiple objects with additional details enabling them to be identified.


The police have direct access to this database and the public have indirect access. Anyone can request verification of an object's origin.

Statements recording the theft of an object are made on a form (see an example on the following page) and a photograph of the object is included in the ARTIST database.

This database is due to be improved and should receive financial investment.



## FORMULAIRE D'ENREGISTREMENT POUR OBJETS D'ART, ANTIQUITES ET BIJOUX



|                   |  |                |  |          |
|-------------------|--|----------------|--|----------|
| <b>POLICE</b>     | <b>PROPRIÉTAIRE</b> LA PERSONNE QUI DÉTIENT LE DROIT DE PROPRIÉTÉ DE L'OBJET |                |  |          |
| NUMÉRO DE DOSSIER | NOM & PRÉNOM   | DATE DES FAITS |  |          |
| SERVICE DE POLICE | RUE  | N°             |  | POSTCODE |
| N° ZONE DE POLICE | COMMUNE  | TÉL. MAIL      |  |          |
| TÉLÉPHONE         |  |                |  |          |

|   |                 |              |       |         |
|---|-----------------|--------------|-------|---------|
| <b>OBJET</b>  |                 |              |       |         |
| DESCRIPTION   |                 | TITRE        |       |         |
| AUTEUR/CRÉATEUR   |                 | OBJET        |       |         |
| LARGEUR (CM)  | PROFONDEUR (CM) | HAUTEUR (CM) | POIDS | DATAION |
| Toutes les inscriptions lisibles apposées sur l'objet (artiste?, signature, atelier, fondeur, numéro, date, inscription, poinçon, marque, ...). autres particularités, commentaire, remarques (époque, style, ...). |                 |              |       |         |
| (*) Si l'artiste est connu, le mentionner, même s'il n'est pas signé son œuvre.   |                 |              |       |         |
| Matériel utilisé pour la fabrication de l'objet:  |                 |              |       |         |
| Remarques particulières (défauts, vices, restaurations, marques personnelles ou industrielles et leur localisation, ...) commentaires, remarques.   |                 |              |       |         |
| Nom de la compagnie d'assurances ou du courtier + tél.:   |                 |              |       |         |

- N'oubliez pas, après avoir déposé plainte:**
- D'ajouter une ou plusieurs photos en couleur, qui permettent de voir tous les côtés de l'objet
  - De compléter les deux cadres supérieurs du formulaire.
- Cela nous permettra d'insérer les objets dans notre banque de données.



## Remplissez maintenant ce formulaire! En cas de vol de vos objets d'art, il vous aidera à déposer correctement plainte!



### > Une photo et une marque sont indispensables

#### Pourquoi?

- Sans photo, il n'est possible de procéder ni à une identification, ni à une restitution.
- Une photo classée dans ARTIST (Art Information System) peut constituer la preuve que vous êtes effectivement le propriétaire d'un objet identique à celui qui a été retrouvé par les services de police. Néanmoins, le fait qu'un objet retrouvé soit identique à celui qui figure dans la banque de données ne peut rester qu'une présomption de propriété. C'est le cas de nombreux objets d'art qui ont été fabriqués en de multiples exemplaires (objets de bronzes, meubles, orfèvrerie, porcelaine, vaisselle, bijoux, armes, horloges ...) ou qui ont été copiés plusieurs siècles plus tard (à savoir au 19ème siècle).
- Afin que cette présomption ait force de preuve, vous devez mentionner certains particularités de l'objet volé:
  - Accidents, défauts, vices, restaurations, ...
  - un marquage (signe, trace, inscription, que vous avez vous-même volontairement apposé, gravé ou incrusté) à un ou deux endroits discrets ou dans l'objet (éventuellement par un professionnel) pour lui conférer un caractère personnel et au finalifier vos biens.

#### > Vous complétez le formulaire ...

- complétez un seul formulaire par objet. Prenez votre kit de formulaires que nécessaire, ou faites des photocopies exactes vers du papier exemplaire.
- Prenez des photos en tenant compte des instructions suivantes:
  - Prenez toujours des photos en couleur (numériques: minimum 3 mega pixels!), à au moins 1 photo par objet, et plus d'une photo si l'objet diffère en apparence que nd il est pris sous différents angles.
  - Prenez un gros plan des particularités qui peuvent servir à l'identification (modifications particulières, griffes, décolorations, dégâts, etc).
  - Il est conseillé de prendre les photos à la lumière du jour et de veiller à ce qu'il n'y ait pas d'arrière-plan réfléchit.
  - Placez une règle à côté de l'objet afin que sa taille puisse être déterminée sur la photo.
  - Lors du développement, vous n'êtes pas obligé de donner vos coordonnées à un photographe.
  - Dans le cas d'un tableau, n'oubliez pas d'en photographier le verso!

- N'ajoutez pas au formulaire la (les) photo(s) de l'objet décrit.
- N'écrivez rien dans les rubriques si vous ne connaissez pas la réponse ou en cas d'informations trop vagues.
- Pour décrire une collection (timbres postaux, monnaies, statuettes, ...), il est également indiqué d'utiliser un seul formulaire par objet. Si le nombre d'objets de la collection est trop important, ajoutez une description aussi complète que possible, ainsi que des photos de l'ensemble de la collection.
- Placez vos formulaires complétés dans un endroit sûr. Ne les montrez pas sans motif fondé.

#### > Vous venez d'être victime du vol d'une partie de vos biens...

Évitez de toucher quoi que ce soit sur le lieu du vol et déposez plainte auprès du service de police locale auquel vous avez fait le(s) déclarations de l'enregistrement. Les photos peuvent être gravées sur CD-R OM ou imprimées sur papier photo de qualité. Le formulaire et les photos permettront à l'agent de réaliser une description aussi complète que possible des objets qui ont disparu. Il peut également être utile de conserver une copie de votre (vos) formulaire(s) pour votre dossier personnel et, si nécessaire, pour votre compagnie d'assurances.

La police fera parvenir tous ces éléments (votre plainte, le formulaire d'enregistrement et les photos), via le canal de l'information de l'arrondissement (CIA), à :

**Police judiciaire fédérale > PF / ART**  
Rue Fritz Toussaint 8 > 1050 Bruxelles  
E-mail: art@jib.be > tél: 02 642 65 77 > Fax: 02 642 60 45

**ART Research Team (ART)** est un service qui fait partie de la direction générale du pilier judiciaire de la Police fédérale - Direction d'immunité contre les biens. Il gère la banque de données nationale d'images ARTIST, qui dispose l'inventaire de l'ensemble des objets d'art et biens culturels volés sur le territoire belge.

Enfin, si vous reconstruisez quelque part un objet qui vous a été dérobé, contactez-le convenablement pour vous assurer qu'il vous appartient, n'écrivez pas les soupçons de la personne qui le tient en main et signalez cette découverte aussi rapidement que possible au service de police le plus proche. Celui-ci interviendra immédiatement.



- **CYPRUS**

- II Police and Antiquities Department databases

1. Police-maintained stolen cultural goods database.

2. Department of Antiquities – database on stolen cultural goods and on lost cultural goods located in the northern part of Cyprus.

The purpose of the Cyprus Archaeological Digitization Programme is to digitize movable and immovable goods listed in Cyprus's Antiquities Act, but not goods in the northern part of the island. The public will have Internet access to the database. The Cyprus Archaeological Digitization Programme is a project independent of the databases of the Department of Antiquities on stolen cultural goods and on cultural goods in the northern part of Cyprus, to which only the Department of Antiquities, and not the public, has access.

- **SPAIN**

- II DULCINEA, stolen goods database

DULCINEA contains photographs of works and full information on items' characteristics and current location. Only the historical heritage squad of the police force (*Guardia civil*) and provincial officials have access to DULCINEA.

- **FRANCE**

- II TREIMA 2 (Electronic search and fine-art images thesaurus), database of France's Central Office against Trafficking in Cultural Property (OCBC).

This database, operational since 1995, is France's main national library of photographs of stolen cultural goods (85,000 items), including cultural goods reported by INTERPOL as stolen abroad. Entries are uploaded by OCBC, the national gendarmerie (military police) and the organized crime squad (antique dealers group) at the Paris Prefecture of Police.

The crucial feature of this database is that it is linked to a search engine that finds similar images. The computer uses information provided on an item to find a number of images comparable to the item checked, ranging from the most similar to the most unlike. Furthermore, one of the strengths of this database is its mobility, since it can be downloaded on to a laptop for work outside the office – in searching of premises, for example – and abroad.

The public does not have access to this photograph library, which is open to civil and military police officers and can be used for intelligence gathering by the national customs information and investigation directorate, specific French Ministry of Culture units and the ARGOS insurance group. Art market professionals may, however, request OCBC to conduct searches of the photograph library.

Stages in the TREIMA search process

Current state of play

2.1.2 - Photographie soumise à TREIMA



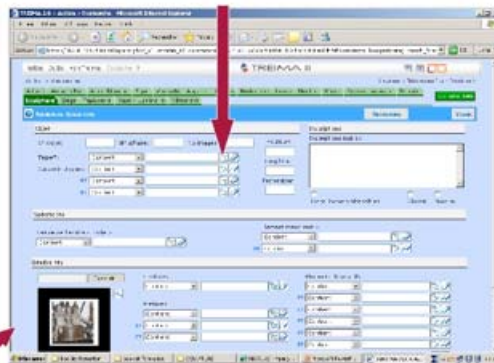
Stage 1 – Photograph submitted to TREIMA

2.1.3 : Capture de l'image



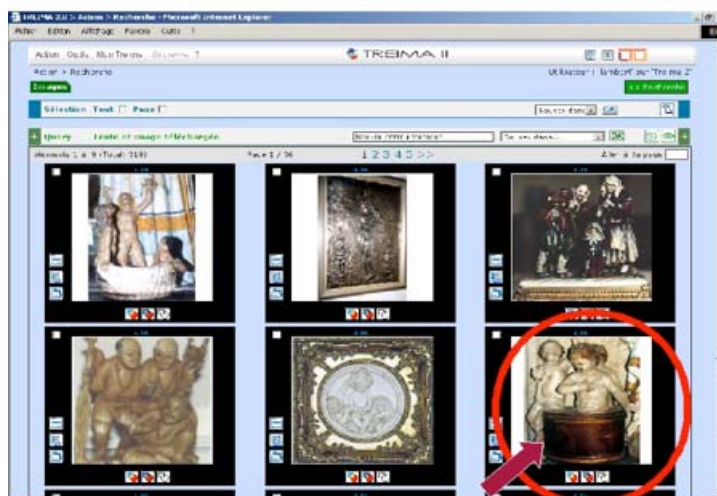
Stage 2 – Image capture

**Etape 9 : Cliquer sur l'icône pour faire apparaître le thésaurus. Cliquer sur exécuter et sur OK. Pour effacer on cliquera à côté sur icône "gomme".**



**Etape 8 : La photo s'affiche dans TREIMA dans le cadre photo, ici dans la fiche objet "sculpture".**

Stage 3



**Etape 13 : Cliquer sur la photo pour la comparer**

Stage 4

#### 2.1.14-VERIFICATION DANS LA BASE TREIMA II



Stage 5 – Verification in the TREIMA database

II Stolen Art Register kept by the French Ministry of the Interior (<http://www.avisderecherches.interieur.gouv.fr/osvafficher3.asp?N=1>)

This register consists of a list of stolen items and a list of recovered items. It is open to the public but does not contain many items, and very few entries have been made by police services.

Example of a stolen item advisory:

Issuing unit: Dax Police Station. Urban Security Squad.

Works of art sought by the Dax Urban Security Squad.

Date of theft: 29 June 2011, Ref. CIAT DE DAX: Bronze statuette, 80cms high.



Hermes, bronze statuette by Rodin

The French national gendarmerie, too, has its own stolen art database, to which the public has access, at

[http://www.gendarmerie.defense.gouv.fr/judiciaire/accueil\\_objets/](http://www.gendarmerie.defense.gouv.fr/judiciaire/accueil_objets/).

It does not contain many items and is not for cultural property only.

- **GREECE**

- II Stolen and confiscated goods databases

Databases of the Directorate for Cultural Property Protection and Documentation (Article 3, para. 4 of Law 3658/2008) listing of information concerning:

- (a) movable property stolen or misappropriated, and photographs thereof;
- (b) illicit excavations or stripping, and photographs thereof;
- (c) confiscated movable property, and photographs thereof;
- (d) persons implicated in the illegal acquisition of and trafficking in movable property;
- (e) persons possessing metal detectors and other devices for searching the subsoil, the seabed, riverbeds and lakebeds.

- II Ministry of Culture databases:

- (a) stolen Byzantine and post-Byzantine cultural goods database;
- (b) stolen prehistoric and Classical antiquities database;
- (c) collection of digitized images of all stolen cultural goods from prehistoric to post-Byzantine times.

- **HUNGARY**

- II Stolen goods database of the National Office of Cultural Heritage (OCH)[http://kereso.koh.hu/index.php?url=all.php&\\_mp=mutargy&\\_amp=L](http://kereso.koh.hu/index.php?url=all.php&_mp=mutargy&_amp=L))

- **ITALY**

- II Specialist police “Leonardo” database of the Italian police art heritage protection squad,  
at [http://tpcweb.carabinieri.it/tpc\\_sito\\_pub/simplecerca.jsp](http://tpcweb.carabinieri.it/tpc_sito_pub/simplecerca.jsp).

This is the largest European database. It contains information on over 3,400,000 items and more than 400,000 images.<sup>127</sup> The police have direct access and art dealers and sales rooms have indirect access upon request.

- **LATVIA**

- II Police-maintained stolen cultural goods database

This database contains details of thefts of cultural goods until expiry of the period of limitation.

Another electronic service, to be launched in 2011, is the database dedicated specifically to identifying cultural goods stolen or missing in Latvia. Firstly, it will be a source for private persons wishing to check whether, for instance, a particular item sold on the market is a stolen or missing artefact. Secondly, it will contain intelligence on wanted items by enabling people to report, for example, online sales of wanted items to the police. The database is supposed to be sufficiently operational for real-time reporting to police.

- **LITHUANIA**

- II Police-maintained stolen cultural goods database

([www.policija.lt/lt/kuriniai](http://www.policija.lt/lt/kuriniai))

The Lithuanian Criminal Police Office manages and maintains the database, to which it has direct access. Museums and other institutions also have access.

- **NETHERLANDS**

- II Police-maintained stolen cultural goods database

Only police services have access to this database.

- **POLAND**

- II Police-maintained stolen cultural goods database

[http://www.policja.pl/portal/pol/300/21941/Dobra\\_kultury.html](http://www.policja.pl/portal/pol/300/21941/Dobra_kultury.html)

There is a page (in Polish) on crimes/offences against cultural goods on the police site, [http://www.policja.pl/portal/pol/300/21941/Dobra\\_kultury.html](http://www.policja.pl/portal/pol/300/21941/Dobra_kultury.html), which has links to the relevant texts.

- II Cultural goods missing as a result of the Second World War

<http://kolekcje.mkidn.gov.pl> (in English and Polish).

- II Internet access to the stolen or illegally exported goods database –

<https://www.skradziona.zabytki.pl> (in Polish) – established in 1991, has been possible since 2005.

- **CZECH REPUBLIC:**

- II Stolen/missing goods database – MacArt – Ministry of Culture and police

- **ROMANIA**

- II Police-maintained stolen/missing cultural goods database

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<sup>127</sup> Statement by A. Deregibus, Lieutenant Colonel, Carabinieri. UNESCO, 1 July 2011.

(<http://www.igpr.ro/obiecte/obiecte.aspx>)

- **UNITED KINGDOM**

- II London Stolen Arts Database (LSAD):

This database is maintained by the Art and Antiques Unit (Metropolitan Police, London). It is therefore a London, and not a national, database.

The database contains some 54,000 highly diverse art items,<sup>128</sup> divided into three categories:

- most wanted;
- recent thefts;
- recently recovered.

Both the database and the specialist police unit seem to be at risk because of stringent budgetary constraints.

- **SLOVAKIA**

- II Stolen and missing art database – Ministry of the Interior

(<http://www.minv.sk/?odcudzene-a-najdene-umelecke-diela> and

<http://www.policija.si/index.php/ukradene-slike>) in Slovak

Items are divided into five categories and archived, together with a photograph, with records showing such details as title, artist, material used, size, period, date of the event (theft) and value.

*States not members of the European Union*

- **CROATIA**

- II Lost and stolen goods database, Croatian Ministry of the Interior

- **SWITZERLAND**

- II Police-maintained databases

Swiss cantons have set up police databases. Most databases are not dedicated to cultural goods alone, but also include other goods and missing persons. They are therefore highly varied with non-standardized database criteria .

Sample report for a stolen armoire (Source: canton of Vaud stolen object database)

Burglary – one armoire and some paintings were stolen from an exhibition in Murten/Löwenberg, Fribourg, in the night of Thursday, 31 October 2001 to Friday, 1 November 2002.

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<sup>128</sup> Paintings, furniture, books, maps, manuscripts, carpets, rugs, clocks, watches, coins, medals, glass, ivory, jade, musical instruments, postage stamps, pottery, porcelain, silver, gold, textiles, toys and games.



- UNITED STATES OF AMERICA

- II Stolen Art File (NSAF): FBI Art Theft Programme:

[www.fbi.gov/hq/cid/arttheft/noticerecov.htm](http://www.fbi.gov/hq/cid/arttheft/noticerecov.htm)

The NSAF database lists stolen cultural goods reported to the FBI by agencies both in the United States of America and worldwide.

The database consists of images and descriptions of lost and recovered items as well as investigative case information.

The database is accessible to the police, and to the public in an abridged form that excludes information for investigators.

To be eligible for entry into the database, the item must meet the following criteria:

- be identifiable and have historical or artistic significance;
- be valued at least \$2,000, or less if associated with a major crime.

Sample report of a stolen work of art (Source: NSAF database)



Description: Stolen  
Period: c. 1871  
Category: Paintings  
Materials: oil on canvas

Measurements: 65.50 x 81.00 cm  
Maker: Edgar Degas  
Additional Information: painting

- TURKEY

- II Stolen goods database, Ministry of the Interior



<http://www.kultur.gov.tr/EN/ana-sayfa/2-0/20110608.html>

The database is accessible in English and French. Unfortunately, the list of stolen cultural goods varies from language to language (for example, the Arabic language list of stolen goods is longer than the English or French lists).

Sample report of a stolen artefact

Artefacts Stolen From Milet Museum

Inventory n° 4052

Name and type : Ostotek, white marble

Place of find : Salihli, Manisa

Period : Roman

Dimension : Lid length : 41.5 cm, width : 33.5 cm, height: 8 cm Ostotek height : 21 cm, length : 41.5 cm, width : 34 cm

Date of entry to the museum : 15.07.1998

Way of entry to the museum : Bought from ihsan Acar

Place in the museum : Hall H

Description: Ostotek: It has four legs. It is chest formed. □ It is plain and in the shape of rectangular prism. The casket is hollow.

Ostotek lid : It is in the shape of hipped roof. The narrower ends have triangular pediments and projecting parts on four corners. There is an inscription on one □ □ Surface :

ΕΤΟΥΣ ΒΚΑΓΛΤΟΥ ΔΕ ΔΥΙΟΥΣ ΚΑΙ Π  
ΜΗΝΟΣ ΒΘΑ Ν ΕΙΚΑΓΑΧ ΑΡΕΙΝΟΥ Η ΚΑΙ  
ΤΑΤΙ ΛΕΤΥΝΗ ΔΕ ΑΡΚΕΣΙΛΑΟΥ ΤΟΥ ΑΣΚΛΗ  
Π-ΑΔΟΥ ΕΤΩΝ Κ



### (c) Examples of private databases relating to stolen goods

#### II ART LOSS REGISTER: [www.artloss.com](http://www.artloss.com)

The Art Loss Register (ALR) is a private company with its origins in the International Foundation for Art Research (IFAR), a not-for-profit organization based in New York, which established an art theft archive in 1976. To facilitate the restitution of these goods, the Art Loss Register computerized database was created in London in 1991. The ALR is also an intermediary in the negotiation and restitution of identified goods.<sup>129</sup>

According to its website, the ALR offers the following services:

- Registration of the legitimate ownership of works of art and other valuable possessions
- Registration of the loss of works of art and other valuable possessions
- Registration of fake and forged works of art and other valuable possessions
- Extensive preliminary research services
- Expert provenance research of works of art and other valuable possessions
- Specialist World War II provenance research
- Investigative and recovery work

The database holds around 300,000 objects concerning not only stolen items but also lost and dispossessed goods.

Items are registered in the database by owners and research is carried out by ALR experts. A fee is charged for registration and access to the database.

The Art Loss Register is consulted by a large number of art market and museum professionals, but it is often challenged by the investigation and prosecution authorities, which reproach the company for encouraging theft, insofar as the ALR investigates and recovers cultural goods from thieves or receivers by negotiating their restitution without informing the prosecuting authorities.

#### II ARTSAFE: <http://www.artsafe.com>

This website is a private online property inventory service. It aims to help individuals to post accurate descriptions together with photographs of their goods according to international standards.

In addition to this inventory service, the Artsafe website has a declaration section for reporting stolen goods and posting a photograph of the object, as well as a stolen goods research section.

#### II FIBAR: *Fichier informatique des biens assurés recherchés* (Computer file of insured stolen goods)

[www.gieargos.org/PortailARGOS/mobilier\\_gdpublic.htm](http://www.gieargos.org/PortailARGOS/mobilier_gdpublic.htm)

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<sup>129</sup> <http://www.artloss.com/content/history-and-business>.

Set up by ARGOS, a consortium of French insurers, this database registers insured stolen goods, particularly cultural goods.

II STOLEN.BOOK.ORG – Database for books reported stolen: International League of Antiquarian Booksellers (ILAB-LILA). <http://www.stolen-book.org/>

A league of 23 national associations, representing 1,850 booksellers around the world.

The database holds precise references for books reported stolen after 15 June 2010 and more general data for books stolen before that date. It has links with the Asoziazione Librai Antiquari d'Italia (ALAI) which compiles lists of stolen books in Italy.

Access to the database is public and free.

II TRACE: <http://www.tracechecker.com/>

This database is hailed as “America’s largest database of stolen goods”.

It fulfils three functions:

- an inventory of goods before any event such as theft
- a database of stolen goods
- a database of recovered goods.

### 5.1.3. Transaction registers: an overview

#### 5.1.3.1. Transaction registers

##### (a) Transaction Registers

The aim of transaction registers is to inventory movable objects bought and held by art market professionals such as art dealers, auction houses and so on. Such registers are rare in European Union Member States. In States where such registers are kept, the information they contain varies greatly.

II The norm: transaction registers not kept

Transaction registers, containing information on professional transactions, artefact descriptions and traceability, are not required by the majority of European Union Member States. To regulate this professional activity, some States (such as Cyprus)<sup>130</sup> require those wishing to deal in cultural goods to obtain special permits from the relevant heritage protection authorities. These permits may serve to guarantee professional skills and good practices, but are in no way equivalent to an inventory of objects held by the professional and the determination of their provenance.

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<sup>130</sup> As a point of comparison, in Romania there is no police register as such; there is an obligation to keep some documents up-to-date and to hold a permit to deal art. In Iraq, the law allows for the establishment of businesses dealing in cultural heritage objects between 50 and 200 years old. For Iraqi nationals, such businesses are subject to prior approval by the Ministry of Culture.

**(b) The exceptions: varied registers**

There are two types of cultural goods registers.

\* Records of transaction

These records list transactions, namely object description, price and date, on a day-to-day basis, carried out by art market professionals. Records of transactions are more similar to accounting ledgers and the information they contain is used for tax collection purposes (United Kingdom, Belgium). Accordingly, a degree of reserve might be expressed as to the veracity of the information held in such registers, notably with regard to object price.

Some records of transaction target certain transactions, such as the Spanish record of transactions concerning Spanish historic heritage objects or the United Kingdom's records relating to importation and exportation.<sup>131</sup>

\* Traceability records

Traceability records hold more information than records of transactions. They list the identity of the person selling, supplying or transferring the object, the price and method of payment, the object's description including its distinctive features or marks, flaws, serial numbers or signatures, and its provenance.

This is the case for instance in Greece, France, Italy,<sup>132</sup> the Netherlands<sup>133</sup> and Spain.<sup>134</sup> The buyer's identity is not always required.<sup>135</sup> The traceability of cultural goods is therefore not ensured throughout the transfer chain.

**5.1.3.2. The various systems of acquisitive and extinctive prescription**

Prescription should be considered from two angles. We will discuss, here, the rules governing acquisitive prescription and those applying to extinctive prescription. Acquisitive prescription leads to ownership provided that the buyer

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<sup>131</sup> Section 75A of the Customs and Excise Management Act of 1979 stipulates that "every person who is concerned (in whatever capacity) in the importation or exportation of goods of which for that purpose an entry is required by regulation 5 of the Customs Controls on Importation of Goods Regulations 1991 or an entry or specification is required by or under this Act shall keep such records as the Commissioners may require."

<sup>132</sup> Article 32 of the Code on Cultural Property provides for the register and Article 64 of the Code provides for the declaration of provenance.

<sup>133</sup> Greece: Law 3028/2002, Article 32, paragraph 4, stipulates that antique dealers and merchants of recent movable monuments shall keep books authorized by the Ministry of Culture, where they shall register movable monuments after their entry into their premises. Registration shall include a description, a photograph and the place of origin of the monument, the personal data of the previous possessor or owner of the monument and the transferee, the details of the permit of possession, the price and the date of transfer. This information shall be notified to the Ministry of Culture without undue delay.

France: Articles 321-7, 321-8 and R.321-1 to R.321-8 of the Penal Code. Netherlands: Articles 86b of the Civil Code (referring to due diligence).

<sup>134</sup> The requirement to keep such records appears to be poorly respected in Spain.

<sup>135</sup> Switzerland: Persons active in the art trade and auction business are required to maintain written records (Article 16 LTBC). The records must contain the name and address of the supplier or seller (Article 16 LTBC). Rather surprisingly, the law does not require the buyer's identity to be listed. The traceability of cultural property is therefore not ensured along the transfer chain.

acts in good faith, while extinctive prescription means the extinction of a right or an action. The two mechanisms bring different interests into play: market security in the first case; and public order in the latter. “Discharge by lapse of time is an institution designed to protect the general interest. Society cannot accept for a trial to continue ad infinitum.”<sup>136</sup>

**(a) Legal acquisition of property by acquisitive prescription (in good faith)**

The mechanism of acquisitive prescription leads to the (legal) acquisition of property.

There are substantial differences depending on the system, given that countries governed by Anglo-American law do not recognize this mode of acquisition because of the “*nemo dat*” rule.<sup>137</sup> The rules governing acquisition by prescription are often governed by common law, regardless of the characterisation of the goods as cultural. However, some States apply special rules to cultural property.

The mechanism of acquisitive prescription can result in the (legal) acquisition of property. By way of example, we present below some national laws that are representative of the legal systems in force in the Member States of the Union.

Under German law, acquisitive prescription is recognized when a person has held an object in his possession as an owner for a continuous period of ten years. German law recognizes the rule of joint possession. A third party’s (predecessor) length of possession in good faith extends to the beneficial owner. Possession does not apply only in cases of derivative acquisition (by sale agreement, for example); it can also be the result of an original acquisition, for example the discovery of something that has been lost.

In property law, there is a general presumption of good faith (para. 937(2)BGB). Consequently, when claiming his property, the true owner must prove that the possessor is in bad faith. This rule corresponds to acquisition in good faith in accordance with paragraph 932(1) BGB. Good faith must therefore exist both at the moment of possession and throughout the following ten years.

Unlike in paragraph 932(1) BGB, the crucial moment for appreciating the existence of bad faith is not when the alienator disposes of the object or when the acquirer finds something that has been lost. The latter must believe that he is the true owner for an uninterrupted period of ten years following the moment he takes possession. However, in the field of cultural heritage, high standards apply to the consideration of good faith relating to acquisitive prescription. To the extent that the area of cultural goods and works of art is a sensitive one, where the origin of the property and ownership are often documented, the acquirer has a duty to research

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<sup>136</sup> C. Eyben, “Quels délais pour la prescription”, Belgian Report in P. Jourdain and P. Wéry (dir.), *La prescription extinctive, Etudes de droit comparé*, Bruylant, 2011, p. 4.

<sup>137</sup> No one [can] give what he does not have. If the seller is not the true owner, then the buyer cannot acquire title.

in detail the provenance of the object in question. To establish proof of bad faith, it is enough to prove that the circumstances warrant a clarification of provenance; on the other hand, it is incumbent on the acquirer to prove that he has taken all the steps available to him. In this way, the legislator takes account of the owner's interests while respecting paragraphs 932, 937 BGB, which assume good faith.

Under Swiss law, the rules of acquisitive prescription are fairly similar to those under German law. However, the period provided for in Article 728(1) of the Civil Code is generally five years rather than ten. That said, there is a significant exception for cultural goods, for which the prescribed period is thirty years (Article 728(1a) of the Civil Code).

Under Italian law, the legal situation is, at first glance, similar to that under German and Swiss legislation. Article 1161 of the *Codice Civile* provides for acquisitive prescription after a period of ten years, provided that the acquirer is in good faith. If the object in question is in the public domain (*demanio pubblico*), there can be no legal acquisition of title (see also Article 5 of Law 88/1998) owing to the inalienable nature of such assets. It is important to stress this because in Italy a large number of objects of cultural value are covered by this exception.

Turning to French law, Article 2258 et seq. of the Civil Code provide for acquisitive prescription (usucapion). In cases of acquisition of chattels in good faith, acquisitive prescription has immediate effect (Article 2276 (1) of the Civil Code), except in cases of theft or loss, in which case the period is three years from the loss or theft. These rules do not apply to all objects of cultural value as a number of items are declared to be inalienable. This applies to chattels in the public domain (Article 2112-1 of the General Code of Property of Public Entities) and certain items of protected cultural goods, including when privately owned (chattels classified as part of historic monuments, collections of French Museums, historical archives).

Spanish law provides for a rule of acquisitive prescription in Article 1930 of the *Codigo Civil*. This prescription is considered, according to Article 609 of the *Codigo Civil*, as a means of acquiring property. In general, the rule also applies to objects of cultural value. Certain chattels declared to be of cultural value, however, are exempt from acquisitive prescription. This also applies to inventoried objects belonging to church entities and to chattels that are part of state-owned national heritage. It includes a notion similar to that found in Italian, French, Belgian and Swiss law: that of the public domain, to which the rules of imprescriptibility and inalienability apply. Cultural goods that have been exported without prior authorization constitute a novel exception. The latter rule is particularly interesting when examining the potential for creating a civil law system that can protect cultural property more effectively from trafficking.

A bill before the Polish legislature is proposing an interesting rule: a new national register of lost cultural goods would be created, and, once a good was entered in the register it would not be possible to rely on the the rules of acquisitive prescription in

order to acquire title to the good. At present, even if a good has been stolen and is listed in a register of stolen goods, the possessor may claim to be in good faith and, after a period of three years, acquire ownership (Article 174 kodeks cywilny kc.). The new draft rule aims to prevent this form of acquisitive prescription.

**(b) Extinctive prescription**

Extinctive prescription refers to the expiry of a certain period of time after which a person owing a duty may refuse to provide the service due. The expiry of a certain period of time thus leads either to abrogation or extinction of the property claim.

- Systems in which the rule of extinctive prescription applies

In several States, extinctive prescription is possible regardless of the nature of the object. This is the case in German law. According to Article 197(1) No. 1 BGB, the claim (Article 985 BGB) shall lapse after 30 years. As stated in Article 214(1) BGB, once prescription has taken place, the person owing a duty has the irrevocable right to refuse to provide the service. Under German law then, it is not the property right that lapses, but the right to make a claim deriving from the property right. This means that the possessor of a cultural good that has been lost and who has not acquired ownership (in good faith) either at auction or by usucapion may, after 30 years, refuse to return the cultural good even though the owner retains his property rights. Consequently, ownership and possession can be permanently separated from each other, an outcome which is commonly accepted in case law and doctrine. Despite the criticism of this aspect,<sup>138</sup> when the German contract law was reformed in 2002, the legislature explicitly codified, with a new version of Article 197(1) No. 1 BGB, the rule that a claim based on Article 985 BGB is subject to extinctive prescription.

- Systems in which extinctive prescription does not apply

Under Swiss law, a claim is not subject to extinctive prescription if the acquirer is in bad faith. Article 936 of the Civil Code provides that a recovery claim may be made “at any time” against whomsoever is in bad faith. And Article 127 of the Code of Obligations (the 10-year principal) does not apply to *rei vindicatio*. The rule applies to any movable good, not just to goods of cultural value.

The situation is similar in Italian law. According to Article 948 (3) of the *Codice Civile*, a claim (*l'azione di rivendicazione*) is not subject to statutory limitation. This is also the case in the United Kingdom under the Limitation Act 1980.

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<sup>138</sup> See, for example, G. Kegel, “Von wilden Tieren, zerstreuten Leuten und versunkenen Schiffen. Zum Verhältnis vom Besitz und Eigentum beweglicher Sachen” in H.C. Ficker, *Festschrift für Ernst von Caemmerer*, Tübingen, Mohr, 1978, p. 176; K. Müller, *Sachenrecht*, Heymanns, 4th ed. (1997), No. 455; F. Peters/R. Zimmermann, *Gutachten und Vorschläge zur Überarbeitung des Schuldrecht*, Verlag Bundesanzeiger, 1981.

### 5.1.3.3. Good faith and due diligence

#### (a) The rule of good faith in the various systems and its main effects

The meaning and scope of the legal concepts of good faith and due diligence differ as between the common law and civil law legal systems.

In civil law systems that have incorporated the rule that “as far as goods and chattels are concerned, possession amounts to title”, the concept of good faith is doubly useful. It concerns property rights and, more especially, cultural property rights – two aspects that must be taken into account.

Good faith is a requirement that applies in the acquisition of cultural property rights in which the timeframes can vary but are relatively short (acquisition sometimes takes place immediately, regardless of the nature of the divestiture).

It can also be a requirement when determining the compensation to be paid to a possessor of a cultural good who has been forced to return it where, for example, it has been stolen from its rightful owner or illegally exported. This is the case in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and in the 1993 Directive on the Return of Cultural Property.

In many States, the concept of good faith is part of the Civil Code (Belgium, Austria, Estonia, Germany, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Luxembourg, Netherlands, Romania, Slovakia and Spain) or specific legislation (Bulgaria, Sweden). Austria, which for many years used an *a contrario* definition, has recently adopted a provision defining good faith (Article 326 sentence 2 ABGB).

In common law systems, by virtue of the principle of *nemo dat quod non habet*, good faith can play no role, at least in terms of the acquisition. Stolen property cannot be legally acquired, not even by an acquirer acting in good faith. This does not mean, however, that the concept of good faith does not play a role in the legal system: for example, the statutory limitation applying to recovery claims by a dispossessed owner is different if the acquirer is in good faith (six years) or bad faith (no limitation).

#### (b) Good faith and due diligence

Furthermore, from a terminological point of view, the concept of *good faith* often rubs shoulders with that of due *diligence*. The requirement to act diligently by carrying out checks on provenance may be a criterion or an indicator in establishing good faith. The notion of good faith, together with that of *due diligence*, is a factor in decisions taken by English courts, taking into account all aspects of the case.

The concepts can also be used in different contexts: for example, under Swiss law, the principle of good faith is used to determine whether the behaviour of the buyer is such that it allows him to claim that he has acquired a valid title to the goods; conversely, due diligence refers to a public law obligation that requires the transferor of a cultural good to comply with certain standards of behaviour.



Internationally, there are texts that refer to the two concepts of good faith and due diligence, without distinction and without any apparent justification for using one term rather than the other. For example, the First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Article 4) and the 1970 UNESCO Convention (Article 7(b)(ii)), refer to the good faith of the acquirer, while the UNIDROIT Convention prefers to speak of the diligence of the acquirer of a stolen or illegally exported cultural object (Articles 4(4) and 6(2)); similarly, in European Union law, Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, also refers to the notion of due care<sup>139</sup> (Article 9(1) of the Directive).

The situation is complex in domestic law, where the emphasis is on good faith. There has been little codification of the concept of due diligence. Either it is absent or else operative as a result of ratification of the 1995 UNIDROIT Convention.<sup>140</sup>

Only the Netherlands has made a genuine attempt to codify the concept of due diligence. The law implementing the 1970 UNESCO Convention sets out clearly the circumstances of the acquisition to be taken into account in establishing good faith (Article 87a) and the steps that must be taken by the buyers. Buyers are further differentiated as follows: buyer (Article 87a para. 1); commercial dealer (Article 87a para. 2); and auctioneer (Article 87a para. 3).

It is interesting to note that German law, which does not consider the notion of due diligence, does provide a definition of the concept of negligence in its Civil Code.<sup>141</sup> In England and Wales, the notion of due diligence appears in Section 5 of the Money Laundering Regulations 2007. However, due diligence in the acquisition of cultural goods is not regulated by law. It is, however, taken on board in much of the Government's work, as confirmed in the Department for Culture, Media and Sport's October 2005 publication, *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Material*.<sup>142</sup>

### **(c) The requirement of good faith and the question of proof**

From a procedural point of view, the question of good faith is most often linked to the presence or absence of a *presumption*. In this sense, there is some convergence of national legal systems deriving from civil law. The presumption of good faith exists in Bulgaria (Article 70 (2) Property Law), Estonia (Article 139 *Presumption of Good Faith, General part of the Civil Code Act*, 27.03.2002), Greece, Hungary (Article 4

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<sup>139</sup> Article 9: Where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object.

<sup>140</sup> 13 European Union Member States had acceded as at 6 September 2011.

<sup>141</sup> Para. 276 (2) BGB: "A person acts negligently if he fails to observe the relevant accepted standards of care."

<sup>142</sup> See: [http://www.culture.gov.uk/images/publications/Combating\\_Illicit\\_Trade05.pdf](http://www.culture.gov.uk/images/publications/Combating_Illicit_Trade05.pdf).

para. 4 Civil Code), Latvia (Article 918 *Civil Law* 01/28/2000) and Lithuania (Article 4.26 Civil Code 07/18/2000), Malta (Article 532 Civil Code), Luxembourg (Article 2268 Civil Code), the Netherlands, Poland (Article 7 Civil Code), Romania, Spain (Article 434 Civil Code), Iraq (Article 1148 (1) Civil Code) and Switzerland (Article 3 (1) Civil Code), France (Article 2258 Civil Code).

Germany does not recognize the presumption of good faith.

Generally speaking, it seems that the application of the presumption of good faith rule is tending to make greater demands in terms of stakeholder behaviour. Comparative law observations show that case law tends to consider that the buyer is in bad faith not only if he knew of the illicit origin of the cultural object but also if, given his expertise, he ought to have known (for example in Swiss case law, or in French case law, where some decisions have shown a noticeable trend).

It is in this connection that some national legal systems, such as the Dutch one, have taken account of case law developments. The burden of proof remains with the person alleging bad faith on the part of the buyer but there is a shift towards an assessment of the diligence exercised during the acquisition process. The courts are generally more demanding if the acquirer is a professional, a dealer or a museum. However, the idea that it might be a collector – no matter how well-informed – is not generally taken into consideration by the courts, though this situation may well change.

Nevertheless, in most of the systems reviewed, the acquirer has no real duty to be aware of his ability to make inquiries of the person before him. Some German and Swiss judges asked themselves this question and came to the same conclusion: according to them there is no general duty to ask, but if circumstances so dictate, the acquirer must make inquiries. For German judges this applies in the case of particularly precious goods, whereas Swiss judges have extended the duty to areas where goods of dubious origin are in circulation, such as the used car or antiques markets. Given the way practice is changing and that more cases will hopefully be brought to the attention of judges in States where the 1995 UNIDROIT Convention has entered into force, this position could change.

From this point of view, one of the major innovations introduced by the 1995 UNIDROIT Convention at the international level is a reversal of the burden of proof: it is not up to the dispossessed owner to prove the absence of good faith on the part of the current acquirer or possessor; it is now the duty of the latter to establish that he has acted with due diligence (Article 4(1)). The 1993 European Directive did not go this far, as it left it to the national legislature to decide in the matter (Article 9(2) Directive 93/7/EEC of 15 March 1993).

Finally, it should be emphasized that if this procedural issue arises in the context of criminal proceedings, it will be for the prosecution to establish that the objective and subjective conditions of the offence, such as receiving stolen goods, exist. However, the person who is under investigation or has been charged will incur no

criminal penalty (prosecution or punishment) if he can establish that he has acted in good faith. Examples of this exist in French and Swiss law.

However, comparative law shows that there are some exceptions which prevent the protection offered by the “acquisition in good faith” rule from working: in German law, for example, bona fide acquisition of stolen property is not normally possible (in this sense German law is similar to English law), except in the case of public auctions. Austrian law (para. 367(1) ABGB) and Greek law (Article 1038 and 1039 Civil Code) adopt the same approach. Luxembourg law provides that bona fide acquisition of stolen property is not possible, while property misappropriated through fraud, is (Article 2279(2) para. 2a Civil Code). Greek law further restricts the possibilities for acquisition in good faith by automatically ruling out ownership of cultural goods unless there is a holder’s certificate. In Greece and in Bulgaria, the absence of a prior declaration of sale is also a criterion that rules out acquisition in good faith. In States which require prior notification of any trading in antiquities (e.g. Greece, Cyprus, Romania and Bulgaria), the purchase of cultural goods from an unsworn dealer is deemed to be *de facto* illegal and the good faith rule cannot be invoked.

Under Spanish, Italian, French and Swiss law, acquisition in good faith is not possible for certain categories of goods that are deemed inalienable and imprescriptible. This particularly applies to cultural goods belonging to the State under public domain rules.

In a number of States, the public domain applies *de lege* to archaeological objects recovered by excavation.

But these exceptions, which confer the status of “non-tradable goods” on certain types of property, are limited owing to the territoriality of laws governing the public domain.

Such items of cultural goods, which are largely unavailable and hypothetically belong to the State or a public body, may, where appropriate, be purchased as a bona fide acquisition abroad through the interplay of conflict of law rules. The only way to avoid this consequence of the international nature of trafficking in cultural goods would be to enforce the State of origin (*lex originis*) rule instead of the “where the property is situated” (*lex rei sitae*) rule. With the exception of Belgium, few have taken this path thus far.

It should be added that the rule of possession may well benefit public owners, such as owners of public museum collections.

For example, Luxembourg case law has taken a constant approach to cultural gifts to museums since the beginning of the twentieth century, recognizing that “peaceable possession” is sufficient for the donation to be valid. Disputes which arise subsequently can no longer alter a conclusive situation.

#### **(d) Criteria of good faith**

Turning to the “good faith” criteria, a study of comparative law provides a number of pointers. As French and Spanish case law emphasize in particular, it is indisputably a question of fact that should be left to the judge to decide. However, there is a body of evidence to help the judge decide whether the acquirer is in good faith or not. The *price paid* is a key factor (the low price criterion is quite widely accepted in systems that use the “good faith” rule; Article 559 para. 2 of the Maltese Civil Code explicitly provides that low price constitutes bad faith), and the *payment method* used, the *nature of the parties* involved in the transaction, the *speed* with which the transaction took place, the quality of the documents accompanying the object (e.g. export licence), whether the available data have been *consulted* or not or *investigated further* in case of doubt, are also important factors.

In some legal systems (particularly in German and Greek law), bad faith can be established if the possessor knew – or would have known if he had not been grossly negligent – that the import was illegal.<sup>143</sup>

Swedish case law has consistently ruled that the inclusion of an item in the INTERPOL database of stolen art makes it difficult to claim that the acquirer was in good faith, especially where it is a professional who made the sale.

The nature of the buyer is a factor in determining good faith and, in a few States (including the United Kingdom), it can be difficult to dispute the good faith of a professional art dealer.

#### **(e) Stakeholder practice**

In recent years it has been observed that some players pay more attention to the legal origin of a work during the acquisition stage. This is most noticeable in museums and curators who, in contrast with past practice, appear to regard a doubt about the origin of the work as sufficient justification for not proceeding with the purchase. In the Baltic countries, procurement contracts concluded by Latvian and Estonian museums state specifically that the institutions have acted in good faith. Practice in most States shows that in the case of an acquisition, museums must look to their supervisory authority. Some States, such as Slovenia, have enshrined this requirement in law.

Auction houses and dealers are undoubtedly less demanding than museums, although there is a noticeable change in attitude. The reasons for this are mainly economic, since an object whose provenance is documented in detail will see its value increase. Some stakeholders also stress that they would be liable for inadequately documented property. For most art dealers, the risk of breaching their professional code of ethics would be enough to stop the sale of dubious goods.

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<sup>143</sup> “Trafficking in cultural property in the Member States of the European Union and Switzerland. Additional questions”, SAEI (Department for European and International Affairs), Office of Comparative Law, Ministry of Justice (France) study, 2008.

Finally, some market players say that they refer to experts both to establish the authenticity of an object and to document its provenance.

Private collectors do not appear to have radically changed their approach. Provenance is questioned only in the case of high quality objects.

In order to provide an acquisition practice framework for all players, Greece has established a number of obligations for individuals (Article 31 para. 6 Law 3028/2002), art and antiques dealers (Article 32 para. 6 Law 3028/2002) and recognized museums (Article 9 para. 45 Law 3028/2002).

#### **5.1.3.4. Monitoring of public acquisitions**

This issue concerns the mechanisms for monitoring of acquisitions by public institutions such as museums, libraries and heritage institutions, with regard to the provenance of goods. Several systems coexist, with varying degrees of obligation.

For the main part, the rules prohibiting acquisition of goods if there is doubt as to its provenance fall under codes of ethics.

A number of regulatory sources observe the requirement for greater vigilance on the part of public bodies with regard to the acquisition of cultural goods. Article 7(a) of the 1970 UNESCO Convention provides that States Parties to the Convention undertake “to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural goods originating in another State Party which has been illegally exported after entry into force of this Convention...”.

The ICOM Code of Ethics also contains similar provisions.

States develop a range of solutions to deal with this issue, both in terms of standard-setting methods and in the standard of the duty required, which may be more or less binding.

##### **(a) Existence of monitoring of public acquisitions**

Some States establish upstream procedures to supervise public acquisitions, via a range of methods (supervision of institutional trusteeship, advisory bodies etc.). As a rule, the aim of this type of monitoring is to examine the validity of an acquisition, particularly from a scientific and heritage perspective. At this stage, the provenance of the goods may be checked. The requirements vary from State to State. In the French system, national museums must consult a scientific commission before acquiring any good. A dossier is prepared to that end, and the provenance of the object must be indicated. However, the information contained in the dossier is not subject to any form of specific checking.

However, some States monitor provenance in a detailed fashion. In Greece, this monitoring applies to import and export documents, the purchase document and any other information concerning provenance (owners, holders, previous holders,

catalogues, photos, etc.). The Hellenic Ministry of Culture and Tourism monitors acquisitions.

Portuguese law stipulates that museums must verify the provenance of cultural goods prior to any acquisition. Estonian law also provides for monitoring of the origin of goods and has established a number of principles to which museums must adhere (the Museums Act of 13 November 1996, which, as a rule, applies only to State-operated museums, municipal authorities and public law entities). This involves: (a) the obligation to verify the origin of the goods, (b) documentation, in the form of a legal instrument, of any acquisition of cultural goods. These principles are reflected in the legal text thus:<sup>144</sup>

(a) “Upon replenishment of a museum collection, the museum shall, within available means, ascertain the origin of a thing of cultural value such that the museum collection would not contain things which have been acquired illegally in Estonia or in another State or have been exported illegally from another State” (Art. 16.2);

(b) “The handing over and receipt of a museum object shall be documented in the form of a legal instrument which sets out the person who hands over and the person who receives the museum object, the date of handing over, the date of the initial registration and the number of the museum object and its condition at the time of handing over” (Art. 17.3).

In Slovakia, museums wishing to acquire cultural goods by whatever means (purchase, donation, bequest, etc.) must submit the goods to a commission for the formation of collections. Each object brought before the commission must be accompanied by background information, for example the name of the previous owner. A museum are not permitted to acquire objects found in the course of illicit surveys or excavations (para. 9 (7) of Act No. 206/2009).

Swiss law contains a provision forbidding museums from acquiring goods of illicit origin.

Pursuant to Article 15 of the CPTA:

“1. Federal institutions are prohibited from acquiring or exhibiting cultural property that:

(a) was stolen, lost against the will of the owner or illegally excavated;

(b) are part of the cultural heritage of a State and have been illicitly exported from the same.

2. Federal institutions offered such property must immediately report it to the specialized body.”

This provision applies only to national museums, not to museums managed by cantons or other local authorities that are within their competence.

The duties which are applicable in this regard can be found not only in legal texts, but also in codes of ethics.

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<sup>144</sup> The English translation of the text is taken from [www.legaltext.ec](http://www.legaltext.ec) (official website).

In the United Kingdom, acquisitions by museums are subject to a number of guidelines laid down in practical guides (notably, the Museums Association's Ethical Guidelines on Acquisition, 2004).

The Bavarian Minister of Culture adopted several directives in 2001 and 2004 stipulating that for acquisitions, particularly of property pre-dating 1945, an expert opinion must be requested beforehand.

Lastly, some museums are enhancing vigilance at the time of acquisition. Some German museums send their requests to an institution specialized in provenance research.

The Römisch-Germanisches Zentralmuseum (RGZM) stressed that proof of the legal provenance of a good was a critical factor in acquisition. Proof may be provided by valid official documents (e.g. excavation permits or export certificates, notice of discovery) or evidence of a broken chain of legitimate owners. However, RGZM stated that it would make an exception to that rule where the acquisition was a gift and where the circumstances suggested that the donor was unlikely to have acquired artefacts of questionable provenance (e.g. a widow's estate). In such cases, RGZM tries to identify the lawful owner and contact him or her for restitution. If the lawful owner cannot be found, RGZM includes the goods in its collection, subject to later restitution to the owner.

In general, the museums surveyed did not consider that it is appropriate for them to acquire cultural goods with the aim of removing from the market items of archaeological heritage considered to be particularly vulnerable to pillage with a view to facilitating their return to their country of origin. They were very critical of that assumption. A state of emergency, which might justify such an acquisition, was not applicable in these cases. One cannot buy a cultural good that must later be returned.

In many States, museum institutions rely on the ICOM Code of Ethics as an authority. It would seem that the degree of vigilance in this respect has risen over the last few years and that the rule according to which the existence of any doubt precludes acquisition is very widely followed by professionals.<sup>145</sup> In some States (such as the Netherlands), observance of the ICOM Code of Ethics is mandatory. Museums also rely on the UK Spectrum System, a procedural guide on museum management.

Centralized monitoring of provenance seems to be a solution in some States (Hellenic Ministry of Culture, the Dutch Museums Association Ethics Committee, which advises museums on monitoring of provenance and the observance of good faith in acquisitions).

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<sup>145</sup> These were the observations of curators during the test workshop for museums held on 8 July 2011. On the issue of codes of ethics, see below.

**(b) Existence of doubt on acquisition**

Some countries have introduced binding rules in this regard. In Greece, in particular, Article 45, paragraph 8 of Law 3028/2002 provides that all State-recognized museums must notify the national Archaeological Service of any change in the cultural property in their collections – all losses or acquisitions of cultural goods. Under Article 45, paragraph 9, private museums are prohibited from acquiring or accepting either on loan or deposit cultural property suspected of deriving from theft, illegal excavation or other illegal activity or suspected of having been acquired or exported in violation of the legislation of its country of origin. In such a situation, private museums are required to inform immediately the Archaeological Service. In the case of acquisitions, private museums have to declare to the Ministry of Culture monuments works? which have either been imported into or acquired in Greece. Public museums must also refrain from acquiring or accepting cultural property suspected of having been acquired or exported in violation of the legislation of the country of origin.

In the Netherlands, in the event of a sale, bequest or donation to a museum, archives or library, where there exists some degree of doubt as to whether or not the cultural good at issue might have been illicitly trafficked, the institutions in question may seize the Dutch National Police Services Agency/regional police or the Cultural Heritage Inspectorate. These services have an investigatory role to determine the origin of the property. If the origin is shown to be illicit, the necessary measures are taken to return the property in question to its rightful owner.

In a number of countries, it seems that, even without binding rules, museums refrain from acquiring cultural property if there is doubt as to its provenance (Austria). Reference is often made to the code of ethics, which is sometimes reflected in national charters or codes (Dutch museums, German museums ..., France).

In Austria, private museums are prohibited from acquiring or accepting on loan or deposit cultural property suspected of deriving from theft, illegal excavation or other illegal activity or suspected of having been acquired or exported in violation of the legislation of the country of origin. In such a situation, private museums are required to inform immediately the Archaeological Service (Article 45, para. 9 of Law 3028/2002). Public museums must also refrain from acquiring cultural property in the case of doubt.

**(c) Public acquisitions and endangered heritage**

When there is a prospect that the property may have come from a conflict zone, stakeholders generally exercise greater vigilance (according to the Regional Museum of History in Bulgaria). Further comments have been requested.

The German museums concerned (Bayerische Staatsgemäldesammlungen (BSGS), RGZM, the Prussian Cultural Heritage Foundation (SPK)) take into consideration cultural property from conflict zones.



RGZM has designated all regions in which antiquities have been discovered as “conflict zones”. In the light of the antiquities market, such regions are under threat of wholesale pillaging, illegal excavation and handling of stolen property. The museum therefore exercises particular diligence with regard to objects from areas affected by political violence (particularly Iraq) and seeks police action to seize the objects concerned and return them.

#### **5.1.3.5. Monitoring online sales**

##### **(a) Current practice in the Member States**

The responses from stakeholders who were contacted for this study provide an outline of current practice in monitoring acquisitions over the Internet.

In addition to their other duties, one or several operatives from a specialised department are engaged in monitoring Internet sales. They are employed by various authorities in specialised departments of the Ministries of Defence (Italy), the Interior (France, Romania, Portugal), Culture (Greece, Cyprus, Poland, Denmark, Hungary, Croatia, Estonia, Latvia) or of cultural institutions (Slovenia). A monitoring operation usually begins with a sale advertised by sales companies and traditional galleries, followed by random searches on brokerage sites, and ending with the entire Web. The search uses keywords corresponding to the property that is specifically involved in trafficking. The scale of the task is such that it is carried out only patchily, even in States such as Italy, which performs monitoring on a daily basis with the help of the national database of stolen goods.

It is therefore a flawed, manual monitoring exercise, performed by specialist operatives who also have other duties to attend to. No State reported the use of image recognition software. Some States say they do not monitor Internet sales (Bulgaria); others act only on specific requests and as part of ongoing investigations (Spain).

In some States, such as Romania, Internet monitoring is performed by specialised units that focus on the general fight against organised crime and terrorism, rather than specifically focusing on trafficking in cultural property.

Owing to the complexity of the task, the sale of cultural goods on specialised websites or through Internet forums goes virtually unmonitored. The sheer number of sites and the scale of the Web are a factor in this lack of monitoring.

It should also be noted that a Dutch study has concluded that illegal traffic in cultural goods on the Internet concerns only goods of low or unknown value.<sup>146</sup> This may be true for all heritage assets.

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<sup>146</sup> V.B. Bieleman, R. van der Stoep, H. Naayer, *Pure Art, Preventive crime analysis of the Dutch art and antiques trade*, Intraval: Groningen-Rotterdam, September 2007, p. 39.

**(b) Legal provisions and acquisition monitoring practice in the Member States**

From a legislative point of view, there are virtually no specific provisions relating to the sale of cultural goods over the Internet. A few States have adopted such provisions and developed a legal framework to implement them according to specific criteria. One example in this regard is France which, prior to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)<sup>147</sup> had provided for sales by auction over the Internet and had excluded brokerage operations, while taking into account the specific nature of cultural goods (Article L. 321-3 Commercial Code). Generally speaking, the Member States have not taken the opportunity provided by the implementation of the Directive on electronic commerce to regulate online sales. The prevailing logic is that of consumer law. However, it is interesting to note that in Article 12 (d) of Decree 70/2003, Italy requires disclosure of the codes of conduct to be applied. In Sweden, a 14-day cooling-off period is guaranteed for all online purchases, although this is not the case in traditional transactions.<sup>148</sup>

Because of the different situations in which cultural goods are exchanged over the Internet, monitoring acquisitions is a very complex operation. In general, the same obligations apply to the online sale of cultural goods as those applying to sales by traditional auction houses. Similarly, Internet disposal of registered cultural goods must be notified to the competent authority in the same way as disposal by more conventional means. Application of these requirements for identified goods by conventional auction houses seems to function relatively well. Some States (Greece, Romania) have nevertheless indicated that the flow of information between the auction houses and the competent authorities could be improved.

However, the sale of non-identified goods (from archaeological excavations, disguised goods, non-inventoried and stolen cultural goods, etc.) is much less well-regulated. In theory, the provisions of common law apply as a minimum. The sale and purchase of stolen goods are punishable offences but the likelihood of interrupting an illegal sale and identifying and locating the seller, the buyer and the cultural good is slim. In an attempt to overcome this problem, some States have decided to step up cooperation with brokerage sites and to conclude memoranda on the exchange of information.<sup>149</sup>

A subsequent verification of acquisitions, for example when goods purchased abroad are imported, is not really possible either. In fact, few States currently have

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<sup>147</sup> OJ L 178 of 17 July 2000.

<sup>148</sup> Source: Swedish Consumers' Association:  
<http://www.konsumentverket.se/otherlanguages/English/Consumer-rights/Right-to-cancel-a-purchase>.

<sup>149</sup> See section below on the memoranda concluded with eBay.

operative import licences (Italy issues one against payment and Greece also provides for one). Some States have import declarations (Spain). Furthermore, many of these goods are imported through channels that are subject to little monitoring or protection, such as by normal postal services (in France, the principle of postal secrecy prohibits the surveillance of exchanges by mail).

**(c) Agreements and memoranda of cooperation with online brokerage sites**

As part of the process of monitoring sales of cultural goods on the Internet and in an expression of a willingness to fight against trafficking, some States or state-level institutions have concluded agreements with brokerage firms. Such agreements may take an official form (Switzerland, Poland) or may be in the form of principles resulting from informal meetings with the police (in Germany and Austria) or institutions (United Kingdom). These agreements and principles are particularly concerned with online sales of archaeological objects.

In the United Kingdom, a partnership agreement was signed in October 2006 between eBay, the British Museum and the Museums, Libraries and Archives Council (MLA), under the title “eBay partners with British Museum and Museums, Libraries and Archives Council to Protect British treasures”. The agreement aims indirectly to protect archaeological objects found within the territory of England, Wales and Northern Ireland. Under the terms of the agreement, a body known as the Portable Antiquities Scheme (PAS) sets up a team to monitor sales on eBay.co.uk. If an object is being sold illegally, the PAS alerts a special police unit (Art and Antiques Unit of the Metropolitan Police) and eBay UK. The latter is committed<sup>150</sup> to blocking advertisements for illegal goods.

In this context, eBay has compiled a comprehensive guide (*Antiquities Buying Guide*), working closely with the Portable Antiquities Scheme and the British Museum, to help sellers and buyers of archaeological objects (antiquities) comply with the legal obligations the Treasure Act 1996. The guide can be accessed from a website<sup>151</sup> which also includes details on the purchase of cultural and archive property.

In Germany and Austria, the authorities have been involved in developing principles, but there is no formal agreement.<sup>152</sup> In both States, eBay requires a justification of origin, which must be displayed with the offer of sale. The general information pages on eBay Germany contain a table which classifies cultural goods as “Sale prohibited”, “Certificate of origin required” and “No certificate of origin required”.<sup>153</sup> Failure to comply with the principles in Germany and Austria exposes

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<sup>150</sup> See: <http://www.britishmuseum.org/pdf/eBay%20partnership.pdf>.

<sup>151</sup> <http://pages.ebay.co.uk/buy/guides/antiquities>.

<sup>152</sup> See the eBay principles for Germany: <http://pages.ebay.de/help/policies/artifacts.html>; and for Austria: <http://pages.ebay.at/help/policies/artifacts.html>.

<sup>153</sup> <http://pages.ebay.de/help/policies/artifacts.html>.

the seller to various sanctions such as exclusion from the eBay community or withdrawal of his “power seller” status. In Germany, eBay has appointed a dedicated contact person to assist the authorities and the Länder in dealing with illegal trafficking in cultural goods, whereas the judicial police have appointed an expert to coordinate law enforcement work. The German report highlights the success of the cooperation between eBay and the police, with the BKA stopping between 10 and 20 auctions on eBay every week. Sales are withdrawn owing, in equal measure, to the absence of a certificate or to the fact that the certificate is illegible. It is interesting to note that not all certificates accompanying a sales offer have the same value. Certificates issued by the Israeli Department of Antiquities, for example, are treated with extreme caution. Certificates issued by representatives from the art market are accepted on a case-by-case basis. Finally, because of uncertainty about their validity, the BKA is in close contact with the Danish authority that issues the certificates and with the Danish police.

In Poland, two initiatives have been taken. First, a memorandum has been signed between the police and the most popular online brokerage firm in the country, Allegro.<sup>154</sup> The text of the memorandum regulates the publication of relevant information on the site. The agreement commits Allegro to disseminating the information but it does not directly affect the relationship between the authorities, the brokerage firm and sellers. It aims to prevent trafficking on the website itself, thanks to information banners and to website managers reacting when keywords that are deemed to be suspicious are entered. It also provides for user awareness-raising at the Annual Meeting of the vendor community and the possibility of contacting “power sellers” (*super sprzedawca*) directly, for the purposes of forwarding information. On the webpage containing the text of the memorandum, the principles recommended by INTERPOL, following a meeting in 2006, are displayed. The second initiative involved the National Heritage Board (NID) joining the Allegro website’s Rights Protection Cooperation Program, in order to strengthen the fight against illegal trafficking.<sup>155</sup>

Responding to the MOC “Internet and trafficking” questionnaire, France mentions an agreement between the National Archives and eBay. It was not possible to consult the text, but a “help” page on eBay France<sup>156</sup> clearly states that the sale of cultural and public archives property is prohibited, and refers the reader to the website of the National Archives.

Finally, an interesting example, albeit outside the European Union, is Switzerland, where a Memorandum of Understanding was signed in June 2008 between eBay International AG (eBay) and the Swiss Federal Office of Culture (FOC).<sup>157</sup> The

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<sup>154</sup> [http://www.policja.pl/portal/pol/562/30659/Wspolpraca\\_z\\_Allegropl.html](http://www.policja.pl/portal/pol/562/30659/Wspolpraca_z_Allegropl.html).

<sup>155</sup> <http://allegro.pl/RightsProtectionCooperationProgram.php/company/?f=30&country=0>.

<sup>156</sup> <http://pages.ebay.fr/help/policies/cultural.html>.

<sup>157</sup> [www.news.admin.ch/message/index.html?lang=fr&msg-id=29602](http://www.news.admin.ch/message/index.html?lang=fr&msg-id=29602).

preamble to the agreement mentions the recommendations of the INTERPOL Expert Group on Stolen Cultural Property, of 4 and 5 March 2008.

In its Conclusions, the INTERPOL Expert Group on Stolen Cultural Property, which met recently,<sup>158</sup> encourages Member States to cooperate closely with Internet sales platforms in accordance with the Basic Actions concerning Cultural Objects being offered for sale on the Internet, published jointly by ICOM, INTERPOL and UNESCO in 2007. This document makes a number of recommendations concerning Internet sales platforms.<sup>159</sup>

Their application in Switzerland has prompted the FOC, the Federal Office of Police (Fedpol) and the Swiss Conference of Cantonal Archaeologists (CSAC) to agree with eBay Switzerland on the need to consolidate what was already a satisfactory collaboration.<sup>160</sup> To this end, they agreed that eBay would amend its principles concerning archaeological and cultural goods and would incorporate them into the website's general conditions. Consequently, they are now an integral part of eBay's contract with the users of its platform. The amendments have led to the following improvements: a ban on the sale of items included on the ICOM *Red Lists* or in bilateral agreements concluded by Switzerland as part of the implementation of the CPTA, and the requirement for the description of the object to be accompanied by a certificate issued by a competent authority.

Since all these principles and agreements were concluded in the last five years, it is perhaps too early to draw any conclusions about their effectiveness; it does seem, however, that the approach should be developed and encouraged. Indeed, interviews with representatives of States that have concluded such agreements all reveal a high degree of satisfaction.

#### 5.1.4. Entry and exit procedures

The movement of cultural goods is governed by specific procedures depending on the destination and the circulation area of the cultural property, whether it takes place within the European Union or involves a third country. This complexity is

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<sup>158</sup> Conclusions, 8th Meeting of the INTERPOL Expert Group on Stolen Cultural Property (Lyon, 5-6 April 2011).

<sup>159</sup> Of particular note is the first Article of this document which strongly encourages Internet sales platforms to post the following disclaimer on all their cultural objects sales pages:

“With regard to cultural objects proposed for sale, and before buying them, buyers are advised to: i) check and request a verification of the licit provenance of the object, including documents providing evidence of legal export (and possibly import) of the object likely to have been imported; ii) request evidence of the seller's legal title. In case of doubt, check primarily with the national authorities of the country of origin and INTERPOL, and possibly with UNESCO or ICOM.”

<sup>160</sup> A statement from the Federal Office of Culture and the Federal Office of Police (Fedpol) in December 2007 indicates that the Internet sale of an engraved tablet of Iraqi origin was blocked thanks to cooperation with the eBay auction platform. eBay blocked the sale just as the transaction was about to conclude. This action was taken while negotiations between the FOC, Fedpol and eBay were on-going. See page 2 of “La loi fédérale sur le transfert des biens culturels a trois ans” (The federal law on the transfer of cultural property: three years on), at: <http://www.bak.admin.ch/themen/kulturguetertransfer/03110/index.html?lang=fr>.

compounded by the powers exercised by the Union and by the States involved. The European Union has developed a common set of rules that bring together the control procedures applying to the export of cultural property to third countries. It imposes a uniform control procedure for certain types of cultural goods, on the understanding that the States retain the right to carry out a more thorough control. In addition, it is also a national responsibility to control the export of cultural goods to another Member State, and to control imports, whatever the source. Since 1 January 1993 and the opening of the single market, there has been a dual legal framework for the protection of national cultural heritage: the Community framework and the national framework. We will discuss these different situations below. It is not our intention here to draw up an exhaustive list of the different systems, such an approach being outside the scope of our study, but rather to discuss some of the key issues that may lead to trafficking.<sup>161</sup>

#### **5.1.4.1. Movement within the European Union**

Controlling movement within the European Union falls within the competence of the Member States and involves different techniques, certificates and dispatch authorizations.

The majority of Member States do not have a document that enables cultural goods to circulate freely within the European Union, a kind of passport system like the one used in France, for example, where a certificate confirms that the object may circulate within the territory of the Union, but must be accompanied by an export licence when the destination is a third country.

The vast majority of European Union States have a shipment licence system in place for export to another Member State.

Administrative control of the movement of cultural goods takes the form of a standard procedure that must be performed before transit occurs.

During the request and validation stage of a transit document, the categories and fields that need to be completed by the applicant and by the administration vary, but the minimum information required, i.e. full description and photograph of the good plus details of the owner, is included in the forms of all Member States. However, the extent to which the forms need to be completed can differ, both depending on national practice and on the person dealing with the case on behalf of the administration. Help with completing the form, either by means of information provided directly below the boxes to be filled in, explanatory notes at the back of

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<sup>161</sup> A recent report gives a precise update on the implementation of the Regulation: Report from the Commission to the European Parliament, the Council and the Economic and Social Committee on the implementation of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, 1 January 2000-31 December 2010, Brussels, 27 June 2011, COM(2011) 382 final (hereinafter the 2004 Report). The report provides an update on national practices in issuing export licences.

the form or an attached document, is available in all countries. However, the type and thoroughness of this information ranges from concise to extensive.

Applications are first checked for formal compliance and those that are not rejected are then submitted to a body to be examined on their merits. The body may be a committee of experts, individual experts, a special committee or any other body prescribed by national law. The Member States adopt widely varying approaches here. It should also be noted that some Member States have decided to entrust control to different institutions depending on the type of cultural goods involved (books and archives in particular).

The authorities responsible for authorizing movement are either centralized (e.g. Bulgaria, Cyprus) or decentralized agencies (such as Germany and Romania). The jurisdiction of the decentralized agencies is sometimes suspended, for example when authorization is requested for goods belonging to the category of “national treasures” (this is the case in Germany for example, where the jurisdiction of the Länder is replaced by the *Beauftragter der Bundesregierung für Kultur und Medien*). Other Member States distinguish between authorities depending on whether the request is made for a temporary exit (decentralized agency) or a permanent one (centralized). This is the case in Poland.

The movement control procedure is very similar across the Member States. Before the cultural good can cross the border, it must be presented, together with the movement authorization document, at the relevant customs office. The customs officers are then responsible for checking that the good corresponds to that described in the document.

Some Member States customs services have set up dedicated units for checking cultural goods movement documents. This is the case in the Netherlands, for example, where the *Central Licensing Unit for Import and Export of Cultural Goods* handles the administrative side of cultural goods movement permits.

In Romania, the law requires all cultural goods to be accompanied by an identification document when crossing the national border. This is a “duty of documentation”. This can be either a movement permit, or a document certifying exemption from authorization (such as an invoice for a recent good).<sup>162</sup>

In addition to the checks performed when the movement permit is presented, which are restricted to checking the type of good and the authenticity of the document, customs officers also carry out random checks.

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<sup>162</sup> Poland recently repealed a similar provision. See: Olgierd Jakubowski, Centre for the Protection of Public Collections [Nimoz], “New laws regulating the control of export of cultural goods from the territory of the Republic of Poland”, *Illicit Traffic in Cultural Property Stolen in Central and Eastern Europe* (Vienna, 8 – 10 June 2010). We would like to thank the Institute – and Mr Olgierd Jakubowski and Mr Piotr Majewski in particular – for sending us this Article and for contributing to this study with a wealth of information about Poland.

#### 5.1.4.2. Controls on export to third countries

##### (a) Common system: a common set of rules for all Member States

EC Regulation No. 116/2009 of 18 December 2008 (Codified version) establishes a common set of rules ensuring the uniform control of exports of cultural goods at the borders of the European Union. A procedure for submitting licence applications over the Internet was introduced by Regulation No. 656/2004 of 7 April 2004 and its amendment of 8 June 2004.<sup>163</sup>

The common system aims to strengthen solidarity between Member States, ensuring that each State controls the export of cultural goods from other Member States to third countries. However, there is nothing to stop a national legislature from adopting a more stringent control system for its own heritage; this has led to a myriad of systems of varying scope across the European Union Member States.

##### (b) Wide variety of legal provisions

The complexity of the whole system is due, on the one hand, to the wide variety of documents resulting from the many different language versions and, on the other, to the differences observed between licensing procedures, especially in countries with a regional and/or federal structure.

As regards the material scope of legislation relating to exit permits, the differences between national laws are even more pronounced.

Some Member States have adapted their control systems to the material scope of the Regulation. This is what French legislation did initially, although it has been gradually distancing itself from Community law. The 1993 Decree, amended in 2004 and 2006, retained the category lists of controlled items and the financial and dating threshold techniques, but altered the categories several times. Recently a distinction has also been made between the control system to be applied depending on the destination of the goods (European Union or third country) for certain categories of goods. This distinction is not particularly clear and does not appear to be widely used.

Other Member States have their own procedures, involving varying degrees of constraint.

Legislation in the traditionally more protective southern Member States requires fairly extensive controls on exports of their cultural goods. This is the case of Greece, Italy, Spain and Portugal. The level of control is wider than under Regulation (EC) 116/2009, the Annex to which divides cultural goods into fifteen categories, each with its own age and financial thresholds. Some Member States

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<sup>163</sup> Commission Regulation (EC) No 656/2004 of 7 April 2004 amending Regulation (EEC) No 752/93 laying down provisions for the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods, *OJ L* 104 of 8.4.2004 and corrigendum, *OJ L* 203 of 8.6.2004.



have introduced additional categories. Articles 27 and 28 of the Cypriot Antiquities Law provide that antiquities that are not covered by the Regulation and are being exported to another Member State or to a third country must be accompanied by an export licence. In Greece, monuments as defined by Law 3028/2002 which are not included in the Community list can be moved only if the ministerial export or dispatch authorisation is accompanied by an export/dispatch licence, completed by the person concerned and by the Directorate of Museums, exhibitions and educational programmes, or by the Directorate of Modern Cultural Heritage.

Some flexibility is accorded to the Member States with regard to the categories defined in the Annex to the Regulation (second subparagraph of Article 2(2)). According to the provisions of this Article, Member States are authorised not to require export licences for the cultural goods specified in the first and second indents of category A.1 of Annex I, where they are of limited archaeological or scientific interest. This does not preclude the application of stricter criteria for some other goods. In Estonia, for example, the *Intra-Community Transport, Export and Import of Cultural Objects Act* does not apply to archival records. These are subject to the rules established by the *Archives Act* of 25 March 1998, Article 39 of which states that archival documents can be exported subject to the issue of a permit by the State Archivist. The same applies to private documents that are part of a national archives register. Lithuania also prohibits the movement of archives.

The most liberal countries are the Nordic countries and the United Kingdom, where the Waverley criteria provide an original control procedure (see identification of cultural goods, above).

Administrative control requirements are largely the same for exports to a third country and to another Member State. Some States, however, submit the request to a committee other than that which deals with exports within the territory of the European Union. Others make no distinction.

Attention should be drawn to the steps taken by some States to publicize information relating to the issue of export licences .

In Portugal, export licences are published on the website of the Institute of Museums and Conservation.

Denmark has developed an interesting practice with some auction houses. Prior to the sale, the Cultural Property Commission checks the catalogues and studies the goods which are being put up for auction. It then prepares a written report indicating which goods could, if the situation arose, obtain an export licence.

The exit checks carried out by the customs authorities are the same as those for goods dispatched from the national territory to another Member State. There are thus no substantive differences in this situation as compared to the checks made when cultural goods leaves the territory of the Community.

Some Member States, in accordance with the option afforded by Article 5 of the Regulation, have restricted the number of customs offices empowered to handle

formalities for the export of cultural goods. This is the case in Bulgaria, which has chosen to entrust this responsibility to customs offices located near institutions whose experts can provide targeted training for staff working in these positions. Greece, Spain, Cyprus, Luxembourg, Hungary, Malta, Portugal and the United Kingdom have also reduced the number of competent customs offices.

#### **5.1.4.3. Import control or permit**

The Council Regulation on the export of cultural goods establishes a common export control procedure. However, it does not provide for any system of prior verification of legal import before an export licence is issued (Italy opposed the export of an eighteenth century pier glass sold for €15 million, but lost in court because, being a French good, Italy was not entitled to protect it. Consequently, only an investigation into its legal exit from France could have allowed the Italian State to win the case).

It is not common practice to carry out checks on the movement of cultural goods when it is imported to a Member State. In principle, there is no ban on the import of cultural goods to a national customs territory. The controls are technical and may be accompanied by administrative requirements.

In the case of an import, in theory, the good needs only to be declared to customs. However, as with any other merchandise, the cultural good may be examined to check the type, origin and value declared during customs formalities, or where no declaration has been made.

An important exception is made for Iraqi cultural property. Article 3 of Regulation (EC) No. 1210/2003 of 7 July 2003 provides that any movement of Iraqi cultural property is prohibited.<sup>164</sup> This prohibition does not apply where it can be shown that the cultural items were exported from Iraq prior to 6 August 1990 or that they are being returned to Iraqi institutions in accordance with the objective of safe return as set out in paragraph 7 of UNSC Resolution 1483 (2003).

In theory, Germany<sup>165</sup> and Malta<sup>166</sup> carry out more extensive checks on imported cultural goods than do other Member States, but it seems that in practice these are no more thorough than elsewhere in the European Union. Nevertheless, the responses obtained in this study show that customs officials apply a risk management approach when deciding which lots to check.

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<sup>164</sup> Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96, *OJ L 169* of 8.7.2003.

<sup>165</sup> Para.14 Kulturgüterrückgabegesetz (KultGüRückG) Law on the implementation of the UNESCO Convention of 14 November 1970 and on the transposition of Council Directive 93/7/EEC of 15 March 1993.

<sup>166</sup> Article 53(e) of the Cultural Heritage Act.

Switzerland has adopted much the same solution. Paragraphs 24 and 25 of the CPTO<sup>167</sup> establish a requirement to declare the goods to Customs and produce all the necessary documents and information relating to this cultural goods (provenance and also the statutory framework of the exporting country).

While some States issue import documents on a voluntary basis (Italy, Spain), import licences are rare. A notable exception is Greece, where an import licence is required for certain goods. According to Article 33 paragraph 1 of Law 3028/2002, cultural property may enter the territory freely, subject to the provisions of the 1970 UNESCO Convention. This control is seen as an important measure in the fight against illicit trafficking in cultural Regulation (EC) No. 1210/2003 of 7 July 2003. An importer of cultural goods is obliged to declare their entry into the country. This reporting obligation exists for three categories of cultural goods:

- monuments dating from before 1453;
- monuments post-1453 and pre-1830 which are the products of excavations or other archaeological research or have been detached from immovable monuments, and icons and other religious objects from the same period;
- uniform categories of movable cultural goods classified as monuments by decision of the Ministry of Culture and Tourism and with particular social, technical, folkloric, ethnological or historical significance, provided they are rare, that it is difficult to determine them individually and there is risk of loss or destruction.

The importer draws up three copies of a special document called a “Declaration of import/movement of monuments” (one for the Ministry of Culture, one for Customs and one for the importer) under the guidance of the relevant department of the Ministry of Culture (the regional agency of the Archaeology Department of the importer’s place of residence, except in Attica, where the competent agency is the Agency for private archaeological collections and antique dealers). If the object is imported from a third country, the declaration is made at the customs office of entry, which notifies the appropriate regional agency. If the import is from an European Union Member State, the declaration is made either at the customs office of entry (Community Transit Scheme) or at the regional agency of the competent archaeology department.

Some Member States have adopted alternatives to the import licence. Italy, for example, has a system for issuing an import licence, following submission of an application and payment of a fee.

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<sup>167</sup> Ordinance on the international transfer of cultural goods (Cultural Property Transfer Ordinance), RS 444.11.

#### 5.1.4.4. Regulation of temporary exits of cultural goods

This applies in particular to cultural items that are national treasures of artistic, historic or archaeological value, which can leave the country only temporarily and under specific conditions covering their return, liability terms, duration and the material conditions in which they are kept.

Some Member States experience difficulty in monitoring the return of a temporarily exported cultural goods promptly and efficiently. This does not mean that the control is not performed but rather that the management systems for granting these permits are not always efficient, especially where no database exists.

#### 5.1.4.5. Sources

These considerations on export and import-related matters are taken from the following sources:<sup>168</sup>

- The Free Movement of Cultural Goods in the European Union (European Parliament, 1998).
- Commission report on the Directive and the Regulation (European Commission, 2000).
- Report from the Parliament on the Commission report on the Directive and the Regulation (European Parliament, 2001).
- Second Commission report on the Directive (European Commission, 2005).
- Third Commission report on the Directive (European Commission, 2009).
- Document on protection against trafficking in cultural property (UNODC, 2009).
- Report of the Expert Group Meeting on Trafficking (UNODC, 2009).
- Recommendations by the Expert Group on Trafficking (UNODC, 2010).
- The 2004 and 2007 Reports on cultural property traceability systems in the Member States of the European Union and the EEA (reports for the European Commission).
- Information memo on the Rome international meeting on the fight against illicit traffic of cultural property (Directorate General of Customs and Excise, France, 2009).
- Commission report on the Regulation (2011, European Commission).

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<sup>168</sup> Full references for the reports can be found in the bibliography of works and reports cited.

## 5.2. Penalties

Preventing and combating the traffic in cultural goods also involve the creation and application of criminal offences. It should be stated that none of the 27 Member States has introduced a specific offence of trafficking in cultural goods.

Several issues must be raised in terms of:

- the general definition of trafficking adopted in the framework of this study: “movement of cultural goods carried out in violation of the rules relating to the transfer of property and the circulation of these goods, with a view to selling or disposing of them in some way”.
- Article 2 of the 1970 UNESCO Convention, which states that States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property,
- Article 1 of the 1995 UNIDROIT Convention, which states:
  - “This Convention applies to claims of an international character for:
  - (a) the restitution of stolen cultural objects;
  - (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter “illegally exported cultural objects”).”

In addition, Appendix III of the European Convention on Offences relating to Cultural Property (Council of Europe, Delphi, 23 June 1985) contains a list of criminal offences that may apply to cultural goods. This Convention has been signed by six States but never ratified.<sup>169</sup>

Each Member State of the European Union has thus developed its own criminal policy on the underlying criminal law.

### 5.2.1. Police services

Over half of European Union Member States (14) have set up a specialized police department for the prevention and prosecution of cultural goods trafficking. They are usually responsible for dealing with stolen goods, but this may extend to art forgeries. In other States, illicit cultural goods comes under the remit of the particular police department that deals with organized crime.

#### 5.2.1.1. Specialized police

- **United Kingdom**

Art and Antique Unit (AAU): Metropolitan police – London

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<sup>169</sup> Signed by the following States: Turkey, Portugal, Liechtenstein, Italy, Greece and Cyprus.

<http://www.met.police.uk/artandantiques/>)

This police department serves London, and is not nationwide. It has few officers because of current budgetary constraints, and there is even a question mark over its future.

- [Germany](#)

In Germany, there is no specific police department for the protection of cultural goods. The Länder police departments are authorized to protect cultural goods (national and other) as part of their general powers.

In principle, police departments are not directly responsible for cultural goods trafficking. This is the concern of the authorities in charge of protecting cultural goods and the customs authorities. In this regard, the police merely provide administrative assistance. On the other hand, the police are authorized to act on criminal offences under ordinary or special criminal law.

However, there is a specialized department for crimes committed against cultural goods at the federal level, and in some Länder: the Federal Criminal Police (Bundeskriminalamt) set up the SO41-24 Kunst/art crime unit. The Bundeskriminalamt is also the INTERPOL department within Germany. The SO41-24 unit collects and uses information, manages the national database and coordinates and supports investigations carried out by the criminal police departments of the Länder (LKA) and local areas, and makes contact with experts and commissions. In addition, protecting cultural heritage is also the responsibility of the criminal police of the Länder (Landeskriminalämter), which have special units in Bavaria, Hesse and Berlin: the Berlin LKA has a specialized unit for crimes relating to cultural goods and works of art (LKA 454), the Bavarian LKA in Munich has a specialized investigation unit for art offences (LKA section 6) and the LKA in Hesse has a coordination department for the protection of cultural goods (LKA section 41).

- [Austria](#)

The police services in Austria have some officers who are specialized in cultural goods. At the federal level, the Federal Criminal Police (Bundeskriminalamt, BKA) are responsible for cultural goods offences. There is a cultural goods unit (Kulturgutreferat), which is also the INTERPOL department within Austria. The Länder criminal police (Landeskriminalämter, LKA) usually have one or two specialized commissioners in the theft units (Ermittlungsbereich Diebstahl). The LKA are centrally governed by the BKA. The LKA must report information to the BKA, and there is close and effective cooperation between them.

- [Belgium](#)

ART team (Brussels)

The Art Research Team is a central federal police office in Brussels, and gathers information from all the legal districts, works with them and coordinates with international agencies. There are two people in the team.

- [Cyprus](#)

Cultural Property Office of the Cypriot Police

At the national level, the Cultural Property Office is responsible for coordinating investigations. Police operations and investigations are carried out by officers and agents from the relevant territorial police stations. The Office cooperates directly with the Antiquities Department, the Church of Cyprus and Customs.

- [Spain](#)

Historical Heritage Squad (Brigada de Patrimonio Historico) of the Criminal Police.

The Historical Heritage Squad is a central unit of the National Police with 20 staff, and it works with 125 other individuals. The Squad works with the Ministry of Culture.

- [France](#)

Central Office for the Fight against Traffic in Cultural Goods (Office Central de lutte contre le trafic de biens culturels (OCBC))

The Office employs around 30 people.

It covers the offences of theft and handling of cultural goods, as well as art forgeries. The Office's mandates include prevention, documentation, prosecution, international cooperation and training.

Under the terms of Council Directive 93/7/EEC of 15 March 1993, the Office is France's "central authority" responsible for implementing the claim and restitution procedures for national treasures that have unlawfully left the territory of one Member State for the territory of another.

The Office is in contact with a network of police focal points throughout France.

- [Greece](#)

The police department responsible for protecting cultural goods and combating illegal trafficking is the Department for Combating Illegal Traffic in Antiquities. The Department is part of the Sub-Directorate for Economic and Financial Crime of the Security Directorate of the Department of Attica. There is a branch in Athens, with about 30 police officers and agents, and a branch in Thessaloniki, with around seven police officers and agents. This police department is specialized in protecting cultural heritage, although the officers have not necessarily received specific training in such matters.

- [Italy](#)

Carabinieri Department for the Protection of Cultural Heritage (Comando Carabinieri Tutela Patrimonio Cultural (CCTPC))

This is the largest specialized police force in Europe (with several hundred officers). It has the means not only to search for cultural goods from Italian cultural heritage but also those illegally imported from other States.<sup>170</sup>

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<sup>170</sup> Non European Union States: In May 2011, 37 pre-Colombian objects illicitly removed from Peru; in June 2011, other pre-Colombian archaeological objects illicitly removed from Guatemala and Costa Rica.

In addition, this specialized police department regularly checks Italian world heritage sites protected by UNESCO, using operational support such as helicopters.<sup>171</sup>

The police also organize training seminars within and outside the Union, for police forces and also officials from Ministries of Culture, art restorers, judges, and so on.

In May 2011, this police department and the Italian branch of the European Police College (CEPOL) organized a workshop on the traffic in stolen works of art, which was attended by 26 police officers from 15 States.

- [Lithuania](#)

Cultural and Art Values Theft Investigation Unit

This is a police unit specifically devoted to cases of theft of cultural goods, within the relevant Division of the Criminal Police.<sup>172</sup> According to the information available, only one person is dealing with these matters, and a reform is planned for the end of 2011. This reform might result in the removal of the unit, and the theft of cultural goods might come under the general umbrella of the Theft Investigation Unit in terms of departmental structures. However, the fact that these are structural reforms may make it possible for the same person to continue working on the theft of cultural and artistic goods after the changes are made.

- [Malta](#)

Cultural Heritage Crime Unit

The Unit has four police officers and is responsible for all the islands of Malta. Officers receive specialist training on investigative methods for cultural goods offences, as well as the *modus operandi* and networks involved in such trafficking. However, the Cultural Heritage Crime Unit is not exclusively responsible for cultural goods trafficking, but also participates in other types of investigation. Furthermore, investigations of cultural goods trafficking are not centralized, and can therefore be carried out by each police headquarters. At the domestic level, the Cultural Heritage Crime Unit cooperates with the Superintendence of Cultural Heritage and customs. At the international level, the Unit cooperates with the police forces of other Member States of the European Union, and particularly neighbouring countries such as Greece, Italy and Cyprus.

- [Netherlands](#)

Art and Antiques Crime Unit (AACU)

The procedures used to combat the illicit traffic in cultural goods do not fall mainly under the auspices of the police. It is the responsibility of customs and the Cultural Heritage Inspectorate. Since 2010, however, the police have had the Art and Antiques Crime Unit (AACU), which belongs to the national Netherlands

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<sup>171</sup> The police reported carrying out 56 checks in five months (including a video report).

<sup>172</sup> Compared with Latvia and Estonia, and given that there is a relatively small number of cases of theft of cultural property, the administrative framework is conducive to investigations in their field, and the expression of the particular importance attached to such matters.



police and works in close collaboration with customs and the Cultural Heritage Inspectorate in investigations of violations of the penal code and/or when those departments need police assistance to carry out their mandate.

Although AACU does not have a leading role, it is informed by the local police in cases of theft or handling and possession of cultural goods. In such cases, AACU provides support to the regional police forces in their investigations. In other words, AACU does not lead investigations itself. When it receives a request for assistance from local police units, it forwards it to the relevant regional police force.

AACU also receives some requests from other countries or embassies. In such cases, AACU checks there is a case, and may request the intervention of a regional police force only upon receipt of a formal request for mutual legal assistance issued by the appropriate legal authority of the requesting State.

- [Poland](#)

There is a special police unit with its own detailed website (in Polish only). The website has legislation, news, information sheets (mainly on works of art) and access to national databases.

- [Portugal](#)

Portugal has a criminal police unit specialized in preventing and combating offences relating to cultural goods.

- [Romania](#)

There was a specialized department from 2001 to 2009, although it was reintegrated into other services during a restructuring. There appears to be a strong demand for it to be reinstated (Police and Museums questionnaire, replies from the National Museum of Art of Romania (NMAR)).<sup>173</sup> Nowadays, cultural heritage protection is the responsibility of the Criminal Investigations Department. At the regional level, there are 45 agents working on such matters.

The International Police Cooperation Centre is a Directorate within the General Inspectorate of the Romanian police. It is in charge of cooperation among national and international administrations.

#### **5.2.1.2. Conclusions**

In the police sphere, as in other areas, situations vary greatly among Member States of the European Union. Although more than half of Member States have set up a “specialized” police unit, which could be a sign of a penal policy in this regard, the reality differs greatly from one State to another.

- The number of “specialized” officers varies from one or two (Belgium) to several hundred (Italy). Staff numbers therefore depend only partly on the

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<sup>173</sup> On 6 June 2011, the Romanian information website ActMedia published an article on programmes funded by the FBI in Romania, including two training courses (*inter alia* “Arts and Antiquities”) in 2011.

- scale of crime, as some countries strongly affected by trafficking (such as Belgium) provide little support for prosecution.
- Resources also vary enormously in terms of whether or not the police are in charge of a database of stolen goods.
  - Although the monitoring of online sales falls within the remit of all police surveyed, the arrangement is non-existent, arbitrary or based on intelligence. Monitoring is never systematic.
  - Cooperation between State police and other national institutions working with cultural goods trafficking tends to be good.
  - It is difficult to identify police focal points in federal States, for instance in Germany it can be difficult to find a contact in the Länder.
  - Cooperation between the police forces of European Union States is also good, particularly with the police of neighbouring countries. European instruments (such as joint investigation teams and the European arrest warrant) are seldom if ever used. Cooperation takes place more through personal relations than through European legal instruments.
  - Police training<sup>174</sup> and meetings are extremely common in this area.
  - In the legal sphere, police opinion is divided on the need to create an offence of trafficking in cultural goods. They are more familiar with the offences of theft and receiving.
  - Many police officers surveyed described the difficulties involved in acquainting themselves with foreign criminal and heritage legislation.

### **5.2.2. Criminal offences**

The definitions of the offences that may be used can, and maybe should, follow the aforementioned dual approach: on the one hand, violations of rules on the transfer of ownership of cultural goods and on the other, violations of the rules concerning the movement of cultural goods, on import and on export. It is also important to emphasize the question of archaeological cultural goods as well as to present the implementation of law enforcement in Member States.

#### **5.2.2.1. General offences violating ownership transfer rules**

##### **(a) Theft and receiving stolen goods (see table in Annex)**

Violations of the rules of property transfer are mainly covered by the offence of theft. This offence is contained in all national penal rules. However, theft alone does not encompass cultural goods trafficking, as the latter involves movement of goods. The original offence of illegal property ownership transfer is combined with the offence of receiving property that has been stolen or illegally exported or imported. This offence is receiving an item that is the product of another offence. This duality

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<sup>174</sup> For instance, training conducted by the Italian Carabinieri (INTERPOL).

of theft/receiving or illicit movement/receiving makes it possible to categorize as offences those successive transfers of stolen cultural goods, subject of course to the conditions of “receiving stolen property” being met (particularly the holder’s knowledge of the fraudulent origin of the property).

In terms of penalties for theft and receiving, there is **a huge variety in the sentences handed down for the two offences**. These range from one month to 15 years’ imprisonment, depending on any aggravating circumstances,<sup>175</sup> and there is therefore an equivalent range of time limits for prosecution (see table attached). Generally speaking, the time limit for prosecution varies in proportion to the length of sentence associated with the offence.

### **(b) The issue of receiving stolen goods**

Receiving is an offence resulting from an original offence (theft, illegal export, and so on). Furthermore, as receiving is based on possession of an object, this raises the question of when the time limit for prosecution begins.

Member States require proof of knowledge of the fraudulent origin of the cultural goods before they recognize the offence of receiving. This evidence can be difficult to provide, and requires evidence that the good is stolen or is circulating in violation of established rules of movement. Archaeological property is a particular problem, as the date of any theft, illegal excavation or unlawful introduction to the market is difficult to prove, as the item was unknown prior to its discovery. This situation leads to difficulties in using criminal law to protect such property.

Furthermore, the knowledge of fraudulent origin in establishing the offence of receiving has ramifications in the civil sphere, in terms of assessing the good faith of the owner, and then the possibility of returning the property. The quest to prove such knowledge partially depends on the existence of databases of stolen or illegally circulating goods. Indeed, the publicity given to the initial unlawful act (theft or illegal export) makes it easier to prove knowledge of the fraudulent origin of the item.

The limitation periods for prosecution vary and, above all, **in most States, receiving is considered to be an instantaneous offence** for which the limitation period will start to run from the date on which wrongdoer takes possession of the stolen good. Defining receiving of stolen goods as an ongoing offence for which the limitation period starts to run from the date on which possession ends is the exception rather than the rule.

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<sup>175</sup> Where there are other aggravating circumstances, the maximum sentence may be life imprisonment (for example in France).

**(c) Aggravating circumstances owing to the cultural nature of the property**

Another essential dimension relating to offences is whether to consider aspects specific to cultural goods and the art market in the criminal classification of offences within Member States.

The legislations considered have revealed the following two trends:

- Most States do not consider the cultural nature of an item as an aggravating circumstance when prosecuting theft. When a State does consider this to be an aggravating circumstance, it takes account of the type of heritage involved (national treasure, protected property, and so forth), the historical or artistic importance of the item<sup>176</sup> or sets a threshold value.<sup>177</sup>
- **The profession of the defendant is sometimes taken into account** in cases of theft or receiving or the habitual nature of those activities.<sup>178</sup> However, it is only in exceptional circumstances that the aggravating circumstances specifically target art market professionals.

Cultural property crime does not therefore have a high profile if we consider general or ordinary law offences.

**5.2.2.2. Violation of the rules on the movement of cultural goods**

The penal protection of the movement of cultural heritage falls more within the remit of special legislation. In some cases, rather than making theft and receiving of stolen cultural goods an aggravating factor of the general offences of theft and receiving stolen goods, States have chosen to enact special rules aimed at improving the movement of cultural assets.

The national reports indicate that there is a high number of special offences, although only a few States cover a wide range of unlawful behaviour.<sup>179</sup>

With some variation, most States have adopted the following three categories of offence:

- Offences penalizing damage to cultural property.
- Offences relating to the movement of cultural property.
- Offences relating to illegal excavations.

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<sup>176</sup> In Greece for instance, this concerns the specific theft of high-value monuments or property from protected excavations or inventoried property.

<sup>177</sup> Austria, Cyprus, Estonia, France, Germany, Greece, Hungary, Lithuania, Poland, Portugal, Romania and Spain consider the cultural nature of the property. Finland, Greece and the United Kingdom use the criterion of value.

<sup>178</sup> The receiving of stolen goods may be punished more severely if the source offence had aggravating circumstances owing to the cultural nature of the property stolen.

<sup>179</sup> Cyprus, France, Greece, Malta, Romania and Spain in particular.

**(a) Offences penalizing damage to cultural property<sup>180</sup>**

These offences may be considered as preventive measures aimed at protecting cultural assets from physical attacks carried out in order to move them: the legal texts refer to the destruction of cultural assets but also acts that might facilitate the movement of such property if the latter is too large or part of a set. Examples include damage (such as splitting up the screens of a triptych or disguising an item) or mutilation (such as removing a bas-relief or cutting up a painting).

Also included are non-conservation of the goods or particularly the exercise of a restoration or repair activity on cultural goods without a licence or authorization.<sup>181</sup> In the latter case, not only are such activities critical in terms of conserving the asset and must be carried out by the appropriate professionals, but there is also the risk that they may lead to the asset being altered for criminal purposes.

These offences are categorized by States in accordance with the particular status of the cultural asset<sup>182</sup> or whether the damage was accidental or deliberate.<sup>183</sup> Penalties also vary enormously, and range from a fine to 17 years' imprisonment.<sup>184</sup>

**(b) Offences relating to the movement of cultural property**

*Intra-State movement inside and outside the European Union*

It is vital to distinguish import from export. The type of requirements for the two varies from one State to another. The opening up of the European Union market in 1993 means that, in principle, there are no longer any checks among Member States. There are several exceptions to this principle in terms of the movement of cultural goods.

- Illegal export offence

The criminal offence of illegal export (temporary or permanent) is provided for in the vast majority of Member States,<sup>185</sup> and this must be distinguished from the customs offence of smuggling. The offence of illegal export is divided into different types: planned attempted export,<sup>186</sup> incitement to illegal exportation,<sup>187</sup> extension of offence to the cultural goods of another Member State,<sup>188</sup> and penalties for acts

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<sup>180</sup> Cyprus, Estonia, France, Germany, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia and Spain.

<sup>181</sup> Estonia, Malta and Romania.

<sup>182</sup> In Germany, this means an asset of national importance or the same importance for another EU Member State. In France, the item must be in the public domain, while protection is broader in Luxembourg.

<sup>183</sup> For example in Poland.

<sup>184</sup> Latvia.

<sup>185</sup> Austria, Cyprus, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia and Spain.

<sup>186</sup> For example, Greece and France.

<sup>187</sup> Such as Cyprus.

<sup>188</sup> Germany, for instance.

relating to export requests, such as supplying false data to obtain an export licence.<sup>189</sup> Failure to return goods with a temporary exit authorization in a timely manner is also sometimes categorized as illegal export.<sup>190</sup>

The basic offence of illegal export is often accompanied by the marketing of an illegally exported cultural asset,<sup>191</sup> which may resemble a special kind of receiving if the owner is aware of the illegal origin of the goods.

- Illegal import offence

As far as imports are concerned, the issues are very different. State vigilance is highly variable in these matters. Indeed, the weakness of import checks is based on the idea that a check should already have been carried out when the goods left one country, and that it is therefore pointless to carry out another. Import checks are thus generally limited to verifying the value of the item. If the good is imported under a false name, then customs can intervene. The penalties are therefore customs sanctions (see below).

This is why the criminal law of Member States does not tend to include criminal offences for illegal import. There are, however, a few exceptions.<sup>192</sup>

- Specific case of Iraqi cultural property

Some States have specifically made it illegal to import and export Iraqi cultural goods that are the subject of a movement ban.<sup>193</sup>

*Domestic movement (inside a State)*

Besides the prohibition on the sale of certain cultural assets,<sup>194</sup> requirement of authorization to trade in cultural goods<sup>195</sup> and supplying lists of antiques held to the relevant authority,<sup>196</sup> there are some offences that protect the movement of cultural goods within Member States, although there is no harmonization of such rules.<sup>197</sup>

- Offences relating to the holding of inventories and “movement” registries

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<sup>189</sup> Cyprus, Estonia and Slovakia.

<sup>190</sup> Italy, Poland and Slovakia.

<sup>191</sup> Romania.

<sup>192</sup> For example, Germany, Hungary and Romania.

<sup>193</sup> Germany, Netherlands and the United Kingdom.

<sup>194</sup> In Spain, for example, this concerns the sale of property belonging to the Church.

<sup>195</sup> For antiques, this applies to Cyprus and Greece. For cultural assets, in Romania there are rules concerning the movement of such property. Lithuania has introduced a licence system for antique shops. According to the Law on Protection of Movable Cultural Property, “the Department of Cultural Heritage Protection of the Ministry of Culture shall: [...] issue licenses to engage in trade in antiques; supervise the observation of the regulations governing trade in antiques [...]” (Art. 4.3). From 2007 to 2011, the Department issued 49 licences for antique shops.

<sup>196</sup> Cyprus.

<sup>197</sup> In Romania, for instance, it is compulsory to clearly display the word “copy” or “facsimile” on reproductions of cultural assets.

It is vital to be able to trace a cultural asset from its State of origin. Not only does this guarantee the validity of a transaction at the domestic level, but it also has implications for when the item crosses borders.

It is therefore well known that keeping inventories and registries is essential for the movement of cultural goods. These must contain a description of the item, possibly a photograph and mention of its origin (purchase, storage, donation, etc.). Such inventories are often held by institutions, and are therefore a major source of knowledge and traceability of cultural property. The same can be said of what are known as “police” registries kept by art market professionals to guarantee market transparency. Not all European Union Member States require the holding of inventories or registries of cultural goods circulation. In fact, such registries are more of an exception, which means that criminal measures are extremely rare in this sphere.<sup>198</sup>

- Failure to respect the compulsory declaration of the movement of cultural goods or certain cultural property.

These offences relate to protected cultural property,<sup>199</sup> and mainly concern archives.<sup>200</sup> The alienation of protected archives is generally subject to specific formalities: the buyer must be informed of the status of the item; there must be administrative authorization of the transfer, declaration of transfer, and so forth.

### **(c) Archaeological offences**

Trafficking in archaeological cultural items is one of the dark holes in the movement of archaeological items. The *ab initio* lack of knowledge of the identity of such items makes it difficult to tackle this traffic. To limit the phenomenon, certain States have introduced preventive measures on the use of metal detectors, while the rules on illegal excavations are becoming increasingly strict.

#### *Rules on metal detectors*

There are three categories of rules:

- Rules prohibiting the use of such detectors<sup>201</sup> or their use in protected areas;<sup>202</sup>

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<sup>198</sup> France, Romania, Slovakia, Spain and United Kingdom.

<sup>199</sup> France, Spain, Romania. For instance, in Romania there is an obligation to report the sale or theft of a classified item.

<sup>200</sup> Austria, France and Germany.

<sup>201</sup> For instance, in Cyprus and Portugal. In Germany, the mere use of metal detectors requires authorization under the The Federal Act on the Protection of Monuments in Germany (*Denkmalschutzgesetz*). It is possible to buy metal detectors without an authorization.

<sup>202</sup> United Kingdom. In Greece, there is a database held by the Directorate for the Protection and Documentation of Cultural Property (Art. 3 para. 4, Law 3658/2008): e) with the details of owners of metal detectors or other underground detectors or underwater detectors for use in seas, rivers or lakes.

- Control rules that require authorization for the use of metal detectors<sup>203</sup> or regulate the sale thereof;<sup>204</sup>
- Permissive rules with no particular regulation.<sup>205</sup>

*Failure to respect excavation formalities*

In most States, archaeological excavations are the subject of specific rules. Obligations differ based on the area of the excavation (public, private, protected, non-protected and so on). Violations can be classified into three categories:

- Prohibition on excavations in protected areas;<sup>206</sup>
- Failure to obtain prior authorization for excavations;<sup>207</sup>
- Failure to submit a declaration of a chance find.<sup>208</sup>

In addition, there may also be a prohibition on the purchase or sale of a cultural asset from an illicit excavation.<sup>209</sup>

### **5.2.2.3. Application of criminal offences**

It is worth stating the obvious fact that criminalizing the traffic in cultural goods depends on a political will that is lacking in some Member States of the European Union. Some stakeholders have even acknowledged a political indifference to the issue,<sup>210</sup> which results in minimum criminalization, and thus very few prosecutions and convictions.

Generally speaking, the police recognize that the criminal prosecution of cultural goods trafficking is not considered a priority in Member States. When it is given priority, it is when it is associated with organized crime or other forms of trafficking such as drug trafficking.

An examination of national reports revealed the following points.

### **5.2.2.4. Appraisal of criminal offences**

Criminal legislation is very varied and can be difficult to access.

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<sup>203</sup> For example, Article L.542-1 of the French Heritage Code: “No one may use equipment that enables the detection of metal objects for the purposes of seeking monuments and objects that may relate to prehistory, history, art or archaeology, without having obtained prior administrative authorization issued on the basis of the qualification of the applicant, as well as of the nature of and arrangements for the search”. This can be compared with the legislation of Scotland and Poland. Other examples include Cyprus, Estonia, France, Romania, Slovakia, Spain and Sweden.

<sup>204</sup> For instance, in Romania and Austria.

<sup>205</sup> Czech Republic.

<sup>206</sup> For example, Greece.

<sup>207</sup> Cyprus, Estonia, France, Greece, Romania, Slovakia, Spain and Sweden.

<sup>208</sup> Poland and the United Kingdom.

<sup>209</sup> Cyprus and France.

<sup>210</sup> Belgium, Latvia, Luxembourg and Slovenia.



Very few States have harsher penalties for theft and receiving when cultural property is involved.

There is no consensus on the creation of an offence of illegal trafficking, as the theft/receiving combination (with a few adjustments) appears to be satisfactory.

It is difficult to prove knowledge of the fraudulent origin of the item in cases of receiving. The following signs should be used: nature of the goods (rarity, for instance), price (bargain price or normal price), means of payment used, identity of the seller and the presence or absence of evidence of title. This assessment should be carried out on a case-by-case basis.

In some legislation, there is little to link the general offences (theft and receiving) with special offences. For actions that constitute “specialist” theft or receiving, the sentences are more lenient<sup>211</sup> and prosecutions more difficult to implement.<sup>212</sup>

#### **5.2.2.5. Appraisal of procedure implementation**

- The discrepancies are too great as regards the length of the limitation periods for the commencement of criminal proceedings for the same offences.
- There is uncertainty surrounding the date from which time will run for the offence of receiving, as some States consider it an instantaneous offence while others consider it an ongoing offence.
- Cooperation with customs and police of neighbouring countries is generally considered good.
- European instruments (such as joint investigation teams and the European arrest warrant) are seldom if ever used.<sup>213</sup>
- There is little or no monitoring of online sales.<sup>214</sup> Only a few States have concluded formal agreements with e-Bay to prevent illegal sales.<sup>215</sup>
- Databases of stolen goods are not sufficiently updated, and there is insufficient access for market professionals and institutions.
- It is almost impossible to establish offences in terms of archaeological excavations, except in those rare cases of offenders caught in the act, and prosecutions are difficult as it is often impossible to know exactly when the offence was carried out.

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<sup>211</sup> In France, for instance, the transfer or purchase of a land or sea object from an illegal excavation is penalized less severely than under ordinary law (Art. L. 544-4 et seq. of the Heritage Code).

<sup>212</sup> In Portugal, for example, stakeholders state that the time limit for prosecution is shorter for special offences.

<sup>213</sup> This point is systematically emphasized.

<sup>214</sup> Malta is the exception, as it reports monitoring online sales. Poland, Slovenia and Sweden report not monitoring online sales, while Romania, Portugal and France report sporadic surveillance of online sales (often based on intelligence).

<sup>215</sup> Austria, Germany and Poland.

- The seizure procedure for an item put up for sale in a foreign State is difficult but not impossible, as it must be carried out quickly and as follows:
  - It is pointless for a diplomat from a foreign country to inform the police directly. The representative of the foreign State must contact a judge who will order the police to carry out the seizure, provided that the intelligence is reliable and suggests the unlawful situation of the item.
  - If there is an immediate certainty on the illegal origin of the cultural asset for sale, it is possible to use the flagrant offence procedure.

**Annex: Delphi Convention, 23 June 1985: Appendix III: List of offences**

- Thefts of cultural property.
- Appropriating cultural property with violence or threats.
- Receiving of cultural property where the original offence is listed in this paragraph and regardless of the place where the latter was committed.
- Acts which consist of illegally appropriating the cultural property of another person, whether such acts be classed by national law as misappropriation, fraud, breach of trust or otherwise.
- Handling cultural property obtained as the result of an offence against property other than theft.
- The acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft.
- Destruction of or damage to cultural property belonging to another person.
- Any agreement followed by overt acts, between two or more persons, with a view to committing any of the offences referred to in paragraph 1 of this appendix.
  - Alienation of cultural property which is inalienable according to the law of a Party;
  - Acquisition of such property as referred to under i, if the person who acquires it acts knowing that the property is inalienable;
  - Alienation of cultural property in violation of the legal provisions of a Party which make alienation of such property conditional on prior authorization by the competent authorities;
  - Acquisition of such property as referred to under iii, if the person who acquires it acts knowing that the property is alienated in violation of the legal provisions referred to under iii;
  - Violation of the legal provisions of a Party according to which the person who alienates or acquires cultural property is held to notify the competent authorities of such alienation or acquisition;

- Violation of the legal provisions of a Party according to which the person who fortuitously discovers archaeological property is held to declare such property to the competent authorities;
- Concealment or alienation of such property as referred to under i;
- Acquisition of such property as referred to under i, if the person who acquires it acts knowing that the property was obtained in violation of the legal provisions referred to under i;
- Violation of the legal provisions of a Party according to which archaeological excavations may be carried out only with the authorization of the competent authorities;
- Concealment or alienation of archaeological property discovered as a result of excavations carried out in violation of the legal provisions referred to under iv;
- Acquisition of archaeological property discovered as a result of excavations carried out in violation of the legal provisions referred to under iv, if the person who acquires it acts knowing that the property was obtained as a result of such excavations;
- Violation of the legal provisions of a Party, or of an excavation licence issued by the competent authorities, according to which the person who discovers archaeological property as a result of duly authorized excavations is held to declare such property to the competent authorities;
- Concealment or alienation of such property as referred to under vii;
- Acquisition of such property as referred to under vii, if the person who acquires it acts knowing that the property was obtained in violation of the legal provisions referred to under vii;
- Violation of the legal provisions of a Party according to which the use of metal detectors in archaeological contexts is either prohibited or subject to conditions.
- Actual or attempted exportation of cultural property the exportation of which is prohibited by the law of a Party;
- Exportation or attempted exportation, without authorization of the competent authorities, of cultural property the exportation of which is made conditional on such an authorization by the law of a Party.
- Violation of the legal provisions of a Party:
  - II which make modifications to a protected monument of architecture, a protected movable monument, a protected monumental ensemble or a protected site, conditional on prior authorization by the competent authorities,
  - II or according to which the owner or the possessor of a protected monument of architecture, a protected movable monument, a protected monumental ensemble or a protected site, is held to preserve it in adequate condition or to give notice of defects which endanger its preservation.

Receiving of cultural property where the original offence is listed in this paragraph and regardless of the place where the latter was committed.

### 5.2.3. Customs

#### 5.2.3.1. Customs offences

All customs offences tend to be potentially applicable to cultural goods where they correspond to the application requirements.

All Member States mention the offence of smuggling. While the offence of smuggling is not limited to cultural goods,<sup>216</sup> the offence punishes the failure to declare a good to customs declaration or the making of a false declaration on the type, origin or value of the goods. Sentences depend on whether the smuggled item is the subject of a movement ban or highly taxed. The offence can apply to cultural goods insofar as it targets exports and imports.

While criminal law may provide for the offence of illegal import of cultural goods, it might be also be possible to combine this with the offence of smuggling.<sup>217</sup>

The offence of false declaration can be used alongside the offence of smuggling.

There are therefore almost no specific customs offences for cultural goods.

The proposal for an import certificate is not supported by all Member States, even though any customs export ban should ostensibly have an equivalent import ban (and this is far from being the case among Member States)<sup>218</sup> Rather than an import certificate, those surveyed would prefer customs import offences to be on the same level as export offences.

The national reports indicate that customs authorities are relatively satisfied with the offences and powers invested in them by national laws. However, it is hugely difficult to implement customs checks on the movement of cultural goods, owing to the cultural nature of such assets and the inherent problems in identifying them.<sup>219</sup>

#### 5.2.3.2. Customs procedure

National customs are able to carry out “temporary seizures”, although the terminology varies among Member States.<sup>220</sup> This provisional measure, the duration of which varies from State to State, is implemented where there is a doubt concerning the legality of the export or import. A temporary seizure gives the

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<sup>216</sup> Except Greece, which categorizes the export of items of cultural heritage as smuggling (Art. 155 of the Customs Code), and Portugal (Art. 92c of the Customs Law refers to the smuggling of items that are extremely valuable in historical and artistic terms).

<sup>217</sup> The Greek Court of Appeal, in Decision No. 851/1982, accepted the real combination of the offences of smuggling and illegal import of cultural property.

<sup>218</sup> Particularly given that the 1970 UNESCO Convention places export and import on the same level.

<sup>219</sup> See below, Part 2, obstacles.

<sup>220</sup> Seizure, consignment, custody, etc.

authorities time to carry out the necessary checks.<sup>221</sup> If illegality is established, a confiscation measure may then be implemented. The item is generally handed over to the cultural, national or foreign authorities (as applicable)<sup>222</sup> or to the police.

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## 6. CODES OF ETHICS

### 6.1. International tools

#### 6.1.1. Introduction

It is increasingly often the case that implementation of international and even national legal rules, particularly in the field of the circulation of cultural goods and transactions concerning works of art, might be helped by the rules and customs laid down in codes of ethics.

Alongside the development of rules in the true sense, which have proliferated especially since the second half of the twentieth century, we are now witnessing a veritable parallel phenomenon in the production of rules of conduct which, while they do not enjoy the enforceability that is characteristic of legal rules, are nonetheless capable both of having binding effect for certain categories of subjects, and of exerting a significant influence on market regulation.

These rules can be placed in the general category of codes of ethics, and their most notable feature is that they come into being spontaneously or quasi-spontaneously. In practice, in the majority of cases, instead of being produced in a disparate manner following a “vertical” division of relations between administrators and the administered, they are designed, drawn up and oriented in a “horizontal” way, as the instruments of self-regulation of those associated with or belonging to the professional category concerned.

These norms often emanate from the very subjects to whom they relate, and who are therefore bound to comply with them, by virtue of belonging to the category in question.

Looking at this phenomenon from the legal standpoint, the first observation is that these codes of ethics give rise to contractual obligations for the members. But it should also be added that they are constantly used as a reference in the everyday

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<sup>221</sup> Questions submitted to the Ministry of National Culture (Portugal), the diplomatic representation of the State of origin, the relevant authority (Germany), or experts (France, Germany, Greece and Hungary).

<sup>222</sup> In the United Kingdom, when the customs authorities confiscate illegally imported objects, the Ministry of Culture returns the items to the exporting country. The UK has thus returned antiquities to Greece, Iran and Afghanistan. In France, such items are handed mainly to the cultural authorities of the country of origin, once the Ministry for Foreign Affairs has checked whether the country of origin is requesting their return. In other cases (such as French national treasures, unclaimed foreign cultural item, etc.), the item is handed over to the French cultural authorities.

operations of the categories concerned, thus elevating them to the rank of customary practices genuinely comparable to those in the field of international trade.

It should be noted, too, that the phenomenon is also given some weight among the classic sources of international law. In this regard, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provides, for example, that Member States must set up one or more services for the protection of their cultural property with qualified personnel, for “establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules”.<sup>223</sup>

### 6.1.2. The fields covered and the sources

If one looks at the phenomenon of codes of ethics from the point of view of their origins, it is obvious that they derive from a variety of sources. The rules in question are drawn up in environments as diverse as international organizations, specialist institutes, national or international trade associations and public or private sector institutions or bodies. Examples that might be mentioned include UNESCO (*International Code of Ethics for Dealers in Cultural Property*, 6 November 2000), ICOM (*ICOM Code of Ethics for Museums*, 8 October 2004), CINOA (*International Confederation of Art Dealers, International Code of Ethics for Dealers in Cultural Property*),<sup>224</sup> AAM (*American Association of Museums*), which has produced three major codes, the *Code of Ethics for Museums*, 2000, *Guidelines on Exhibiting Borrowed Objects*, 2000 and *Guidelines concerning the Unlawful Appropriation of Objects during the Nazi Era*, 1999, amended in 2001, AAMD (*Association of Art Museum Directors*) which has produced the *Guidelines on Loans of Antiquities and Ancient Art 2006*,<sup>225</sup> and which approved at the end of 2008, the final text of the *Standards Regarding Archaeological Material and Ancient Art*,<sup>226</sup> EAA (*European Association of Archaeologists*), which adopted the *Principles of Conduct* in 1998<sup>227</sup> and ICA (*International Council on Archives*), whose General Assembly adopted the international *ICA Code of Ethics* for archivists in 1996.<sup>228</sup>

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<sup>223</sup> Article 5(e) of the 1970 UNESCO Convention.

<sup>224</sup> The code was adopted at the General Assembly in Florence in 1987, and amended in Stockholm on 26 June 1998 and New York on 11 May 2005.

<sup>225</sup> See the text of the code adopted on 27 February 2006 on the website [http://www.aamd.org/papers/documents/loans\\_and\\_PressRelease.pdf](http://www.aamd.org/papers/documents/loans_and_PressRelease.pdf).

<sup>226</sup> See the text of the preliminary draft adopted on 4 June, 2008 on the website [www.aamd.org/2008ReportAndRelease.pdf](http://www.aamd.org/2008ReportAndRelease.pdf).

<sup>227</sup> See the text of the code, adopted at Gothenburg on 26 September 1998 on the website [www.e-a-a.org/EAA\\_Princ\\_of\\_Conduct.pdf](http://www.e-a-a.org/EAA_Princ_of_Conduct.pdf)

<sup>228</sup> See the text of the International Council on Archives code, adopted in Beijing, on the website [www.ica.org/5556/documents-de-reference/code-de-deontologie-de-lica.html](http://www.ica.org/5556/documents-de-reference/code-de-deontologie-de-lica.html).

The persons to whom these codes of ethics are addressed are those belonging to the respective category, such as museum management bodies or the specialist dealers operating in the sector.

### **6.1.3. The question of content of the system of rules**

One of the questions to be asked relates to the content of the norms laid down in codes of ethics: does the provide a complete, uniform body of rules, or is one faced instead with instruments that have nothing in common, other than the form of the tool used to express them, and are mere non-legislative sources?

In this regard, it should be noted, first, that the the key aspects of most of the instruments under consideration already form the subject of specific rules in major international conventions. These include the acquisition and disposal of collections, the origin of collections, the professional conduct of members, and the sanctions for failure to comply with the rules in question. But it should be borne in mind, at the outset, that one of the most remarkable functions served by these codes of ethics is that – at least for the groups concerned – they render certain rules covered by international conventions enforceable far beyond the scope of those conventions in terms of time and subject matter.

Codes of ethics typically cover four aspects of the movement of goods. These are the acquisition and disposal of goods and collections, the provenance of items and collections, the professional conduct of members, and the sanctions laid down in the event of violation of the rules.

#### **6.1.3.1. The acquisition and disposal of goods and collections**

The acquisition and disposal of goods and collections is one of the most keenly disputed aspects in international practice, thus proving that sometimes specific cases arise in which the legal rules laid down in the relevant national law and/or those of international law, which should apply, do not completely dispose of the issue.

In this regard, the fundamental principle underlying the ICOM Code of Ethics is that museums holding collections are conserving them in the interests of society. Consequently, for each museum, the governing body must adopt and publish a charter covering the acquisition, protection and use of the collections. This text must clarify the position of objects that will not be catalogued, conserved or exhibited. Article 2.2. (Valid Title) provides that “No object or specimen should be acquired by purchase, gift, loan, bequest or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title”. Article 2.3 (Provenance and Due Diligence), provides that, “Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item since discovery or production”.

The CINOA Code of Ethics also lays down, in Article 5, that professionals dealing in cultural property “cannot under any circumstances participate in transactions which to the best of their knowledge can result in money-laundering operations”, and, in Article 3, “agree to comply with the laws on the protection of endangered species. They therefore agree not to trade in objects manufactured from materials that are protected under the Convention on International Trade in Endangered Species.”<sup>229</sup>

The concern to safeguard the integrity of the collections is a very strong theme of the UNESCO International Code of Ethics for Dealers in Cultural Property, Article 6 of which provides: “Traders in cultural property will not dismember or sell separately parts of one complete item of cultural property”.

Lastly, where museums in the United States are concerned, the AAM Code of Ethics requires that “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials.”<sup>230</sup>

#### **6.1.3.2. Provenance of goods and collections**

With respect to the **provenance of goods and collections**, these rules touch on the traditional problem of the return and restitution of cultural goods. From this standpoint, even international law has for some time now generally accepted the distinction between the case of goods stolen from their owner, which require restitution, and goods illegally transferred (or exported) from their country of origin, which require return.<sup>231</sup> As to this, in terms of rules of conduct, the ICOM Code of Ethics provides, first, in Article 6.1: “Museums should promote the sharing of knowledge, documentation and collections with museums and cultural organizations in the countries and communities of origin. The possibility of developing partnerships with museums in countries or areas that have lost a significant part of their heritage should be explored”. The Code makes reference to precisely those notions of return and restitution already used in the UNIDROIT Convention.

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<sup>229</sup> The previous version of Article 2 of the UNESCO Code provided that “A trader who is acting as agent for the seller is not deemed to guarantee title to the property, provided that he makes known to the buyer the full name and address of the seller. A trader who is himself the seller is deemed to guarantee to the buyer the title to the goods”. Article 3 provides that, “A trader who has reasonable cause to believe that an object has been the product of a clandestine excavation, or has been acquired illegally or dishonestly from an official excavation site or monument will not assist in any further transaction with that object, except with the agreement of the country where the site or monument exists. A trader who is in possession of the object where that country seeks its return within a reasonable period of time, will take all legally permissible steps to cooperate in the return of that object to the country of origin”.

<sup>230</sup> See AAM, Code of Ethics for Museums, [www.aam-us.org/museumresources/ethics/coe.cfm](http://www.aam-us.org/museumresources/ethics/coe.cfm), p.3.

<sup>231</sup> The distinction is, moreover, clearly present in Article 3 of the UNIDROIT Convention on restitution – which includes in the notion of theft, and thus as subject to restitution, an item “unlawfully excavated or lawfully excavated but unlawfully retained” – and in Article 5 dealing with return.



With regard to title, according to Article 2.2 (Valid Title), the acquiring museum must be certain that valid title exists.

#### 2.3 Provenance and Due Diligence:

“Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item since discovery or production.”

#### 2.4 Objects and Specimens from Unauthorized or Unscientific Fieldwork:

“Museums should not acquire objects where there is reasonable cause to believe their recovery involved unauthorized or unscientific fieldwork, or intentional destruction or damage of monuments, archaeological or geological sites, or of species and natural habitats. In the same way, acquisition should not occur if there has been a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.”

#### 2.5 Protected Biological or Geological Specimens:

“Museums should not acquire biological or geological specimens that have been collected, sold or otherwise transferred in contravention of local, national, regional or international law or treaty relating to wildlife protection or natural history conservation.”

Article 6.2 (Return of Cultural Property) provides: “Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level”, while Article 6.3 (Restitution of Cultural Property), provides: “When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country’s or people’s cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to cooperate in its return”. Finally, Article 6.4 of the Code (Cultural Objects From an Occupied Country) refers to the international norms of the 1954 Hague Convention applicable in the event of armed conflict when it lays down that: “Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respect fully all laws and conventions that regulate the import, exportation and transfer of cultural or natural materials”.

Again, Article 4 of the *AAM Guidelines concerning the Unlawful Appropriation of Objects during the Nazi Era* provides: “It is the position of AAM that museums should address claims of ownership asserted in connection with objects in their custody openly, seriously, responsively, and with respect for the dignity of all parties involved. Each claim should be considered on its own merits.

(a) Museums should review promptly and thoroughly a claim that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution.

(b) In addition to conducting their own research, museums should request evidence of ownership from the claimant in order to assist in determining the provenance of the object.

(c) If a museum determines that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner”.

Furthermore, the CINOA Code of Ethics provides that members finding themselves in possession of an object about which there are serious doubts as to whether it had been illegally imported, and whose country of origin is seeking its return within a reasonable time, must, under Article 2, “do everything that is possible to them according to the current laws to cooperate in returning the object to its country of origin. In the case of a purchase in good faith by the antique dealer, an amicable refund may be agreed to”. It is understandable that there are no provisions in the codes of conduct to cover what is now called “safe conduct” for works of art that are loaned for exhibitions, including against seizure by the courts.<sup>232</sup>

Article 2 of the Code of Ethics for archivists, a rather vague and particularly flexible provision, states: “Archivists should appraise, select and maintain archival material in its historical, legal and administrative context, thus retaining the principle of provenance, preserving and making evident the original relationships of documents.”<sup>233</sup>

Lastly, it should be pointed out that Article E of the AAMD preliminary draft of 2008 of the *Standards Regarding Archaeological Materials and Ancient Art* provides that the Association recognizes the date of 17 November 1970 – date of signature of the 1970 UNESCO Convention – as the most relevant starting date for the application of more rigorous standards for museums for the acquisition of objects of archaeological interest, especially as to the prohibition on acquisition of objects having left their country of origin after the said date.

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<sup>232</sup> Many national legal systems now provide for the exemption of works of art on loan from judicial seizure and other interim measures of protection, which obviously cannot be the subject of codes of conduct; see E. Jayme, *L'immunité des oeuvres d'art prêtées. Quelques procédures et législations récentes en Europe*, M.A. Renold, P. Gabus (ed.), *Claims for Restitution of Looted Art*, Geneva, Zürich, Basel, Schulthess, 2004, p. 175 et seq., M. Weller, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Lichtenstein Litigation*, *Vanderbilt Journal of Transnational Law*, Oct. 2005, vol. 38, Issue 4, p. 997 et seq.

<sup>233</sup> The brief commentary on Article 2 of the Code states that “Archivists should cooperate in the repatriation of displaced archives”.

### 6.1.3.3. The professional conduct of members

As regards **the professional conduct of members**, Article 1.16 of the ICOM Code of Ethics provides, with regard to ethical conflicts: “The governing body should never require museum personnel to act in a way that could be considered to conflict with the provisions of this Code of Ethics, or any national law or specialist code of ethics”. More particularly, Article 7.1 (National and Local Legislation), provides: “Museums should conform to all national and local laws and respect the legislation of other states as they affect their operation”, and Article 7.2 (International Legislation) stipulates that “Museum policy should acknowledge the following international legislation that is taken as a standard in interpreting the *ICOM Code of Ethics for Museums*:

- Convention for the Protection of Cultural Property in the Event of Armed Conflict (“The Hague Convention”, First Protocol, 1954 and Second Protocol, 1999);
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970);
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973);
- Convention on Biological Diversity (United Nations, 1992);
- Convention on Stolen and Illicitly Exported Cultural Objects (UNIDROIT, 1995);
- Convention on the Protection of the Underwater Cultural Heritage (UNESCO, 2001);
- Convention for the Safeguarding of the Intangible Cultural Heritage 1 (UNESCO, 2003)”.

Further, Article 8 of the ICOM Code of Ethics provides that museums should operate in a professional manner, and that members of the museum profession have an obligation to follow the laws and rules laid down, and to uphold the honour and dignity of their profession. They must protect the public against any professional conduct that is unlawful or contrary to professional ethics. They should take every opportunity to inform and educate the public about the objectives, goals and aspirations of the profession, so as to raise awareness of the enrichment museums represent for society.

Professional conduct is, moreover, expressly dealt with in Article 8, which, in making the following provisions, contains an almost complete system of rules:

“8.1 (Familiarity with Relevant Legislation): ”Every member of the museum profession should be conversant with relevant international, national and local legislation and the conditions of their employment. They should avoid situations that could be construed as improper conduct”.

8.2 (Professional Responsibility): “Members of the museum profession have an obligation to follow the policies and procedures of their employing institution.

However, they may properly object to practices that are perceived to be damaging to a museum, to the profession, or to matters of professional ethics”.

8.3 (Professional Conduct): “Loyalty to colleagues and to the employing museum is an important professional responsibility and must be based on allegiance to fundamental ethical principles applicable to the profession as a whole. These professionals should comply with the terms of the ICOM Code of Ethics for Museums and be aware of any other codes or policies relevant to museum work”.

8.4 (Academic and Scientific Responsibilities): “Members of the museum profession should promote the investigation, preservation and use of information inherent in collections. They should, therefore, refrain from any activity or circumstance that might result in the loss of such academic and scientific data”.

8.5 (The Illicit Market): “Members of the museum profession should not support the illicit traffic or market in natural or cultural property, directly or indirectly”.

The codes sometimes draw a distinction between rules of conduct towards society and those rules covering the professional conduct to be observed in dealings with other professionals. The Code of the European Association of Archaeologists is one that includes among the former a reference to the provisions of the 1970 UNESCO Convention on the conduct of any activity connected with trade in property of archaeological interest, and among the latter, respect for the conditions of research and work of that profession.<sup>234</sup> The concern – which might seem purely pleonastic – to ensure observance by the members of internal rules prohibiting discrimination and, more generally, conditions of work, is clearly what underlies Articles 2.9 and 2.10 of the same code.<sup>235</sup> It may be, then, that codes of conduct are pursuing the goal not only of providing standardized models of behaviour, but of serving as a reminder of certain international or even national norms that might otherwise not be applicable to the particular case.

Finally, the CINOA Code of Ethics provides, in Articles 3, 4 and 5, which are specific rules for the conduct of members with regard to respect for laws for the protection of endangered species, a prohibition on taking part in transactions giving rise to money-laundering operations. Article 6 lays down a general obligation on members to ensure the authenticity of objects in their possession, and this is also

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<sup>234</sup> The *EEA Code of Practice* of 1997 deals in Articles 1.1-1.8 with “Archaeologists and Society” and in Articles 2.1-2.10 with “Archaeologists and the Profession”. See Article 1.6, “Archaeologists will not engage in, or allow their names to be associated with, any form of activity relating to the illicit trade in antiquities and works of art, covered by the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property”; Article 2.1 emphasizes that “Archaeologists will carry out their works to the highest standards recognized by their professional peers”.

<sup>235</sup> Article 2.9 provides: “In recruiting staff for projects, archaeologists shall not practise any form of discrimination based on sex, religion, age, race, disability, or sexual orientation”, while under Article 2.10, “The management of all projects must respect national standards relating to conditions of employment and safety”.

provided for, *mutatis mutandis*, in Article 3 of the Code of Ethics for Archivists.<sup>236</sup> More rarely, the codes provide for purely moral forms of responsibility towards living and non-living species in the pursuit of professional activities, which must be taken exclusively in the meta-legal sense.<sup>237</sup>

The European Confederation of Conservator-Restorers' Organizations (ECCO, which includes the *Fédération Française des Conservateurs-Restaurateurs*, FFCR) – has adopted a Code of Ethics, which “embodies the principles, obligations and behaviour which every Conservator-Restorer belonging to a member organization of E.C.C.O. should strive for in the practice of the profession.”<sup>238</sup> In Part I of the code (General Principles for the Application of the Code), Article 2 states: “The profession of Conservator-Restorer constitutes an activity of public interest and must be practised in observance of all pertinent national and European laws and agreements, particularly those concerning stolen property. In Part II (Obligations towards Cultural Heritage), the new Article 19 provides: “The Conservator-Restorer should never support the illicit trade in cultural heritage, and must work actively to oppose it. Where legal ownership is in doubt, the Conservator-Restorer must check all the available sources of information before any work is undertaken”.

#### 6.1.3.4. Sanctions laid down for violation of the rules

Finally, turning to the **sanctions laid down for violation of the rules**, it has to be said that these sanctions are rarely applicable, which might even have an adverse effect on the level of effectiveness of the codes of conduct. In practice, not only is suspension from the association or the loss of membership status rarely provided for, but also there is often no indication of the procedures by which violations are established.

It can be noted that, at the national level, sanctions are indeed laid down for members violating the rules of ethics, as is the case in France with the Council for Auctions (*Conseil des ventes aux enchères*). At the international level, on the other hand,

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<sup>236</sup> See the CINOA Code of Ethics, Article 3: “The affiliated members of CINOA agree to comply with the laws on the protection of endangered species. They therefore agree not to trade in objects manufactured from materials that are protected under the Convention on International Trade in Endangered Species”; Article 4: “The members will have to take all the necessary measures to detect stolen objects and refer, among others, to registers that are published to this effect and to use these judiciously”; Article 5: “The members cannot under any circumstance participate in transactions which to the best of their knowledge can result in money-laundering operations”; Article 6: “It is the duty of each one of the members to check the authenticity of the objects they possess”. Article 3 of the Code of Ethics for archivists provides: “Archivists should protect the authenticity of documents during archival processing, preservation and use”.

<sup>237</sup> See for example the *Code of Ethics* of the *American Anthropological Association* of June 1998, on the website [www.aaanet.org](http://www.aaanet.org), Article III.A.1 of which “Responsibility to people and animals with whom anthropological researchers work and whose lives and cultures they study” provides: “Anthropological researchers have primary ethical obligations to the people, species and materials they study and to the people with whom they work” [www.aaanet.org/committees/ethics/ethcode.htm](http://www.aaanet.org/committees/ethics/ethcode.htm).

<sup>238</sup> See the website <http://www.ffcr-fr.org/ref/guidefr.htm>.

it is more difficult to provide for sanctions, especially if the code is adopted by bodies unable to exercise any effective power over those to whom the rules are addressed, as is the case with ICOM.

Among the texts that are least vague on this point one might mention the Code of Ethics for Dealers in Cultural Property, approved by the UNESCO Intergovernmental Committee, Article 8 of which provides: “Violations of this Code of Ethics will be rigorously investigated by (a body to be nominated by participating dealers). A person aggrieved by the failure of a trader to adhere to the principles of this Code of Ethics may lay a complaint before that body, which shall investigate that complaint. Results of the complaint and the principles applied will be made public”.

Where the ICOM Code of Ethics is concerned, reference to the 2007 ICOM Statutes shows that, according to Article 4 on termination of membership: “Membership of ICOM may be discontinued by voluntary withdrawal or by a decision of the Executive Council for one of the following reasons:

1. Change of professional status;
2. Breach of professional ethics;
3. Actions considered to be substantially incompatible with the objectives of ICOM;
4. Non-payment of fees after formal notice of the payment due”.

Article 8 of the UNESCO code provides: “Violations of this Code of Ethics will be rigorously investigated by (a body to be nominated by participating dealers). A person aggrieved by the failure of a trader to adhere to the principles of this Code of Ethics may lay a complaint before that body, which shall investigate that complaint. Results of the complaint and the principles applied will be made public”.

#### **6.1.4. The role of rules of conduct in the circulation of goods**

The question of what function is served by rules of conduct in regulating the circulation of goods and the art market must be answered, first, by stressing that these are rules that must be respected by those belonging to the category of persons to whom they are addressed. In other words, these are rules of conduct with binding force for the members, at least in the case of codes of conduct establishing a link between the consequences of violating them and violating specific statutory norms, and ultimately assimilating them to the latter.

Secondly, the incomplete nature of these codes of ethics should not be underestimated, in that they are intended only for those persons acting as professionals and taking initiatives in the sector, represented in this case by the public and private institutions operating museums, and/or traders such as antique or art dealers and so on.

The purpose of the codes of ethics examined here is sufficiently broad as it covers the purchase and sale of goods, origins of collections, the professional conduct of the members and the penalties for failure to observe these rules.

An examination of the content of the rules in question makes it clear that these are broadly derived from the more important norms in the international conventions, which, in recent decades, have introduced duties of conduct in the circulation of cultural goods, often reproducing their content. To cite only one example, it is enough to consider norms such as Articles 3 and 5 of the 1995 UNIDROIT Convention on the restitution and return of property, and the codes of ethics such as Article 6 of the ICOM Code of Ethics on the origin, return and restitution of collections. This permits us to state that what might appear to be an intrinsic weakness in codes of ethics can, on the contrary, be turned into an effective strength. While these rules are intended only for the members and/or structures belonging to the category concerned, it should not be forgotten that, not infrequently, the international conventions that give rise to norms capable of having an impact on the workings of the market often encounter a considerable obstacle to their effectiveness in the behaviour of States. The case of the UNIDROIT Convention is especially significant in this regard, as it has experienced numerous problems because of the lack of enthusiasm on the part of many States with a high profile in the art market that have not yet ratified the Convention. As is known, this seems to be due to the distrust generated by the content of some of the norms in the Convention, in particular as to the abandonment of the rule that “possession amounts to title” in the circulation of cultural property, the reversal of the burden of proof on the good faith possession of goods, and the duty of restitution to the legitimate owner irrespective of the good faith of the acquirer.

An attempt can be made to outline two categories of effects produced by codes of ethics in regulating the art market, from the point of view of trafficking. In this regard one could speak of a “direct effect”, referring to the relative and habitual effect of the rules on the subject consisting of the negative consequences the member risks in the case of (serious) breach of these rules, in any case where the code or, more often, the statute of the association or institution concerned lays down sanctions that can lead to the loss of membership status of the particular category.

In practice, this “direct effect” must exist, at least where the codes of conduct containing the codes of ethics in question must be observed and applied from time to time by the members of the groups concerned and the bodies to which they belong.

To this can be added an “indirect effect” that would occur each time a reference was made to the said rules of conduct, or where fulfilment of those rules was to be taken into consideration as a factual element in evaluating the behaviour of the persons concerned. The UNIDROIT Convention provides, as an example, in Article 6(2), that in order to determine if the possessor knew or ought reasonably to have known that the cultural item had been unlawfully exported, “regard shall be had to the circumstances of the acquisition”. It is possible, therefore, that in applying the rules of the convention, the national court might take into account the conduct of the professional dealers under the rules laid down in the codes of ethics. It is

noteworthy that the said codes of ethics often contain more detailed and sometimes stricter rules of conduct in terms of the diligence required than those provided by law, but that does not mean that these rules are always respected either. Moreover, some, like the *Guidelines on Loans of Antiquities and Ancient Art* produced by the Association of Art Museum Directors (AAMD), offer their members a level of transparency in the acquisition of goods that is often higher than that provided in a number of national legal systems, though this is a code with no sanctions for breach.

## 6.2. National practices

### 6.2.1. Heritage actors and institutions (curators, museums, etc.)

The ICOM Code of Ethics for museums is widely known in the Member States. It is a reference tool for professionals working in museums and heritage institutions.<sup>239</sup>

Some Member States (Belgium, Denmark, Estonia, Greece, Italy, Latvia, Lithuania, Portugal) have incorporated the provisions of the Code concerning acquisitions into their national legislation. The codification process reinforces the impact of these rules, at least in theory.

In some cases, adoption of or compliance with the ICOM Code can have an impact on the status of museum institutions.

For instance, Dutch museums must subscribe to the ICOM Code of Ethics in order to be registered as museums. The register is maintained by the Netherlands Museums Association. The Ethics Commission, set up by the Netherlands Museums Association in 1991, advises museums on issues relating to the Code of Ethics which includes several articles on checking the provenance of items and acting in good faith when acquiring goods or accepting gifts or loans for exhibitions. Similarly, the Ethics Committee of Dutch Ethnological Museums advises ethnological museums in the Netherlands on issues of ethics and the acquisition of goods.

In some Member States, codes of ethics are drawn up by the national museums (England and Wales, Hungary).<sup>240</sup> Codes of ethics are very important in England for public and private associations. Since 1973, the Director of the Office of Fair Trading has encouraged, in accordance with Section 124(3) of the Fair Trading Act 1973, the creation of codes of practice. Thus, various groups have been created on the one hand to ensure a minimum level of competence in order to protect consumers and, on the other hand, to facilitate the amicable settlement of disputes.

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<sup>239</sup> The Code is published in the three ICOM official languages: English, French and Spanish. The Code is currently translated into Danish, Dutch, Finnish, German, Italian, Polish, Portuguese and Swedish.

<sup>240</sup> The Museums Association's Code of Practice for Museum Governing Bodies, 1994 – the Museums Association's Ethical Guidelines on Acquisition, 2004 – the Museums Association's Code of Ethics, 2002 NOW REVISED: 2008 – the British Museum Ethics Policy, 2007.



Finally, in some cases, the code is referred to in the internal regulations or statutes of museums (Latvia, Finland). In France, the Ministry of Culture has published a Charter of Ethics for heritage curators and other museum officials. It is stipulated that the Charter is primarily based on the fundamental principles set out in the ICOM Code of Ethics.<sup>241</sup>

### **6.2.2. Actors in the market**

It can be seen that the application of ethical practices by salerooms and dealers in cultural goods is unevenly applied throughout the between Member States.

In addition to adhering to the Code of Ethics of CINOA (International Confederation of Art and Antique Dealers Associations) or the International Code of Ethics for Dealers in Cultural Property of UNESCO,<sup>242</sup> some actors in the art market draw up their own codes of ethics.

In England and Wales, self-regulation by professionals is strongly encouraged and codes of ethics play a very important role. There are several voluntary associations for professionals in the art market. For example, salerooms specializing in the sale of works of art have been represented by the Society of Fine Art Auctioneers (SFAA) since 1975. Antiques dealers belong to several groups such as the British Antique Dealers Association or Thames Valley Antique Dealers Association. Each association has defined a code of ethics with which professionals are free to comply or not.<sup>243</sup> Members failing to comply with the obligations set out in the code may be expelled from the association. This sanction may not seem very coercive, as there is no legal obligation to comply with such codes; however, these types of associations play an important role in England and most professionals do in fact comply with them.

In Belgium, the Royal Chamber of Antiques and Art Dealers has a code of ethics, as do the Swedish Antiquarian Booksellers Association and the Finnish Antiquarian Booksellers Association.

In Denmark, all members of the Danish Antiquarian Booksellers Association are required to adhere to the International League of Antiquarian Booksellers (ILAB) code of ethics.

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<sup>241</sup> Circular No. 2007/007 of 26 April 2007 introducing the Charter of Ethics for heritage curators (State and local-authority posts) and other scientific officials of museums in France for application of Article L.442-8 of the French Heritage Code.

<sup>242</sup> In particular, this Code has been translated into Finnish and Swedish.

<sup>243</sup> The Code of Practice for the Control of International Trading in Works of Art, 1985 – The Ancient Coin Collectors Guild (ACCG) Board Code of Ethics, 2005 – the Code of Ethics of the International Association of Dealers in Ancient Art, 1993 – the two codes of the Council for the Prevention of Art Theft, 1999: one for auction houses and the other for antiques dealers (these two codes have the same title: Code of Due Diligence) – the Principles of Conduct of the British Art Market Federation.

The Association of Fine Art Dealers in the Netherlands (*Vereeniging Handelaren in Oude Kunst, VHOK*) is the largest organization of Dutch art dealers. It is a member of the International Confederation of Art and Antique Dealers Associations (CINOA). The Association of Fine Art Dealers in the Netherlands has a code of conduct which is based on the CINOA Code of Ethics. The Czech Association of Antique Dealers has adopted a Code of Ethics which encompasses that of CINOA.

In Portugal, the Portuguese Antique Dealers' Association has its own code of practice.

France has recently adopted a law on the liberalization of sales of movable goods by public auction,<sup>244</sup> which stipulates that the French Auction Market Authority (*Conseil des ventes volontaires de meubles aux enchères publiques*) is responsible for drawing up a comprehensive list of the professional conduct obligations of auctioneers, which will be submitted to the Minister of Justice (Garde des Sceaux), for approval and then published.

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## 7. RELATIONSHIPS BETWEEN INTERNATIONAL SOURCES AND NATIONAL LEGAL SYSTEMS

### 7.1. Ratification status of the 1970 Convention and reservations

Although the majority of Member States have ratified the 1970 Convention (22 States at 1 September 2011), there are still five States that have not yet done so:

| States         | Date of deposit of the instrument | Type of instrument         |
|----------------|-----------------------------------|----------------------------|
| Austria        |                                   |                            |
| Belgium        | 31/03/2009                        | Ratification               |
| Bulgaria       | 15/09/1971                        | Ratification               |
| Cyprus         | 19/10/1979                        | Ratification               |
| Czech Republic | 26/03/1993                        | Notification of succession |
| Denmark        | 26/03/2003                        | Ratification               |
| Estonia        | 27/10/1995                        | Ratification               |
| Finland        | 14/06/1999                        | Ratification               |
| France         | 07/01/1997                        | Ratification               |
| Germany        | 30/11/2007                        | Ratification               |
| Greece         | 05/06/1981                        | Ratification               |
| Hungary        | 23/10/1978                        | Ratification               |
| Ireland        |                                   |                            |
| Italy          | 02/10/1978                        | Ratification               |

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<sup>244</sup> Law No. 2011-850 of 20 July 2011 on the liberalization of sales of movable property by public auction.

|  |            |                            |
|--|------------|----------------------------|
| Latvia   |            |                            |
| Lithuania  | 27/07/1998 | Ratification               |
| Luxembourg   |            |                            |
| Malta  |            |                            |
| Netherlands  | 17/07/2009 | Acceptance                 |
| Poland   | 31/01/1974 | Ratification               |
| Portugal   | 09/12/1985 | Ratification               |
| Romania  | 06/12/1993 | Acceptance                 |
| Slovakia   | 31/03/1993 | Notification of succession |
| Slovenia   | 05/11/1992 | Notification of succession |
| Spain  | 10/01/1986 | Ratification               |
| Sweden   | 13/01/2003 | Acceptance                 |
| United Kingdom of Great Britain and Northern Ireland | 01/08/2002 | Acceptance                 |

It should be noted that some States have ratified the Convention subject to reservations, particularly concerning the areas to which the Convention applies or the scope of certain rules.

Thus, some States have limited the influence of the 1970 Convention, narrowing the definition of cultural goods by specifying financial or date thresholds. France, for example, stipulated a reservation on ratification. Pursuant to Decree No. 97-435 of 25 April 1997, which implements the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done in Paris on 14 November 1970<sup>245</sup>, “cultural property which is designated as being of importance for archaeology, prehistory, history, literature, art or science in accordance with Article 1” of the 1970 Convention, is specified in an annex which contains the categories of property set out in Decree No. 93-124 of 29 January 1993 in its original version (these categories are identical in Regulation No. 116/2009), and is consequently affected by financial and date thresholds. The scope of the Convention is limited to these types of property. Belgium has also specified reservations to the 1970 Convention, stipulating that the expression *cultural property* must be interpreted as being limited to the objects listed in the annex to Regulation (EC) No. 116/2009, as well as in the annex to Directive No. 93/7 of 15 March 1993, as amended.

This was also the solution chosen by the United Kingdom.

## 7.2. Forms of accession to or integration of the Convention

The methods of taking into account the 1970 Convention and incorporating into national law the rules and principles set out in the Convention have varied greatly. They range from passing an implementation law specifying rules for application of

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<sup>245</sup> Official Journal of the French Republic No. 103, 3 May 1997, p. 6680.

the Convention to simple ratification, via the adoption of measures intended to better meet the needs raised by the Convention.

### 7.2.1. States which have adopted implementation acts

Some States have adopted texts indicated as being for the implementation, application or transposition of the Convention. That is the case of Germany,<sup>246</sup> Hungary,<sup>247</sup> Slovakia,<sup>248</sup> Czech Republic,<sup>249</sup> Poland,<sup>250</sup> Netherlands,<sup>251</sup> Lithuania,<sup>252</sup> Portugal,<sup>253</sup> Estonia<sup>254</sup> and Switzerland.<sup>255</sup>

However, the methods of transposition or implementation are diverse. We can cite some interesting recent examples of implementation methods which establish more effective provisions for restitution in cases of illicit export, import or transfer of ownership of cultural property.

Switzerland followed a method considered relatively effective, particularly given that its legislation on the transfer of cultural property (LTBC) is the law enacting the 1970 Convention (this process took place in the course of ratification of the Convention). The strengths include the definition of cultural property, the penalties, the imposition of a duty of diligence and the time limits for action.

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<sup>246</sup> *Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15. März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern.* Act implementing the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 and implementing Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (Act on the Return of Cultural Property - KultGüRückG), translation into English available at [http://bundesrecht.juris.de/englisch\\_kultg\\_r\\_ckg/index.html](http://bundesrecht.juris.de/englisch_kultg_r_ckg/index.html).

<sup>247</sup> Decree-Law No. 2 of 1979 on the promulgation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.

<sup>248</sup> Ministry of Foreign Affairs Decree 15/1980 Zb which transposes the 1970 UNESCO Convention, Ministry of Foreign Affairs Order 18/1980 on the 1970 UNESCO Convention (which transposes the Convention, reply of the Ministry of Culture).

<sup>249</sup> Ministry of Foreign Affairs Decree No. 15/1980 of the OJ on the Convention concerning the measures for prohibiting and preventing the export of cultural property. Four laws implement the Convention.

<sup>250</sup> Law of 23 July 2003 (amended version of the law of 15 February 1962) on the conservation and protection of monuments.

<sup>251</sup> 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act (2009), 12 June 2009, Bulletin of Acts, Orders and Decrees 2009 No. 255).

<sup>252</sup> Lithuania has adopted one law and four resolutions transposing the Convention.

<sup>253</sup> Law No. 56-85 of 26 July 1985 concerning application of the 1970 UNESCO Convention.

<sup>254</sup> Four texts are relevant: Law on the Transport, Export and Import of Cultural Property (2007); Law on the Protection of Heritage (2002); Law on Museums (1996); Law on the Return of Cultural Property Illegally Removed from the Territory of a Member State of the European Union (2003/2005).

<sup>255</sup> Federal law on the international transfer of cultural property (LTBC; RS 444.1).

The Netherlands adopted fairly similar legislation in the form of the Implementation Act of the UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Germany ratified the 1970 Convention in 2007 and began an implementation process that led to the adoption of the law on the return of cultural property in 2008. In the same text, Germany implemented both the 1970 Convention and Directive 93/7/EEC.<sup>256</sup>

Belgium has also commenced an integration process with the creation of a “cultural property import, export and restitution” consultation platform, bringing together the different public authorities concerned. The first task of this platform is to reflect on the drafting of implementation legislation.

### **7.2.2. States which have adopted provisions for compliance with certain rules of the Convention**

This process is different and consists of making changes, to varying degrees, to the national legal system having regard to the rules and principles set out in the 1970 Convention.

In Croatia, certain provisions of the Convention influenced the 1999 Law on the Protection and Preservation of Cultural Property, amended in 2003.

In Estonia, the process of accession to the European Union stimulated the integration of European standards into national law. The implementation of Community legislation resulted in the drafting of national rules which do not cover all possible scenarios and exclude cases of the movement of cultural goods outside the European Union. In Estonia’s report on the implementation of the 1970 Convention, it was highlighted: “In accordance with the 1970 Convention Estonia has agreed to cooperate with all Member States in order to facilitate identification and return to their lawful owners of works of art and cultural property illegally brought into its territory, but the return of unlawfully removed cultural objects is legally regulated only with regard to European Union Member States.”<sup>257</sup>

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<sup>256</sup> *Kulturgüterrückgabegesetz (KultGüRückG; Gesetz zur Ausführung des Unesco-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verbütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15. März 1993 über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaates verbrachten Kulturgütern)*; Law on the implementation of the 14 November 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the application of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State of the European Union, of 18 May 2007 (Law on the return of cultural property, BGBl. I No. 21 of 23 May 2007, p. 757).

<sup>257</sup> Report by Estonia on the application of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The report was prepared with the cooperation of the National Heritage Board, Ministry of Culture, Tax and Customs Board, Police and Border Guard Board and Estonian National Commission for UNESCO, Tallinn, 31 January 2011, p. 9.

### **7.2.3. States which have ratified the Convention without changing their national legislation**

Some States have ratified the Convention without having reflected on the impact of its rules on their national legislation and the need to make changes to certain rules. This is the case of the French legal system. Some changes have led to more rigorous implementation of the Convention, even though they were not adopted directly in relation to the 1970 Convention, for example the creation in 1975 of a specialist police department in France, the Central Office for the Fight against Traffic in Cultural Goods (OCBC),<sup>258</sup> and the introduction of an export certificate that replaces the export licence system provided for in the law of 1941.<sup>259</sup> This certificate was not based on the UNESCO/WCO model certificate. The system was developed primarily in reference to Community legislation and the requirements linked to the movement of cultural goods. That being the case, the level of legislation regarding the control of such movement was deemed sufficient.

With regard to Italy, ratification of the UNESCO and UNIDROIT Conventions has not significantly influenced Italian law as Italy has its own effective export control legislation of, which dates back to the early nineteenth century and has even inspired other States.

### **7.2.4. States in which the Convention is directly applicable**

In several legal systems the Convention is considered to be directly applicable. That is the case in Bulgaria, where Article 5(4) of the Constitution states that: “International agreements ratified according to the constitutional procedure, promulgated, and having entered force in the Republic of Bulgaria are a part of the internal law of the country. They supersede those norms of internal legislation which contradict them.”<sup>260</sup>

Likewise, in Romania, which ratified the 1970 UNESCO Convention in 1993,<sup>261</sup> Article 11(1) and (2) of the Constitution establishes that:

“(1) The Romanian State undertakes to perform the obligations incumbent on it pursuant to the treaties to which it is party, fully and in good faith.

(2) The treaties ratified by the Parliament, in accordance with the law, form part of national law.”<sup>262</sup>

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<sup>258</sup> Decree No. 75-432 of 2 June 1975, Official Journal of the French Republic, 4 June 1975, p.5572.

<sup>259</sup> Law of 31 December 1992 codified in Articles L 111-1 *et seq.* of the French Heritage Code.

<sup>260</sup> English translation at [www.parliament.bg/en/const](http://www.parliament.bg/en/const).

<sup>261</sup> Law 97 of 11 November 1993 ratifying the 1970 UNESCO Convention.

<sup>262</sup> French translation at [www.cdep.ro/pls/dic/sile.page?id=371&idl=3](http://www.cdep.ro/pls/dic/sile.page?id=371&idl=3).

### **7.2.5. States which, without having adopted any implementation acts, draw on the 1970 Convention when faced with restitution matters**

The rise in power of a form of moral duty of restitution of States when the unlawfulness of the situation is obvious means that, even in the absence of an implementation act, some initiatives are based on and draw on the rules recommended by the Convention. When resolving these types of issues, some States refer, for instance, to the date of the Convention and if the unlawful situation occurred after that date, will be more likely to initiate a restitution process. By way of illustration, we cite the recent restitution by the Louvre Museum of the Tetiki frescos to Egypt.

## **7.3. Transposition or integration solutions leading to uneven implementation**

### **7.3.1. Key points concerning preventing and combating the trafficking in cultural goods: UNESCO guidelines**

The UNESCO website states that the 1970 Convention requires States Parties to take action in the following main areas:

- Preventive measures:

Inventories, export certificates, monitoring trade, imposition of penal or administrative sanctions, educational campaigns, etc.

- Restitution provisions:

In accordance with Article 7(b)(ii) of the Convention, States Parties undertake, at the request of the State Party “of origin”, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. More indirectly and subject to domestic legislation, Article 13 of the Convention also provides provisions on restitution and cooperation.

- International cooperation framework:

The idea of strengthening cooperation among and between States Parties is present throughout the Convention. In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides the possibility for the States subjected to pillage of archaeological or ethnological materials to “call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned.”

### **7.3.2. National solutions in the implementation of the 1970 Convention**

National solutions for implementing these different measures vary. We will take a few examples that might prompt reflection on the need to harmonize or approximate certain legal, technical or operational provisions.

#### **7.3.2.1. Operational aspects**

- Services responsible for application of the Convention

These services vary greatly, and may be police services (in France the OCBC) or cultural administration departments (Cyprus, Italy, Lithuania). In some States, several services are involved depending on the nature of the property and the type of offence or illegal situation. In the Netherlands, two services are responsible for application of the 1970 Convention: the Cultural Heritage Inspectorate of the Ministry of Education, Culture and Science, and the Customs Administration. As for the police, the Department of International Police Information (IPOL) has jurisdiction in cases of theft of cultural goods and, since 2010, has had a specific unit (Art and Antiques Crime Unit, AACU). All these services cooperate with their counterparts internationally. Nationally, a special committee, chaired by the Ministry of Culture, meets three or four times a year to coordinate the work of these services.

In Cyprus, both the Department of Antiquities of the Ministry of Communications and Works and the cultural departments of the Ministry of Education and Culture are competent. In Romania, the division takes place along lines of preventing (jurisdiction of the Ministry of Culture's Directorate for Cultural Heritage) and combating the trafficking in cultural goods (jurisdiction of the police).

Some services and institutions are explicitly invested with the task of managing restitutions (for example in Lithuania, the Cultural Property Act designates the Ministry of Culture as the institution responsible for restitution, Article 17, Law on Protection of Cultural Objects).

These services have not always been given the task of reflecting on application of the Convention, hence the great disparity between Member States.

- Cooperation and coordination of actions:

Some States have set up coordination services responsible for matters linked to trafficking. That is the case in Germany with the Koordinierungsstelle, an institution common to the Federal State and the Länder, and in Finland, which has created a committee to prepare proposals within the framework of application of the 1970 Convention which are submitted to the police, customs and ministries concerned. In the United Kingdom, the Cultural Property Unit (CPU) of the Department for Culture, Media and Sport (DCMS) is responsible for preventing illicit trade in cultural goods. This authority also acts within the framework of Directive 93/7/EEC. It liaises between different authorities: customs, the police, museums, etc.

Coordination is sometimes organized in a more informal manner, without always having an institutional framework. It may take the form of joint actions for



education (French website on cultural goods) or the circulation of information, for example.

### 7.3.2.2. Legal aspects

Here we provide examples of some of the implementation acts mentioned above, through which a number of key points emerge.

#### Identification/provenance

- Useful definition in the delimitation of cultural goods in national legal systems<sup>263</sup>

National legislatures drew, to varying degrees, on the definition contained in the 1970 Convention when delineating the notion of **cultural** property.

Some States, for instance, adopted the definition contained in the 1970 Convention to designate important cultural property in their domestic law. That is the case of the LTBC in Switzerland.

The German legal system adopted the concept of cultural property used in the 1970 Convention but also developed a notion of German cultural property.

The Netherlands adopted the notion of cultural property set out in Article 1 of the UNESCO Convention when it passed the 2009 implementation law.<sup>264</sup> That is also the case of Croatia, which includes in its definition of cultural property the same list system as the 1970 Convention.<sup>265</sup>

The question is, in light of that definition, what types of property are considered to be the most valuable and as such constitute national heritage? For example, in the European Union, types of property that can be classified as national treasures within the meaning of Article 30 of the Treaty on the Functioning of the European Union (TFEU).

- Due diligence/good faith<sup>266</sup>

Switzerland, when adopting its implementation act for the Convention, took the opportunity to create a duty of diligence in the cultural goods market. A general rule creates a duty of diligence for all (Art. 16.1 LTBC), with special rules that apply to art dealers and salerooms (Article 16.2 LTBC), as well as to museums and institutions of the Swiss Confederation (Article 15 LTBC).

The incorporation of the UNESCO Convention into the legal system of the Netherlands in 2009 (12 June 2009, Bulletin of Acts, Orders and Decrees 2009, No. 255) imposed an obligation on the general public, the art market and auction houses to act in a more thoughtful manner when acquiring cultural property. That translates, in particular, into an effort regarding the good faith of actors in relation to verifying the origin of the property acquired. Obligations in this area are set out

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<sup>263</sup> For a comparison of the systems' understanding of the notion, see Current state of play, 5.1.1.

<sup>264</sup> 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property Implementation Act.

<sup>265</sup> 1999 Law on the Protection and Preservation of Cultural Property, amended in 2003.

<sup>266</sup> For a detailed comparison of this notion, see Current state of play, 5.1.3.3.

in Chapter 3, section 6 of the law implementing the provisions of the UNESCO Convention into Dutch law (Article 87A of the Civil Code). They are also based on the UNIDROIT Convention. Although the Netherlands has not ratified this Convention, some elements of it have been integrated into Dutch law. That is the case, for example, of the articles concerning good faith. This integration has been dubbed “UNESCO +”. Moreover, during our interview we were informed that that might constitute a good practice for other Member States to follow.<sup>267</sup>

– Traceability of trade in works of art

By Article 10 of the 1970 Convention States undertake to require antique dealers to maintain, subject to penal or administrative sanctions, a register.<sup>268</sup>

The requirement to keep a register is one of the key points in the chain of the trade of cultural goods identified as such under Swiss law. Art dealers and auctioneers are required to keep a register (Article 16 LTBC). This register must include the name and address of the supplier or the seller (Article 16 LTBC), however, according to said law, it need not include the identity of the purchaser. This may seem surprising. Consequently, the traceability of the cultural goods is not assured throughout the entire transfer chain. It is true that art dealers and auctioneers must also comply with a duty of diligence in a *broad sense* (Article 16(1) LTBC), which obliges them to refrain from selling on a cultural goods that, in view of the circumstances, could be presumed to be of illegal origin. Violation of this duty does not entail any civil consequences (although not all legal commentators are agreed on this), although it does give rise to penal sanctions (Article 25 LTBC). In other words, an art dealer or auctioneer who acquires an item of cultural property in good faith and subsequently learns of its illicit origin must inform the specialized service (Article 16(2) (d) LTBC), which can check the register and find the supplier or seller (Articles. 17 and LTBC).<sup>269</sup>

### **Displacement of cultural goods**

The Implementation Act of the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property imposes a prohibition on importation into the Netherlands of cultural goods:

(a) from a State Party, in violation of the provisions adopted by the said State Party in accordance with the objectives pursued by the Convention concerning the

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<sup>267</sup> See also the Explanatory Memorandum on the integration into Dutch law of the 1970 UNESCO Convention.

<sup>268</sup> The States Parties to this Convention undertake:

“To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject”.

<sup>269</sup> For a detailed comparison of the systems in terms of transaction registers, see Current state of play, 5.1.3.1.

export of cultural property from that State Party or the transfer of ownership of cultural property; or

(b) which has been illegally appropriated in a State Party (section 3).

The return of goods imported into the Netherlands in violation of section 3 of this text may be requested, in accordance with Articles 1011a-1011d of the Dutch Code of Civil Procedure, by proceedings brought by the State Party in whose territory the goods originated or by a person having valid title to the goods in question (section 4). The proceedings are brought against the possessor. In order for that title to be valid, there must be a document certifying that the items in question correspond to the definition of cultural property set out in section 1d of the 2009 text incorporating the 1970 UNESCO Convention into the Dutch legal system. Similarly, the State which has been dispossessed of the item in question in breach of the export rules in force, must provide a declaration to that effect.



## **II. Identifying obstacles and difficulties**

## II. Identifying obstacles and difficulties

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Before considering possible solutions, it is necessary to identify obstacles and shortcomings in the existing system for preventing and combating trafficking. This calls for closer examination of the kind of difficulties experienced by States in curbing trafficking and of the way in which these difficulties are perceived by target groups, including ministries, institutions and market and heritage professionals.

### 1. TYPES OF DIFFICULTIES GIVING RISE TO TRAFFICKING

The nature of these difficulties, which are detailed in the next section, will be noted for each of the situations identified in the chain of trafficking in cultural goods, according to this template.

- Legal difficulties of a technical nature. These are of various kinds, reflecting the inadequacy or absence of legal norms and their level of effectiveness (degree of application, insufficient regard to the distinctive features of cultural property). Difficulties can also arise from the distortions produced by a host of overlapping rules and from discrepancies in the national treatment of trafficking in cultural goods. These can be the result of differences in legal systems and methods of transposing and incorporating European and international instruments. They can likewise arise from a lack of coherence in the source provisions, which given their wide range and the multiple competencies in this field must be approached as a whole in the interest of effectiveness.
- Procedural difficulties. These concern in particular the implementation of sanction or restitution procedures nationally and internationally.
- Difficulties with regard to the application and effectiveness of norms. These include the difficulty of applying norms in legal disputes, of implementing provisions in restitution procedures under private or public international law and in assessing possible disruptive effects on the legal market (e.g. the creation of parallel markets).
- Technical difficulties. These may be purely technical (relating to the flow of information and the identification of protected or stolen goods) or operational. Since most of these difficulties have a legal foundation, they will be examined in conjunction with the legal issues.
- Operational difficulties. These have a number of causes: lack of information, lack of inter-institutional cooperation, absence of cooperation between public and private stakeholders and a failure to reflect on good practices.

## **2. SPECIFIC NATURE OF THE DIFFICULTIES ANALYSED IN THE CHAIN OF TRAFFICKING**

In this section concerned with difficulties and obstacles, our starting point will be situations in the chain of trafficking in cultural goods that pose practical difficulties regarded by the different actors as particularly significant. We analyse in each case the types of difficulties encountered and the nature of the obstacles to be overcome before going on to indicate their practical consequences for trafficking and for the actors concerned.<sup>270</sup> We shall draw for this purpose on existing sources and data identifying difficulties and obstacles, together with additional data deriving from field surveys carried out in the context of this study.

### **2.1. General considerations**

A number of difficulties of a general nature emerged from the country surveys involving the different target groups.

Several States considered divergences in legal systems to be a major difficulty despite the harmonization achieved through international law. This is the case in particular with Italy and Greece, which have adopted an impressive array of normative provisions in this field. Cultural authorities in Austria pointed to the wide array of legal systems in the source and market States. One of the major obstacles arises from the sharp differences in the way cultural goods is defined and in the techniques and methods of protecting and controlling it. The difficulty here is virtually insoluble in view of the cultural powers of States and the fact that the rules governing cultural property in most cases come under domestic law. The challenge is not to attempt to harmonize diversity but rather to manage it. The starting point must be a better understanding of the national heritage and the individual way in which States define their heritage and identify their national treasures. Beyond the question of the flow of information, these are the specific issues regarding the identification of cultural goods that need to be explored. In many cases, the way in which cultural property is defined is imprecise, sometimes not transparent. In several States, those consulted pointed to difficulties in this regard.

The proliferation of cultural powers at the institutional level is seen as a very real obstacle in the effective prevention and combating of trafficking. This applies particularly to certain States with a federal structure (Germany) or strong regional components (Spain). More generally, it is the result of a dispersal of responsibilities in the services which are, in one way or another, concerned with trafficking in cultural goods (a point frequently made, and identified by the Romanian police and cultural officials in Germany as a major obstacle) together with a lack of coordination in methods and structures.

National reports often note data flow and access problems in the case of information originating in foreign States (mentioned by Poland with regard to

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<sup>270</sup> For an overview of these difficulties, see the annexed table.

cultural goods removed from its territory, in particular goods lost, stolen or looted during the Second World War) and by Lithuania (with regard to information on Internet sites). Another widespread complaint concerns the slowness and complexity of the flow of information at the international level and the inadequacy of information systems within the European Union.

The lack of institutional exchanges of experience, expertise and good practices within the European Union was identified as a particular problem (for example, by Lithuania, Latvia and Poland, which stressed the shortage of qualified specialists and the difficulty of obtaining rapid expert advice).

Finally, the need for training having regard to the specialized knowledge required to identify suspect goods was pointed out in several national reports drawn up following the surveys.

Some argued that the difficulties at national level were exacerbated at the international level. In particular, those States suffering from insufficient cooperation between the services responsible for preventing and combating trafficking were the first to deplore the lack of adequate cooperation at the European level.

## **2.2. Provenance/identification of cultural goods**

The question of the lawful provenance of cultural goods placed on the market is crucial for the security of transactions. It calls for a number of precautions and solutions with regard to both prevention and sanction.

### **\* Inadequacy of preventive tools**

#### **2.2.1. Legal obstacles**

By way of introduction, it would seem necessary to define two basic notions, namely “best practices” and “provenance”.

British and American museum associations have given substantial thought to the notion of “best practices”. The first thing is to define “standards”, consisting of benchmarks and levels of requirement that institutions agree to apply.<sup>271</sup> “Best practices” involve implementing these standards in accordance with their spirit.<sup>272</sup>

While museums were the first to reflect on this notion, this does not prevent other market players from developing best practices based on and applying existing norms. They will be found to be an effective lever in preventing trafficking. These

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<sup>271</sup> American Association of Museums (AAM), Best Practices and Standards: “Standards are generally accepted levels that all museums are expected to achieve” (<http://www.aam-us.org/aboutmuseums/standards/index.cfm>).

<sup>272</sup> “Best practices are commendable actions and philosophies that demonstrate an awareness of standards, solve problems and can be replicated. Museums may choose to emulate them if appropriate to their circumstances” (<http://www.aam-us.org/aboutmuseums/standards/index.cfm>).



are the generally accepted standards that market participants should embody in their everyday practice.

As for “provenance”, this notion is undoubtedly central to preventing and combating trafficking in cultural goods. No legal definition of provenance exists. However, the different international and national codes of ethics offer some pointers towards a definition.<sup>273</sup> For example, the provenance of a work can be defined as a body of information relating to the origin of a work and serving to identify it. The degree of detail and the quality of the information are specific to each cultural good and vary according to its nature, history and historical and monetary value. It will often be easier to compile information on the provenance of a picture than on that of an ancient amphora or a tribal work of art.

The provenance of a cultural good is also a cross-disciplinary notion encompassing simultaneously historical, scientific and legal data.

Historical and scientific data consist of information concerning the context in which the work was created (such as the date and place of production, author and subject), its various owners (person commissioning it, purchaser at public sale, collector, and so on) and the place of the work in art history and in history (publication in descriptive catalogues, exhibition catalogues, reviews, and so on). These data searches are usually performed by professionals with the help of various tools (archives, works on history, art history, and so on).

As to legal data, these serve to verify the lawful origin of the work. The definition of lawful provenance is the obverse of the definition of illicit traffic in cultural goods.<sup>274</sup> A work of licit origin is one that has been verified as not having been the subject of fraudulent appropriation or imported and/or exported in breach of the relevant legislation. Theft and illicit circulation often go together. The two aspects of the definition of provenance are complementary and closely related; details of provenance in terms of art history constitute additional information on provenance in the legal sense (for example, reference to the location of a work in an annotated catalogue can help to identify illicit export).

The notion of provenance having thus been defined, it remains to identify the legal obstacles to establishing the provenance of an item of cultural property.

#### **2.2.1.1. Disparities in the notion and rules applicable to the good faith of the acquirer**

The searches and checks carried out prior to a transaction in order to establish the provenance of a work have a dual purpose: to prevent trafficking by preventing

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<sup>273</sup> On the content of codes of ethics and, more especially, the question of origin, see *supra*.

<sup>274</sup> See the definition of illicit traffic in *Dictionnaire de Droit comparé du patrimoine culturel et du droit de l'art*, CNRS éditions, 2011 (publication forthcoming): “*déplacement de biens culturels effectué en violation des règles relatives au transfert de propriété et à la circulation de ces biens en vue de les vendre ou d'en disposer d'une quelconque manière*”.

the acquisition of a work of doubtful origin, and to enable the acquirer to demonstrate good faith in the case of dispute over the provenance of the cultural goods.

However, the demonstration of good faith presupposes that the checks on provenance have been undertaken with due rigour. The provisions of Article 4(4) of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects spell this out in more detail.<sup>275</sup> However, this Convention has been ratified by only 32 States.<sup>276</sup>

The notion of good faith, common to several States, is however subject to variable rules as regards both the notion and the applicable provisions.<sup>277</sup> While the notion of good faith can, generally speaking, be defined as the positive conviction that the good is lawfully possessed, the conditions and criteria of the notion remain imprecise, being left more often than not to the discretion of the judiciary. The consequence is marked differences, which are a source of legal uncertainty for the market

The scope of the moral factor extends from genuine knowledge to negligence. The acquirer can be considered to act in bad faith not only when he has positive knowledge of the illicit situation but also when, in light of the circumstances of the acquisition and having regard to his degree of expertise, he should have known or suspected that the work was illicit in origin. The degree of negligence constituting evidence of bad faith is appraised in different ways (gross negligence in the German system, serious failing under Italian law). This is the point at which the notion of diligence becomes relevant.

The objective factors to be taken into account concerning the degree of diligence usually include the bargain price, the circumstances of the acquisition, the mode of payment, the nature of the checks carried out particularly in databases, and the attention paid to the documents which should accompany the goods when it is in circulation. The situation or the origin of the property, for example the fact that it may come from a State in a of crisis or war situation, is also an important factor to be taken into account. The absence of an export licence is sometimes taken into consideration (in Germany and Austria, for example, the absence of an export licence can constitute an indication in the appraisal of bad faith), but the approach is far from uniform. The Swiss Federal Court takes the view, for example, that an export licence does not constitute a factor entailing a duty to enquire into the seller's

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<sup>275</sup> Article 4.4 of the UNIDROIT Convention: "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances".

<sup>276</sup> Situation as at 30 September 2011.

<sup>277</sup> See above.

right to dispose of the goods.<sup>278</sup> The argument rests on the distinction between a property right and an export licence, the one being independent of the other. It could be argued, on the other hand, that the illegal situations of theft, possession of stolen goods and illicit exportation are frequently interrelated and that the absence of an export licence can be a factor in the assessment of diligence.

This approach, and the taking into account of the exercise of diligence, is not however endorsed by the States as a whole, some of which recognize bad faith in very restrictive circumstances. In Belgium, for example, only a confession or actual knowledge of illicit origin is considered to constitute proof of bad faith. The circumstances of the sale or the bargain price are irrelevant criteria. In France, while the courts seem in some circumstances to have regard to the diligence of the acquirer, this is not always so and they sometimes apply the rule of the presumption of good faith in a broad sense.<sup>279</sup> The issue of the privileged situation of the good faith purchaser is identified in some reports as a major difficulty (notably Poland).

Other disparities exist. They concern in particular the moment at which good faith is assessed. Whereas in the majority of systems the relevant moment is that when the good is acquired or comes into the possession of the acquirer, in some cases the requirement of good faith extends for the duration of possession (this is the case in Germany and Austria, for example, with regard to the acquisition of public property). The question of good faith is sometimes not relevant (for example, in France in the case of property in the public domain).

These differences also apply to the actors who are potentially concerned – acquirers, sellers, intermediaries – who are subject to varying sanctions (civil, penal, administrative, etc.).

The disparity between systems has as its corollary a lack of clarity in the standards and degree of diligence required in transactions relating to works of art, depending on the location of the market concerned, thereby creating great insecurity in the art market.

#### **2.2.1.2. Lack of clarity in the standards relating to due diligence**

Examination of the different national laws regarding the forms of diligence required in checking provenance yields few clues since few States have chosen to define and codify the obligation to check provenance in the form of “hard law”.

In fact, the purchaser is not the only one concerned with verifying the provenance of a work. Market professionals are also potentially liable as agents in the circulation of cultural goods. While common law rules regarding liability may apply here, few States would seem to a specific obligation on market professionals

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<sup>278</sup> SJ 1999 1 and ATF 131 418c2.4.4.2.

<sup>279</sup> In the case of the virgin of Saint Gervasy, for example, the low price and the fact that the dealer was familiar with a statue classified as an historic monument was set aside in the appraisal of good faith.

to check the origin of a work. One country that does so is Switzerland, which following its reform of the art market has introduced a requirement of diligence for the seller when he is an art dealer or art auctioneer.<sup>280</sup>

International codes of ethics for art market professionals also provide guidance on the checks that should be carried out prior to an acquisition, namely the International Code of Ethics for Dealers in Cultural Property (Preamble and Articles 1, 3, 4) and the ICOM Code of Ethics for Museums (Articles 2.2 and 2.3).

The standards of diligence required in provenance searches and checks, whether legal in nature or deriving from codes of ethics, clearly draw on the provisions of the UNIDROIT Convention; yet they remain very widespread and therefore difficult to apply.

This diffusion of norms and lack of harmonization clearly constitute a legal obstacle.

#### **2.2.1.3. Shortcomings in the requirement of due diligence placed upon market players**

Various types of difficulties were mentioned. The absence or inadequacy of the level of requirement was noted in a number of cases (Austria, Poland), and was more strongly criticized with regard to archaeological property (in Poland particularly). The lack of a standardized provenance record ensuring a measure of traceability was identified as a difficulty in Germany (police/museums) and in Austria.

Some of those questioned also expressed doubts about existing systems of self-regulation in which the lack of market rules can lead to the flouting of legal provisions and rules of conduct (cultural ministry officials in the Netherlands, for example, who stressed that their views were not shared by all art market professionals, some of whom considered the rules to be satisfactory). Some States, particularly the United Kingdom, remain strongly attached to this approach.

Finally, in States that have introduced a statutory duty of diligence, the question arises as to how violations should be punished. In Switzerland, for example, the failure to exercise due diligence leads to criminal liability (contravention).<sup>281</sup> On the other hand, lack of due diligence has no consequences in civil law, even if this question remains the subject of theoretical debate in Switzerland. The shortcomings may thus result from the fact that the penalties imposed render the requirement ineffective

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<sup>280</sup> Article 16, Swiss Law on the International Transfer of Cultural Property (LTBC)

<sup>281</sup> Article 25, LTBC.

#### **2.2.1.4. Absence of legislative and regulatory provisions regarding online sales**

It is important to underline that, while the monitoring of online sales is a very topical issue, it does not seem to be on the agenda of most Member States and legislative provision for such monitoring is either weak or non-existent. Some of those questioned stated that the movement of cultural goods which gives rise to the greatest number of problems concerns online sales.

Analysis of the replies received during this study, as well as in the exchanges conducted by the Expert Working Group on Mobility of Collections, confirmed the existence of very real gaps.

In a survey of the situation in Member States, it was hard to pinpoint the relevant provisions. Representatives of the target groups contacted were often unable to provide more information, either because no specific provisions existed, or because the relevant remedies were arose from common law rather than statute. The transposition of Directive 2000/31/EC of the European Parliament and the Council (8 June 2000) on certain legal aspects of information society services – in particular electronic commerce – in the Internal Market (“Directive on electronic commerce”) does not seem to have resulted in specific provisions on cultural goods. The absence of specific rules induces in the inspection authorities a sort of indifference leading to inertia. The inspection authorities acknowledge that, because of lack of motivation and staff resources, they do not monitor the online market. Some States have concluded “agreements” with eBay (Germany, Austria), but these are exceptions. When monitoring takes place, it is in response to specific pieces of information and not in application of the relevant provisions.

Regulation of this expanding market therefore takes place essentially through codes of ethics or contractual obligations, with the conclusion of agreements with important operators (particularly eBay). Hence the fragility of the system in terms of the content of these agreements (often very “soft”), their relative effect (committing only the signatories) and, therefore, the numerous possibilities of circumvention.

The main legal difficulties in determining provenance thus concern:

- a lack of clarity in the criteria for establishing due diligence due to the failure to codify the requirement, accentuated by different levels of obligation with respect to the notions of good faith and “due diligence”;
- the absence or unclear definition of the obligation to check provenance applicable to market professionals and heritage institutions;
- the consequent uncertainties or absence of obligations and/or specific sanctions concerning the failure to exercise diligence, with particular application to art market professionals;
- the lack of forms of regulation of online sales.

## 2.2.2. Technical obstacles

The technical obstacles encountered by art market players when seeking information on the provenance of cultural goods or when trying to identify it derive in particular from (1) the databases available and (2) the traceability of cultural goods. The question of online sales poses special problems (3).

### 2.2.2.1. Difficulties concerning databases

Databases of cultural goods in an illicit situation pose a number of difficulties relating in particular to their diversity, forms of data input and modes of consultation. Databases developed over the last fifteen years have changed professional practice since they make it possible to check, especially online, information on the provenance of an item of cultural property and, in particular, that the good has not been reported missing. Existing databases help in particular to ensure that the good has not been stolen.<sup>282</sup>

The two types of databases listing cultural goods in an illicit situation function differently:

- in the so-called “passive” databases, the enquirer wishing to obtain information sends a description of the goods to the database experts who themselves carry out the checks (e.g. the private database Arts Loss Register, and the French police database TREIMA);
- in the so-called “active” databases, the enquirer carries out his own searches and checks (INTERPOL’s stolen works of art database).

Other databases are useful sources of information. They include online registers or inventories of protected cultural goods, public collections, and inventories of national heritage.

Consultation of a database is one of the two requirements for demonstrating good faith at the time of acquisition of a cultural property, under Article 4(4) of the UNIDROIT Convention.<sup>283</sup>

Codes of ethics for art market professionals also require that the provenance of a work be checked at the time of acquisition, in particular through the consultation of databases.

Market participants, particularly professionals, regard databases as an essential tool in complying with the requirement of diligence in the verification of

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<sup>282</sup> See above. The distinction between “general list” databases and the databases of stolen cultural property.

<sup>283</sup> Article 4(4) of the UNIDROIT Convention: “In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.

provenance, but they experience difficulties both in consulting databases and recording missing goods. The absence of proof of consultation is another technical obstacle.

**(a) Difficulties relating to the diversity of databases**

Despite their specific focus, databases of cultural goods “in an illicit situation” lack uniformity:

- as regards content: goods stolen, looted, missing, endangered, confiscated or retrieved;
- as regards the description of the goods: some require a photograph, others not (non- standard, moreover, as the above illustrations show), a variety of identification criteria, etc.;
- as regards management: the police usually manage the national database;
- as regards data input (police, institutions, individuals);
- as regards access (police, customs, ministries, market professionals, individuals);
- as regards functionalities: registering the goods, searching for it, searching for its owner;
- as regards language used: there are few multilingual databases;
- as regards length of data storage: in Latvia, for example, information on such goods remains operational only for the duration of the limitation period for criminal prosecutions, which can be inadequate for research into missing or stolen national treasures.

The current situation in practice reflects the evolution of these databases. Initially designed to help police in their investigations into theft and the receiving of stolen goods, they have acquired the added function of informing art market professionals with a view to preventing trafficking in cultural goods and providing clues to its provenance so as to help establish good or bad faith.<sup>284</sup>

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<sup>284</sup> For example, Article 87A of the Civil Code of the Netherlands stipulates:

1. To determine whether a possessor has acted in good faith in the acquisition of a cultural property as defined in Article 1(d) of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (*Implementation Act*), regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies in that In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances field.

Poland – It is reported by the representatives of Nimoz that a bill is being drafted for the establishment and management of a new open-access national database of “missing” cultural

This evolution explains the changes in criteria for the identification of goods, since information contained in the databases is different depending on whether it is intended for professionals or investigators. It also explains the variety of access methods, since some databases are purely designed for police investigation and are not accessible to the public, while others have become open to all.

Finally, these databases are for the moment poorly connected to each other, each having developed its own autonomy. However, interconnection would provide them with added value, an observation which has been consistently highlighted in interviews and questionnaires conducted under this project.

While these bases have made enormous progress in terms of their scope and efficiency, a number of specific difficulties have been pointed out regarding access and utilization.

#### **(b) Difficulties in consulting databases**

Practical examples and the results of field enquiries reveal great diversity in the way databases are used. First, the choice of databases consulted differs between Member States: professionals in the United Kingdom and Germany report that they mainly use private databases such as the Art Loss Register, whereas professionals in other States tend to consult the INTERPOL's stolen works of art database.<sup>285</sup> Secondly, some stakeholders such as collectors or small traders consult databases more rarely and sometimes do not know of their existence.<sup>286</sup>

It emerges finally from the responses to the questionnaires by the different target groups that, while existing databases are a useful tool, they need to be improved. Professionals, for example, recognize that the proliferation of separate databases does not facilitate their searches and would like to be able to consult a single database. The INTERPOL database could become such a reference tool, subject to major improvements (see the recommendations below).

The result of the absence of a comprehensive database and the fragmentation of existing databases is illustrated by the case of the painting by Edgar Degas (1834-1917) entitled "Laundry Woman with Toothache". This picture was due to be auctioned by Sotheby's in New York in November 2010. The auction house, whose catalogues are systematically checked through the Art Loss Register and which had consulted the INTERPOL database, had not been alerted to the fact that the picture had been stolen from the Museum of Le Havre in 1973. It turned out that the theft of the picture had been recorded only in the Orsay Museum inventory. A mistake in the description of the painting in that inventory had moreover made the painting

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property. It provides that an object registered in this forthcoming database will not be subject to the provisions of the Civil Code, thereby avoiding any risk of acquisitive prescription.

<sup>285</sup> "Art market" questionnaire, Part I, Question 1: "When acquiring a work of art do you consult one or more databases providing information on the provenance of art objects?"

<sup>286</sup> "Art market" questionnaire, Part I, Question 2: "Quote the name of databases known to you on the provenance of works art".



hard to identify, since it stated that the work had been painted on cardboard whereas it was in fact an oil on canvas.<sup>287</sup> Moreover, the theft committed in 1973 had not been registered in the TREIMA database set up in 1995. The auction house withdrew the painting from sale following the intervention of the French authorities.

There are three kinds of difficulties concerning databases listing the protected cultural heritage. The first concerns the diffusion and lack of standardization of inventories, including at the national level and sometimes in States with a longstanding and elaborate regulatory framework for protection of the heritage. This fragmentation means that the user or acquirer cannot be expected to have consulted all these databases.

The second difficulty concerns the more worrying lack of online inventories. The situation of Member States of the European Union is very uneven in this regard.

The third difficulty concerns that cultural property which is particularly vulnerable to trafficking, which clearly requires that efforts be made to identify and locate it.

Market participants have also highlighted the difficulties relating to the complex search criteria in certain “active” databases, for example the Palissy<sup>288</sup> and Joconde<sup>289</sup> bases in France. An original tool has now been devised to bring together data on the collections (over 3 million images in the “Collections” search engine of the [www.culture.fr/sections/collections/accueil](http://www.culture.fr/sections/collections/accueil) website).

### **(c) Difficulties linked to the way cultural good is registered in databases**

One practical difficulty noted concerns the updating of databases. Existing databases do not make information on missing cultural goods sufficiently or sufficiently rapidly available. The delay in placing declarations of theft online is prejudicial to the circulation of information, which is the key to combating trafficking. The failure to register stolen items in the INTERPOL database can hinder their recovery. It was likewise noted that the INTERPOL base does not provide for multiple or serial cultural properties, hampering the registration of many stolen or missing archaeological objects

Another obstacle concerns the variable procedures for registering goods in databases. In the case of the INTERPOL database centralizing the declaration of stolen art goods worldwide, it is States that decide which registered items will be included in the national database, whose contents will then be incorporated in the INTERPOL base. However, there is no uniform procedure for entering and registering declarations. Practice regarding the declaration and inputting of items in

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<sup>287</sup> D. Rykner, “A Degas painting stolen from French museums found in a sale at Sotheby’s New York”, *Tribune de l’art*, 3 November 2010 ([www.latribunedelart.com](http://www.latribunedelart.com)).

<sup>288</sup> <http://www.culture.gouv.fr/culture/inventai/patrimoine/> (heritage inventory).

<sup>289</sup> <http://www.culture.gouv.fr/documentation/joconde/fr/> (museum collections).

the INTERPOL database vary from one country to another according to national sensitivity. For example, in France, the OCBC registers declarations of theft of works of art selectively in the TREIMA base, whereas other States such as Italy and the United States register missing goods more fully.

The reflex of registering stolen goods in a database is not a practice endorsed by market participants, whether professional or amateur. It emerges from the replies to the questionnaire by the “market” target group that for almost all those canvassed who had been confronted by theft there was no instinctive reaction to declare this in a database of stolen goods, whether public or private.<sup>290</sup> On the other hand, if they were to be faced by another theft, over 70% of market participants questioned said that they would register it in a database.

The field survey revealed a concern on the part of professionals to protect confidentiality and professional secrecy. Very marked opposition was expressed to the idea of registering the name and personal details of the owner of the work online.<sup>291</sup> The proposal was seen by the participants as a whole as an obstacle to the circulation of works. Interviewees stressed that registering personal data would favour theft. In fact, this reluctance is prompted more by a concern to preserve a measure of confidentiality in art market transactions, so that the idea of obligatory disclosure of the name of the owner to the purchaser provokes strong opposition. While it could be argued that informing the public of the name of the owner could increase the risk of theft, the refusal to communicate information to the acquirer is more specious and of another order, reflecting the preoccupation with secrecy concerning the identity of clients. Reference was also made to the fear of controls by tax authorities.

On the other hand, the survey revealed the willingness of some market participants to share information regarding provenance. According to the results of the questionnaire, half of those questioned would be favourable to the idea of registering data on the provenance of a work in a database.<sup>292</sup> Museums consider that they already do so when they place their collections online.

#### **(d) Difficulty of proving that a database has been consulted**

Article 4(4) of the UNIDROIT Convention provides that a factor in determining the exercise of due diligence shall be “whether the possessor consulted any reasonably accessible register of stolen cultural objects”. It is therefore important

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<sup>290</sup> “Art market” questionnaire, Part III, Question 2: “In the case of a missing or stolen object, what would be your reaction?”

<sup>291</sup> “Art market” questionnaire, Part III, Question 5: “In your opinion, would placing the name and personal details of the owner of the work online tend to impede or promote the circulation of works?”

<sup>292</sup> “Art market” questionnaire, Part I, Question 11: “Would you like to have the possibility of registering in a database information on the provenance of the work of art acquired?”

that the possessor should be in a position to prove that he or she has consulted the register.

As already noted by the MOC group,<sup>293</sup> market participants stress the difficulty of obtaining proof that a database of stolen cultural goods has been consulted prior to making a purchase.

Currently, the INTERPOL database does not issue a receipt following a consultation, unlike the Art Loss Register which provides a certificate indicating whether or not the item of cultural property is the subject of a declaration of theft or loss in its database. In its general conditions, the Art Loss Register specifies that the certificate is neither an export licence, nor a certificate of authenticity, nor a guarantee of provenance and that its issuance does not dispense the purchaser from performing other checks. The certificate is however proof that one of the requirements of due diligence has been met.<sup>294</sup>

#### **2.2.2.2. Difficulty of identifying stolen or illicitly exported cultural goods**

The difficulties concerning the traceability of cultural goods are linked to problems of identification in the case of certain types of goods or where the goods has been disguised or modified and to failings in the maintenance of inventories and police records.

##### **(a) Difficulty of identifying certain kinds of cultural goods**

The difficulties relating to the nature of the cultural property inventoried concerns in particular the fact that, whereas a unique cultural good may be fairly easily described (author's signature, special marks such as scratches, etc), this is not the case with other forms of cultural good. They include, for example:

- cultural goods belonging to civilizations that have flourished over a wide area (e.g. Byzantium) and which are difficult to identify precisely (geographical location, dating, etc);
- serial cultural goods (e.g. coins);
- jewellery that can easily be “dismembered” when it contains precious stones.

Some databases therefore exclude jewellery unless it constitutes a well-known and exceptional item.

With regard to the INTERPOL database, while most participants recognize its importance, they see it as having two limitations: (1) a country that is deprived of an item of property is not necessarily aware of the fact, an example being an illicit excavation that goes unreported in a database, and (2) the request for a photograph

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<sup>293</sup> Expert Working Group on Mobility of Collections, Sub-Group on the prevention of theft and illicit traffic, Report on Due Diligence, 2010.

<sup>294</sup> Based on the certificate issued by the Art Loss Register.

of the item of property cannot always be met. In such a case INTERPOL refuses to include the item in the database, whereas its existence could at least be mentioned. This poses a problem, for example, in the case of archives.

Finally, the point was made that databases were useless if they did not include a system of goods traceability. A representative of the Dutch police gave the example of the theft of gold coins (worth about \$3,000) at Schiphol airport in the Netherlands. The theft was reported but no photo of the coin was available and, even if it had been, a gold coin is simply a gold coin. The only way of identifying them would have been if there had been a trace of the coins.

### **(b) Difficulty relating to the disguising of works**

In many cases stolen or illicitly exported good is disguised to prevent identification. For example, the subject of a canvas is sometimes concealed during restoration, making it unrecognizable. All it takes is for an accessory or a feature of one of the subjects of the canvas to be altered and it ceases to be identifiable.

Very often it is the markings on a work that are concealed. A case in point was the “Garel” affair, in which part of an Ashkenazi Bible of the second half of the 13th century, property of the French National Library and stolen by its curator, M. Garel, had been cut out to get rid of the stamp of the Bibliothèque Nationale, seriously damaging the Hebrew manuscript in the process. Without having been identified, the manuscript had been put up for auction at Christie’s in New York in 2010 and had been bought by an American collector.<sup>295</sup>

### **(c) Lack of traceability of works**

The traceability of works depends on databases and police records kept by professionals (dealers and auctioneers) but also on inventories. Inventories are an essential tool in preventing and combating trafficking since they can be helpful in recovering the work and constitute useful proof of ownership.<sup>296</sup> Police records may also be regarded as a particularly valuable category of inventory since they should include all properties.<sup>297</sup>

In museums, the work of registering and positive identification is considerable and ancient inventories are sometimes faulty. Inventories of large batches of goods are difficult to establish, and errors exist. In States that do not yet have an inventory methodology, the object ID standard can prove useful.<sup>298</sup> However, it is far from being a universal reference standard.

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<sup>295</sup> D. Bétard, “The Garel affair: recovery of the manuscript. A Hebrew bible stolen by a curator in the Bibliothèque Nationale de France rediscovered after a searching enquiry”, *Le Journal des Arts*, No. 251, 19 January-1 February 2007; and BNF press release of 7 March 2007.

<sup>296</sup> M. Cornu and N. Mallet-Poujol, *Droit, œuvres d’art et musées*, CNRS Editions, 2006, p. 236.

<sup>297</sup> See above.

<sup>298</sup> Object ID Standard, to be found in the UNESCO handbook “Legal and Practical Measures against Illicit Trafficking in Cultural Property”, 2006, CLT/CH/INS-06/220.

The European Union Historic Houses Association has drawn attention to the diversity and lack of updating of inventories held by individuals (EUHHA).<sup>299</sup>

Inadequacies have also been noted in the identification of endangered heritage, particularly the religious and archaeological heritage.

Photographs of works of art are essential, for individuals and museums alike; they should be included in the file of the work, which should be kept in a different place from the work itself.<sup>300</sup> There are repeated complaints in field surveys about the lack of photographic records of works, or their poor quality.

The main difficulties noted with regard to data and provenance bases are:

- the dispersion of databases of stolen goods in an illicit situation and the lack of standardization in the structure and content of those databases in various respects (content, types of good, descriptive criteria, management, updating, access, functionalities, language and length of storage);
- the lack of a “one-stop-shop” providing access to the information contained in these bases;
- the lack or paucity of bases of other types of goods in illicit situations (looted or illegally exported);
- the problem of handling the databases (complexity of research criteria, updating of the databases, lack of proof of consultation, treatment of data confidentiality);
- the dispersion of databases of cultural goods and the very uneven standard of online inventories;
- lack of standardization of inventory techniques;
- the paucity of inventories and tools for identifying privately held and endangered heritage (religious heritage, archaeological heritage).

### 2.2.2.3. Technical problems concerning online sales

The issue of the monitoring of online sales reveals a paradoxical situation. Although most of those questioned (only Slovakia considers that there is no problem in this area) agree that online sales constitute a weakness in the fight against trafficking in cultural goods, all are equally agreed on the inadequacy of existing arrangements for monitoring transactions. The shortcomings are at once financial, technical and human. Lack of staff, financing and image recognition

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<sup>299</sup> A questionnaire referring to the technical problems has been distributed to its members by the European Historic Houses Association. For the results of the enquiry, see the annex supra.

<sup>300</sup> Noted by the OCBC (Central Office for the Fight against Traffic in Cultural Goods). Central Directorate of Judicial Police, in their online guide “*Photographier ses objets de valeur*” (“Photograph your valuables”), available in French at the following link: [http://www.interieur.gouv.fr/sections/a\\_votre\\_service/votre\\_securite/votre-domicile/guide-photo-objet-valeur](http://www.interieur.gouv.fr/sections/a_votre_service/votre_securite/votre-domicile/guide-photo-objet-valeur).

software are recurrent themes in responses to the questionnaires and interviews. Some specific difficulties are also cited, such as the international nature of sales and the problem of locating the goods and those involved in the transaction.

The electronic monitoring of sales of cultural goods is complicated by the wide variety of places where sales take place. These fall into three main categories.

- Transactions taking place on sale sites run by auction houses. Monitoring these sites is relatively easy since the sales agents must observe the same professional standards as those governing their traditional activities. Identification of the seller and purchaser is also facilitated by the *de facto* presence of the seller's agent
- In practice, however, there are problems in monitoring such transactions not because of any lack of information on the holding of such sales but rather because of the large number of transactions taking place, which makes monitoring difficult.
- Transactions taking place on platforms such as eBay. Such sales pose much greater problems with regard to monitoring and identifying parties to the transaction. In this case, it is not the firm managing the site that is involved in the sale but rather the seller and purchaser, without the involvement of any third party. The identity of the seller and purchaser is more difficult to establish, as is the location of the item being sold. The very brief space of time in which the sale takes place is also an obstacle to effective monitoring. Finally, the large number of brokerage sites (international sites, sometimes with a national platform, national sites, specialized sites) complicates the task of monitoring and controlling such transactions.
- Person-to-person sales between a seller and purchaser who have met on the Internet. Transactions of this kind – a relatively new phenomenon – are the most difficult to monitor and identify. The sellers alert potential purchasers to the availability of a good, whether through “posts” on specialized forums, or through a personal site. The actual transaction takes place privately, usually off line.

The heritage protection authorities are therefore confronted by a wide variety of situations involving radically different degree of transparency.

### **2.2.3. Operational obstacles**

The difficulties arising from the lack of expertise of police and customs officers are a recurrent theme, together with the problem of assessing the value of a good and the authenticity of its provenance.

The lack of financial and human resources is also very widely mentioned, along with the lack of public awareness and information (Cyprus, Greece, Netherlands, Spain).

A number of those interviewed consider that the coordination and distribution of powers among national authorities is a source of difficulties (Bulgaria, Latvia, Estonia, Luxembourg and Spain).<sup>301</sup> Operational obstacles are also linked, to a lesser extent, to how far participants in the art market, as well as States and museums, are prepared to observe good practices.

### **2.2.3.1. Unequal observance of good practices among participants in the art market**

Responses to the questionnaires show that participants in the art market vary in the degree of attention they pay to the provenance of cultural goods, depending on their situation within the market.<sup>302</sup> However, the general tendency reflects a growing awareness of the importance of provenance by all stakeholders over the last ten years.<sup>303</sup>

Museums, auction houses, dealers and experts are more sensitive to questions of provenance than collectors. This is explained in particular by the fact that art market professionals are accountable for the sale or acquisition of a good of doubtful provenance infringing their respective codes of ethics. Moreover, a museum purchasing an item of doubtful provenance places itself in a particularly delicate situation and could be obliged to return it.

Generally speaking, where the origin of an item of cultural property has been carefully documented, its value will be increased. In the case of quality items, buyers demand fuller information from the seller on the provenance of the work. Having regard to the way the market has evolved, professionals recognize that their practices have changed over the last 10 years and that they are more painstaking in their searches and checks on provenance.<sup>304</sup>

Among the good practices identified by the questionnaires, it emerges that most professionals compile a file on provenance.<sup>305</sup> Professionals also say that they employ specialists to check authenticity and provenance<sup>306</sup> and that they refuse to sell a good whose provenance has not been properly established.

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<sup>301</sup> See in this respect United Nations Office on Drugs and Crime reports E/2010/30, E/CN.15/2010/20 and CCPCJ/EG,1/2009.2.

<sup>302</sup> For a definition of provenance in the historical and scientific sense and provenance in the legal sense, see above.

<sup>303</sup> “Art Market” questionnaire, Part I, Question 9: “What importance do you attach to knowledge of provenance in your decision to purchase or in advice given to the buyer?”.

<sup>304</sup> “Art Market” questionnaire, Part I, Question 6: “Has your practice with regard to researching provenance changed over the last ten years?”.

<sup>305</sup> “Art Market” questionnaire, Part I, Question 10: “Do you constitute a dossier of the information assembled on the provenance of the work of art?”.

<sup>306</sup> “Art Market” questionnaire, Part I, Question 4: “Do you consult a specialist (expert, compiler of an annotated catalogue, committee, etc) before acquiring a work of art and, if so, which?”.

Non-professionals seem less interested in provenance. In most cases, collectors place their trust in dealers and do not perform additional checks. However, seasoned and well-informed collectors are no longer satisfied by a prestigious origin from the standpoint of art history. To protect their acquisition and ensure it can be resold at a profit, they conduct or commission checks on the lawful origins of the goods.

### **2.2.3.2. Compliance with good practices by public actors**

#### **(a) The attitude of States to public and private databases**

An obstacle with regard to preventing and combating trafficking is the different degrees of recognition accorded by States to different databases. In the responses to the questionnaires, some countries systematically advocate use of the Art Loss Register and only rarely mention INTERPOL.

Member States thus recommend and utilize different databases. For example, the United Kingdom in its good practice guidelines for museums refers only to the Art Loss Register, whereas other European countries recommend INTERPOL.<sup>307</sup> In one case, a picture located in the United States that had been stolen in France, which was registered in the INTERPOL base as stolen, could not be investigated on the other side of the Atlantic. This was because current practice suggests that in the United States the theft or disappearance of a work of art must be recorded in the Art Loss Register before it can be investigated by the police. Other databases are much less well regarded. It was therefore necessary to wait until the disputed picture was included in the Art Loss Register database before the official investigations could finally begin. In France, on the other hand, institutions such as the Office central de lutte contre le trafic des biens culturels (OCBC) are traditionally mistrustful of private bodies which charge for their services, such as the Art Loss Register. For the INTERPOL database to become a standard tool, States would have to include consultation of this database in their good practices.

#### **(b) Compliance with good practices by museums**

The report of the OMC Expert Working Group on Mobility of Collections notes the absence in many Member States of public scrutiny of acquisitions by museums, archives and libraries with regard to provenance. While a number of States have introduced procedures for scrutinizing public acquisitions, including supervision by line authorities and consultative bodies, such scrutiny is mainly concerned with the authenticity of the acquisition. While provenance forms part of the requested information, it is unclear whether such scrutiny does in fact lead to greater vigilance. Under the French system, French museums have to consult a scientific committee before making any acquisition. The file compiled for this purpose must include

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<sup>307</sup> Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material, October 2005.



information on provenance. In practice, however, the relevant committee does not always perform any checks.

### **2.2.3.3. Online sales**

The lack of monitoring of online sales is repeatedly stressed. Mention is made in particular of the shortage of staff to cope with the workload and, from the operational standpoint, a general lack of cooperation with auction houses.

The main difficulties in operational terms concern:

- the dispersion of competencies and responsibilities for preventing and combating trafficking in cultural goods;
- the problem of training specialized bodies (customs, police);
- unequal access to scientific expertise;
- problems of financial and human resources;
- non-existent or inadequate scrutiny of the provenance of public acquisitions;
- the lack or inadequacy of public provision for informing market stakeholders and institutions;
- shortcomings in cooperation, exchanges of information and monitoring regarding online sales of cultural goods;
- variable observance of good practice.

### **\* Inadequacy of available penalties**

## **2.2.4. Legal obstacles in the field of domestic criminal rules**

### **2.2.4.1. Inconspicuousness of domestic criminal rules on cultural property**

(a) The main and recurring legal obstacle is the diversity of criminal law, which leads to discrepancies in law enforcement. Moreover, few judicial authorities are actually alive to trafficking in cultural goods: specialist police departments in this field vary greatly, investigations are often lengthy and expensive, and judges and prosecutors are unfamiliar with this sphere.

(b) In the main, theft and receiving stolen goods are ordinary offences in the great majority of Member States. But the fact that a cultural asset is a protected good is not clear in the definition of offences: either the cultural nature of a good does not constitute an aggravating factor in the relevant legislation for ordinary offences or else offences specific to criminal goods are low profile, little known and seldom punished by either the law or the courts. When the evidence is there, it is through the aggravating circumstance of an organized gang or a multi-perpetrator offence that crimes affecting cultural goods are recognized. However, this legal classification does not cover all forms of crime in this field.

(c) At present the offence of laundering is rarely or never used for trafficking in cultural goods,<sup>308</sup> since it is usually held by the prosecuting authorities to be an offence connected with tax evasion or drug trafficking. Laundering is also hard to pin down for trafficking in cultural goods inasmuch as it has to be detected by art market professionals, and the proper authorities for suspected laundering have to be notified. Yet the art market is currently disinclined to participate in this process, and there are consequently few witnesses and little evidence to reveal laundering.

However, it might be possible to consider extending laundering to cover the illicit provenance of a work of art sold on the market legally.

#### 2.2.4.2. Unsuitability of limitation rules for prosecution

Limitation periods for prosecution are also extremely diverse (ranging from a short limitation period to no limitation at all). But it is above all the starting point of the limitation period that raises problems, especially where handling and unlawful archaeological excavations are concerned:

- Handling: this is established by possession, for whatever period of time, of the stolen good. It is therefore critical to determine whether or not the period of possession is included when calculating the limitation period. Criminal law in most Member States considers the limitation period to start on the date of entry into possession (see table) and therefore holds handling to be an instant offence. Thus a handler merely has to await the end of the limitation period while remaining in possession of the item in order to gain impunity. Handling must be made a continuous offence (or a permanent offence, depending on the system).
- Unlawful excavations: it has often been pointed out that, except in the case of an offence discovered while it is being committed, it is impossible to date an unlawful excavation and therefore have a starting point for the limitation period. This is also detrimental to implementation of Directive 93/7/EEC on the return of cultural objects, since it makes it impossible to provide proof that a cultural object was unlawfully exported or stolen after 1 January 1993.

Handling therefore has the added advantage of being applicable when a cultural good comes from an unlawful excavation even if, in actual fact, the good is in the possession of the person who undertook the excavation, since although the UNIDROIT Convention itself considers a cultural good which has been unlawfully excavated or lawfully excavated but unlawfully retained to be stolen, when

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<sup>308</sup> See the Tombaroli and Boucher cases: traffickers deposited archaeological items from the south of Italy with pawnshops in the country and these items were then sold by frontmen in auction houses and art galleries: the money made was reinvested in real estate. Cited by G. Nistri, “La coopération internationale dans la lutte contre les délits relatifs aux biens culturels: l’expérience du commandement des carabinieri pour la protection du patrimoine culturel”, in *L’entraide judiciaire internationale dans le domaine des biens culturels* (M.-A. Renold, ed.), Schulthess, 2011, p. 44.

consistent with the law of the State where the excavation took place (UNIDROIT Convention, Article 3, para. 2), treating the object as stolen does not solve the problem of the starting point for the prescription period, which may still remain impossible to determine.

#### **2.2.4.3. Unsuitability of the confiscation penalty**

The penalty of confiscation, consisting in permanent loss of the property, is particularly useful with regard to trafficking in cultural goods. However, under the rule that punishment should be applied to the offender alone, this measure can be only a limited response, since the convicted person must be holding the stolen cultural good at the time of conviction (otherwise an equivalent sum will be confiscated).

#### **2.2.5. Operational obstacles**

##### **2.2.5.1. Operational obstacles relating to traceability of cultural goods**

Such obstacles mainly concern cooperation in criminal matters. But there are also other obstacles relating to traceability of goods: no “transaction registers” for identifying goods at dealers<sup>3</sup>, no inventories of public goods, no markings, etc. The lack of standardized criteria for describing goods also constitutes a real problem, as do the difficulties in describing modern works of art such as paintings.

Furthermore, in the field of archaeology the lack of an identified or identifiable victim, and therefore the absence of a reported offence, makes establishment of punishable offences problematic.

Lastly, as far as unlawful export is concerned, there is considerable difficulty in identifying falsification of the provenance and status of works which has been performed in order to deceive officials responsible for granting export documents.

##### **2.2.5.2. Obstacles to cooperation in criminal matters**

**\* The national reports have identified a number of obstacles to the use of cooperation instruments:<sup>309</sup>**

(a) Protection of cultural goods is not a priority for national criminal policy.

(b) The lengthiness and delays associated with judicial cooperation have discouraged the relevant authorities from using it. Three examples may be mentioned. First, going through INTERPOL (to report offences and obtain information) has its limitations. It is possible to stop the auction of an illicit item on the basis of an INTERPOL NCB message. But a writ must then be obtained to validate the procedure (an international letter rogatory, for example). Secondly, when an item is located abroad, it is necessary to go through the national liaison

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<sup>309</sup> The European arrest warrant, freezing of evidence and joint investigation teams are not used in this field.

officer and often the members of the local legal service. This process engenders fairly lengthy delays incommensurate with the speed at which cultural goods circulate. A first step towards solving this problem might be to computerize procedures.

(c) The police and judiciary lack knowledge of the instruments available for cooperation in criminal matters. Their training in this field is often inadequate.

(d) There are powerful economic interests hindering procedures, especially when requests for international cooperation have to be issued.

(e) Requests for cooperation in criminal matters are badly drafted, imprecise, obscure and insufficiently detailed.

(f) Requests for cooperation are not addressed to the proper authorities in the executing State. They then have to be resent, which takes time. In some States, special requests can be made directly to the police, whereas in others they must be submitted to a judge (e.g. data from mobile phones).

(g) Requests for cooperation are made in ignorance of the law and procedure applying in the executing State.

(h) The information about a cultural good and the description of its features in requests for cooperation are inadequate (especially the lack of photographs). There is failure to comply with identification standards.

(i) Lack of documentary evidence in requests for cooperation.

(j) Cooperation does not allow enough room for experts and it is difficult to obtain an expert report promptly. The experts in one Member State are not always versed in the cultural goods of other Member States, which may hinder mutual assistance.

(k) Some of those involved in cooperation may have no specialist knowledge of the cultural field.

(l) Cooperation is not coordinated at the European level.

(m) Cooperation in criminal matters comes up against a shortage of police, judicial, customs and scientific staff and a shortage of court resources.

(n) A failure by players in the various European Union States to exchange experience and share expertise in the field of cooperation in individual member countries of the European Union has been identified as problematic.

#### **\* Some shortcomings in instruments of cooperation**

(a) Some instruments of cooperation have only limited scope, which therefore also restricts the scope for combating trafficking in cultural goods. Thus the relatively integrated mechanisms of the 2000 Palermo Convention apply, in substance, only to organized transnational crime.

(b) Some instruments of cooperation, such as the 2002 framework decision on the European arrest warrant (Article 4), provide for the option of refusing to execute a warrant where the criminal prosecution or punishment of the requested person is time-barred according to the law of the executing Member State. With regard to trafficking in cultural goods, this ground for refusal may be raised in some cases inasmuch as limitation periods vary greatly from one Member State to another within the European Union.

(c) The framework decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence covers only an *interlocutory* freeze in the executing State. As for the subsequent treatment of the frozen property, Article 10 of the framework decision provides that the freezing order must be accompanied or followed either by a request for transfer or a request for confiscation, depending on subsequent procedure. In principle, these mechanisms function by the rules of conventional international judicial cooperation. The situation is therefore complicated and difficult to understand: the asset freezing procedure here coexists with the rules for international legal assistance (letters rogatory) but does not take their place – unlike the European arrest warrant. As regards evidence in particular, its return to the issuing State is here to be governed by the framework decision of 18 December 2008 on the European evidence warrant.

(d) The evidence warrant provided for by the framework decision of 18 December 2008 is limited to objects, documents and data which already *exist* rather than those *to be acquired*. In other words, it applies not to cultural objects *reported missing or stolen* but only to objects “*available*” in the executing State of the framework decision (Article 4.1). Furthermore, the framework decision expressly rules out certain measures which cannot be required in an evidence warrant (interviews, hearings, bodily examinations, bodily material or biometric data, interception of telephone communications, retained communications data, etc.), in particular analysis of existing objects, documents or data. This exclusion makes the evidence warrant less useful for cultural goods.

(e) The lack of a special contact for investigations and prosecutions concerning trafficking in cultural goods is a major obstacle that could be easily overcome.

(f) Eurojust and Europol do not have sufficient coercive powers over either persons or national authorities.

(g) No joint investigation team has ever been set up for trafficking in cultural goods owing to a lack of political, administrative and judicial resolve and the priority given to joint investigations in the field of terrorism.

## 2.3. Movement of goods

### 2.3.1. Legal obstacles

The way in which cultural goods circulates differs between Member States, and there are marked differences between States in the documents required for this purpose.

#### 2.3.1.1. Difficulty of introducing customs control within a space for the free movement of goods

It was with a certain wry humour that customs officials identified the free movement of goods as the main legal obstacle to combating trafficking in cultural goods. The opening of the EC's "internal frontiers"<sup>310</sup> arguably precludes effective monitoring of the movement of cultural goods within the Union.

The current situation in fact rests on a paradox: European regulations on the movement of cultural goods are largely inoperative, and the relevant national legislation is in practice applied – hence the need to know the national laws of the other member countries of the European Union, since there is no real harmonization regarding movement of cultural goods within the European Union.

Customs services mentioned in particular the complexity of the system and of the annexes to the 1992 Community regulation. They also stressed the lack of legal unity between Member States with regard to value and age thresholds and export documents. The whole system has been described as a veritable labyrinth.

#### 2.3.1.2. The wide variety of national documents: varying ways in which cultural goods circulate in the different Member States

The entry into force of Council Regulation No. 3911/92 of 9 December 1992, replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 (codified) aligned rules governing the export of cultural goods to third countries.<sup>311</sup> The introduction of common authorization documents (definitive and temporary export authorizations), in support of the export declaration to the relevant customs office, have helped to facilitate uniform control over the export of cultural goods to the external borders of the European Union.<sup>312</sup> In the case of exports to third countries

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<sup>310</sup> Term used by a customs authority.

<sup>311</sup> Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods (Official Journal L 395 of 31.12.1992). Amended by the Council Regulation (EC) No. 2469/96 of 16 December 1996 (Official Journal L 335 of 24.12.1996) and by Council Regulation (EC) No 974/2001 of 14 May 2001 (Official Journal L 137 of 19.5.2001). Repealed and replaced by Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal L 39/1 of 10.2.2009).

<sup>312</sup> Commission Regulation (EC) No. 656/2004 of 7 April 2004 amending Regulation (EEC) No. 752/93 laying down provisions for the implementation of Council Regulation (EEC) No. 3911/92 on the export of cultural goods (Official Journal L 104 of 8.4.2004; Corrigendum Official Journal L 203 of 8.6.2004).

exceeding the thresholds prescribed in the annex to the regulation of 18 December 2008, an export authorization is required in addition to possible national exit authorizations.<sup>313</sup>

Each State in fact retains control over the protection of its national treasures. The exit of cultural goods from the national territory is subject to regulation and authorization specific to each Member State. If we compare the different systems governing the movement of cultural goods, we find that there is a disparity not only regarding the basis of the cultural goods subject to control but also the between the systems and export documents governing exit from the national territory of Member States. The documents necessary for the movement of cultural goods from one Member State to the next. For example, once the cultural goods exceeds the threshold fixed for its category, France makes the exit of this cultural good from its territory conditional upon the issuing of an accompanying document (export certificate).<sup>314</sup> This accompanying document is valid for an indefinite duration for items over 100 years old, whereas the duration for other property is 20 years renewable. Other Member States issue an export authorization of limited duration, in the case of Belgium for one year and Italy three years. In the United Kingdom, professionals can obtain an “open general export licence” to export certain forms of cultural goods without the need to obtain an individual certificate for each item.<sup>315</sup>

Finally, in other Member States such as the Netherlands and Luxembourg, cultural goods circulate freely within the European Union and no authorization is required for the exit of cultural goods from the national territory to another Member State.<sup>316</sup>

This disparity at the intercommunity level results in different practices in the issuance of national and community export authorizations, as well as major differences in the number of authorizations delivered.<sup>317</sup>

### **2.3.1.3. Formalities regarded by the market as out of touch with their needs: lengthy procedures, multiple interfaces, thresholds**

Replies to the questionnaire show that three quarters of those questioned, in particular dealers, experts and auction houses, emphasize the length of time taken to

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<sup>313</sup> Annex to Council Regulation (EC) No. 3911/92 of 9 December 1992, concerning the export of cultural goods (*OJ L* 395 of 31.12.1992, pp. 1–5) repealed and replaced by Council Regulation (EC) No.116/2009 of 18 December 2008 concerning the export of cultural goods. (*OJ L* 39/1 of 10.2.2009).

<sup>314</sup> Annex to Decree No. 93-124 of 29 January 1993 relating to cultural goods subjected to certain restrictions of circulation.

<sup>315</sup> Analysis of structures and mechanisms for disseminating the data which authorities require to ensure that the directive on cultural objects is being enforced. Information & Communication Partners (hereinafter “2004 Report”) (MARKT/2003/05/C), 28.12.2004, Country File annex, “United Kingdom”, pp. 66-70.

<sup>316</sup> 2004 Report, p.125.

<sup>317</sup> 2004 Report, p. 19.

issue licences for exporting cultural goods abroad. In Italy, the certificate of free movement is issued within a period of 40 days following the submission of a request.<sup>318</sup> In Denmark an application for permission to export cultural goods abroad must be processed within a month;<sup>319</sup> after three months, the authorization is deemed to have been granted. In the United Kingdom the issuing of a foreign export licence is subject to a waiting period of between two and six months.<sup>320</sup> In France, an export licence for an item of cultural property must be issued within four months of the submission of the corresponding request.

When the licence is refused, a new time limit for acquisition of the property comes into effect. In Italy, for example, the Ministry of Culture has forty days, with a possible extension of sixty days, to make a purchase offer.<sup>321</sup> In the United Kingdom, the Ministry has two months to submit a purchase offer. If an institution announces its intention to acquire the good, it is granted an additional 4 to 6 months to assemble sufficient funds.<sup>322</sup> In France, the State has 30 months, dating from notification of the refusal to issue the certificate on the grounds that it might be considered a possible national treasure, to make a purchase offer.

In the view of professionals, these time limits are out of touch with the market's demand for a rapid response.<sup>323</sup> However, professionals have the option of anticipating applications for authorization, certificates and licences. Moreover, these time limits are necessary in the case of a screening process that can reveal significant cultural assets and thus identify possible national treasures. Finally, the waiting periods are in practice very often shorter than the legally prescribed time limits. That being said, the difference in procedures from one State to another is obviously a source of complication.

Furthermore, professionals believe that the procedures could be streamlined if they were not obliged to apply to several government departments. Those questioned therefore propose the establishment of a single point of contact.<sup>324</sup> In Italy, for example, certificates of free movement and export licences are issued simultaneously by the export bureau. The “one-stop-shop” solution, whereby a single office issues export licences (towards non-European Union countries) and certificates (movement within the European Union), has recently been adopted.

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<sup>318</sup> 2004 Report, Country File annex, “Italy”, pp. 42-45.

<sup>319</sup> *Ibid.*, Country File annex, “Denmark”, pp. 11-15.

<sup>320</sup> *Ibid.*, Country File annex, “United Kingdom”, pp. 66-70.

<sup>321</sup> Article 70 of code 41/2004, Codice dei beni culturali e del paesaggio.

<sup>322</sup> Protection of cultural property and circulation of cultural goods – Study of comparative law Europe/Asia, *Synthèse comparative et rapports nationaux*, directed by M. Cornu, Research Director at the CNRS, September 2008, p. 286.

<sup>323</sup> Article 2-2 of Decree No. 93-124 of 29 January 1993 relating to cultural goods subjected to certain restrictions of circulation.

<sup>324</sup> “Art market” questionnaire, Part II, Question 4: “Do you favour a single procedure involving a single government body and, if so, which government body would you choose?”.



Professionals moreover consider that the financial thresholds<sup>325</sup> beyond which a cultural property certificate is required are too low and ill-adapted to minor transactions.<sup>326</sup> Auctioneers also experience problems with the financial thresholds when a batch of items offered for sale at an estimated price below the financial threshold exceeds the threshold at auction and therefore requires a cultural property certificate. In general, the successful bidder intending to export the cultural goods is unhappy at having to wait several months to obtain – possibly – the necessary export licence.

However, the institutions of the Member States do not share this of professionals' point of view as to the modification of financial thresholds.<sup>327</sup>

It must also be stressed that some Member States have not aligned their thresholds and categories of cultural goods for authorizing export to a Member State with the community thresholds and categories specified in the annex to (EC) Regulation No. 116/2009 of 18 December 2008 concerning exports to non-EC countries, and have added a number of variants to them. This is the case with Hungary, which controls the movement of all cultural goods over 50 years of age whereas the European Regulation provides for the control of some categories of cultural goods aged over 50 years and for other categories a control for those aged over 100 years. On the other hand, United Kingdom in its 2003 decree reproduced word for word the provisions of the annex to the 1992 European Regulation.<sup>328</sup> This lack of harmony in thresholds at the European level in part explains the complexity of the system and the difficulty of understanding and therefore complying with it.

#### **2.3.1.4. Absence of a legal basis for import controls**

The establishment of import controls, in whatever form, is virtually non-existent in the States of the European Union.

Greece provides for an import declaration (import certificate) for all cultural goods but has not introduced a supporting document. In Spain and in Italy, this import declaration exists but is optional.

A number of stakeholders have referred to this difficulty, which means that even when an item of property is known to have been illicitly imported some States are unable to sanction this illicit import in the absence of a specific misdemeanour or other customs or criminal offence.

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<sup>325</sup> Annex common to Decree No. 93-124 of 29 January 1993 and Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal No. 39/1 of 10.2.2009), replacing Council Regulation (EEC) No. 3911/92 of 9 December 1992.

<sup>326</sup> The Syndicat national des antiquaires en France has recently issued an official demand for these thresholds to be reviewed <http://www.sna-france.com/Actions-juridiques-et-fiscales-N=f76cb3a5-e22e-41b7-b6fd-87d5730236c5-L=FR.aspx>.

<sup>327</sup> This emerges from the 2011 Report.

<sup>328</sup> Export of Objects of Cultural Interest Control Order 2003.

In particular, customs officers complain of the absence of a legal basis for import controls since the customs service is not obliged to check export licences from other countries at the point where good enters the receiving country. One also finds curious situations: for example, the arrival in Belgium of goods coming from Switzerland for which export licences had been requested in Belgium.

There is a need then for more information on the legal provisions of Member States of the European Union concerning the protection of their cultural heritage and the monitoring of the export of cultural goods. This aspect is linked to the fact that most of the trafficking in cultural goods is discovered precisely at the moment of importation and not exportation.

Finally, the customs also deplore the rigidity of the rules relating to the return of goods to the country of origin. In Germany, for example, the control of imports of cultural goods under the 1970 UNESCO Convention, which is incorporated in the law on the return of cultural property (*Kulturgüterrückgabegesetz*),<sup>329</sup> is currently virtually impossible. The KultGüRückG requires that in the case of a request for restitution by another State the goods in question must be included in a register of cultural goods of national value or rather that the good is included in the inventory of cultural goods of Member States maintained by the Zentralstelle des Bundes (*Vertragsstaatenverzeichnis*), that is to say by the BKM (para. 6 KultGüRückG and *Vertragsstaatenverzeichnisverordnung* of 15.10.2008). This system does not function at all in the absence of foreign lists of cultural goods: the right of restitution to Member States is not legally feasible. In the absence of such a list or such an inventory, there is practically no involvement by the customs in this connection.

Without embarking on an exhaustive analysis of these different systems for monitoring the movement of cultural goods, it is obvious that this disparity entails the risk of trafficking. It places control systems and procedures under strain on the ground and favours open trafficking at minimum legal risk.

The main legal difficulties with regard to the movement of cultural goods are:

- disparities in systems for controlling exit from the territory (authorizations, passport systems, etc);
- variable distinctions between circulation within and outside the Community;
- lack of import controls;
- lack of one-stop-shops for the issuing of licences;
- sometimes complex formalities.

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<sup>329</sup> Incorporating in domestic law the provisions of the 1970 Convention and the 1993 Community Directive.

### **2.3.2. Technical obstacles**

Export formalities are in practice undertaken by professionals, in particular transporters. The latter state that they transfer the information provided by their clients to the required documents. At the same time, the owners of the cultural goods, who are after all responsible if import and export regulations are infringed, are poorly informed about the relevant legislation. So the persons legally responsible lack information on the legislation applicable to the movement of cultural goods.

#### **2.3.2.1. Export formalities carried out by professionals**

##### **(a) Formalities carried out by transporters**

Replies to the questionnaires indicated that export formalities are in most cases delegated to transporters, particularly export licence procedures.<sup>330</sup> In other words, export formalities are carried out by the professionals who play a key front-line role in the movement of cultural goods. Completion of the export licence form is undertaken by the same transporters who accompany the export declaration to customs. They may also be the ones who submit the request for an export licence for the cultural goods. In both cases, they ask their client for information about the work in order to complete the export documents: proof of residence, identity card, purchase invoice, sales invoice, pickup and delivery address, list of works with technical datasheets, copy of the export licence, insurance and a photograph.

In the questionnaires the transporters state that they have no difficulty in obtaining information from the client in order to complete the export documents. If they are unable to obtain the necessary information and documents (proof of residence, identity card, purchase and sales invoice, etc), or where there is an obvious anomaly, the transporters questioned say that they refuse to organize the transportation of the cultural goods. At the test workshop, some transporters stated that they did not formally check the information provided by their clients or consult the databases of stolen art goods.

When authorized, transporters are usually responsible for the content of the documents submitted. Professionals such as traders and auction houses thus regard recourse to an authorized transporter as an additional guarantee. Over three quarters of the professionals questioned use an authorized transporter of works of art. The International Convention and Exhibition Fine Art Transporters (ICEFAT)<sup>331</sup> is one of the associations enabling transporters of works of art to be authorized when they adhere to the Association's standards. ICEFAT's authorization requirements are not available on the Internet, making the procedure non-transparent.

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<sup>330</sup> "Art market" questionnaire, Part II, Question 2: "To whom would you apply to carry out the formalities for the export and movement of a work of art?"

<sup>331</sup> <http://www.icefat.org>.

### **(b) Formalities carried out by auction houses and art dealers**

Apart from transporters, auction houses also offer to undertake, on a commercial basis, administrative export formalities. In France, for example, when offering for sale goods that exceed the threshold, they assume responsibility for seeking an export certificate for the cultural good so as to enable the work to achieve its price on the international market. They can also undertake the necessary administrative procedures for transporting the items purchased by the clients, whether collectors, traders or museums. Certain major auction houses have set up an internal transport department exclusively responsible for managing and assembling all the export and import documents relating to the cultural property entrusted to them.

Art dealers, and more rarely experts, will also on occasion undertake the formalities on behalf of their buyer customers. Museums undertake certain export formalities, whether on their own behalf or that of collectors lending them works.

#### **2.3.2.2. Lack of information about the person responsible for carrying out the formalities**

As mentioned previously, compliance with the regulation on the movement of cultural goods rests in the end with the property's owner. In France the code of ethics for voluntary service companies makes it obligatory to advise purchasers of this regulation.<sup>332</sup> The general conditions of sale and the information sheets for buyers prepared by auction houses emphasize that: "it is the responsibility of the purchaser to obtain export or import licences".<sup>333</sup> Auction houses require their clients to sign a declaration guaranteeing that goods entering from abroad has obtained the necessary authorizations and has thus been legally imported. However the persons legally responsible, namely the owners who are also the purchasers, often have no real knowledge of the compulsory formalities, and cannot therefore verify effective compliance. Indeed, the replies to the questionnaire reflect a lack of information on the part of certain actors, in particular collectors: they are ignorant of both the responsible departments and the relevant legislation. Collectors do not yet seem to realize the usefulness of such information, despite the fact that some of them are regularly called upon to lend the works to exhibitions abroad.

This lack of information is explained also by the difficulties of accessing regulations on the movement of cultural goods. Few Internet sites, whether those of ministries of culture or private operators, compile and assemble existing legislation together with explanatory material. There is no reference on the pages of the European Union's *Europa* site<sup>334</sup> to the subject. It emerges from exchanges that took

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<sup>332</sup> Guide pratique à l'usage des professionnels des ventes volontaires de meubles aux enchères publiques: "The SVV are also well advised to indicate to purchasers, particularly foreign purchasers, the rules governing the export of auction items and the existence and main provisions of the legal right to priority buy-out by the State".

<sup>333</sup> General conditions of sale, Sotheby's (France).

<sup>334</sup> [http://europa.eu/index\\_fr.htm](http://europa.eu/index_fr.htm).

place during the field survey that traders and auction houses inform their clients orally and provide them, where necessary, with the general conditions of sale, but do not have clear and detailed information materials to distribute.

While professionals are warned by their codes of ethics of the need to ensure that the good has been legally imported when making an acquisition,<sup>335</sup> the purchaser has difficulty in gaining access to legislation.

In practice, the fact that an export licence request cannot be submitted electronically represents a further difficulty.<sup>336</sup>

### **2.3.3. Operational obstacles**

#### **2.3.3.1. Inadequate border controls**

For a start, it should be noted that, for both the customs and the police, trafficking in cultural goods is not a priority issue. There are a number of reasons for this.

The customs service has identified as problem areas the counterfeiting of medicines and consumer goods, rather than the illicit movement of cultural goods.

The customs service is more interested in the value of a good, with an eye to the payment of customs dues.

Cultural good comes in various guises, making its identification very difficult. The customs service does not have the necessary knowledge to effectively scrutinize the movement of such goods.<sup>337</sup>

Lack of knowledge of the models of documents accompanying cultural goods and of national exit licences for such goods constitute an obstacle to frontier controls.<sup>338</sup>

Moreover, licences for exporting goods towards a third State are issued by the relevant authorities in the Member State in which the cultural good is located. Yet the cultural good may have its origin in another Member State. However, it is the State in which the cultural good is in transit that delivers the export certificate. The authorities in the transit country do not contact the authorities in the country of origin of the cultural goods.

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<sup>335</sup> Us et Coutumes des Antiquaires “Title one. II C. Special cases: [...] Dealers run the risk of being considered accomplices of fraudulent import” (www.sna-france.com).

<sup>336</sup> 2011 Report, p.7.

<sup>337</sup> In Greece, for example, four customs offences involving cultural property were recorded in the period 2002-2010; in Hungary, there were 16 cases of smuggling and false declarations involving cultural property in 2010.

<sup>338</sup> Obstacle noted in the two reports: “Analysis of structures and mechanisms for disseminating the data which authorities require to ensure that the directive on cultural property is being enforced”, (2004 Report and 2007 Report).

This inadequate system of controls at the external borders of the European Union and the failure to make contact with countries of origin when issuing export certificates can lead, in some instances, to critical situations. One case dealt with by the Borghese agency involved a picture stolen in France and the subject of an investigation in Germany which was successful in leaving Germany for the United States. It is interesting to note that the picture was considered by France to be a national treasure.

### **2.3.3.2. Lack of operational resources to cope with the complexity of the traffic**

The first obstacle is the lack of operational resources: there is some contradiction between national laws providing for the control of all exports of cultural goods to whatever destination - whether within or outside the European Union - and the customs service's very limited operational resources. It is obviously impossible to check everything and customs therefore practise targeted inspections:<sup>339</sup> small parcels (Italy, Romania), goods from war zones, risk areas, etc.

This difficulty is compounded by the diversity of fraud techniques, including:

- dividing up consignments to lessen the risk of interception;
- sending illicit goods concealed in lawful goods: for example, cultural objects hidden inside valueless items of furniture that have been declared; small objects hidden in large objects;
- hiding the real place of origin;
- lying about the nature and value of the cultural goods.<sup>340</sup>

One also needs to emphasise the difficulty of detecting such traffic because of its forms and nature:

- dispatches between private individuals;
- missing or false information (classification error).

These obstacles are particularly significant in the case of archaeological property in that it is impossible to protect property deriving from illicit excavations whose existence is unknown. In particular, it is impossible to identify the real origin of archaeological objects that may be situated in the territory of several States.

It is not uncommon for expert advice to be sought. French customs have established a network of experts who can be contacted rapidly.<sup>341</sup> Expert examination can be carried out during temporary seizure by customs in the case of doubts about the value or origin of a good. For example, Romanian interviewees

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<sup>339</sup> Example of the freight targeting cell at Roissy airport (France).

<sup>340</sup> Example: November 2005, in Montpellier (France) : 9523 archaeological and ethnographical objects imported by two Moroccan nationals, who declared 240 kilos of "personal effects" coming from Bamako (Mali), of which 163 were ordinary handicraft objects whereas the others came from illicit collections in several regions in Mali.

<sup>341</sup> If the expert cannot make the journey to see the object, a photo can be sent to the person initially.

report that customs officers contact the Ministry of Culture which sends them a list of authorized experts, who charge for giving their advice. The goods seized are sometimes returned to their owners without being examined because of the cost of expert opinion.<sup>342</sup>

The lack of exchanges of experience and expertise between Member States of the European Union has been identified as a problem (Lithuania, Estonia, Spain, Luxemburg). Given the specialized nature of the knowledge required to identify suspect objects, possibly of significant cultural value yet non-declared, custom services need training not only by experts in artworks and antiques but also by specialist colleagues with experience of customs work. The establishment of a European network of experts would also be beneficial.

Finally, reference was made on several occasions to delays in the transmission of information: for example, when a cultural good of great significance is stolen, customs are not systematically informed.

### **2.3.3.3. Lack of cooperation between the customs authorities**

As previously noted, certificates are issued by the State in which the goodst is in transit. Customs in the State concerned do not systematically undertake a detailed examination and do not cooperate with customs in the country of origin. For example, a stolen work of art placed on sale in Switzerland was the subject of criminal proceedings in France, in liaison with the Swiss authorities. However, the picture was finally redirected through Germany for lack of sufficient evidence to pursue the enquiry.

The filters prescribed by national and community legislation could therefore be made more effective if administrative cooperation were encouraged. Under Part II “Administrative cooperation”, Article 6 of the regulation of 9 December 1992, currently Council Regulation (EC) No 116/2009 of 18 December 2008, provides that Member States “shall take the necessary steps to establish, in the context of their mutual relations, cooperation...”.<sup>343</sup> This obligation to cooperate does not seem to be sufficiently reflected in official practice.

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<sup>342</sup> Expert opinion is not chargeable to all customs services. In France, it is free of charge to customs (Decree No. 89-315 of 11 May 1989).

<sup>343</sup> Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods (Official Journal L 395 of 31.12.1992, p. 1,) repealed and replaced by Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal L 39 of 10.2.2009).

## **2.4. Seizure of goods held illicitly (from the criminal standpoint)**

### **2.4.1. Seizure of cultural goods of doubtful origin as a preliminary step to restitution**

#### **2.4.1.1. Usefulness of seizure as a preliminary step to restitution**

In the case of doubt about the origin of cultural goods placed on the market, it is useful to sequester it until any ambiguities have been resolved so as to prevent it from disappearing. However, judicial organization of the seizure of movable cultural goods can be problematic because of the international nature of the market, its rules of confidentiality and the very brief space of time in which action has to be taken.

#### **2.4.1.2. Lack of cooperation between judicial authorities with regard to international criminal seizures**

The seizure of cultural goods of illicit provenance is a way of preventing its circulation and, if the circumstances are all favourable, returning it to its owner. However, the seizure procedure can be complex when a number of countries are involved. At the Community level, several instruments are available, such as the European warrant<sup>344</sup> as well as the freezing of assets and evidence,<sup>345</sup> but these Community provisions have been very little used in the field of cultural property.

At the international level, machinery for police cooperation in criminal matters, particularly through INTERPOL, is very useful so long as cooperation between the legal authorities can be effective very rapidly. It has been observed in practice that coordination and cooperation between judicial authorities, through the execution of letters rogatory ordered by an investigating judge or through international criminal cooperation, is essential. For example, when a picture stolen in France reappeared on the Swiss market, the Swiss authorities were able to seize the good in their national territory through the international criminal cooperation machinery. However, a “lack of interest in pursuing the matter on the part of the French authorities” obliged the Swiss authorities to release the seized item. Similarly, a seizure in Germany of an item stolen in France, via international criminal cooperation, was unsuccessful because of delays : the item had already left Germany for the United States. These cases highlight the need for machinery for judicial cooperation between Member States to be activated rapidly in organizing the seizure of cultural goods.

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<sup>344</sup> Transposed in France in Article 695-11 of the Code of Criminal Procedure.

<sup>345</sup> Transposed in France in Article 695-9-1 of the Code of Criminal Procedure.



## 2.5. Restitution of illicit cultural goods

### 2.5.1. Legal obstacles – Difficulties in applying the UNESCO and UNIDROIT Conventions and European directive 97/3/CEE of 15 March 1993

Since the end of the 1990s, we have seen the emergence of a practice of “voluntary” restitutions facilitated by the birth a moral duty of return,<sup>346</sup> which has been accompanied by the development of solutions deriving from methods of alternative conflict resolution in the domain of cultural property.

However, in the numerous cases in which the judicial path continues to be pursued, the parties find themselves confronted by the traditional problems of such proceedings, including cost, the difficulty of producing evidence as to the origin of the property and, finally the choice between civil and criminal proceedings.<sup>347</sup>

In the case of criminal proceedings, the difficulties relate in particular to classification of the offence, the time limit for bringing an action and the production of evidence showing knowledge of fraudulent origin. The advantages of criminal proceedings lie in the scale of the investigative resources at the disposal of the judicial authorities, who bear the cost of the investigations. However, it should be stressed that the decision as to whether or not to prosecute rests with the prosecution service. When the plaintiff makes a claim in a civil court for the return of cultural goods, it is for the person concerned to provide proof of ownership. Yet, in civil law countries, the possession of movable goods confers on the possessor a legal presumption of ownership that the person disputing ownership must contest. The cost of the proceedings is borne exclusively by the parties concerned and when the contested good is in a foreign country the plaintiff must pursue his claim in the courts of the country in which it is situated.

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in 1970, stresses the importance for States Parties of taking measures to facilitate the restitution of stolen or illicitly exported cultural property. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted in Rome in 1995, is specifically concerned with facilitating the restitution and return of cultural objects. The European Directive of 15 March 1993, for its part, lays down the conditions for the restitution of national treasures between Member States. In practice, however, the application of these instruments poses numerous problems.

#### 2.5.1.1. The UNESCO Convention

The failure to integrate the provisions of the UNESCO Convention in national legal systems and the reservations expressed by many States to the UNIDROIT

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<sup>346</sup> Elazer Barkan, “Making Amends: A New International Morality?” in *Witness to history: a compendium of documents and writings on the return of cultural objects*, UNESCO, 2011, p. 78-94

<sup>347</sup> N. Palmer, “Litigation: The Best Remedy?” in *Witness to history, Ibid.*, pp. 358-368

Convention constitute the main legal obstacles to application of the machinery designed to facilitate the restitution and return of cultural property. The 1970 UNESCO Convention currently comprises some 120 States Parties. This Convention provides for the control of exports and seeks to facilitate the restitution of both stolen<sup>348</sup> and illicitly exported<sup>349</sup> property. However, the application of these provisions requires that they be integrated by Member States in their national legislation. Yet Switzerland and Greece are among the few States who have truly implemented them.<sup>350</sup> This failure to implement constitutes an obstacle to their application with regard to restitution and creates a legal vacuum in this domain. For example, in 2004 the Paris Appeal Court rejected a claim by the State of Nigeria, based on the provisions of Article 13 of the 1970 Convention, for the return of the Nok statues exported illicitly from its territory by a French antique dealer, arguing that: “the provisions of the Convention on Cultural Property are not directly applicable in the domestic legal system”.<sup>351</sup> Indeed, France, which ratified the UNESCO Convention in 1997, has not incorporated the Convention’s provisions in domestic law.

On the other hand, the Court of Appeal of England and Wales, in its decision of 21 December 2007 in *Government of the Islamic Republic of Iran versus The Barakat Gallery Limited*, recognized the application of Iranian public law and national legislation on protection of the cultural heritage. The Court of Appeal recognized Iran’s rightful ownership of illegally excavated antiquities and authorized the restitution of the Iranian antiquities.<sup>352</sup> It is interesting to note that the Appeal Court judges justified this recognition of the public law of a third State by referring to the principles of the UNESCO Convention, the UNIDROIT Convention and the European Directive. It argued that even if some of those instruments have no direct effect in domestic law, they nevertheless indicate the willingness of the United Kingdom to collaborate in the case of theft or illicit export and therefore deserve to be taken into account.<sup>353</sup>

Other archaeological items from Iran, more particularly from the Khurvin Necropolis, acquired by Madame Wolfcarius in Iran in the 1950s and exported in 1965 without authorization, have been the subject of an Iranian demand for restitution to the Belgian courts since 1981.<sup>354</sup> The property was impounded in 1981

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<sup>348</sup> Article 7(b)(ii) of the UNESCO Convention.

<sup>349</sup> Article 13(b) and (c) of the UNESCO Convention.

<sup>350</sup> Switzerland: Law on the International Transfer of Cultural Property (LTBC) of 3 May 2005; Greece: Presidential Decree No. 3348/2005.

<sup>351</sup> Paris Appeal Court, 5 April 2004, No. 2002/09897, Federal Republic of Nigeria v. Alain de Montbrison, *JurisData* No. 2004-238340, and Court of Cassation, 1ère civ., 20 Sept. 2006, No. 04-15.599, *JurisData* No. 2006-034988; J.-M. Schmidt, “Statues nok: cynisme ou rappel?”, *Journal des Arts*, No. 256, 30 March 2007.

<sup>352</sup> D. Fincham, “Iran v. Barakat: Iran Wins Barakat Appeal”, in *Witnesses to History*, p. 388-390.

<sup>353</sup> *Iran v. Barakat Galleries Ltd* [2007], EWCA (Ethiopian Wildlife Conservation Authority) Civ 1374 (CA).

<sup>354</sup> Lyndel V. Prott, *Witnesses to History*, *op. cit.*, p. 406.

at a time when Belgium had not yet ratified the UNESCO Convention. As of 2011, the affair has still not been resolved although in 1985 it was brought to the attention of the UNESCO Intergovernmental Committee on Return and Restitution, which is waiting until domestic remedies have been exhausted before taking it up.

Another difficulty, even when States have implemented the 1970 Convention, can arise from the refusal to apply foreign public law, a problem encountered again and again in national legal rulings. The English Barakat case, referred to above, remains a notable exception. In another decision, this time in Switzerland, the Federal Court refused to take account of an Indian public law ruling incriminating the export of two ancient gold coins on the grounds that an international agreement alone could oblige a State to apply the public law of another State, despite ratification of the UNESCO Convention by both India and Switzerland.<sup>355</sup>

The provisions of the 1970 Convention seem to be applied more in cases of restitution through diplomatic channels: on 14 December 2009, France returned to Egypt which was claiming them five mural paintings deriving from the Tetiky tomb that the Louvre had acquired between 2002 and 2003 without knowing that they had been illicitly exported. These works were delisted and struck off the inventory of the Louvre's Department of Antiquities by Ministerial Decree of 5 November 2009.<sup>356</sup> The press release by the Ministry of Culture stated that the restitution to the Egyptian State was "in application of the Convention of 14 November 1970".<sup>357</sup>

These differences of approach and the clear refusal of some national courts to apply the provisions of the Convention create a legal uncertainty that clearly hinders the effective treatment of the question of restitutions.

#### **2.5.1.2. The UNIDROIT Convention**

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects is an international instrument that complements the 1970 UNESCO Convention since it establishes genuine restitution machinery and defines several fundamental notions such as "good faith" and "due diligence". However, it has been ratified by no more than 32 countries including only 11 Member States, which is a clear legal obstacle to the return and restitution of cultural objects. The UNIDROIT Convention establishes a principle providing for the restitution and return of any stolen<sup>358</sup> or illegally exported<sup>359</sup> cultural object at the request of a State or an individual irrespectively, including the good faith possessor, who shall however be entitled to the payment of fair and reasonable compensation.

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<sup>355</sup> Decree of the Swiss Federal Court of 8 April 2005, ATF III 418, JdT 2006 I 63.

<sup>356</sup> *Official Journal* 10 November 2009, No. 261, p. 457.

<sup>357</sup> Press release of the Ministry of Culture of 14 December 2009.

<sup>358</sup> Article 3 of the UNIDROIT Convention.

<sup>359</sup> Article 5 of the UNIDROIT Convention.

This principle of restitution constitutes a means of combating trafficking. However, the failure to ratify the 1995 UNIDROIT Convention is clearly a legal obstacle to the harmonization of legislation concerning acquisitive prescription, which is characterized by particularly marked differences between civil law countries and common law countries: whereas the balance of interests leans towards the possessor in good faith in civil law countries, common law legal systems tend to protect the owner in accordance with the rule *nemo dat quod non habet*.<sup>360</sup>

### 2.5.1.3. The European Directive

The content of Council Directive 97/3/CEE of 15 March 1993,<sup>361</sup> concerning the return of cultural objects unlawfully removed from the territory of a Member State, draws substantially on the preparatory work for the 1995 UNIDROIT Convention. It is interesting to note that ratification of the UNIDROIT Convention by Member States does not exclude application of the Directive in their mutual relations. The UNIDROIT Convention contains a disconnection clause that enables Member States that have ratified the text to assert the primacy of the Directive in intercommunity relations.<sup>362</sup>

The common objective of Council Directive 93/7/EEC of 15 March 1993 and Council Regulation (EEC) No. 3911/92 of 9 December 1992,<sup>363</sup> replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods, is to reconcile the principle of the free movement of cultural goods with the protection of national treasures.<sup>364</sup> Thus the Directive of 15 March 1993 is not in itself an instrument for combating trafficking but rather a tool to facilitate the return of certain cultural goods illegally removed from the territory of a Member State, thereby contributing to safeguarding the national cultural heritage. By discouraging illegal export through the possibility of restitution, the Directive is designed to have a dissuasive and therefore preventive effect.<sup>365</sup> However, between 2004 and 2007, only eight judicial claims for restitution were brought before the courts on the basis of Article 5 of the 1993 Directive.<sup>366</sup>

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<sup>360</sup> *Nemo plus juris in alium transferre potestquam ipse habet* (No person may transfer to another more rights than he himself possesses).

<sup>361</sup> Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, (*OJ* L 74 of 27.3.1993, p. 74), modified by Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997, (*OJ* L 60 of 1.3.1997, p. 59-60), and by Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001, (*OJ* L 187 of 10.7.2001, p. 43-44).

<sup>362</sup> Article 13 of the UNIDROIT Convention.

<sup>363</sup> Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods (Official Journal L 395 of 31.12.1992, p. 1) rescinded and replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal L 39 of 10.2.2009).

<sup>364</sup> See Articles 28 to 30 of the EC Treaty and the judgment of the Court of Justice of 10 December 1968, *Commission v. Italy*, (7/68, Reports. p. 617), quoted in the 2000 Report, p. 3.

<sup>365</sup> 2009 Report, p. 9.

<sup>366</sup> *Ibid.*, p. 6.

The conditions for the exercise of the Directive of 15 March 1993 are restrictive and its application is limited to claims for restitution between States, which explains why the provision has been little used. In addition, the Directive applies only to goods unlawfully removed from the territory of a Member State after 1 January 1993, and its scope of application is restricted to the cultural goods listed in the annex to the Directive and declared national treasures of artistic, historical or archaeological value in accordance with the laws and procedures of the Member States.<sup>367</sup> During the discussions at the “museums and administrations” workshop, the participants, mainly curators, stated that the 1993 Directive was not usable in its current state, particularly because of the time limit for instituting proceedings, which is one year from the date when the State making the claim became aware of the identity of the possessor and of the place where the cultural good was located.

The restitution procedure under the Directive is regarded as excessively cumbersome, which is the reason why it is little used and why Member States prefer to have recourse to amicable settlement procedures, for which the Directive moreover makes provision.<sup>368</sup>

### **2.5.2. Technical obstacles**

The main technical difficulty encountered with regard to restitution concerns the updating of databases. The need for information contained in the databases to be reliable has already been emphasized. Reference to the restitution of an item of property which has been declared missing is essential to the reliability of the information contained in the database. Thought therefore needs to be given to ways of ensuring that the successful conclusion of a procedure for restitution of a cultural good should automatically be brought to the attention of the competent authorities so that it can be included in databases of missing (and found) goods.

### **2.5.3. Operational obstacles**

#### **2.5.3.1. Alerting market players to the fact of restitution**

Media hype surrounding high-profile cases of restitution in recent years has added to the confusion regarding their legitimacy. Replies on this question by art market players reveal that awareness of the importance of restitution for combating trafficking in cultural goods depends on the category of art market player. In the case of the restitution of stolen goods, we find that over three quarters of the market participants questioned have been victims of theft.<sup>369</sup> Half of the collectors questioned were ready to advance the cost of legal proceedings in order to recover

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<sup>367</sup> Article 1 of Council Directive 93/7/EEC of 15 March 1993.

<sup>368</sup> Article 1 of Council Directive 93/7/EEC of 15 March 1993.

<sup>369</sup> “Art market” questionnaire, Part III, Question 1: “Have you ever been confronted by the theft or disappearance of a work of art in your possession?”.

the good, particularly when emotionally attached to it.<sup>370</sup> As to the other half, the cost of claim proceedings is a disincentive to legal action, the priority being to recover the value of the good from the insurance company. This is the same for professionals, experts, auction houses and museums alike. Just under half the professionals are ready to advance the cost of legal proceedings, so long as it is proportional to the value of the good concerned. Professionals seem more optimistic than collectors concerning the possibility of successful legal action for restitution. Almost all the market players questioned had no opinion concerning the choice of legal proceedings, whether civil or criminal. The few who did express an opinion saw action in the criminal court as the only course available to them.<sup>371</sup>

It is interesting to note that the idea of compensating the good faith possessor in return for restitution of the goods is unfavourably received by 50% of the market players questioned, particularly if they are owners.<sup>372</sup> The owner of the rediscovered goods is unhappy at having to compensate the good faith possessor in a “fair and reasonable” manner. This compensation of the good faith possessor for which both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention provide is not yet understood by the market players, who are not aware that the principle of restitution protects them and enables them to avoid the effects of acquisitive prescription.

### **2.5.3.2. Issue of compliance with good practices with regard to restitution**

Good practices have a key role to play in preventing and combating trafficking in cultural goods. All participants in the art market should incorporate the concept in their daily practice.

We have already seen the extent to which the formulation and observance of good practices with regard to acquisition can help to prevent illegal trafficking.<sup>373</sup> Just as the observance of good practices is essential to verification prior to a purchase, so it is fundamental with regard to restitution.

Some groups of museums have set out in the form of recommendations good practices applicable to restitution. In the United Kingdom, for example, the Museums and Galleries Commission published in 2000 a document entitled “*Restitution and repatriation: Guidelines for good practices*”.<sup>374</sup> A work published by the French Ministry of Culture and Communication and placed online in 2010, *Le guide*

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<sup>370</sup> “Art market” questionnaire, Part III, Question 4: “Would you be ready to commit the cost of legal proceeding to achieve this aim and, if so, to what amount in relation to the value of the work of art?”.

<sup>371</sup> “Art market” questionnaire, Part III, Question 5: “Would you favour an action in the civil court or the criminal court?”.

<sup>372</sup> “Art market” questionnaire, Part III, Question 6: “To obtain restitution of the work of art, would you be prepared to compensate the good faith possessor?”.

<sup>373</sup> See above.

<sup>374</sup> Museum and Galleries Commission, *Restitution and repatriation: Guidelines for good practices*, (MGC Guidelines for good practices), London, 2000, in *Witnesses to History, op.cit.*, pp. 130-149.

*sécurité des biens culturels*, likewise provides guidelines for initiating a procedure for restitution of a stolen good.<sup>375</sup> The American Association of Museums (AAM) has published a set of good practices concerning goods looted during the Second World War: *Unlawful Appropriation of goods during the Nazi Era*.<sup>376</sup> Finally, in an initiative constituting a first in Europe, the city of Geneva set up in 2009 a city museums ethics committee. As recently indicated by the Administrative Councillor in charge of culture in Geneva, this committee “is responsible for evaluating the status of collections, particularly when their provenance is debatable”.<sup>377</sup>

The “museums and administrations” workshop helped to highlight the difficulties encountered by museums whether in a position of claimant or whether facing a claim for restitution. In both cases, recourse to good practices proves effective.

## 2.6. Endangered heritage

Certain categories of the movable heritage are particularly vulnerable to dispersion and thereby to loss. This notion of loss should be understood as the disappearance of the heritage to the detriment of the community; loss therefore does not simply mean the destruction of a work but also its appropriation or wrongful possession as the result of theft or deception.

But the notion of endangered heritage is not one expressly identified in national legislation and defined as such on the basis of increased exposure to loss or dispersion, thereby justifying a set of special rules. However, this notion is implicitly present in national legislation providing for specific measures to strengthen the protection of particular categories of heritage.

Risk is also a plural notion, designating both the nature of certain goods and the context of disturbance and crisis to which a State may be subject:

- Certain cultural goods are by their nature directly exposed to this risk. This is the case in particular with archaeological heritage, religious artefacts and privately owned heritage items;
- Crisis or conflict situations and wars increase the risk of trafficking in property that is by its nature particularly vulnerable to such risk; such situations are also liable to encourage and provoke illegal trafficking in that cultural goods which would normally be less prone to the pressure of looting.

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<sup>375</sup> *Guide Sécurité des biens culturels, de la prévention à la restitution de l'objet volé*, Ministry of Culture and Communication, Ministère de la Culture et de la Communication, Heritage Directorate, p. 54 (on the website [www.culture.gouv.fr](http://www.culture.gouv.fr)).

<sup>376</sup> American Association of Museums (AAM), Accreditation Commission Statement on Best Practice, *Unlawful Appropriation of Objects During the Nazi Era*, 5 April 2006.

<sup>377</sup> Reply by the Administrative Council to the written question of 23 March 2011 (QE-357), Geneva City Council, 18 May 2011.

## 2.6.1. Categories of cultural goods vulnerable to illicit trafficking

### 2.6.1.1. The archaeological heritage

Archaeological objects come to be known only as the result of a process leading to their discovery, deliberate or otherwise, or of a special methodology usually described as excavation. Excluding excavation, discovery of the archaeological heritage can be more sudden, ranging from chance finds – by nature non-intentional – to looting, which is a source of illicit trafficking in particular. Excavation is regulated by national laws based on a common provision subordinating research to a procedure of prior authorization for anyone wishing to undertake archaeological excavations or to explore an archaeological deposit scientifically. It should be noted that this form of regulation of archaeological research involving prior administrative authorization applies equally to land excavations and to the study or exploitation of the underwater heritage, whether in inland waters or in the territorial waters of seaboard States.<sup>378</sup>

Chance discoveries are subject to a form of regulation, for which legal provision is usually made through a system whereby the person making the chance discovery is responsible for reporting it. The consequences of this reporting obligation are not however the same in every country as regards the rights of the person making the discovery. Depending on the system, the person may be entitled to a reward varying in amount according to the relevant national rules. The purpose of the reward is to encourage the reporting of such discoveries.

National legal systems for protecting the archaeological heritage are generally organized along these two main lines, involving the regulation of research and the monitoring of chance finds. The essential purpose of this dual provision is to prevent loss of knowledge of the buried heritage, which underpins the identity of the State and embodies common values on which the history of a people is built. These attributes justify the legal prerogatives granted to the State authorities in regulating all operations and activities affecting or likely to affect this heritage.

Breaches of these legal provisions defining the prerogatives of the State in regulating the archaeological heritage constitute the core offences at the root of trafficking in archaeological goods. In this regard, looting amounts to non-authorized archaeological excavation, which goes on to produce a chain of offences extending from theft to illegal export.

The main characteristic of looting, like other form of disclosure of the buried heritage, is to uncover cultural goods not previously known, identified, located, logged or inventoried – all elements conducive to trafficking. An aggravating factor

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<sup>378</sup> On the specific problem posed by this heritage, see M. L'Hour, at the round table on the security of cultural property held on 20 December 2007, organized jointly by the French Ministries of Culture and Justice (unpublished, press kit available at: [www.culture.gouv.fr/culture/actualites/index-biensculturels.htm](http://www.culture.gouv.fr/culture/actualites/index-biensculturels.htm)).



here is the use of metal detectors, which are regulated in different ways in the various European countries. Illegal trafficking in looted archaeological property therefore poses major difficulties with regard to establishing the provenance of the object concerned. A scheme for reporting such discoveries is the only way of strengthening the fight against looting and regulating the circulation of this property. However, a monitoring scheme of this kind is easily circumvented, and its effectiveness from a legal standpoint remains debatable (England and Wales, France).

The same is true of the underwater heritage, where discoveries are particularly difficult to monitor since the maritime areas subject to state control are vast, the shape of the coastline is complex and marine activities are very varied (Greece, France, Spain, Italy, Malta).

The legal rules in force in Member States reveal a discrepancy between the prerogatives of the State in monitoring archaeological research and regulating all activities liable to affect it and the rules and regulations governing the ownership of movable property extracted from the subsoil.

### **2.6.1.2. The cultural heritage and private property**

Religious artefacts and the privately owned cultural chattels – categories that are never or rarely inventoried - are also particularly vulnerable to illegal trafficking.

The preservation of privately owned heritage chattels and religious artefacts is closely linked to, not to say dependent on, control over its circulation, calling for inventory and identification mechanisms.

Such mechanisms form part of the obligations inherent in the protection of the heritage. The possession of cultural goods safeguarded by national legislation and recognized as part of the national heritage is therefore subject to instruments of control. However, outside the protected – and hence identified and listed – heritage, such control could not function in the absence of identification or prior knowledge. Public oversight of the conservation of this heritage presupposes the existence of an inventory.

Just as the archaeological heritage is particularly vulnerable to illegal trafficking because of the impossibility of identifying it before it is disclosed, so the private movable heritage and cultural heritage not protected by national legislation will be revealed by the owner only in the context of theft or an export declaration or request for authorization. From the standpoint of controlling the export of private or cultural movable goods, the effectiveness of the declaration or authorization request mechanism is therefore key to the system for protecting this heritage. In the case of religious objects such as icons, present in churches and monasteries, the risk is compounded by the lack of adequate security arrangements (Cyprus) as well as the scattered and isolated nature of such places of worship (Malta). Inventorying such goods may be made the responsibility of the religious authorities (Spain).

### 2.6.2. Crisis or conflict situations

While the risks affecting conservation and control of the archaeological, private movable and cultural heritage are shaped by lack of knowledge or prior inventory, crisis or conflict situations can seriously increase the risks of looting and dispersion, not only of this heritage but also of other categories of heritage, which outside these particular situations are usually better protected.

Crises, conflicts and wars entail, to varying degrees, a loss or reduction of supervision by the public authorities over the national heritage as a whole. While outstanding works are generally shielded, other cultural goods are exposed to illegal trafficking. Moreover, in particularly acute cases, the looting of national museums combined in some cases with the disappearance of the State apparatus will serve to boost illegal trafficking in cultural goods.

From this point of view, the effectiveness of international law can appear relative. The prohibition on looting, like the immunity enjoyed by cultural goods under the Hague Convention, which has codified the law of war since 1899 and is today incorporated in international customary law, today struggle to achieve their full effects. There has however been a notable increase in the effectiveness of the branch of international law dedicated to preventing, and curbing, attacks on the cultural heritage. Significant in this regard are the sentences handed down by the International Criminal Tribunal for the Former Yugoslavia (ICTY) against military officials who deliberately directed offensives against the Old City of Dubrovnik and Sarajevo as well as Mostar and its bridge.

The offence behind the looting, is twofold. It results not only from the seizure of goods by theft or by any other offence of dispossession punishable under domestic law, but also from breaches of public international law, whether it be customary law prohibiting looting and according immunity to cultural goods, particularly privately owned cultural goods, or the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in 1954. It is also worth noting that Protocols I and II (1977) to the 1949 Geneva Conventions, enshrining the contemporary principles of international humanitarian law, reaffirm these international precepts concerning the protection of cultural property – whether international or otherwise – in times of crisis or conflict.

In times of crisis or conflict, museums can be confronted by situations involving the acquisition of goods from conflict areas, in which the presumption of looting or fraudulent removal is strong given the disturbances characterizing these periods. In such circumstances, a distinction must be made between acquisition – in the strict sense – and temporary deposit. Museums do not consider that the acquisition of objects can be guided by a wish to remove an archaeological item particularly vulnerable to looting from the marketplace in order to facilitate return to its country of origin. This issue can even be regarded very critically: an object cannot be acquired with a view to its subsequent restitution (Germany). The Code of Ethics of

the International Council of Museums (ICOM) provides for the possibility of temporary deposit under the heading “repositories of last resort”.

Article 2.11 of the Code states that “Nothing in this Code of Ethics should prevent a museum from acting as an authorized repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility”. This notion of repositories of last resort, authorizing return to the country of origin when the crisis or conflict is over, should be viewed in conjunction with Article 6.4 of the Code, which prohibits the acquisition of cultural property coming from an occupied country. The Article provides that “Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respect fully all laws and Conventions that regulate the import, export and transfer of cultural or natural materials”.

### **2.6.3. Special features of the endangered heritage, and specific difficulties**

The main characteristic of the endangered heritage lies in the lack of identification and inventory. The traceability of this property is therefore an essential element in preventing illegal trafficking.

The provenance of the object, in particular relevant documentation on its origins, constitutes the basic information for determining whether its circulation is legal or illegal.

#### **2.6.3.1. Archaeological objects and collections**

In the case of archaeological objects and collections, illegal excavations, unreported chance discoveries and the looting of sites are the main source of international trafficking. Data on the origin of the property will be available in the case of items deriving from ancient collections or recent excavations. However, the lack of relevant documentation on the discovery of the object and on its subsequent history does not allow us to conclude that the property is illicit. The collection may have ancient origins, have been little or never studied, be undocumented, and may not have been described or displayed prior to being placed on the market. Moreover, it is always possible to construct a false genealogy testifying to the object’s provenance.

In States whose domestic law provides for the public ownership of buried archaeological heritage, the authorities can assert their legal rights over dispersed collections. European Union law, for example, enables its Member States to have recourse to restitution machinery. Conversely, non-European Union States that are the victims of looting will be hard pressed to assert their rights of ownership over objects circulating illegally, except if the court authorities in the country of destination agree to apply the law of the country of origin. It should moreover be noted that recourse can no longer be had to the machinery under the 1970 UNESCO Convention, which no longer regulates relations between States and cannot be invoked against an individual who has in good faith acquired

archaeological collections that are the product of looting in a country outside the European Union.<sup>379</sup>

The situation will be even more difficult in States whose domestic law gives to the owner of the soil the right of ownership over archaeological objects buried in the subsoil. In such a case, the State as guarantor of the scientific value of the archaeological heritage and the common value of these remains for the study and understanding of history cannot assert ownership based solely on these functions and prerogatives. The legal provisions governing the ownership of buried objects thus largely determine possible responses to the dispersion of the archaeological heritage and the illegal movement of such collections.

### **2.6.3.2. Religious heritage and private property**

Religious or private property forming part of the heritage is particularly vulnerable to trafficking and to the difficulty of mobilizing legal instruments to determine whether it is circulating legally or illegally in cases where it has not been inventoried or documented. Information on the provenance of the goods will depend on the measures taken by the owner or possessor, always provided the theft has been noticed.

This category of goods shares some features with ancient archaeological collections. Religious artefacts and private collections are by nature ancient in origin and may have been little documented or not at all and may not have been described or displayed prior to being placed on the market. Moreover, it is always possible to establish a fictitious genealogy to attest to the origin of a collection.

Unlike looted archaeological property, where the theft will be hard to characterize if the property was unknown before being brought to light and remains unknown to the owner dispossessed by the act of looting, the illegal possession of religious or private property may have been the subject of a declaration. These objects were at least known to their owner, even indexed to varying degrees before their dispersion.

In both cases, however, it is the fact of being placed on the market that will indicate their disappearance from their place of origin, and possibly the theft behind the trafficking. This point is all the more important since offences involving these cultural objects are not always recognized by the public as genuine offences. In this regard, there is insufficient recognition of the cultural significance of such property (Austria).

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<sup>379</sup> Appeal Court Paris, 5 April 2004, No. 2002/09897, Federal Republic of Nigeria v. Alain de Montbrison, Jurisdata No. 2004-238340 and Cassation 1st civ., 20 September 2006, No. 04-15.599, Jurisdata No. 2006-034988.

## **III. Recommendations**



### III. Proposals and recommendations

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Some progress has been made towards approximating legislation.

The practical, technical and operational dimension is obviously very important.

Moreover, the range of possible changes and corrective mechanisms extends from simple flow of information all the way to unification of rules, the furthest point on the scale, which obviously cannot meet with success in every field. The latter option must be centred on a common set of rules, which raises problems with regard to jurisdiction. Such an approach implies that some powers to combat trafficking are vested in the European Union or that we are talking about shared powers, which would mean thinking about how to implement the subsidiarity principle. Further progress may also be made through approximation of laws using a bottom-up approach.

When seeking answers, account must be taken of the different approaches to these issues by today's main legal systems (common law, civil law and mixed systems), which diverge both with regard to civil law (e.g. limitation periods and the concept of good faith) and criminal law and with regard to national institutional frameworks and decision-making structures.

Making recommendations entails clarifying the right level of regulation in the light of what is technically possible.

The following range of action will be considered:

- Unification of rules (e.g. for criminal procedure but also for promoting existing international instruments);
- Harmonization of rules;
- Approximation of laws and ethical standards (e.g. for criminal offences or treatment of heritage at risk; uniform laws);
- Coordination (monitoring systems);
- Knowledge and information flow (definitions, particularly of protected cultural goods).

#### 1. BRIEF PRESENTATION

##### **Proposal for a European Union programme of action in the prevention and combating of the trafficking in cultural goods**

This question must necessarily be dealt with in a global context, closely linked to actions being taken at the international level, in particular by such institutions as UNESCO, UNIDROIT, INTERPOL and ICOM. The issue, among other things, is to ensure that the European Union is an effective lever or hub in this project, hence

the importance of planning the development of European Union actions in coordination with those that already exist.

The areas in which the Union might engage should be identified. The current state of play, and the problems encountered by the actors and institutions directly concerned by the issue of trafficking in cultural goods, suggest a number of priority objectives both in terms of prevention and penalties, which should lead, on the one hand, to regulation of the art market and on the other, to better protection of the heritage of States, especially national treasures within the meaning of Article 36 of the Treaty on the Functioning of the European Union (TFEU).

This project must form part of a system that ensures overall consistency among the various actions to be undertaken, and dialogue with other bodies, including at the international level. With a view to drawing up a “European strategy that makes culture a consistent and systematic part of the external relations of the Union and contributes to the complementarity of actions of the Union with those of its Member States”, the project of more effectively combating trafficking in cultural goods at the European level could be based on certain key provisions, from which a number of actions could be derived. The actions that the Union might take, in the form of binding legal or technical instruments (regulations, directives and accreditation techniques) or non-binding ones (Council recommendations, conclusions, etc.) are presented here.

### 1.1. Key provisions

#### **Recommendation No. 1**

Creation of a **cross-cutting coordination department at European level.**

Proper coordination of the various types of action pursued at international, European and Member-State levels is a major area of work, as was emphasized by all the stakeholders surveyed. Developing European expertise in this field entails setting up a cross-cutting department on a permanent basis (a number of the Commission’s Directorates General may be involved in combating trafficking in cultural goods: Home Affairs, Education and Culture, Enterprise and Industry, Taxation and Customs Union, and Internal Market and Services). This department might be given multiple responsibilities and take Article 74 TFEU (administrative cooperation) as its legal basis. Its object would be to foster the emergence of a common culture and create a genuine network by facilitating contact between the persons and services concerned and developing mutual trust.

The survey of Member States conducted for this study has clearly demonstrated the value of considering the question of trafficking in cultural goods within cross-cutting bodies, a method of organization which has proved its relevance at the national level and which the Commission should also adopt if it is to act satisfactorily as a coordinator and hub for the European area. With regard to this



key function of coordination, the conclusions of the Council and of the representatives of the governments of the Member States, meeting within the Council, on the Work Plan for Culture 2011-2014 state that “the Commission will intensify collaboration between its services”.<sup>380</sup>

The responsibilities of this department could be broken down into different sections and should be the following:

- In addition to acting as an **advisory body** to Member States, it could devise a **coordinated approach** to combating trafficking, working together with those responsible nationally in the specialist investigation services that designate points of contact.<sup>381</sup> It would have the role of establishing contacts, acting as intermediary and sharing good practices, with Europol continuing in the role of coordinating investigations.
- It would be the **management and supervisory** body for the **European point of single contact** for information, cooperation, surveillance and alerts on trafficking in cultural goods (see below). It could manage or supervise the **training** of officials in cultural administration, museum curators and art dealers.
- It could also **represent the Union in the competent international bodies** and serve as a link to UNESCO for any issues concerning the implementation of the 1970 UNESCO Convention in the Member States.
- It could act to provide **alternative dispute resolution**, through conciliation, mediation or arbitration (see Article 81.2 (g) TFEU) by promoting these tools.
- It might manage a European art market observatory bringing together the various players to exchange data and information.

### Recommendation No. 2

#### Creation of a **European web portal**.

The dual function of the European web portal would be to strengthen inter-institutional cooperation and improve the level and quality of dissemination and sharing of the information needed by the different actors.<sup>382</sup> Putting this technical

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<sup>380</sup> Conclusions of the Council and of the Representatives of the Governments of the Member States, 2010/C 325/01.

<sup>381</sup> One example is the anti-trafficking coordinator, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings, Article 20.

<sup>382</sup> The recommendation to have a single point of contact providing more fluid and accessible information is a recurring theme, and identified as desirable by all the actors in the market, institutions and individuals: see, especially, OMC Final Report, p. 8, which recommends the setting up of a database or the creation of a European platform devoted to the lawful movement of cultural property.

tool in place fulfils the objective not only of developing the exchange of data and information at the European and international levels but also of ensuring better coordination and greater exchange of good practices between the competent authorities and the services concerned at national and European level. It is imperative that this institution is designed in liaison with UNESCO and INTERPOL and that it should dovetail with their databases. There can be no question of duplicating those tools.

This platform would consist of a **public portal** for individuals and actors in the art market and an **institutional portal** dedicated to the services and administrations concerned with the prevention and combating of trafficking in cultural goods. It would provide access to relevant websites (national and international), making it easier to access information and offering relevant technical tools and forms (for inventorying, applying for certificates and licences, declaring archaeological sites and allowing buyers to verify the origins of a cultural good).

On the professional side, the purpose of the platform is to provide a cooperative tool for information and declarations and support the specialist bodies combating trafficking in cultural goods.

### Recommendation No. 3

Endorsement of **international conventions on culture**.

The European Union has ratified the Convention on the Protection and Promotion of the Diversity of Cultural Expressions,<sup>383</sup> the first international instrument to recognize the dual economic and cultural nature of cultural goods, which “must therefore not be treated as solely having commercial value”. The Council is here among those to have called attention to the need to fight trafficking in cultural goods. A number of recommendations could draw upon the UNESCO and UNIDROIT international conventions:

- **States** that have not already done so should **ratify the 1970 UNESCO Convention** (five States are in this category: Austria, Ireland, Latvia, Luxembourg and Malta) and ratify the 1995 **UNIDROIT Convention**.
- **States should pass laws to incorporate** the 1970 Convention. There is still progress to be made in implementing the Convention, as was unanimously pointed out during the celebration of the fortieth anniversary of the Convention at UNESCO in 2011.
- The European Union might start the process of ratification of the **1970 UNESCO Convention** by the European Union. This prospective work is addressed from a number of standpoints: whether it is possible, in the current state of international law, for a regional organization to commit itself to this

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<sup>383</sup> Signed on 20 October 2005.

ratification process, whether it is useful and legitimate for the European Union to ratify it, directly or indirectly, and what is its added value in the deployment of tools for preventing and combating trafficking. Article 216 TFEU permits ratification of international conventions within the European Union's fields of competence and could be taken in conjunction with Article 207 TFEU on the common commercial policy. It is also the basis for Council Regulation (EC) No. 116/2009 establishing rules for the export of cultural goods to third countries.

### 1.2. Provisions by targeted objectives

A number of levers can be employed to achieve what have been identified as priority objectives (increased vigilance by those concerned, traceability, heavier penalties for trafficking, more training and cooperation, better knowledge of and dissemination of information on States' heritage, improved conditions for return of illicit goods, identification of heritage at risk). Some require new rules to be introduced into European Union law in several of the Union's fields of competence, primarily market regulation and criminal law. Member States must support this trend in their own fields of competence, since the need for alignment of systems and for convergent solutions has been held to be an important area of work. To this legal strand may be added the technical and operational strand, which has an important place in this study. A number of recommendations concern technical tools mainly for prevention (databases, inventories, due diligence, good practice) but also to support through institutional cooperation. Some of these tools must be introduced through a process of dialogue with the players concerned.

The role of the Union in preventing and combating trafficking is many-faceted. It especially concerns the activities of the art market.

While transparency in the market is obviously a goal internationally, the European Union can make a useful contribution to raising the standard in the European area, particularly by virtue of its competences in the field of market regulation on the basis of Article 114 TFEU. Fulfilling this objective means improving the traceability of cultural goods on the art market and increasing the level of vigilance among players in this market, whether private individuals or public institutions.

#### ⇒ **Increasing the level of vigilance**

To attain this goal it will be necessary to establish binding rules, especially regarding the requirement for due diligence, and to provide training and technical tools/documents (two key aspects) as well as, where appropriate, incentives designed with the players concerned. More specifically, in the Council conclusions on the Work Plan for Culture 2011-2014 it is suggested that an expert group should be established to propose, in cooperation with Member States, a "toolkit" including European good practice guidelines and a code of ethics on due diligence in the fight

against illicit trafficking in cultural goods.<sup>384</sup> A number of recommendations may be made along these lines:

#### **Recommendation No. 4**

Codification by Member States of the **due diligence obligation**.

Designed on the pattern of Article 4(4) of the UNIDROIT Convention,<sup>385</sup> this obligation could be integrated into a directive dedicated to the trafficking in cultural goods<sup>386</sup> on the basis of Article 114 TFEU.

- **Provision of a “provenance record”** accompanying the item, and containing certain information – a tool for ensuring the security of transactions - and of a **due diligence handbook** containing a list of the checks to be carried out at the time of acquisition.<sup>387</sup>
- Drafting of a **guide to interpreting the notion of good faith** for courts, giving the different standards and criteria usually met in the case of a good faith acquisition. It was not considered appropriate to set a uniform standard for the notion of good faith in acquisition, both because of the diversity among legal systems and, more fundamentally, because this should remain a generic notion.

#### **Recommendation No. 5**

Introduction at European Union level of **an obligation on online sales websites to provide information**.

A number of the elementary measures to check the growth in illicit sales of cultural goods on the Internet (suggested by the INTERPOL, UNESCO and ICOM group of experts, and drawn up following their annual meeting on 7 and 8 March 2006) could be taken up in the form of a Community rule, for example a requirement that all online sales websites publish a warning with a prescribed form of words. In codifying these tools, the Union would be acting fully within its role as a lever and a hub for concerted preventive action, on the basis of Article 114 TFEU and for the functioning of the internal market.

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<sup>384</sup> Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the Work Plan for Culture 2011-2014 (2010/C 325/01).

<sup>385</sup> See, as to this, Article 16 of the Swiss law implementing the 1970 UNESCO Convention (LTBC of 20 June 2003).

<sup>386</sup> The proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works contains a requirement to carry out a prior diligent search which might be taken as a model for European Union legislation, since the problem is very similar to the one with which we are concerned in that it involves combating unlawful use of works whose provenance has not been established.

<sup>387</sup> See Part III of this report for a detailed presentation of these tools.

### **Recommendation No. 6**

#### **Implementation of European training programmes.**

These programmes embodying the specific features of the European market (on the basis of Article 6 TFEU, which grants the Union power to coordinate and supplement continuing training) should enable those involved in combating trafficking to develop and improve their expertise. This training should be aimed at judges, police/customs, government administrations, and market players more generally. This request came up repeatedly in the various surveys. Where police training is concerned, the training work could be coordinated by the European coordination department (Rec. No. 1) and drawn up in liaison with the European Police College (CEPOL).<sup>388</sup> For judges, this training could be carried out in association with the European Judicial Network. The training should be organized in cooperation with INTERPOL, UNESCO and ICOM.

### **Recommendation No. 7**

#### **Introduction of a Euromuseum seal of approval.**

Stakeholders should be involved in discussions on standardization and certification of museums complying with norms relating to security and inventorying, and the duty of due diligence in acquisitions. European standards should be drawn up in liaison with ICOM (for example by requiring adoption of the ICOM *Code of Ethics* principles). The seal of approval could also determine the allocation of financial aid.

### **Recommendation No. 8**

#### **Institution of the status of Approved European Art Dealer.**

This matter should be considered with stakeholders (organizations representing the art market). It might be a voluntary certification process in conjunction with the adoption of an ethics charter the contents of which could be determined in consultation with the professional bodies. This proposal is similar to the recommendations to the Commission by the OMC group on the mobility of collections, that: “A special group should be set up [...] to work on framing a Code of Ethics concerning acquisitions, lending and/or sales of cultural goods by professionals of cultural institutions/collectors/owners/dealers/auction houses”.<sup>389</sup>

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<sup>388</sup> Decision of the Council of 22 December 2000 establishing the European Police College (Official Journal L 336 of 30.12.2000).

<sup>389</sup> OMC final report.

⇒ **Improving traceability**

This field of work is just as important as the previous one and is one of the preconditions for its success. The traceability requirement entails a number of measures, based mainly on Article 114 TFEU inasmuch as they concern traceability and affect the functioning of the internal market.

**Recommendation No. 9**

Support for **Interpol's** stolen works of art databases.

Following directly from the conclusions of the Council of the European Union<sup>390</sup> on the prevention and combating of trafficking in cultural goods, this involves not only recognizing but also, at a more operational and institutional level, supporting the key role of INTERPOL and its function of piloting and centralizing databases of stolen goods and property that is in a more general sense unlawful (illegally exported or imported items, plundered goods, missing goods, etc.). Alongside this, the Union might put in place a financing programme for national databases of stolen items in States that do not have them using a design that can be adapted to the INTERPOL database.

**Recommendation No. 10**

General obligation to keep a **transaction register of cultural goods**.

On the basis of Article 114 TFEU, the obligation to keep a register of goods in the charge of art market professionals (sellers, antique dealers and intermediaries such as voluntary salerooms) should be extended to all States in the Union. This register should have a uniform definition and prescribed content so as to ensure the traceability of the good, encouraging States to impose penalties in the event of failure to comply with this obligation.

**Recommendation No. 11**

**Creation of a logbook.**

This would be a common administrative document (similar to a European enforcement order, with a number of mandatory fields to be completed) certifying that an item may be moved freely within the European Union, leaving it entirely to the States to determine which types of goods should be subject to it. This document, designed on the lines of a passport, could ensure better security for transactions involving items for which such a document had been issued. A new

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<sup>390</sup> Conclusions of the Council of the European Union on the prevention and combating of trafficking of cultural property, 3 November 2008, 14224/2/08REV2, CRIMORG 166, ENFOPOL 191.

regulation might be adopted on conditions governing movement of cultural goods, whose legal basis might be Article 114 TFEU.

From a technical standpoint, an electronic certificate capable of being put online on the European platform should be promoted.

### Recommendation No. 12

Institution in Europe of a **“national treasure” mark** common to the Member States.

Such a mark would leave States entirely free to define and mark the heritage so identified (the rationale is different from that of the European heritage label as its purpose is not to identify property that is part of the European cultural heritage but rather to anticipate the risks of trafficking. It is comparable to the system set up under the 1954 Convention with the affixing of the blue shield symbol). The mark would serve for identification rather than certification. One of its effects could be to facilitate the restitution of illicitly exported national treasures as between Member States pursuant to Directive 93/7/EEC. This would provide institutions such as museums and public and private collections of heritage at risk (such as religious heritage) with reliable identification of marked objects and would have the further advantage of making it easier to prove the date when the item left the country, given that the affixing of such a symbol could be done only after the directive enters into force.<sup>391</sup>

⇒ **Encouraging better knowledge of the cultural heritage in Europe and ensuring better dissemination of information on the heritage of the States**

This objective is fully in line with Article 167 TFEU which provides, among other things: “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”.

### Recommendation No. 13

**Better understanding of States’ cultural heritage.**

The Union should encourage **States to adopt a clearer and more understandable legal definition of the cultural goods considered as national treasures** (without impinging on the States’ own competence to delimit their heritage). The Union should also encourage States to give a **more understandable**

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<sup>391</sup> Some States, including France, have begun to consider standardization of identification marks.

**definition of public heritage** (see also, on the same lines, the part on heritage at risk, below).

#### **Recommendation No. 14**

**Coordination of programmes for the digitization** of the heritage of States.

Information on the content of the State heritage is essential in terms of prevention. A campaign should be launched to digitize the inventories of the national treasures and cultural heritage of States, especially in those States that lack the tools (the DG for Information Society and Media runs programmes for the creation of digital content and services in areas of public interest, including culture, and should be involved). This aspect should obviously be handled in close coordination with existing projects or those under construction such as the MICHAEL project and the NUMERIC project, so that these programmes can incorporate the necessary data for the project of preventing and combating trafficking.

More specific digitization campaigns for religious heritage (see heritage at risk).

⇒ **Improving the conditions for the return of cultural goods and the States' heritage**

#### **Recommendation No. 15**

**Review of Directive 93/7/EEC on the return of cultural objects** unlawfully removed from the territory of a Member State.

An ad hoc working group was set up within the Commission to examine possible modifications to the Directive, and it is expected to present its conclusions shortly. We have not, therefore, explored these questions in depth. The problems of implementing the Directive have, however, been widely signalled during the country-by-country survey. Aside from issues relating to the shortness of the time limit and evidentiary problems, other points could also be made. This process should be undertaken with a closer eye to international tools such as the 1970 UNESCO Convention or the Unidroit Convention, particularly as to what is said about the **notion of due diligence**. Certain modifications might also be made with regard to the identification of national treasures and their voluntary entry into a dedicated database (see above, on improving knowledge of national treasures and in particular the introduction of a **national treasure mark in Europe**). Encouragement should also be given for the **central authorities** to be in administrative charge of heritage protection, and for the competent service to act in coordination with other services so as to function inter-ministerially, bringing together culture, justice, police and customs.



### Recommendation No. 16

Introduction of a **Community standard to abolish the rule of extinctive prescription on claims against a possessor in bad faith**, applicable only to cultural property. Recommendation to extend the time period required for acquisition in good faith.

This rule would apply only to cultural property. If one looks at some legal systems, which do not have extinctive prescription for claims in such cases – Swiss law is one example – this recommendation seems obvious, and appears not to be in contradiction with other legal systems, including those that admit acquisition through possession in good faith. Such systems are not in fact undermined by the absence of extinctive prescription. It is, moreover, consistent with the criminal strand and the concept of receiving stolen goods as a continuous offence. Ideally, this harmonization would be based on Article 114 TFEU and covered by a European Union rule, since disparities in the field of prescription are a source of market distortion.

### Recommendation No. 17

According greater weight to **foreign public law**.

Improving the conditions for **restitution of heritage illegally imported from another country** involves, among other things, according greater weight to foreign public law, an area to which national authorities still pay insufficient attention.

It is still too often the case that a State's administration or courts fail to impose penalties on the illegal export of cultural goods coming from another State. It would appear important, therefore, to extend the scope for foreign public law to be applied or given greater weight in this area. It would be up to individual States to make corresponding changes to their judicial practice and, if necessary, their laws.

One clear solution to this problem would be simply to decide that the illegal export of cultural goods into a European State constitutes *ipso facto* an illegal import into that State (the Canadian solution). Switzerland, too, does this, but on a more specific basis, under the bilateral agreements it has signed on the import and return of cultural goods (to date, such agreements have been entered into with Italy, Greece, Egypt, Peru and Colombia).<sup>392</sup> These bilateral agreements provide that the customs authorities of the States Parties must verify that the cultural goods designated in the agreements has been validly exported (generally speaking, they cover antiquities).

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<sup>392</sup> For a reference to these agreements, see the website of the Federal Office of Culture: <http://www.bak.admin.ch/themen/kulturguettertransfer/01985/index.html?lang=fr>.

In comparative law, it will be noted that a number of recent judicial decisions have admitted the principle that foreign public law should be applied to determine the status of cultural goods present in their territory.

#### **Recommendation No. 18**

Drawing up of a **European guide to good practices in the restitution of cultural goods.**

Some groups of museums have drawn up good practices to apply in restitution cases, in the form of recommendations. The Museums and Galleries Commission in the United Kingdom published, in 2000, a document entitled “*Restitution and repatriation: guidelines for good practice*”.<sup>393</sup> *Le guide sécurité des biens culturels* by the French Ministry for Culture and Communication, put on line in 2010, also gives guidelines for initiating a procedure for the return of a stolen object.<sup>394</sup> Lastly, the American Association of Museums (AAM) has published good practices for dealing with objects spoliated during the Second World War: *Unlawful Appropriation of Objects During the Nazi Era*.<sup>395</sup> This European guide could draw on these tools and nourish the debate on the ethical charter for the actors.

#### **Recommendation No. 19**

Introduction of a **rule of private international law** making it possible to choose between the law of origin and the law of the *situs* in an action for recovery of a stolen item.

The traditional conflict of laws rule on acquisition of title to an item is that of the *lex rei sitae* (requiring application of the law of the place where the item is located at the time of its acquisition). In the case of stolen cultural goods the question arises whether the law of the place where the theft occurred (or the law of the provenance of the item, also known as the *lex originis*) should be taken into consideration.

Thus, the Belgian Code of Private International Law of 2004 gives the original owner the option of choosing either the law of the place where the stolen cultural goods was located at the time of its disappearance, or the place where it was located at the time of the claim for recovery (Article 92 of the Code of Private International Law).

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<sup>393</sup> Museum and Galleries Commission, *Restitution and Repatriation: Guidelines for good practice*, (MGC Guidelines for good practices), London, 2000 in *Témoins de l'histoire, op.cit.*, p. 140-160.

<sup>394</sup> *Guide Sécurité des biens culturels, de la prévention à la restitution de l'objet volé*, Ministry for Culture and Communication, Heritage Division, p. 54 (on the website [www.culture.gouv.fr](http://www.culture.gouv.fr))

<sup>395</sup> American Association Of Museums (AAM), Accreditation Commission Statement on Best Practice, *Unlawful Appropriation of Objects During the Nazi-Era*, 5 April 2006.

### **Recommendation No. 20**

Development of **alternative methods of dispute resolution** for disputes concerning cultural **goods**.

Legal proceedings for, among other things, the restitution of stolen cultural goods or the return of illegally exported cultural goods can often be long and costly, and the outcome uncertain.

It appears that increasing numbers of cases are being resolved by non-judicial dispute resolution procedures, in particular mediation, conciliation or international arbitration. The advantage of such methods of resolving disputes is their flexibility, as they often lead to overall negotiated solutions.

This development is fostered by the institutionalization of these methods in specialist international organizations. In UNESCO, the Intergovernmental Committee on return and restitution has adopted mediation and conciliation rules for disputes, and WIPO and ICOM offer specific rules for the mediation of disputes concerning cultural goods. It seems beyond question that the European Union should encourage this development, based, moreover, on Article 81(2)(g) TFEU.

#### **⇒ Increased penalties for trafficking in cultural goods**

In the field of criminal law, progress must be made not only in European Union law but also in the legislation of Member States. This will be of various kinds:

### **Recommendation No. 21**

**Adoption at the European level of minimum rules for the definition of criminal offences of trafficking in cultural goods.**

Under Article 67 TFEU, it is one of the European Union's general policy objectives to ensure a high level of security through measures to prevent and combat crime, including organized crime. Under Article 83 TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and penalties in the areas of particularly serious crime, such as organized crime, with a cross-border dimension (resulting from the nature or impact of such offences or from a special need to combat them on a common basis) or if they prove essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures.

- theft and all forms of fraudulent appropriation of cultural goods;
- destruction of or damage to cultural goods;
- illegal import and export of cultural goods;

- holding, concealment or transfer of cultural goods obtained through theft, any form of fraudulent appropriation, or illegal export or import.

The criminal laws of the Member States should treat illegal removal of non-appropriated property found on archaeological, historical or cultural sites protected by national law as fraudulent misappropriation of the property of another because of the specific characteristics of archaeological heritage, in particular the absence of records prior to discovery of the property.

Legal persons ought to be held liable for such offences. This measure would, among other things, make it possible to prosecute and punish auction houses that have participated either directly or indirectly in trafficking in cultural goods.

Recommendation No. 22

Adoption of criminal law measures **by Member States.**

Under Article 82 TFEU, judicial cooperation in criminal matters in the EU includes approximation of the laws and regulations of Member States. The European Parliament and the Council may, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, establish minimum rules concerning the rights of individuals in criminal procedure and the rights of victims of crime.

The European Union should compel States to adopt minimum rules:

- to enable their authorities to seize, as an interim measure and without delay, cultural goods where there are one or more serious factors indicating that it has been the subject of one of the above offences;
- to ensure that the above offences can be prosecuted for a sufficient period of time after their perpetrator has ceased to be in possession of the illegally held cultural goods;
- to ensure that the investigation or prosecution of the above offences of trafficking in cultural goods does not depend on legal proceedings brought or an information laid by the victim;
- to ensure that the victims of trafficking in cultural goods have the right to information and have access to their specialist services for the investigation and prosecution of trafficking in cultural goods.

⇒ **Promote cooperation between authorities in the area of freedom, security and justice.**

Cooperation between national authorities responsible for combating trafficking in cultural goods must be stepped up. Instruments of cooperation already exist, and it is mainly a matter of improving them and fostering mutual trust between those involved. Under Article 82.1 TFEU, the Union has the power to enact rules on judicial cooperation in criminal matters, including:

## Recommendations

- to ensure recognition throughout the Union of all forms of judgments and judicial decisions in criminal matters;
- to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

### Recommendation No. 23

#### Improvement of existing instruments of cooperation.

The framework decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence allows *interlocutory* freezing in an executing State, in connection with criminal proceedings, of a cultural good having been trafficked. The framework decision of 18 December 2008 on the European evidence warrant enables a cultural object to be returned for use in criminal proceedings. The framework decision of 6 October 2006 provides for the recognition and execution of confiscation orders issued by courts in other Member States. The confiscated property can be cultural property but must constitute either the “proceeds” or the “instrumentality” of the offence. Lastly, the European Union Convention of 29 May 2000 allows the option of “plac[ing] articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners”. Tools for cooperation exist, but they must be made easier to use.

This requires the institution, in all applicable instruments of cooperation, of a “standard procedural document” allowing accurate identification of the stolen or missing object and standard presentation of all available information relating to its movement;

- Transnational expertise must be facilitated;
- The dovetailing of the punitive criminal sanctions affecting property (freezing, securing evidence, confiscation) with “civil” instruments for cooperation to obtain its return must be clarified.

### Recommendation No. 24

#### Improving mutual trust between national authorities.

Member States must all set up specialist departments for the prevention, investigation and prosecution of trafficking in cultural goods, which should include heritage experts. In these departments they should designate “contact persons” or “national rapporteurs” responsible for assisting and facilitating international cooperation and who will form a specialist network.

The Union should appoint a “European Coordinator” in the European committee monitoring the prevention and combating of trafficking in cultural goods, who would convene the “contact persons” or “national rapporteurs” not less than once per year to a major meeting for training, exchange of information and feedback.

The objective is to create a European community of officials responsible at the national level for the fight against trafficking in cultural goods who know each other and can therefore cooperate with ease.

Recommendation No. 25

**Adoption of a** new instrument of cooperation in criminal matters.

There are two possibilities, depending on the state of progress of the ongoing legislative work on cooperation in the field of criminal law:

- Adoption of an autonomous warrant for “search, seizure and obtaining” in respect of an identified item of (cultural) goods that has disappeared, and which is the subject of criminal proceedings, that would allow the authorities of the issuing State to issue a request to the executing State binding it to conduct searches (excavation or impounding, etc.), and seize and return the item to the issuing State (to serve as evidence of the offence or to be the subject of restitution).
- Integration of the above instrument in the draft directive, currently under discussion, on the “European investigation order” (setting up, throughout the Union, of an overall system of evidence-gathering: the “European investigation order” would enable a national authority in the course of domestic criminal proceedings to compel the authorities of another Member State to carry out all types of investigation, etc., within a short time frame and with a limited number of grounds for refusal to comply).

Recommendation No. 26

Creation of sections specializing in the trafficking in cultural goods within Eurojust and Europol.

Eurojust and Europol should each have a section specializing in the trafficking in cultural goods responsible for coordinating, at the European level, prosecutions and investigations by the different national authorities. This section (a criminal law entity) would also allow operational exchanges of information between the Member States and would be part of the training and information effort in collaboration with the coordinator of the contact persons or national rapporteurs (an administrative entity). The existence of dedicated sections is a prerequisite for better use of resources for preventing and combating trafficking, as emphasized by a number of those surveyed, especially in the police.

Recommendation No. 27

Encouragement to enter into cross-border cooperation agreements (dissemination of good practices on the subject).

This recommendation is aimed at Member States, which might draw on existing good practice in this field.

⇒ **Identify the heritage at risk**

Recommendation No. 28

Creation of an inventory of cultural and private goods.

Article 5 of EC Directive 93/7 of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, provides: “Proceedings may be brought only where the document initiating them is accompanied by: – a document describing the object covered by the request and stating that it is a cultural object”.

Based on, and by extension of, that provision, it is recommended that an inventory of cultural goods and private collections be set up, using the fields in the Object-ID standard, via an Internet platform. The description of the goods and its inscription on that platform would be the responsibility of the owner. There are two options for creating this inventory. A common standard based on Articles 36 and 114 TFEU might be established, since this is a traceability measure affecting functioning of the market. The other, less restrictive, option would be an incentive measure or Council recommendation regarding heritage protection, here based on Article 167 TFEU.

Assimilation of cultural property unlawfully excavated, or lawfully excavated but unlawfully retained, to stolen goods (see Rec. No. 21 above).

### Recommendation No. 29

Introduction of a Community standard to start the period for extinctive prescription running from the date of appearance of the archaeological item on the market, making it possible to claim its recovery.

On the subject of penalties for offences, counter-measures against trafficking of archaeological objects run up against an obstacle with regard to the starting point for the period of prescription. Where the date of the looting or the unlawful excavation is not known or cannot be proved, the fact that the period of prescription starts to run from the date of commission of the offence giving rise to the trafficking can constitute a major obstacle in implementing systems of reparation !

It is therefore recommended that the date on which the period of prescription starts to run be disconnected from the offence at the origin of the trafficking and attached, instead, to the moment the archaeological object appears, making it possible to claim its recovery.

### Recommendation No. 30

Creation of an obligation on the seller to certify provenance.

The key to trafficking in endangered heritage centres on the question of provenance of these items. While an obligation of due diligence generally applies to the purchaser, a rule should be introduced requiring **the seller to certify provenance**. This requirement might take the form of a certificate stating the origin of the item, and would be accompanied by penalties and restorative measures in the event of a false declaration or a fictitious history. For such a mechanism to be effective, all transactions involving cultural goods without such a certificate would have to be unlawful, with the absence of a certificate creating a presumption of irregularity in the trade in the item.

Recommendation No. 31

Establishment of a system of museums as repositories of last resort.

In crisis or conflict situations, museums can be faced with acquisition processes for items originating in zones of conflict, where there is a strong presumption of looting or fraudulent removal during the troubles typical of such periods of crisis or war. For such situations, the Code of Ethics of the International Council of Museums (ICOM) has developed the concept of “repository of last resort” Article 2.11 of the Code provides that a museum may serve as an authorized repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility.

This notion of the repository of last resort, allowing the good to be returned to its country of origin when the crisis or conflict has ended, should be formalized in order to provide a framework for the interventions of museums in such a situation and position museums as the guarantors of the temporary conservation of foreign heritage at risk of dispersal in times of crisis or conflict. Implementation of this system of repository of last resort should be made conditional upon an automatic process of return of the object to its country of origin when the crisis or conflict has ended, or as soon as the security of the objects can be guaranteed in the country of origin, whether European or non-European.

Recommendation No. 32

Introduction of a common standard to restrict and regulate the use of metal detectors.

The main feature of looting, like other means of uncovering buried items of archaeological heritage, is that it brings to light heritage that was not previously known about, located, logged or inventoried; all of these are factors that facilitate the trafficking of such goods. Those factors are aggravated by the use of metal detectors, regulation of which varies from one European State to another.

⇒ **Raising public awareness of the risks involved in trafficking in cultural goods.**

Recommendation No. 33

Initiation of a public information and awareness-raising campaign.

The Union should initiate a campaign to raise awareness:

- of the importance of the cultural heritage of States;
- of the possible penalties associated with the illegal import of cultural goods coming from a European or third country. Such a campaign should be aimed at the general public (along the lines, for example, of the communication campaigns in European airports concerning endangered species of animals and plants, in the form of posters, notices on airline tickets, etc.), and also at the actors in the market;



- awareness-raising and involvement of associations of owners of cultural goods;
- awareness-raising and involvement of the religious authorities in working groups and exchanges of information.

## 2. DETAILED ACCOUNT OF CERTAIN KEY SYSTEMS

This section will not deal with all recommendations, but only with those that require particular technical development or questioning related to the necessary legal basis.

The recommendations were structured by the identification of key provisions from which more targeted objectives have been identified.

### 2.1. Key provisions

#### 2.1.1. Creation of a cross-cutting coordination department at European level (Recommendation No. 1)

Proper coordination of the various types of action pursued at international, European and Member-State levels is a major area of work, as has been stressed by all the stakeholders surveyed. Developing European expertise in this field entails setting up a cross-cutting department on a permanent basis (a number of the Commission's Directorates General may be involved in combating trafficking in cultural goods: Home Affairs, Education and Culture, Enterprise and Industry, Taxation and Customs Union, and Internal Market and Services). This department might be given multiple responsibilities and take Article 74 TFEU (administrative cooperation) as its legal basis. Its object would be to foster the emergence of a common culture and create a genuine network by facilitating contact between the persons and services concerned and developing mutual trust.

The survey of Member States conducted for this study has clearly demonstrated the value of considering the question of trafficking in cultural goods within cross-cutting bodies, a method of organization which has proved its relevance at the national level and which the Commission should also adopt if it is to act satisfactorily as a coordinator and hub for the European area. With regard to this key function of coordination, the conclusions of the Council and of the representatives of the governments of the Member States, meeting within the Council, on the Work Plan for Culture 2011-2014 state that 'the Commission will intensify collaboration between its services'.

This idea of a cross-cutting department may be compared to the well-known concept of a monitoring committee in international law. Think, for example, of the human rights conventions and the role of the United Nations Human Rights Council.<sup>396</sup> Such bodies are less commonplace in matters of cultural goods, even

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<sup>396</sup> See the Human Rights Council website:

though UNESCO's World Heritage Committee<sup>397</sup> plays a fundamental role in the field of immovable cultural property.

The subject has nevertheless become relevant today in terms of the fight against the trafficking of cultural property. At UNESCO States Parties to the 1970 Convention are currently discussing the possibility of creating such a monitoring committee (in addition to the Intergovernmental Committee for the promoting the Return of Cultural Property to its Countries of Origin or Restitution in Case of Illicit Appropriation, created in 1978).<sup>398</sup> Furthermore, the UNIDROIT Governing Council decided in May 2011 to convene the Convention's follow-up committee in application of Article 20 of the UNIDROIT Convention of 1995.<sup>399</sup>

The European Union provides for the existence of a committee in Article 8 of Council Regulation No. 116/209 of 18 December 2008 Regarding the Export of Cultural Property<sup>400</sup> and Article 17 of Council Directive 93/7/EEC of 15 March 1993 regarding the Restitution of Cultural Property Unlawfully removed from the Territory of a Member State.<sup>401</sup> However, this committee has not been convened at regular intervals and only three reports have been drafted since the adoption of the Regulation on the issue in 1992 and their distribution has been very limited.<sup>402</sup> It would seem useful to create a similar body at the European level. Furthermore, it may very well be able to participate in the monitoring committees that are currently being established at UNESCO and UNIDROIT.

With regard to Europe, one can infer that the planned body would have cross-cutting skills since several Directorates-General are possibly affected by the trafficking in cultural goods (Home Affairs, Internal Market and Services, Education and Culture, Taxation and Customs Union, Enterprise and Industry). Furthermore, European initiatives have recently been taken for the creation of similar monitoring mechanisms in other fields, such as the fight against corruption.<sup>403</sup>

What would this department's **responsibilities** be?

- It could act as an **advisory body** to Member States for all questions related to the fight against the trafficking in cultural goods.

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<http://www2.ohchr.org/english/bodies/hrcouncil/index.htm>.

<sup>397</sup> <http://whc.unesco.org/en/committee>.

<sup>398</sup> [http://portal.unesco.org/culture/fr/ev.php-URL\\_ID=35283&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/fr/ev.php-URL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>399</sup> According to art. 20 of the UNIDROIT Convention of 1995 "The President of the International Institute for the Unification of Private Law (UNIDROIT) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention"; See UNIDROIT 2011 C.D. (90) Misc. 3, May 2011.

<sup>400</sup> OJ L 74 of 27.3.1993, p. 74.

<sup>401</sup> OJ L 39 of 10.2.2009, p. 1.

<sup>402</sup> COM (2000) 325 final, COM (2005) 675 final and COM (2009) 408 final, none of them published in the OJ, but available for consultation at: [http://europa.eu/legislation\\_summaries/culture/l11017b\\_fr.htm](http://europa.eu/legislation_summaries/culture/l11017b_fr.htm).

<sup>403</sup> See the Commission's decision of 6 June 2011 C(2011) 36773.

- It could devise a **coordinated approach to combating trafficking**, working together with those responsible nationally in the specialist investigation services that designate points of contact (one example is the coordinator for combating the trafficking in human beings, Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human Beings, Article 20; see recommendations No. 24, 25 and 26 on international cooperation, below). This section would have the role of establishing contacts, acting as intermediary and sharing good practices, with Europol continuing in the role of coordinating investigations.
- It would be the management and supervisory body for the **European platform** for information, cooperation, surveillance and alerts on trafficking in cultural goods (see recommendation No. 3 below). It could manage or supervise the **training** of officials in cultural administration, museum curators and art dealers (see recommendation No. 29 below).
- If the European Union were to decide to ratify the 1970 UNESCO Convention in its present form (see recommendation No. 4 below), it could also serve as a link to UNESCO for any issues concerning the **implementation** of the Convention in the Member States. The committee could also represent the Union before the competent international bodies.
- **Market surveys** and other types of research could be carried out under the direction of the committee, in particular to improve the prevention of trafficking in cultural goods.
- Lastly, the committee could act as the body providing **alternative dispute settlement**, through conciliation, mediation or arbitration (see recommendation No. 17 below). It might function either as the body charged directly with dispute settlement, or with facilitating the setting up of dispute settlement mechanisms.<sup>404</sup>

### 2.1.2. Creation of a European web portal (Recommendation No. 2)

#### 2.1.2.1. Rationale for the recommendation

The need for a platform at the Community level, an expectation expressed by all actors

The creation of a platform at the Community level was requested by all the target groups questioned by way of interviews or written exchanges on the basis of questionnaires.<sup>405</sup> In the search for tools to fight the trafficking in cultural goods

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<sup>404</sup> Along the lines of the Swiss Contact Bureau on Looted Art, part of the Federal administration, the aim of which is to assist parties to disputes in finding an appropriate means of resolution: <http://www.bak.admin.ch/themen/raubkunst/index.html?lang=en>.

<sup>405</sup> Final question of the questionnaire: “What legal, technical and operational solutions do you recommend?”

and the resale of goods which have been stolen, unlawfully discovered or exported, all actors in the field contacted in the framework of the Home/2009/ISEC/PR/019-A2 contract recommended resorting to solutions that facilitate access to information and the circulation thereof, which strengthen cooperation between Member States and facilitate the identification of goods. In this sense, the creation of a Community platform is a targeted response in carrying out the fight against trafficking in cultural goods, and one which is likely to meet these expectations.

This need has also surfaced in other surveys and studies. In this sense, the “Open Method of Coordination” expert working group on mobility of collections recommends the creation of “technical and financial means to establish a European database/platform.”<sup>406</sup> A similar aspiration was expressed by the OMC group on trafficking in cultural goods. The legitimacy of such a tool is *de facto* considered obvious, provided it does not compete with pre-existing tools and that it is designed in close coordination with the OMC.

The platform could contribute to the harmonization or alignment of the systems within the European Union, in particular as regards control over the movement of cultural goods, inventorying and marking of cultural goods.

Lastly, this platform is of international interest. It would facilitate access to information by centralizing and redistributing it, acting as a gateway to all questions related to the protection of cultural goods and its movement in the European area. It could inspire other regional groupings, both formal and informal (such as GRULAC, among others).

### **A complementary tool essential to national one-stop shops**

The projects currently under way at the national level are very useful in terms of cooperation and internal information.

Several Member States have committed themselves to the widespread disclosure of information and training for private owners as well as exchanges of information between specialised organizations.<sup>407</sup>

By way of example, there are the French initiatives to publish an information guide for public and private owners, entitled “*Sécurité des biens culturels. De la prévention du vol à la restitution de l’objet volé*” (Safety of cultural goods. From the prevention of theft to the restitution of the stolen goods), and to make available at [www.culture.gouv.fr](http://www.culture.gouv.fr) a website dedicated to the movement of cultural goods, in

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<sup>406</sup> Final report. Summary, OMC – Expert Working Group on Mobility of Collections, June 2010, p. 8. Available at [http://ec.europa.eu/culture/our-policy-development/doc/mobility\\_collections\\_report/reports/mobility\\_collections\\_fr.pdf](http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/reports/mobility_collections_fr.pdf).

<sup>407</sup> Available at <http://www.culture.gouv.fr/culture/securite-biensculturels/appli.htm>.

order to provide professional actors with all the necessary practical information,<sup>408</sup> the British information website intended for both the general public and actors on the art market,<sup>409</sup> Latvian project “Kultūras objektu apraksta veidošana”<sup>410</sup> and Polish project “Bezpieczne zbiory – bezpieczne kolekcje”<sup>411</sup> which contribute to the description of cultural goods held by individuals, and the Romanian website for the sharing of information gathered by the administrations of the Ministry of Culture, customs, the police and the border guards.<sup>412</sup>

The European Union provided partial or full funding to projects which were set up previously.<sup>413</sup> The internal development of these operational tools must of course be encouraged, given that a tool designed at the European level would be a timely addition to these tools as it would foster access to and exchange of information as well as inter-State cooperation. A concerted effort at the Community level would meet real needs for the circulation of information, exchanges of good practices, knowledge of systems, and provision of technical and practical tools. This platform should therefore be considered from a dual perspective of information and cooperation.

### **2.1.2.2. Technical summary: the European platform as a cooperative tool for information and declarations**

The platform would develop information regarding the protection and identification of cultural goods in order to enable the general public to receive concise information on the issue and to have a single gateway to all national sites, as well as facilitating access of specialized bodies to databases and improving the circulation of information.

On account of this double objective, a platform with two separate areas in addition to certain common tools should be designed. The platform would thus be structured following a dual organization, with one part being completely available to the public and another granting limited access only. Access limitations would be managed by the coordination service and would be adapted to the practical situation of each Member State.

Both parts should be available in at least the working languages of the European Union, i.e. in French, English and German.

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<sup>408</sup> Available at <http://www.circulation-biens.culture.gouv.fr/>.

<sup>409</sup> Available at <http://www.culturalpropertyadvice.gov.uk/>.

<sup>410</sup> Available at <http://ic.iem.gov.lv/ko/index.php>.

<sup>411</sup> Available at <http://www.bezpiecznezbiory.pl/>.

<sup>412</sup> The site (with limited access) can be found at <http://www.patrimoniul-mobil.ro/>.

<sup>413</sup> In particular Project “JLS/2008/ISEC/AG/103 Improvement of record keeping on stolen and lost cultural values to promote the prevention of and fight against smuggling” (Latvia); Project “PHARE 2006/018-147.03.19 Integrated Management Information System for the Protection of Movable Cultural Heritage and Cultural Goods” (Romania).

## Structure, tools and information of the public portal

The public part would be intended to raise awareness and provide information to the general public by targeting both enthusiastic amateurs and art market professionals. The tools and information that must be developed for this portal are as follows<sup>414</sup>:

- (a) **General information:**

Role played by the European Union and all international actors (UNESCO, UNIDROIT, ICOM, INTERPOL, WCO) and links to their sites.

Information on international databases and links to their sites (INTERPOL, UNESCO).

Presentation, disclosure and promotion of the ICOM and UNESCO codes of ethics.

List of relevant national websites that are accessible to the public, by way of summary sheets presenting Member States (see country sheets annexed to this report).

- (b) **Specific information on the legal and ethical framework**

Provenance/ origin of goods

This area would be more particularly intended for people who play an active role in the trade of cultural goods, whether in an individual capacity or as part of an institution, whether sellers or purchasers. It would be completely accessible to all and provide thorough information on due diligence. The area would also provide a charter for online sites selling cultural goods or for sites that serve as platforms for the sale of cultural goods.

One section would be devoted to information on what to do in the event of a chance find of an archaeological site.

One page would outline the particularities of archaeological and religious heritage, reputed to be “at risk heritage”.

Movement of cultural goods

Presentation of relevant Community texts (Council Directive 93/7/EEC of 15 March 1993 on the restitution of cultural objects unlawfully removed from the territory of a Member State and Council Regulation (EC) 116/2009 of 18 December 2008 on the export of cultural goods), the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Property.

General information documents on the movement of cultural goods and export procedures.

- (c) **Practical documents and tools**

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<sup>414</sup> The presentation of the public portal is organized based on the different steps of the object's movement: inventorying/identification, circulation and claim/restitution.

## Recommendations

Recommendations for compiling inventories of private collections of , and provision of standard documents which can be downloaded and completed and then saved in a format which suits the owner.

These documents would be accompanied by explanatory notes on the essential characteristics to be recorded for each type of cultural good. Practical information on the marking and the photography of cultural goods would also be available. States which do not have an inventorying standard can consider promoting the Object ID standard (UNESCO) as the minimum required standard.

Management tool for the inventorying and recording of religious heritage.

Access to a dynamic inventory of inventory marks (sorted by country of origin, type of mark, in increasing or decreasing order, etc.), managed by the coordinating service and provided by Member States.

Handbook acting as a guide and listing the checks to be made prior to the acquisition of any cultural good with a “provenance sheet” as an annex.<sup>415</sup>

- **“Directory function”**

The construction of the platform should be accompanied by the creation of operational email addresses, the extension of which would be the responsibility of Member States under the supervision of the coordinating service.

- **Future development**

The public section may also include a tool to search simultaneously in both national and international databases (see point 6 below).

### **The institutional portal’s structure, tools and information**

The tools provided in the limited access section would be intended for national bodies working for the Member States. The functionalities vary according to the access limitations. These limitations would have an impact mainly on the amount of personal data which could be accessed, in order to respect the individual sensitivities of each Member State. Selective rights should therefore be granted in line with the capacity of the person consulting the information in the limited access section of the platform, depending on the administrative structure of each Member State or the necessary confidentiality criteria. The general tools for information, cooperation and surveillance are the following:

- **(a) General information**

Links to the public portal pages.

A press review related to the existing lists (such as the Museum Security Network, for example) is distributed to all accredited persons.

- **(b) Documents and practical tools**

A guide to interpreting the concept of good faith (including case studies, see recommendation No. 4).

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<sup>415</sup> See recommendation No. 5; provenance sheet developed by the law firm Borghese Associés on the template of the Object ID standard.

Collection of data on national treasures within the European Union, the provision of data being managed by Member States through the coordinating service. It can be consulted by all accredited persons, but limitations to the accessible information are applied depending on the position of the applicant.

A dynamic link, presented as a mirror search form, connected to UNESCO's database on legislation. The coordinating service would require Member States to supply this database with entries. Thus, in addition to the information available in the summary sheets per country that can be accessed in the public section of the site, accredited persons would have access to all relevant legal documents.

Presentation and analysis of "standard cases" from a criminological perspective, taken from common practical situations. The analyses would be presented as documents that may be accessed either from a list of titles or a keyword search. Member States would be invited to provide the body with information regarding cases dealt with by their units, in order to develop better knowledge of trafficking. This approach would help overcome the current lack of information in this field, at a time when criminological analyses are being developed for all other types of trafficking.

Based on these analyses, a trafficking map would be provided to police and customs forces and to border guards. This tool helps to identify risk areas and monitor incidents of trafficking.

Moreover, the platform would enable alerts to be disseminated for information purposes to the general public in the event of an object disappearing (for example "The Scream" by Munch), without prejudice to the competence of Europol and INTERPOL. The alert, recorded in a historical log, would enable analyses to be carried out in the future.

- (c) **Encouraged cooperation**

Good practices (in particular cooperation agreements) would be compiled in a database.

In order to overcome linguistic comprehension difficulties between the different units of the Member States, a thesaurus of key notions would be available to accredited persons. It would take the form of a dynamic table that could be searched as required and added to under the supervision of the coordinating service.

A directory of contact persons containing telephone and fax numbers, postal and email addresses (professional and personal) in each Member State, regularly updated by the coordinating service, should facilitate rapid contact with the relevant persons.

Forums should be created and moderated by the coordinating service. They would enable continued collaboration and exchanges in workshops, training sessions and during working parties between different specialized bodies (skill-specific or regional workshops operating in cooperation with UNESCO, ICOM and INTERPOL).

### **Technical considerations**

The format of the tools and information may vary, but the opinions gathered during these interviews suggest that PDF documents made available online would



present the advantage of ensuring control is kept over the document. Furthermore, more general information (presentation of documents and bodies, etc.) could be displayed as a web page, whereas guides, information sheets on inventorying and standard documents of the private section could be loaded in PDF format. These considerations should be examined in more depth in a specific study.

It is important both for the public section and for the dissemination of messages posted in the private section that operational email addresses are included, whose redistribution is the responsibility of Member States. This would help overcome problems that occur when people change departments, positions or jobs.

### **Future development**

After its establishment and trial period, the platform should acquire new tools. The private section will be modified to meet the expectations of institutional partners, which are in the best position to propose improvements and additions.

The following innovations might be envisaged for the public section:

- the creation of a one-stop shop to obtain export licences through standard forms that are redistributed to the competent authorities and subject to formal requirements, such as the need to produce good quality photographs;
- the provision of an archaeological property discovery form including the identification of the discoverer, general information on the finding, the site and more, created following the Estonian example.<sup>416</sup>

The coordinating service has a leading role to play in terms of the platform's development, enrichment and its relevance to practical needs.

### **Funding, management, accessibility and accreditation as regards the platform**

The issues of funding, management, accessibility and accreditation of the platform would be managed entirely by the coordinating service. In its operation budget, the coordinating service would make provision for the establishment and maintenance of the platform, the management of accreditation requests from Member States, the organization of specific workshops and the promotion of the tool.

Technical costs must be assessed at a later stage. These should include personnel costs for at least three people involved in the site's management and all its operating features.

As regards the platform's linguistic accessibility, at least three full versions should be provided (in French, English and German), and should include a thesaurus with vocabulary in all languages of the Union.

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<sup>416</sup> See <http://www.muinas.ee/for-you/for-everyone-interested>.

Issues of accreditation should take regional idiosyncracies into account, since each Member State brings to light the specific skills of its different specialized bodies. However, access to personal data must be limited and available only to authorized officers in their country of origin. The example of Romania, which established an exchange platform at the national level (while ensuring that interoperability with future projects remains possible) must be studied closely.<sup>417</sup>

### **Provision and updating of data entries**

The continuity and relevance of this platform are among its most important qualities. Its establishment, content and association with what already exists should therefore be considered, and provision made for its maintenance. From this perspective, incentive measures should be developed on the one hand, and Member States supported in their contributions on the other hand (guide on uploading information, user manual for operations, etc.). All these tasks should be ensured by the coordinating service.

One of the strongest incentives for putting information online and ensuring regular updates can be the granting of funds provided that binding obligations are respected in terms of data provision and the monitoring of the platform's operation and activity. These obligations should also require the regular updating of the databases to which the platform refers, such as the INTERPOL database of stolen goods and the UNESCO database of legislation.

### **A platform designed in conjunction with existing tools**

In view of the multiple databases already available at present, both at the national and international levels, it should be remembered that the planned database is to be seen as a European one-stop shop. It will provide a "gateway" and addition to what already exists.

In addition to the functionalities presented and developed previously, it is noteworthy that the relationship between the platform and existing tools is not one of competition, but of complementarity.

The establishment of an interface which enables national and international databases to be searched simultaneously forms part of the approach based on pooling and optimizing efforts. Thus, the aim is not to create a new database, but to take advantage of and contribute to existing databases. Methods of funding the already active supranational tools should therefore be considered by the coordinating service, for example by helping to improve and develop the INTERPOL database.

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<sup>417</sup> "PHARE 2006/018-147.03.19 Integrated Management Information System for the Protection of Movable Cultural Heritage and Cultural Goods" project; site can be accessed at <http://www.patrimoniul-mobil.ro/>.

Along the same lines, it is necessary to consider close cooperation with UNESCO regarding the provision of legislative texts to the database. It is important to look at technical measures that would enable joint updates or the centralization of updates by the coordinating service, which would then transfer them to UNESCO for integration into the database.

### **Extended consideration: technical aspects**

The design of such a platform obviously needs to be thought through and backed up by a thorough technical study for which the authors of this report were not commissioned. This technical approach was also recommended by the expert working group on the mobility of collections.<sup>418</sup>

However, based on the information gathered as part of this study, it is possible to suggest that the design of the platform must be accompanied by a study of the technical documents of all existing databases within the Union, in order to define points of agreement, areas of interoperability, and more. This first stage was partially undertaken by the expert working group on mobility of collections. A table sets forth the following information: standards used by the national databases (databases of national treasures, stolen items and export documents), servers, operating systems and interfaces used, management and accessibility of databases, and so on.<sup>419</sup> The available data has been partially supplemented by this study.

### **2.1.3. Endorsement of international conventions on culture (Recommendation No. 3)**

The possibility and opportunity of European Union accession to the 1970 UNESCO Convention

#### **2.1.3.1. International Organizations and their participation to international treaties**

Over the last fifty years or so there have been many instances of international organizations acceding to international treaties and conventions and this practice is fully consistent with the provisions of international law concerning the law of treaties. For this to occur, it is necessary not only that the relevant rules of customary international law should allow the signature of an international treaty and the possibility of becoming a party thereto, but also this possibility must be admitted by both the statute of the international organization concerned, as well as by the rules of the treaty to be signed.

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<sup>418</sup> Final report. Summary, OMC – Expert Working Group on Mobility of Collections, June 2010, p. 8. Accessible at [http://ec.europa.eu/culture/our-policy-development/doc/mobility\\_collections\\_report/reports/mobility\\_collections\\_fr.pdf](http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/reports/mobility_collections_fr.pdf).

<sup>419</sup> Accessible at [http://ec.europa.eu/culture/our-policy-development/doc/mobility\\_collections\\_report/reports/synthesis\\_answers\\_q1\\_q2.pdf](http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/reports/synthesis_answers_q1_q2.pdf).

Moreover, we must take into account the fact that international organizations now represent a new player in the international relations arena, based on the treaty executed and entered into by a number of States.

Furthermore, the international organization becomes a new subject of international law as long as it is created by an international treaty and, as such, it cannot even be confused with the States that gave life to the relevant international agreement.

With specific regard to the EC/EU we should note that this regional organization is (or is becoming) a party to several international conventions, either alongside or in the place of the Member States. It is interesting to point out that the treaties to which the European Union is (or is becoming) a party deal with rather different subjects and issues, also but not exclusively concerning the cultural domain. In fact, not only did the European Union join the 2005 UNESCO Convention on Cultural Diversity (2006), but also, *inter alia*, the Gatt-WTO, the 2001 Stockholm Convention on Persistent Organic Pollutants (2004), the Rotterdam Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade (2008), or the United Nations Convention on the Rights of People with Disabilities (2010). Eventually, as we all know, the European Union will become a party to the European Convention on Human Rights.

#### **2.1.3.2. The problem of accession from an international viewpoint**

Within the scope of our research it may be asked whether accession to the international conventions concerning the struggle against the illicit traffic of cultural goods would be consistent with the relevant rules of international law and whether it would be consistent with (and suitable for) the European Union legal order. We shall consider separately these two questions below.

As mentioned above, the possibility for an international organization to join an international treaty rests upon its consistency with the relevant rules of international law. The general rules on the subject matter were codified by two United Nations conventions aimed at the codification of the customary law rules, drafted by the International Law Commission, i.e. the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations. It goes without saying that, owing to the general character of their provisions, no rule can be found in the above instruments concerning the European Union and the possibility of its accession to an international treaty. If we look at diplomatic practice it appears that the problem of participation of the European Union in the international treaties may be solved in different ways.

In some cases an express reference to the position of international organizations and, namely, of the European Union is inserted in the relevant international treaty. This is the case, *inter alia*, of the 2005 UNESCO Convention (Article 29) or of the 2010 United Nations Convention on Disability Rights (Article 45), with reference to the accession of the European Union.

In other cases the treaty does not provide for any such possibility and a different solution must be envisaged, as is the case of the formula established by the European Convention of Human Rights and its Additional Protocol n. 14. This is particularly the case when the relevant treaty expressly provides for the exclusive participation of States, implicitly excluding the possibility of any other subject of international law becoming a party to that treaty.

If we take into consideration the main multilateral instruments concerning the illicit traffic of cultural property – i.e. the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – we should note that there is no reference to an accession by an international organization. Moreover, it is clear that the two Conventions mentioned above are expressly conceived as treaties to which only States may become a Party. Accordingly and from the international viewpoint, should the European Union decide to take the opportunity to accede to one of these Conventions, the best solution would be to start negotiations aimed at the adoption of a protocol in order to fill the existing gap.

### **2.1.3.3. The problem of accession from an European Union viewpoint**

If one looks at this problem from the European Union viewpoint, a first difference must be highlighted, concerning the nature of the international treaty at issue. The two conventions, as it is well known, are complementary and we know from history that the 1995 UNIDROIT Convention was negotiated under the auspices of UNESCO and was envisaged from the beginning as a completion of the work started by the 1970 UNESCO Convention.

In fact, the 1970 UNESCO Convention is unanimously considered as a convention imposing some general duties on the Member States (*convention de droit public*), but lacking provisions concerning the private and/or private international law features which are inevitably inherent in the international traffic of cultural property. Instead of re-opening the negotiations in order to add a protocol to the UNESCO Convention, before the end of the 1980s UNIDROIT was indicated as the competent organization entrusted with the elaboration of a new convention whose main aim was to be a complementary addition to the 1970 UNESCO Convention.

The above factors have a direct effect on the evaluation of the expediency for the European Union to decide on its accession to both Conventions. In fact, as a general rule, the European Union as an international organization can adopt an act only where the relevant power is provided for by the Treaties. Moreover, and more generally, any act of the European Union must be supported in law. Furthermore, under the TEU and the TFEU (i.e. “the Treaties”) the European Union has no general power to enter into international relations by way of concluding any international treaty whatsoever; conversely, not only the power to sign an international agreement must be founded on a provision of the treaties, but also the contents of the relevant treaty must not be banned by a provision of the treaties.

In this respect, it appears that accession to the 1995 UNIDROIT Convention would be far more problematic than it would be for the 1970 UNESCO Convention, having regard to the contents of Article 345 of the TFEU which provides: “*The treaties shall in no way prejudice the rules in Member States governing the system of property ownership*”. This provision represents a serious obstacle to accession by the European Union to an international convention in which it is provided that the general rules on transfer of ownership of chattels applying in some European Union Countries shall no longer apply and shall be replaced by different uniform rules directly provided for by the UNIDROIT Convention.<sup>420</sup> It is to be added that the European Court of Justice has stressed that, in order to verify whether the European Union may (i.e. has the competence to) enter into an international agreement one must also take into consideration the central provisions of that agreement. From this point of view it may be of some interest to highlight that the recent experience of the ratification of the 2005 UNESCO Convention on Cultural Diversity, shows that the basis of the European Union competence was founded on Article 167 TFEU (i.e. the only general rule concerning “Culture”<sup>421</sup> and on Article 207 TFEU concerning the common commercial policy.<sup>422</sup>

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<sup>420</sup> Reference is made to Article 3 ff. (Restitution of stolen cultural objects) and Article 5 ff. (return of illegally exported cultural objects), as in both cases – unlike the legal regime of many European Countries – the possession in good faith of cultural property does not entail the effects of the “possession vaut titre” principle, but only gives right to a fair and reasonable compensation (Articles 4 and 6), provided that the possessor proves that he acted in good faith.

<sup>421</sup> Pursuant to Article 167 TFEU:

“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 supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- 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 organizations 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 Treaties, 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:

the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States,

the Council, on a proposal from the Commission, shall adopt recommendations.”

<sup>422</sup> Pursuant to Article 207 TFEU:

“1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.

In the exercise of its internal powers the European Union, when adopting the main provisions concerning the movement of cultural objects – i.e. Regulation 3911/92 on the Export of Cultural Goods, subsequently abrogated and substituted by Regulation 116/2009 of 18 December 2008, and Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a European Union Country, has also based its competence on the common commercial policy<sup>423</sup> and, in the case of the Directive, on the former Article 100 A TEC, concerning the approximation of the laws of the Member States. Furthermore, one should note that in accordance with Article 6 TFEU, the powers of the EU in the field of culture are limited to undertaking actions of support or supplement, while under Article 3 TFEU EU competence in the domain of common commercial policy amounts to an exclusive competence.

All the above provisions – namely but not exclusively both Article 167 and, particularly, Article 207 TFEU – might as well represent, in principle, the legal basis for ratification of either the 1970 UNESCO Convention or the 1995 UNIDROIT Convention. Accession to the latter may naturally be hampered taking into consideration the above remarks concerning the scope of application of Article 345 TFEU. Furthermore, it is to be noted that a major problem would arise when trying to coordinate the main provisions of the UNIDROIT Convention with Directive

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2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.”

423 i.e. the former Article 133 TEC, corresponding to the abovementioned Article 207 TFEU.

93/7, considering the differences between the annexes to the Convention and to the Directive.

#### **2.1.3.4. Why should the European Union join the 1970 UNESCO Convention?**

Turning to the problem concerning the effects of accession of the European Union to the 1970 UNESCO Convention, it appears first of all that some provisions of the Convention should be taken into consideration as they could either create coordination difficulties in relation to implementation of the Convention by the Member States of the European Union, or have a highly positive impact on the future implementation of the Convention.

Article 5, for instance, provides for the establishment of national services with the purpose of setting up services for the protection of cultural goods and, particularly, for the establishment of national inventories of protected goods. In the perspective of a European Union accession would it mean that a “European protected property” would represent a new category in addition to the national protected property? In other words should we think more seriously in terms of European treasures (if not cultural heritage) as something new and different from the national treasures provided for in Article 36 of TFEU?

Article 9 imposes an obligation to participate in collaborative international cooperation aimed at protecting cultural heritage at risk of looting; the involvement of the European Union may well have the effect of reinforcing this provision, without affecting the significant powers of the Member States.

In accordance with Article 13(d) the States Parties undertake - consistent with the law of each State – to recognize the indefeasible right of each State Party “*to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported*”. In this respect the European Union has already adopted the abovementioned regulations and Directive<sup>424</sup> which may well be consistent with the above provision, but it is definitely the case that accession to the Convention could not entail an undertaking by the European Union to declare that the principle of inalienability of cultural property is contrary to Article 345 TFEU.

Article 17 represents a key provision as far as the technical assistance of UNESCO is concerned not only as regards information, consultation and expert advice, but also as regards good-offices, particularly in case of dispute between States Parties engaged in a dispute on the implementation of the Convention. In this respect it appears that the accession of the European Union and the ensuing possibility to call on the assistance of UNESCO as a Party to the Convention could contribute to strengthen the effect of this provision.

But apart from the above examples of specific issues, there is one general effect of EU accession to the Convention that, at first sight, might be considered as

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<sup>424</sup> See paragraph 3 above.



negative - - this concerns the attitude of a number of European Countries towards illicit trafficking.

In fact, diplomatic practice has demonstrated that it is difficult for the Member States of the European Union to reach a common consent not only on the adoption of the main international agreements (namely the 1970 UNESCO and the 1995 UNIDROIT Conventions), but also on the definition of the most important legislative acts adopted by the European Union in this area, such as the aforementioned Regulation and Directive.<sup>425</sup> The traditional, and very likely well founded, common opinion attributes this attitude to the difficulty of reconciling different if not opposing views between States classically defined as “art importing” and “art exporting”. Furthermore, the European Union Countries have a different general approach to the problem of the protection of their cultural heritage; as a consequence they show considerable differences in their own national legislations which are in some case more “liberal” or in others more “restrictive” with regard to the circulation of objects of cultural interest.

As a result, one might expect that EU accession to the Convention could represent not only a slow down in the process of elaborating instruments of effective implementation of the Convention, but also an aligning by the EU to the lowest common denominator. In fact, this is what has been experienced in European Union practice whenever the adoption of a legal instrument is the result of the reconciliation between different expectations, approaches and, last but not least, national legislations. If that was the case, considering the current different approaches of the single Member States of the European Union as to the participation and the implementation of the Convention, the result would probably amount to a clear regressive step. In other words, there is a real risk that the search for more effective and advanced forms of cooperation in the struggle against the illicit traffic would be abandoned, and that the adoption of stricter instruments of implementation would be replaced by more generic declarations of principle and non-binding undertakings.

Nevertheless, the above risk must not be overestimated. In this respect not only can one not forget the decisive impact that accession by the European Union could have on a number of third States that could be spurred on to follow the example of such a major organization and ratify the Convention. Also, in the spirit of a realistic approach, the above risk could be effectively avoided by promoting a negotiation of the accession aimed at making clear that adoption of the lowest common denominator of the envisaged regime of protection and/or of cooperation among the States Parties to the Convention would not prevent any EU Member State from enacting more advanced forms of protection and/or cooperation. This approach appears to be fully consistent with the general principle of good faith in the interpretation and implementation of international treaties and with the rules

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<sup>425</sup> See paragraph 3 above.

concerning the application of successive treaties partially or entirely relating to the same subject matter.

## 2.2. Provisions by targeted objectives

### ⇒ Increasing the level of vigilance

#### 2.2.1. Codification by Member States of the due diligence obligation (Recommendation No.4)

##### 2.2.1.1. Codification by Member States of the due diligence obligation

###### Rationale

Due diligence must be considered as strictly linked to the notion of good faith, which is of central importance to the movement of goods, in particular as regards the possession of movables and its effect on ownership rights. Generally speaking, the effects of good faith possession are regulated quite differently in national civil law systems – inspired by the maxim “possession is nine points of the law”– as compared to common law systems which apply the Roman law rule *nemo plus iuris transferre potest quam ipse habet*, or *nemo dat quod non habet*, which states that someone with no title to an object cannot transfer title to a purchaser in good faith. The notion of due diligence should not be confused with the notion of good faith: regarding the movement of movables, one could argue that the former is a complex standard of behaviour that must be complied with in order to presume the existence of the latter. Considered from this perspective, therefore, due diligence is an element that circumvents good faith.

At the international level, good faith and due diligence are dealt with in particular by the UNIDROIT Convention that represents a model and true cornerstone as regards the movement of cultural goods.

The obligation to return stolen objects as provided for in Articles 3 and 4 is one of the most characteristic aspects of the Convention as regards the assertion of the principle and the solutions in terms of forfeiture and time limitations. A detailed analysis of the regime provided by the Convention cannot be presented in this report. However, it is noteworthy that the rule requiring the possessor of a stolen object to return it irrespective of his/her good faith *per se* represents a considerable exception to the principle of “possession is nine points of the law” and to the effects of good faith on the ownership of movables on which several continental European legal systems are based.

The Convention provides for the reversal of the burden of proof regarding the existence of good faith which is no longer a presumption, but must be proved by the possessor. The proof of good faith entitles the possessor to payment of “fair and reasonable compensation” provided that the possessor “neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object” (Article 4(1)). It is useful to note that, in

order to avoid the obligation of restitution becoming futile through successive transfers of ownership, the Convention provides in Article 4(5) that the possessor shall not “be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously”.

Naturally, the UNIDROIT Convention does not presume good faith in the event of the restitution of a stolen cultural object or even take it into consideration, except for the provision of payment of fair compensation provided that the possessor of the stolen object “neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object”.<sup>426</sup>

However, the second aspect concerns factors laid down in the Convention in order to determine whether the possessor of the object exercised due diligence. According to Article 4(4), the judge must consider “all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.

It is on this basis that a number of suggestions can be made concerning the very practical issue of verifying the most relevant elements to be taken into account when defining the notion of good faith and/or to provide the judge with useful pointers to enable the reliable examination of the existence of good faith.

### **Legal basis of the codification**

In the field of trafficking in cultural goods, the examination of due diligence by different actors on the market and in particular by the main parties to transactions consequently takes on a role of critical importance. Accordingly, the question should be raised as to the usefulness of codification both of the notion of due diligence and of the elements on which diligence can be based, according to good faith.

First, it should be highlighted that this does not seem to give rise to a legal problem, since Article 207 of the Treaty on the Functioning of the European Union (TFEU) regarding common trade policy, alone or in conjunction with Article 167 of the TFEU concerning culture and Article 114 regarding the harmonisation of laws, already constitute an effective legal basis for the adoption of secondary legal acts in the field concerned. This was moreover the case of Regulation 116/2009 and Directive 93/7.

In this regard, it would be worth examining the European Union legal tools available to find the one best suited to the objective described above. First, one should consider whether the indication of one of the binding sources provided in Article 288 of the TFEU can be a convincing approach. Even if the different

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<sup>426</sup> See Article 4.1 of the UNIDROIT Convention.

characteristics of each of these acts are considered, neither the regulation, nor the Directive or the decision constitutes desirable instruments. Among these three legal tools, only the Directive seems to present the characteristics most able to fulfil the required conditions. The instrument is in fact intended to reconcile national legislations that are quite disparate, yet fairly flexible. It merely establishes a framework of rules, within which national legislators can act. In the case in point, however, the goal is not specifically to reconcile different and sometimes far removed legislations, but to provide secondary and highly practical criteria to the interpreter who is required to apply the law. At the same time, the interpreter must enjoy considerable freedom in applying the rule, since it concerns the gathering of elements and criteria aimed at an accurate evaluation of human behaviour.

Consequently, it does not seem useful or necessary to make changes with regard to the legal rules themselves, but rather to contribute to issues of legal interpretation in a field that may present conditions and situations that might be completely different when it comes to concrete application.

It would then be more appropriate to have recourse to a non-binding instrument in the form of a recommendation that:

- (a) could be adopted by the Commission, for example in the form of a communication, as has often been the case in other areas such as competition law;
- (b) would avoid recourse to much the far complex procedures required for the adoption of legislative acts by the European Union with the participation of the Parliament, Council, and so on;
- (c) would in any event be more appropriate to achieve the intended aim, since it would merely constitute a guide for the interpreter.

#### **2.2.1.2. Guide for interpreting the notion of good faith**

Based on this observation and on the normative model represented by the UNIDROIT Convention – as well as by the main codes of conduct of museums and in professional areas – one can try to suggest certain criteria to be taken into account. The issue being to assess whether the purchaser exercised due diligence, it is necessary to consider (as is suggested in Article 4(4) of the UNIDROIT Convention) *objective circumstances* such as the price paid, whether or not the possessor consulted any accessible documentation related to the cultural object concerned or obtained any relevant information, and so forth, as well as the *subjective circumstances*, in particular as regards the character of the parties.

International practice is in fact quite complex and varied as regards the terms and conditions for concluding transactions in cultural goods, and circumstances of time and place could be considered among the objective circumstances mentioned above. The conditions of the art market vary widely depending on the different countries where the transactions are carried out (time and conditions of conclusion of such transactions). Moreover, a recommendation intended to provide a guide to the interpreter should include suggestions of examples to help interpret the meaning of

“any other step that a reasonable person would have taken in the circumstances” in Article 4(4) of the UNIDROIT Convention (last sentence of the Article).

The case law demonstrates the complexity of assessments that the judge is required to make when it comes to applying the rules of good faith to trade in cultural goods and the many ways in which this can be expressed.

For example, the Italian Court of Cassation held in its decision No. 9782 of 14 September 1999 that presumptions which allow the exclusion of good faith must indirectly lead to the belief that the purchaser had a reasonable doubt regarding the unlawful origin of the good. The elements on which these presumptions are based can also be represented by extrinsic circumstances prior to the purchase. In this particular case, regarding the purchase of the painting “Still life with fish” by G. de Chirico at an auction following a previous theft at the owner’s house, the Court confirmed the decision of the trial judge who had applied the presumption to conclude that the purchaser’s state of mind gave rise to a suspicion regarding the unlawful origin of the painting, such that his good faith was to be excluded, given that he was a gallery owner and art expert with a particular knowledge in the work of de Chirico, and was in a position to have checked whether the painting was one of those subject to a criminal investigation following the theft.

Based on this example, one could conclude that the judge’s task was not too difficult, since he had to examine the “reasonable doubt regarding a situation of unlawful origin of property”. Furthermore, it should be recalled that responses can be very different in this area. For example, as regards the obligation of due diligence as provided in Article 3, paragraph 2 of the Swiss civil code, the Swiss Federal Court has ruled that the lack of an export certificate does not constitute a sufficient element to impose on the buyer an obligation to verify the seller’s right to dispose of the work. Although the Swiss Federal Court generally imposes a fairly high level of due diligence’s jurisprudence, this argument rests on the distinction between property ownership and export permits, the one being independent of the other.<sup>427</sup>

It would therefore be useful to follow the example of the German BGB, section 932 paragraph 2 of which defines good faith *a contrario*,<sup>428</sup> considering that the judge should take into account certain decisive criteria regarding the requirement of due diligence, which are determined objectively and subjectively, such as the personal situation of the purchaser, commercial practices, whether the purchaser often enters into transactions of this nature, the effort made by him or her to obtain sufficient information on the origin of the goods, etc.<sup>429</sup>

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<sup>427</sup> See the decision of 8 April 2005, *Union de l’Inde c. Crédit Agricole Indosuez*, SJ 1999 1; ATF 131 III 418 C. 2.4.4.2.

<sup>428</sup> “The purchaser is not acting in good faith if he or she knows that the thing does not belong to the seller or if his or her ignorance of this is due to gross negligence”.

<sup>429</sup> See BGH Bundesgerichtshof, decision of 13 April 1994, NJW 1994, p. 2022; decision of 9 February 2005, NJW 2005, p. 1365, concerning the definition of “gross negligence”; the purchaser

Lastly, the recommendation should highlight the requirement to develop due diligence criteria that take account of the fact that the trade in goods of artistic and cultural value demands increased vigilance. For a start, this duty should be respected by professionals (such as art and antique dealers) as well as all people with knowledge of the field concerned.

Moreover, interpreters of the law (i.e. case law), thanks to their concrete application of the law, have permitted the development of criteria in the form of “reasonable steps” that should be included among the criteria suggested in the recommendation. They include, in particular:

- contacting the State of origin or the potential owner (often an institution) of the cultural object and/or the State that occupies the territory of the place of origin of the cultural object;
- contacting the potential employer of the seller (if it is a State);
- contacting INTERPOL;
- contacting a specialist in the good sold;
- the issue of certificates on cultural goods by an auction house;
- the confirmation of the origin of cultural goods by the representative of the possessor of the cultural good;
- meetings with the possessor of the cultural good;
- documentation on the history of the country of origin of the cultural good.<sup>430</sup>

It would therefore be advisable to support these interpreters by giving them the opportunity in the future to apply the law correctly through inspired (flexible) criteria.

### 2.2.1.3. Checklist for art market participants: precautions advised before a purchase

This document has been modelled on the “Buying with confidence” documentation on the United Kingdom “Cultural property advice” website.<sup>431</sup>

| <b>1. Initial checks</b>   |  |  |
|--|--|--|
| Verify the seller’s identity, status, speciality and membership of any professional dealers’ association.  |  |  |
| Ensure that the price asked reflects the market price.<br>One way of doing this is to consult websites publishing the prices fetched by artists in public sales. |  |  |

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must have seriously failed in his or her obligation to exercise appropriate behaviour and omitted to consider elements that were required by all in the concrete case.

<sup>430</sup> See decision of Swiss Federal Court 8 April 2005, *Union de l’Inde vs. Crédit Agricole Indosuez*, cit. and *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus vs. Goldberg & Feldman Fine Arts Inc.*, and *Peg Goldberg*, United States District Courts, August 1989.

<sup>431</sup> <http://www.culturalpropertyadvice.gov.uk>.

## Recommendations

|   |  |  |
|---|--|--|
| <b>2. Checks to be carried out on the object</b>  |  |  |
| 2.1. Ask where the object came from, including its country of origin.   |  |  |
| 2.2. Ensure that the object does not come from illicit excavations.   |  |  |
| 2.3. Carefully examine any labels, markings and annotations that provide information about origin. Ensure that these are not later additions.   |  |  |
| 2.4. Consult INTERPOL databases of stolen items and national databases. ( <a href="https://www.interpol.int">https://www.interpol.int</a> )   |  |  |
| 2.5. Consult the ICOM Red Lists. ( <a href="http://icom.museum/what-we-do/resources/red-lists-database.html">http://icom.museum/what-we-do/resources/red-lists-database.html</a> )  |  |  |
| <b>3. Documents to ask for</b>  |  |  |
| 3.1. Ask for evidence of origin (catalogue raisonné, exhibition catalogue, auction catalogue, inventory, correspondence).   |  |  |
| 3.2. Ask if an authentication certificate is available.   |  |  |
| 3.3. Ask to see the export documentation (licence or certificate, waybill).   |  |  |
| 3.4. Ask for a condition report and if necessary a restoration report.  |  |  |
| <b>4. Payment precautions</b>   |  |  |
| 4.1. Ensure that the seller makes out a pro forma invoice and retain it indefinitely.   |  |  |
| 4.2. Ensure that any invoices, receipts, sales notes or extracts of public sales records mention the details specified by the professional regarding the nature, composition, origin and antiquity of the object sold. <sup>432</sup> |  |  |
| 4.3. Ensure that a photograph of the object purchased is attached to the invoice.   |  |  |
| 4.4. Pay by cheque or bank transfer (bank card).  |  |  |

- If in doubt or if origin is not adequately established, you are advised not to go ahead with the purchase.
- Once the checks on origin have been satisfactorily completed, it is recommended that advice also be sought from a specialist in the type of object concerned.
- If the checks on origin are satisfactory and the purchase takes place, it is recommended that a dossier be compiled on the object, including all documentation covering the responses obtained to the above questions, and that this be kept safely away from the object itself.

### 2.2.1.4. Object ID record sheet for art market participants

This document is based on the UNESCO object ID record sheet.

1. Description of the artwork or collector's item
  - 1.1 Category of the cultural good as per the annex to Regulation (EC) no. 116/2009 of 18 December 2008 and decree no. 93-124 of 29 January 1993:
  - 1.2 Title or theme:
  - 1.3 Subject represented:
  - 1.4 Maker, workshop or style:
  - 1.5 Dating or period:
  - 1.6 Measurements (height x length):

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<sup>432</sup> Article 1 of France's Decree no. 81-255 of 3 March 1981 on the repression of unlawful transactions involving artworks and collectors' items.

- 1.7 Materials and techniques:
- 1.8 Signature:
- 1.9 State of conservation:
- 1.10 Inscriptions and markings and their locations:
- 1.11 Distinguishing features:
2. Information obtained on origin
  - 2.1 Object referencing
    - 2.1.1 Catalogue raisonné:
    - 2.1.2 Bibliography:
    - 2.1.3 Inventory:
    - 2.1.4 Correspondence:
    - 2.1.5 Existence of a certificate of authenticity or assessment report
  - 2.2 History of the object
    - 2.2.1 Presentation for public sale:
    - 2.2.2 Exhibitions:
    - 2.2.3 Place of origin (place of discovery or manufacture):
    - 2.2.4 Last location (country):
    - 2.2.5 Existence of a cultural property certificate:
    - 2.2.6 Other export documents:
  - 2.3 Review of databases to check the object is not listed
    - 2.3.1 INTERPOL database (stolen objects):
    - 2.3.2 National heritage databases (e.g. Mobilier-Palissy database and Mérimée architecture database):
    - 2.3.3 Online databases of museum collections:
    - 2.3.4 ICOM Red Lists:
    - 2.3.5 Art Loss Register:
    - 2.3.6 Dates on which the different databases listed above were consulted:
3. Documents attached to the object ID record sheet
  - 3.1 Colour photographs or sketches (state how many):
  - 3.2 Object referencing documentation (catalogue raisonné, bibliography, inventory, etc.):
  - 3.3 Documents detailing the object's history (public sale reports, exhibition catalogues, certificate of authenticity or assessment report, export document):
  - 3.4 Condition report and restoration report:
  - 3.5 Receipt confirming that the database has been consulted, or screenshot of the database consulted:
  - 3.6 Documents attesting value:
4. Author of object ID record sheet and date produced

Surname and first name:  
Title, position:  
Address:  
Telephone number:  
E-mail address:



Date object ID record sheet created:

### **2.2.2. Support for INTERPOL's stolen works of art databases (Recommendation No. 9)**

Two thirds of European Union Member States have created databases of stolen goods. The great variety of these databases has been highlighted.<sup>433</sup> Improvements are recommended on several levels.

#### **II Centralization of information**

All the institutions and individuals questioned agreed in principle that information on illegally circulating cultural goods ought to be centralized. Most of them named INTERPOL as the institution best placed to handle this centralization. INTERPOL is not a European Union organization, of course, but cultural goods in an unlawful situation do not circulate solely within the borders of the Union. There is thus a need for an international database.

For its part, INTERPOL is already carrying out a centralization process of this type, the Prevention of and Fight against Crime (ISEC) project,<sup>434</sup> which is in complete accordance with the conclusions of the Council of the European Union (27-28 November 2008): "The Council supports Interpol's action in improving its database and designing to that end an automatic data exchange system supplied, consulted and updated directly by the Member States and exploiting the latest technology, such as image similarity and the use of search engines."

**⇒ Proposal: Invest INTERPOL with the mission of creating and operating a centralized database of stolen or illegally exported cultural goods.**

#### **II Database restrictions**

There are a number of sensitive issues here that merit thorough consideration from both a legal and an operational standpoint.

(a) Should databases be restricted to stolen goods?

Most of the individuals and institutions questioned came out in favour of opening up databases to illegally exported goods and to recovered goods for the purpose of locating their owners.

Where "lost" or "missing" goods are concerned, the question is moot. Some databases already include this information.

However, a good argument can be made for excluding lost or missing goods from databases because of the uncertainty as to whether any offence has been

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<sup>433</sup> See above.

<sup>434</sup> If approved, the project will support Interpol's work by improving its database and providing for a data exchange system supplied, consulted and updated directly by the Member States and exploiting the latest technology, such as image similarity and the use of search engines.

committed (e.g., no complaint has been filed). Specific databases should therefore be set up for these goods.<sup>435</sup>

⇒ **Proposal: Open up databases to illegally exported goods and recovered goods.**

The main difficulty concerns the identification of illegally exported goods. This kind of information is very difficult to obtain, as the scenario assumes that the good concerned is circulating clandestinely. One solution would be to require the creation of “positive” databases of export authorizations issued by the competent authorities in Member States. Austria has set up a database of this kind which handles around 1,500 requests a year. Kept by the competent authorities, these databases would be directly accessible by the police, customs and art market professionals.

Something else that has been suggested is the creation of a database featuring the standard documents used by the different services issuing export certificates.<sup>436</sup>

⇒ **Proposal: Encourage the creation of databases of export authorizations and the standard forms used by States.**

(b) Should all stolen and illegally exported goods be entered in the databases?

While the answer is obviously affirmative for illegally exported goods, the case for including stolen goods is not so clear. The number of stolen cultural goods is very large and this could result in “information overload” that might be counterproductive. However, most of the police forces questioned<sup>437</sup> pointed out that the inclusion of cultural goods in databases was not selective, and supported this way of working.<sup>438</sup> Furthermore, if selection were applied to cultural goods, the selection criteria would probably differ greatly from State to State (e.g., value threshold).

⇒ **Proposal: Include all stolen and illegally exported cultural goods in databases.**

## II Linkage with cultural goods inventory databases

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<sup>435</sup> There are databases of lost or missing goods in the States of central Europe (Rumania, Czech Republic, Slovakia) covering cultural property that went missing as a result of the Second World War. Having dedicated databases of this kind would doubtless be more operationally effective than integrating the information into a database of stolen goods, particularly in terms of access and document searching. (This is the situation in Poland, for example, where there is specific access for the database covering these cultural goods, and with the Lost Art database in Germany and the MNR database in France).

<sup>436</sup> Nimoz (Poland).

<sup>437</sup> V. OCBC (France) pointing out that databases are very useful for goods of some artistic, historical, etc. value, but also for certain investigations, such as those relating to serial thefts.

<sup>438</sup> Outside the European Union, the FBI database requires items to have a value of at least 2,000 dollars or significant cultural importance.

Databases of stolen/illegally exported cultural goods are not the only ones to be consulted during a police or customs investigation. Those questioned in these services (especially customs) said that they consulted cultural goods inventory databases. As well as giving a precise description of the cultural goods they list, these databases also mention their status (e.g., stolen, missing, etc.). A list of all inventory databases, or at least those of public institutions, ought to be compiled so that they can be linked to the future INTERPOL database.

⇒ **Proposal: Link the central stolen cultural goods database to inventory databases.**

### II Information available in databases

Content was found to vary greatly from one database to another:

- description of goods: the criteria for describing a cultural good are straightforward only in appearance. In the first place, it is important to standardize the criteria for registering cultural goods: maker, measurements, material, dating, distinguishing marks, location, owner (person or institution), date and place of the theft. It has been said that the criteria used by INTERPOL are too numerous and should be reduced in number. Furthermore, it should be borne in mind that those consulting these databases (police, customs, museums, art market professionals) have different perspectives and priorities;
- photograph of the cultural good: most databases include a photograph of the cultural good. Photographs obviously have the vital advantage of making the cultural good identifiable. A number of issues have been identified, however: a lack of rules on how photographs should be taken, cases where no photographs can be obtained, and the situation of archives, for which an accurate description may suffice.

⇒ **Proposals:**

- **Standardize and simplify the criteria for describing stolen cultural goods on the register**
- **Provide instructions for taking good photographs: standardize photographs.**
- **Require a photograph of the cultural good to be produced if available.**
- **Allow accurate descriptions without photographs in the case of certain cultural goods (archives).**

### II Retention of records

Information registered in this way ought to be kept for as long as the good is in an unlawful situation. Efforts to prevent trafficking in cultural goods would be negatively affected if the retention period were the same as the civil or penal

prescription period.<sup>439</sup> For one thing, there are certain cultural goods to which prescription is inapplicable in civil law and sometimes in criminal law as well when concealment is treated as a continuing offence. For another, this situation would create very burdensome database maintenance requirements. Most importantly, the fact of the cultural good having been the object of a crime ought to be permanently visible, even if prescription periods have elapsed. The thinking is that this will enhance efforts to prevent trafficking in cultural goods.

⇒ **Proposal: Information in the register should be kept for as long as the goods concerned are in an unlawful situation.**

## II Supplying information to databases

A number of issues of different kinds arise as regards the provision of information to databases. In the first place, certain European Union Member States (about a third)<sup>440</sup> do not have databases of stolen cultural goods (and often do not even have an inventory database). It is thus urgent for them to create such databases. Secondly, it has been observed that information is included in databases more or less haphazardly. Failure to add information systematically or a long delay between a good being stolen and appearing in the database would destroy the latter's usefulness, not least where due diligence is concerned. It is thus important for each State to designate a competent authority or agency to keep its database current.

Furthermore, much care is needed when it comes to the individuals and institutions who are authorized to add information to databases. Information about an unlawful situation needs to be reliable and verifiable. Furthermore, the property concerned may be the subject of civil or criminal proceedings. This is another reason for designating a specific authority (of the State's choice) to supply information to the database.<sup>441</sup>

The provision of data to the INTERPOL database could be done in two ways:

- formatted messages from national bureaux: implementation of an online messaging system accessible on the INTERPOL website, allowing data to be input by countries that do not provide them in large quantities, or that do not have a national database;
- semi-automatic inputting by Member States with national databases.

There is also a plan to develop web services for direct transfer from the Italian national database ("Leonardo") to the INTERPOL database.<sup>442</sup>

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<sup>439</sup> This is the case in Latvia and is regarded as a negative point.

<sup>440</sup> See above "Current situation".

<sup>441</sup> Two points have been made on this subject: the dedicated authority ought to be attached to the police and not to a ministry such as the culture ministry, and the dedicated authority could be different from the national INTERPOL bureau, whose remit is not confined to crimes affecting cultural property, although it should keep in close contact with it.

<sup>442</sup> UNESCO intervention 1 July 2011, Lieutenant-colonel A. Deregibus (Carabinieri, Italy).

⇒ **Proposal: Designate a dedicated authority to upload data to national and INTERPOL databases.**

### II Access to databases

A consensus has emerged about the desirability of broadening access to databases.

Regarding INTERPOL, since 2009 the public have been able to access the database upon demand.

Regarding national databases, and particularly police ones, access is usually restricted, even though it is often possible to put in a verification request to the competent authority. Access in those cases is indirect. It would be possible in these cases to adjust access to databases depending on the kind of information being sought.<sup>443</sup>

⇒ **Proposal: Broaden public access to databases.**

### II Proof that databases have been consulted

Databases thus fulfil a twofold information function:

- a preventive function: preventing the sale of a good that is in an unlawful situation;
- a legal function: consulting a reliable database is a form of due diligence, as it is evidence of good faith.

It is therefore essential to be able to prove that the database has been consulted (date consulted, purpose of the consultation and categories of cultural goods consulted).

⇒ **Proposal: The database should provide a certificate to confirm that it has been consulted, specifying the date consulted, purpose of the consultation and categories of cultural goods consulted.**

## 2.2.3. Obligation to keep a police register (Recommendation No. 10)

### II Justification

It was found that few States had created an obligation for art market professionals (sellers, traders and auction houses) to keep a register of this kind. It has also been pointed out that the information contained in these registers can differ from State to State. However, they are considered to be an essential tool for preventing the illicit circulation of cultural goods.

It is thus recommended that a legal obligation to keep a register of movable goods be extended to all European Union Member States, that this register be defined and its content standardized, that a link be established with the object ID

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<sup>443</sup> Thus, references to any court proceedings and to named individuals would be removed from information given out to the public.

record sheet, and that penalties be imposed for non-compliance with the obligation to keep this register.

## **II Detail of the proposal**

### **(a) Definition of the register**

The transaction register could be an annual listing of cultural goods that comes into the possession of the professionals concerned in the course of their business. It could be held in paper or electronic format. It must be forgery-proof. It would act as a kind of professional inventory.

### **(b) Contents of the register**

The police register must be not only a register of transactions involving cultural goods, in the accounting and administrative sense of the term, but also a register that serves to trace these goods. Its contents must be determined in the light of this objective.

### **Personal identification**

The identity of anyone selling, exchanging or depositing one or more goods with a view to sale should be ascertained from the identity document they produce,<sup>444</sup> as should the name and trading address of any legal person involved in the operation.

### **Identification of objects**

Description of each object with its visible characteristics and any signs, markings and signatures serving to identify it (e.g., numbers in the case of multiple objects such as bronzes).

A photograph of the object.

On the model of French law,<sup>445</sup> objects whose individual value does not exceed a certain amount and which do not present any artistic or historical interest could be grouped into batches.

Assignment of a serial number to each object or batch of objects. The serial number would be noted on the register and on each object or batch of objects.

Indication of the legal status of the object, e.g., protected item, listed item, etc.

Indication of any limitations on the item's movements, e.g., prohibition on unauthorized removal from the country.

### **Traceability of the object**

The manner in which ownership or possession of the object was acquired.

The purchase price or, if the object or batch of objects is being exchanged or deposited with a view to sale, the estimated value.

The method of payment used for the object in the case of sale.

The object's origin. This information is rarely or never required.<sup>446</sup> The seller or depositor might supply a certificate or affidavit of ownership.

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<sup>444</sup> Whether a private individual or the representative of a legal person.

<sup>445</sup> Art. R. 321-3 of the French Penal Code.

<sup>446</sup> See Act no. 2011-267 of 14 March 2011 amending Article 321-7 of the French Penal Code and including a reference to origin among the information to appear in the register.

Valid documentation of the object's movements if it is an imported object subject to special conditions of movement.

**(c) Link to the object ID record**

If the use of object ID record sheets has been adopted for certain cultural goods,<sup>447</sup> and these should be linked to the information they share with the register. The register could thus benefit from the information given in object ID records for the cultural goods these cover.

Once the object concerned has been sold by the market professional, the object ID record could be completed and handed over to the purchaser along with the receipted invoice.

**(d) Retention of the register**

One option would be to set no limit on the length of time the register has to be kept and to require that it be stored for as long as the business continues to operate. Computerization should facilitate such storage.

If this option is not chosen, the time the register has to be kept should be determined in the light of the prescription periods laid down for civil claims and criminal proceedings.

**(e) Online registration and sale**

When an online sale is made by a professional, the information given in the register regarding the object's identity, its origin (except for the purchase price paid by the professional) and any conditions of movement should appear on the website through which the sale is conducted.

**(f) Consequences of non-compliance with the obligation to keep a police register (no register, inaccurate information, etc.)**

Keeping an accurate police register is part of the general framework of good practice required of art market professionals and may have both civil and penal consequences:

- ⇒ **Proposal: Where civil law is concerned: the keeping of an accurate register should be treated as evidence of the due diligence required of the professional and an indication of good faith.**
- ⇒ **Proposal: Where penal law is concerned: the keeping of an accurate register would be evidence that any infraction involving the illicit circulation of cultural goods was unintentional.**
- ⇒ **Proposal: Conversely, failure to fulfil the obligation to keep an accurate register would be evidence of bad faith in both civil and criminal law.**

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<sup>447</sup> See links with EC Regulation no. 116/2009 of 18 December 2008.

## II Legal basis

The recommended European standard creating an obligation to keep a register of movable objects held by art market professionals (sellers, antique dealers, intermediaries such as auction houses), standardized in form and content and with penalties for non-compliance (whatever their nature), would not form part of measures to harmonize criminal law or criminal procedures, nor would it be a standard for cooperation on criminal matters. In practice, it would be primarily a standard relating to the traceability of cultural goods, and thus a “preventive” standard for the protection of such goods. It could thus come within the European Union’s remit regarding freedom of movement of goods and the limitations on this where national treasures are concerned. Indeed, on this basis, Directive no. 93/7/EEC of 15 March 1993 clearly states that it, together with Regulation no. 116/2009, constitutes “a Community system to protect Member States’ cultural goods”. Similarly, the conclusions of the Justice and Home Affairs (JHA) Council on preventing and combating illicit trafficking in cultural goods (27 and 28 November 2008) state very clearly that improved traceability of cultural goods is a prerequisite for free movement. The need for traceability rules (such as the obligation to keep a register) as a condition of free movement is hereby expressly affirmed.

### ⇒ Improving the conditions for the return of cultural goods and the States’ heritage

#### 2.2.4. Introduction of a European Union standard preventing extinction of legal claims against those who come into possession of cultural goods in bad faith (Recommendation No. 16)

## II Justification

Comparison of the different systems shows that, in quite diverse situations, prescription leads to the *de facto* (and sometimes even *de jure*) loss of the cultural object for the dispossessed owner. It is thus essential to ascertain whether the respective interests of the possessor and the former owner justify such a loss. On the part of the possessor, there is obviously an interest in being well protected. The issue concerns the security of transactions, and thus how much confidence purchasers can have in the market. Furthermore, once a certain time has elapsed, there is a general interest in preserving legal peace. As regards dispossessed owners, they have an interest in retaining their *de jure* and *de facto* status as owners.

### (a) Acquisitive prescription

It is clear that acquisitive prescription ought to operate only in situations where the possessor of the object has acquired it in good faith. It should also be noted that there is a fundamental difference between acquiring a consumer or investment object, on the one hand, and cultural good, on the other. In cases where consumer or investment goods are lost, the possibility of possession being acquired in good



faith makes life easier in legal terms and, by way of acquisitive prescription, prevents the formation of *res extra commercium*.

Furthermore, there is a difference in the damage caused to an owner whose good is acquired by a third party in good faith according to whether that good is by its nature irreplaceable or whether it is ordinary good. From the standpoint of their owners, damages do not generally represent adequate compensation for the loss of cultural goods. What is more, there is no reason not to require the possessor to examine his or her legal position at the time possession is acquired.

It would therefore be advisable for the possessor's good faith to be subject to stricter conditions where cultural objects are concerned (see the recommendation concerning good faith and due diligence). The possessor should have an obligation to investigate the ownership situation.

### (b) Extinctive prescription

Extinctive prescription brings into play interests other than those relating to the maintenance of a necessary confidence in the market. The aim of this type of prescription is to deal with the problem of possessors having insufficient evidence of title after a long period. It is true that, after a number of years, it becomes more and more difficult for the possessor of an object to prove title.

That said, when a claim is made the burden of proof rests not on the possessor but on the person asserting title. The situation is thus completely different from that of debtors (owing a sum of money, for instance) who, after a long period, can no longer prove they have effectively satisfied the creditor. Taking into consideration the issue of the burden of proof, extinctive prescription of claims cannot be said to serve the interests of those possessing objects in good faith, since it is not up to them to prove ownership.

Where the interest in legal peace generally is concerned (legal security, reduction of litigation), it should be recalled that the consequences of extinctive prescription, in certain scenarios, are moot in German law:<sup>448</sup> where a thief conceals a cultural object during the prescription period, the owner is prevented from asserting his or her right of ownership, i.e., from claiming direct possession of his or her property (*rei vindicatio*). Conversely, if the thief loses possession of the object, the owner can claim his or her property from the current possessor (if the right to do so has not lapsed because of prescription).

In short, extinctive prescription serves only those possessors who have not acquired the property by acquisition in good faith or by acquisitive prescription. These possessors are not deserving of protection. In this case, the public interest in

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<sup>448</sup> Cf. the criticism expressed by *Müller* (note 135), no. 455; *Henckel*, AcP 174 (1974), p. 97 (130); *Müller-Katzenburg*, NJW 1999, p. 2551 (2558); *Siehr*, in: *Carl/Güttler/Siebr*, Kunstdiebstahl vor Gericht, 2001, p. 53 (63, 73 ff.); *Siebr*, ZRP 2001, 346.

legal peace does not justify going against the interests of an owner whose property has been stolen.

For these reasons, it is desirable *de lege ferenda* for claims relating to cultural goods to be exempted from extinctive prescription rules.<sup>449</sup> If we consider other legal systems, some of which have no extinctive prescription of claims (Swiss law, for example),<sup>450</sup> this idea will be easy to accept.

The question arises as to whether the rule should apply only to cultural goods or be extended to all goods, since most of the arguments excluding extinctive prescription in cases of bad faith. The fact is that the issues involved for owners and States are different in nature when cultural goods are involved, and this consideration justifies a special solution being sought in this case.<sup>451</sup>

## **II Discussion of the proposal for standard rules concerning prescription and the protection of cultural heritage**

The object of the review of the different forms of prescription and the observation that the diversity of systems may be prejudicial to the workings of the market suggest a need for uniform rules on prescription that can replace the very varied regimes currently applied in the different Member States. This rule would be completely consistent here with the rule applied in some States (Italy, Spain, France, Switzerland, Greece, etc.) whereby no time limit is placed on claims to certain goods, either in consideration of the regime of public ownership or of the cultural value of the property concerned. When the Civil Code was revised in Germany, the Federal Council asked the Government to create an exception for extinctive prescription of claims to cultural goods.

Furthermore, it is essential that this proposal be linked to the proposals for adopting a common continuing offence rule for illicit concealment. From this perspective, the owner's claim may cover the entire time the property has been in the possession of the person concealing it. The prescription period will not be operative. The disappearance of extinctive prescription for civil purposes aligns criminal and civil law very opportunely.

Claims to cultural objects should therefore not be subject to extinctive prescription when the possessor has acted in bad faith. The rule in force in Switzerland could serve as a model.

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<sup>449</sup> Cf. Mansel, in: Ernst/Zimmermann, *Zivilrechtswissenschaft und Schuldrechtsreform*, 2001, p. 367 ff.; Zimmermann/Leenen/Mansel/Ernst, JZ 2001, p. 684 (693); Heuer, NJW 1999, p. 2558 (2563), who suggests differentiating by whether possession is acquired in good or bad faith.

<sup>450</sup> Cf. BGE 48 II, p. 38 (46 ff.); Jayme, IPRax 1995, p. 43.

<sup>451</sup> V. Jaeger, *Internationaler Kulturgüterschutz*, 1993, p. 112; Müller-Katzenburg, *Internationale Standards im Kulturgüterverkehr und ihre Bedeutung für das Sach- und Kollisionsrecht*, 1995, pp. 335 ff.; Finkenauer, JZ 2000, p. 241 (247), who allow imprescriptibility only for claims on collections of cultural property.

Further thought should also be given to the matter of acquisitive prescription. The Scottish Law Commission has raised the question of whether the time limit for acquisitive prescription needs to be extended in the case of cultural goods.<sup>452</sup> All this may suggest the need for special rules. That said, the implications of a solution of this kind for the general system of movable property law need to be thoroughly examined.

## II Legal basis

To the extent that differences between systems are liable to alter the workings of the market, the appropriate tool could be a directive devoted to cultural goods on the same legal basis as Directive 93/7/EEC of 15 March 1993 dealing with the return of cultural objects.

Article 26 TEU on the functioning of the internal market is less specific, as it concerns all goods rather than just cultural objects. However, it might be used to the extent that the proposed rules cover not only dispatch but also domestic transport.

⇒ **Increased penalties for trafficking in cultural goods**

### 2.2.5. Adoption at the European level of minimum rules for the definition of criminal offences linked to the trafficking in cultural goods (Recommendation No. 21)

It would be desirable to reconcile the criminal law of the different countries, by, among other things, setting minimum rules at the European Union level to define criminal offences and penalties relating to trafficking in cultural goods.

## II Justification

The issue of cultural goods and their illicit trafficking brings three European Union objectives into play: free movement of people and goods, protection of the European cultural heritage, and construction of an area of freedom, security and justice.

Trafficking in cultural goods is a particularly serious form of property crime, as it affects not just goods but the cultural heritage of Member States. It is a threat to the preservation of national treasures whose value is inestimable. It is often committed in a framework of organized crime, sometimes with the complicity of professionals, resulting in severe disruption of cultural policies and art markets. Consequently, the struggle against trafficking in cultural goods requires a repressive response.

The national reports and chapter II of the present report show that, mainly because of their heterogeneity, the provisions of the criminal legislation of individual countries dealing with the trafficking in cultural goods are now inadequate to provide the forceful response that the scale of the problem calls for. The transnational character of trafficking increases the complexity and difficulty of

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<sup>452</sup> Discussion Paper No. 144.

prosecuting, investigating and trying these offences. The struggle against trafficking in cultural goods thus requires a degree of coordination and cooperation between Member States that differences in legislation currently impede.

The struggle against cultural goods trafficking will be more effective if the European Union can lessen the discrepancies between the relevant criminal laws and procedural rules of Member States. In the first place, such a move towards standardization would be the expression of a common policy and a common determination to combat this scourge. Secondly, it would deprive the perpetrators of offences of the option of committing them in Member States whose rules are less strict. Thirdly, the use of common definitions would enhance mutual understanding and trust between systems and thus be favourable to international cooperation.

Under Article 67 of the Treaty on the Functioning of the European Union (TFEU), the general political objective of the Union is to ensure a high level of security through measures to prevent and combat crime, including organized crime. Under Article 83 TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and penalties in the areas of particularly serious crime with a cross-border dimension (resulting from the nature or impact of such offences or from a special need to combat them on a common basis) or if this proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures. Under Article 87, paragraph 2, of the TFEU, relating to police cooperation, the European Parliament and the Council may establish measures concerning: “(a) the collection, storage, processing, analysis and exchange of relevant information”. Article 82 TFEU allows European legislators to establish minimum rules relating to the rights of victims of crime to the extent necessary to facilitate mutual recognition and judicial cooperation.

## **II Detail of the proposal**

(a) In the first place, it would be advisable to establish minimum rules at the European Union level regarding the definition of criminal offences associated with trafficking in cultural goods. Member States should take the measures necessary to make the following wilful acts punishable:

- Theft and all forms of misappropriation of cultural goods, including those located on archaeological, historical or cultural sites protected under national law.
- These acts should be made punishable by a maximum prison term of at least [...] years.
- The illicit removal of ownerless goods from archaeological, historical or cultural sites protected under national law should be treated by Member States’ criminal legislation as misappropriation of another’s property.
- Possessing, concealing and passing on a cultural good obtained by theft or misappropriation when aware of its origin or having neglected to check

## Recommendations

that it is not listed in one of the databases of cultural goods reported missing or stolen.

- These acts should be punishable by a maximum prison term of at least [...] years.
- Destroying, defacing or damaging cultural property belonging to another or located on archaeological, historical or cultural sites protected under the applicable law of the country.
  - These acts should be punishable by a maximum prison term of at least [...] years:
- Illicit importation and exportation of cultural goods.
  - These acts should be punishable by a maximum prison term of at least [...] years.
- Possessing, concealing and passing on a cultural good obtained through illicit exportation or importation when aware of its origin or having neglected to check that it is not listed in one of the databases of cultural goods reported missing or stolen.
  - These acts should be punishable by a maximum prison term of at least [...] years.

The purpose of these provisions is first of all to act against theft and other types of misappropriation of cultural goods throughout the European Union, including misappropriation of cultural goods on protected sites, such as those recovered from illegal excavations and those legally excavated but illegally possessed.

They provide for action against illegal possession, taking into account the difficulty of proving that the possessor has committed an offence where ancient cultural goods are concerned, as good faith can always be asserted on the grounds that it is impossible to know the full history of an object's movements. It is thus difficult, in the absence of presumption, to prove that an individual was aware of the unlawful origin of a cultural good and that the crime of illegal possession has been committed; it is too strict a condition for many unlawful holders of cultural goods to be apprehended. Without thereby infringing the principle of proportional punishment, it would be advisable to make it a criminal offence likewise, as part of the moral aspect of possession, to fail to check that the item is not listed in one of the databases of cultural goods reported missing or stolen. The obligation to publicize the original unlawful act (theft or illegal exportation) lightens the burden of proof regarding knowledge of the unlawful origin of the item. And failure to check these databases of missing or stolen goods is clearly evidence of negligence. This requirement would make the criminal law instrumental in improving the traceability of cultural goods. However, this provision needs to be tied in with the idea of "good faith" on the part of the holder in private law and as regards restitution.

Going some way towards standardizing sanctions would narrow the differences in penalties for theft and concealment between States, which are substantial (see

“Current situation” in the first part of the present report), and prevent “forum shopping”.

(b) Member States should also take the necessary measures so that incitement to one of the offences mentioned above, aiding and abetting and attempted offences of this kind are punishable.

(c) Member States should take the necessary measures so that it is treated as an aggravating circumstance for one of the above offences to be committed by a professional or a public servant in the course of his or her duties.

This provision will allow the professional status of those prosecuted for theft or concealment (antique dealer, auction house, etc.) to be taken into account. Offences committed by professionals are clearly more serious than those committed by laymen and cause greater harm.

(d) Member States should take the necessary measures so that legal entities can be held liable for the above offences when committed on their behalf by any person who performs an executive function within the legal entity concerned, whether acting individually or as a member of an organ of that legal entity. Member States should also ensure that a legal entity can be held liable when lack of oversight or supervision by one of its executives has made it possible for one of the above offences to be committed on behalf of the said legal entity by someone subject to its authority.

Among other things, this provision would provide a basis for establishing liability and punishing auction houses that have participated directly or indirectly in trafficking in cultural goods.

(e) Member States should take the necessary measures to ensure that their competent authorities are authorized to seize cultural goods on a precautionary basis when there is substantial evidence that it has been concerned in one of the above offences.

(f) Member States should take the necessary measures so that legal action can be taken in relation to the above offences for an adequate period after the unlawfully held cultural good has been confiscated from the perpetrator.

This provision is designed to create greater consistency between national laws as regards periods of prescription for the offence of concealment, and particularly the time from which this prescription period runs.

(g) Member States should ensure that investigations or legal proceedings concerning the above offences, when relating to trafficking in cultural goods, are not dependent on a complaint or accusation being lodged by a victim, whether this is a public or private person, and that criminal proceedings continue even if the victim’s statement is withdrawn.

(h) Member States should ensure that victims of trafficking in cultural goods are entitled to information and access to their investigation and prosecution services

specializing in cultural goods trafficking (with regard to these specialized services in Member States, see the proposals on penal cooperation).

⇒ **Promote cooperation between authorities in the area of freedom, security and justice.**

### 2.2.6. Improving international cooperation tools (Recommendation No. 23)

#### II Justification

It would be advisable to develop certain tools for police and judicial cooperation on criminal matters to meet the specific needs of efforts to combat trafficking in cultural goods.

In the first place, it should be recalled that cooperation tools exist (see the first part of this report, “Current situation”) and that the first and most vital step is for the police and legal authorities of Member States to implement them, something that is not done often enough at present (see the second part of the report, “Obstacles”).

Secondly, the developments proposed in the area of law enforcement cooperation need to take account of the legislative work that has been carried out or is ongoing in the Area of Freedom, Security and Justice (AFSJ), whose purview is cross-cutting and whose area of application therefore includes the effort to combat trafficking in cultural goods. The penal cooperation tools of the European Union, based on the principle of mutual recognition, have been established on a “general” basis and not a “special” one, i.e., category of offence by category of offence. In this context, accordingly, it would run counter to the consistency of the legal framework of the AFSJ for the present report to recommend a whole new cooperation instrument dedicated exclusively to the issue of trafficking in cultural goods.

#### II Detail of the proposal

(a) Improve implementation of existing cooperation instruments.

Some national reports have revealed that little use is being made of European penal cooperation instruments to combat goods trafficking because:

- this area of crime is often not regarded as a priority;
- in practice, there is a lack of mutual knowledge and trust between national actors.

The first need is therefore to put the struggle against trafficking in cultural goods back at the heart of national penal policy priorities, which means adopting European Union legislation in this area that has a full, specific and binding penal dimension.

Building up mutual trust between national actors entails not only bringing greater consistency to national criminal laws (see the proposals on measures to reconcile domestic laws) but also the following measures:

- Member States should put in place prevention, investigation and prosecution services specializing in cultural goods trafficking, whose staff should include cultural heritage experts;
- within these specialized services, Member States should establish “contact points/rapporteurs” responsible:

For aiding and facilitating international cooperation. They should be available for consultation by the services of other Member States wishing to obtain information and advice. They should also be able to request information and advice from the “**contact points**” of other Member States. These “contact points” should facilitate information sharing and mutual knowledge of laws, procedures and institutions pertaining to cultural property.

Prepare a national annual report for the purpose of identifying trends in trafficking in cultural goods and assessing the results of actions to combat it, including the gathering of statistics in close collaboration with the relevant civil society organizations active in this field.

They should form a specialized European network of “contact points/rapporteurs” throughout the Union. Their competence will lie in the provision of information, as they will not replace the competent authorities responsible for implementing cooperation procedures.

- For a coordinated approach to the struggle against trafficking in cultural goods, the European Union should appoint a “**European coordinator**” within its services to take responsibility for combating trafficking in cultural goods. This coordinator should convene the “national contact points/rapporteurs” at least once a year for a major conference for training purposes and to share information and lessons learnt. The goal is to create a European community of individuals responsible for combating cultural goods trafficking in their own countries who know one another and thus can easily cooperate.

(b) Improve existing cooperation instruments

In view of the difficulties mentioned in the national reports and others, current penal cooperation instruments in the European Union could be improved as follows:

In addition to putting databases in place (see the specific recommendations on this point in the present report), it would be advisable, within the framework of existing cooperation instruments (arrest warrant, freezing of evidence, confiscation), to put in place a “**standard procedural document**”, harmonized throughout the Union, that accurately describes the cultural good concerned and details, for example, the grounds for thinking that this good has been trafficked and is on the territory of the authority before which the matter has been brought. This measure would help to deal with the difficulties arising from the vagueness and inaccuracy of cooperation requests as regards information on the cultural good concerned and the circumstances of the offence involved.



While the framework decision of 18 December 2008 on the evidence warrant expressly excludes this, the penal cooperation instruments of the European Union ought to facilitate **transnational assessment** following hearing of the parties within a reasonable time for a cultural good seized in a Member State other than that of the original proceedings, either:

- by allowing the authority in the issuing State to require the authority in the executing State to seize it so that an assessment can be carried out;
- by allowing the authority in the issuing State to send an assessor to the executing State to conduct an assessment of the cultural good seized.

By adjusting current cooperation instruments allowing the freezing of evidence (framework decision of 22 July 2003) and the obtaining of evidence (framework decision of 18 December 2008) to the specificities of the struggle against cultural goods trafficking. It is known that the framework decision on the freezing of assets does not provide for a full procedure, since it envisages only *provisional* freezing in the State of execution and not the surrender of the property; and that the evidence warrant concerns not property *to be sought* but property *“available”* in the State of execution (see the first part of the present report, “Current situation”). It would be advisable to achieve **better coordination** of these coercive measures applied to property in a criminal context with the **“non-repressive” procedure of restitution**. In particular, the currently existing tool of asset and evidence freezing ought to have as its object not just the criminal proceedings in the issuing State, but also international restitution of a non-penal nature.

### 2.2.7. Adoption of a new international cooperation instrument (Recommendation No. 25)

#### II Justification

Considering the specificities of cultural goods trafficking and the needs identified by practitioners, there is undoubtedly a strong argument for adding a new European criminal cooperation instrument to the stock of existing instruments. This is a **“search, seizure and confiscation” warrant** for a (cultural) good that has been identified but is missing and is the subject of criminal proceedings, allowing the authority of the issuing State to require the authorities of the executing State to carry out searches and seizures and return the goods to the issuing State (as evidence of the offence and for restitution where appropriate).

A European Union instrument, based on the principle of mutual recognition, would be more binding on the executing State than the traditional tools of mutual assistance in criminal matters (e.g., international letters rogatory), and thus more rapid.

#### II Legal basis

Considering the “general” and “cross-cutting” character of the criminal cooperation instruments of the AFSJ, this proposal cannot be confined to trafficking in cultural goods. It must also form part of the proposed **directive**,

**currently under discussion, concerning the “European investigation order”.** The idea is to put in place a general system of evidence-gathering at the European level that would replace today’s fragmentary and inconsistent mechanisms. Based on the mutual recognition principle, the “European investigation order” would allow a national authority, as part of domestic criminal proceedings, to have the authorities of another Member State carry out any kind of investigation, within a short time frame and with only limited grounds for refusal.

### **3. EXPERT INTERNATIONAL ORGANIZATIONS : VIEW ON PREVENTING AND FIGHTING ILLICITE TRAFFICKING**

#### **3.1. UNESCO - UNIDROIT**

UNESCO, UNIDROIT and the European Union – a renewed partnership against trafficking in cultural property

(Paper drafted jointly by UNESCO and UNIDROIT Secretariats as partners in the study on the prevention of trafficking in cultural goods in the European Union conducted by CECOJI-CNRS on behalf of the European Commission. This paper will be published as an annex to the study and will be posted on the European Commission’s website.)

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UNESCO and UNIDROIT are institutional partners of the Centre for International Legal Cooperation Studies and the National Centre for Scientific Research (CECOJI – CNRS – UMR 6224) in the team’s study on the prevention of trafficking in cultural goods in the European Union (EU) (Contract No. Home/2009/ISEC/PR/019-A2).

Accordingly, the two organizations have been requested, on the one hand, to highlight the complementarity of their activities and those of the EU in the field of culture, in particular in preventing and combating trafficking in cultural property, and on the other, to state their view on the possible reaffirmation of the competence of the EU (which act as a laboratory testing a range of solutions).

UNESCO and UNIDROIT have chosen to submit a succinct joint document, without expressing any view on the issue of competence shared between the EU and its Member States, which is an internal EU matter.

This UNESCO-UNIDROIT paper overviews past cooperation with the EU, in particular regard to strategic partnerships, financial cooperation and standard setting. Yet another goal consists in gauging the complementarity and potential levels of cooperation in preventing trafficking in cultural goods.

Furthermore, UNIDROIT’s contribution deals specifically with matters pertaining to the restitution and return of stolen or illegally exported cultural objects covered by the 1995 Convention. As the prevention of trafficking in cultural objects is not confined to facilitating their restitution and return and as there are many stakeholders in a range of disciplines, UNIDROIT acknowledges the importance of cooperating by all partners. As stressed in the preamble to the 1995 UNIDROIT

Convention, “(...) implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation”. Accordingly, the preamble commends “the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector”.

## **I. Competence and participation in the work of UNESCO and UNIDROIT**

### **A. The EU and UNESCO**

Since the establishment of relations between the EU and UNESCO in 1964, both institutions’ interest in closer cooperation has grown. Accordingly, an administrative and financial framework cooperation agreement was concluded formally in 1996 and revised in 2004. On the basis of that agreement, a UNESCO Liaison Office was opened in Brussels in early 2011 to strengthen cooperation between UNESCO and the EU and its subsidiary bodies, thus consolidating existing partnerships and establishing new ones in both institutions’ priority areas. The aim of the Office is to ensure that UNESCO’s mandate and activities are better understood.

The role played by the EU is as important as that of the other international organizations that cooperate with UNESCO, and not at the regional level only. With its 27 Member States, the EU is an important and strategic partner for UNESCO in terms of the sustainability and impact of its activities. Thematic dialogue and financial cooperation with the European Commission and EU delegations at the national level are being broadened in mutually agreed areas and operational results are being obtained. At the same time, the EU is increasingly a party to be taken into account in the negotiation and implementation of UNESCO’s standard-setting instruments.<sup>453</sup> Moreover, the European Union is now a Party to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (see b(i) below).

#### **a. Strategic partnerships and financial cooperation**

Several fields, defined jointly by the European Commission and UNESCO, have been identified for strategic partnerships and future cooperation for the mutual benefit of both institutions. Common working themes have been highlighted, in particular, in the areas of development, research and science. In the field of development, culture is the first theme to be considered: strengthening policy formulation and training in cultural policy; acknowledging the cultural dimension in development policies; strengthening dialogue with Africa; production of cultural and development indicators and collection of cultural statistics in order to assess the impact of culture on economic development; and promoting UNESCO’s

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<sup>453</sup> The EU has permanent representation at UNESCO in Paris.

participation in the “Cultural Heritage and Global Change: a New Challenge for Europe” joint initiative.

In regard to financial cooperation, the EU is UNESCO’s key partner and a very valuable source of funding. The 27 EU countries provide approximately 40% of the regular budget of the United Nations. Moreover, the EU accounts for more than half of overseas development aid provided. It is important to emphasize the increasing amount of aid received by the specialized agencies of the United Nations. At UNESCO, EU funds constitute a substantial proportion of extrabudgetary funds received. Since 2001, the volume of activities implemented by UNESCO with EU financial assistance has risen considerably.

#### **b. Cooperation on standard-setting action**

Cooperation on standard-setting action has led to ever broader EU-UNESCO discussions and to joint analyses of specific issues, particularly on the formulation of policies and the implementation of standard-setting instruments, especially in the culture sector. The European Commission has also participated as an official observer in discussions held at UNESCO, particularly within its governing bodies – the General Conference and the Executive Board.

Accordingly, the European Commission participated in the 2004 negotiations on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was adopted in 2005 by the General Conference of UNESCO at its 33rd session. This was possible because the European Commission had been mandated by the EU Council of Ministers to negotiate on behalf of the EU and its Member States. The European Commission was then granted observer status by the Executive Board and the General Conference of UNESCO, which enabled it to negotiate the 2005 Convention on behalf of the EU. To our knowledge, this was unprecedented in the negotiation of a binding standard-setting instrument at UNESCO.

#### **(i) Participation in negotiations and signature of the 2005 Convention**

The Treaty establishing the European Community provides that in the areas of Community competence, and its exclusive competence in particular, the Member States of the European Community may not negotiate and enter into international obligations individually or collectively. However, some provisions in UNESCO’s draft convention on the protection of the diversity of cultural contents and artistic expressions had a bearing on the exclusive competence of the European Community. Other provisions fell within the shared competence of the Community and its Member States. Areas of Community competence include free movement of goods, common competition rules, intellectual property, the common commercial policy and cooperation for development. In view of the breadth of Community competence covered by the draft convention, the Council of the European Community adopted, in November 2004, negotiating directives authorizing the European Commission to participate in discussions on the convention on behalf of the European Community.

It must be stressed that the European Union has observer status at UNESCO, in the category of intergovernmental organizations and regional organizations. Under the rights granted by UNESCO to observers, the European Commission could not negotiate fully on behalf of the European Community, nor could it safeguard the interests of the EU so that it could subsequently become a Party to the Convention. To that end, the European Community Member States represented on the Executive Board requested that a decision be taken to enable the European Commission to participate actively, on behalf of the European Community, in the intergovernmental meetings of experts as a stakeholder in the negotiations on the 2005 Convention. The Executive Board was thus requested to authorize the European Community to participate by extending to it the following rights that would be exercised by the European Commission:

- the right to speak, to reply, to put forward proposals and amendments at formal meetings;
- the right to take part in committees, working groups, formal and informal meetings;
- the right to have its own nameplate, but not the right to vote.

The aim was to grant the European Commission more extensive rights in addition to its rights as an observer, to permit it to discharge its negotiating mandate in full.

In April 2005, the issue was placed on the agenda of the 171st session of the Executive Board, which invited, on an exceptional basis, the European Community, while maintaining its observer status, to participate actively and as fully as appropriate in the work of the intergovernmental meeting of experts that had drafted the 2005 Convention.

The European Union acceded to the 2005 Convention on 18 December 2006 as a regional economic integration organization.

### **(ii) EU Member States and the 1970 Convention**

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted in November 1970 by the General Conference of UNESCO and entered into force on 24 April 1972, three months after the deposit of the third instrument of ratification; the second European State to ratify the Convention was Bulgaria in September 1971. European countries with strong art market connections have generally been slow to ratify the 1970 Convention (for example, France did so in 1997 and the United Kingdom in 2002). Only those States in which antiquities abound, such as Italy or Greece, deposited their instrument of ratification quite early on, in 1978 and 1981 respectively. There are now 120 States Parties to the Convention, 22 of which are EU Member States, while another five (Austria, Latvia, Ireland, Luxembourg and Malta) have not yet ratified the Convention. The recent ratification by Belgium and the Netherlands, in 2009, betokens a significant commitment by two States with dynamic art markets.

Articles 19 and 20 of the Convention provide that UNESCO Member States may ratify or accept the Convention and that States not Members of the Organization may be invited to accede to it by the Executive Board. As these provisions apply only to States, the EU may hardly become party to the Convention as matters now stand. Only a revision of the Convention, in accordance with Article 25, providing for the Convention to be ratified by regional economic integration organizations, would permit any ratification by the EU. Revision has significant consequences that must be taken into consideration. It would bind only those States that became parties to the revised Convention (Article 25, paragraph 1). Moreover, “unless the new convention otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession as from the date on which the new revising convention enters into force”, (Article 25, paragraph 2). The revision would perhaps lead to the reopening of discussions on the substance of the Convention, and not only the approval of the new text and to the requirement of a new list of ratifications. Such a process could be considered in 2012 at the meeting of States Parties to the Convention to be held at UNESCO Headquarters, if States Parties so desire.

## **B. The EU and UNIDROIT**

The two organizations participate very closely because the 27 EU Member States are UNIDROIT members (as are two accession candidate countries and six other European States).

EU Member States are also significant partners because they contribute approximately 26% of UNIDROIT’s regular budget.

The EU is an important partner in the drafting of UNIDROIT standard-setting instruments and is a Party to some of those instruments.

### **a. Cooperation in standard-setting endeavours**

UNIDROIT has developed working methods that combine rigour (in the careful scientific analysis of the law and of the needs on which its negotiations rest) and flexibility (in adapting working methods to the instrument’s specific requirements).

As a result, the 1995 UNIDROIT Convention, as all UNIDROIT conventions, is firmly grounded in scientific research methodology, thorough negotiations by governmental experts and contributions from representatives whose interests are covered by the Convention. The EU participated in all stages of the negotiations that led to the adoption of the 1995 UNIDROIT Convention (Study Committee, Committee of Governmental Experts and Diplomatic Conference). UNIDROIT repeatedly stressed its readiness to participate as an observer in the *travaux préparatoires* of the 1993 Directive.

In general, the UNIDROIT Secretariat and the European Commission already collaborate, and appropriate procedures were put in place to prevent the overlapping of competences on a case-by-case basis when specific instruments such as the 2001 Convention on International Interests in Mobile Equipment (Cap), as well as its protocols on aircraft (2001 – Cap), rail (2007 – Luxembourg) and space (adoption expected in 2012 – Berlin) and the 2009 Convention on Substantive Rules

for Intermediated Securities (Geneva), were being drafted. The EU Council and the European Commission were present and the Commission negotiated in the same capacity and with the same status as States (authorization to submit observations, take the floor and participate in all committees).

Furthermore, as the international community, unlike the European Union, has no central court to ensure that UNIDROIT Conventions are uniformly interpreted by domestic authorities, and so the Conventions are drafted with the utmost precision in order to secure maximum certainty, predictability and uniformity. Under public international law, UNIDROIT Conventions are deemed to be self-executing or directly applicable and, as a result, there has been great consistency in the implementation of these instruments.

Not all EU Member States are Parties to the 1995 UNIDROIT Convention,<sup>454</sup> but it has clearly been influential because it was the basis for the work that led to the adoption of Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. Many European States thus borrowed principles, concepts and rules from the 1995 Convention when they transposed the Directive into their domestic legislation. Several EU Member States became Parties to the 1970 UNESCO Convention (almost 40 years after its adoption!) after the 1995 UNIDROIT Convention had been adopted.

#### **b. Accession of the EU to UNIDROIT Conventions (in particular the 1995 Convention)**

The most recent UNIDROIT Conventions contain a provision entitled “Regional economic integration organizations”, which enables such organizations “constituted by sovereign States with competence over certain matters governed by the (...) Convention to ratify, accept or approve the Convention or to accede to it”. The EU could thus accede to the Cap Convention and 2001 Aircraft Protocol thereto (in their declarations on accession Member States list the areas in which they have surrendered competence to the EU) and sign the 2007 Rail Protocol.

The 1995 UNIDROIT Convention does not contain such a provision. However, if the EC were to express an interest in acceding to it, the two organizations could negotiate with States Parties in order to overcome difficulties arising from the lack of such a clause in the Convention.

The 1995 UNIDROIT Convention contains a “disconnection clause”,<sup>455</sup> under which Member States or regional economic integration organizations may apply, in their relations with each other, their internal rules and not those of the Convention.

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<sup>454</sup> EU Member States Parties to the 1995 UNIDROIT Convention are Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia and Spain.

– The EU accession candidate country and Party to the 1995 UNIDROIT Convention is Croatia.

– Other European State Party to the 1995 UNIDROIT Convention: Azerbaijan.

The 1995 Convention was ratified by France, the Netherlands (Member States) and Switzerland (other European State).

<sup>455</sup> Article 13 (3) of the 1995 UNIDROIT Convention provides that: “in their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will

However, only five EU Member States (Finland, Greece, Italy, Norway and Spain) out of the 12 EU Member States Parties to the Convention have chosen that option. It must be borne in mind that no provision in the UNIDROIT Convention may be deemed to be contrary to the principle of the free movement of goods (the authors drew heavily on the work of UNIDROIT) and that the ratification of the Convention, without any Article 13(3) declaration, would be neutral in regard to relations between a Member State and its EU partners.

## **II. Complementarity with UNESCO's and UNIDROIT's work and activities to combat trafficking in cultural goods: towards stronger and broader eu competence?**

“The Maastricht Treaty (1993) enabled the European Union (EU), which is historically geared towards the economy and trade, to take action in the field of culture in order to safeguard, disseminate and develop culture in Europe. However, the EU's role is limited to promoting cooperation between the cultural operators of the different EU countries or to complementing their activities in order to contribute to the flowering of the cultures of EU countries, while respecting their national and regional diversity (...).”<sup>456</sup>

In June 2008, the European Council reaffirmed the key role of cultural cooperation and intercultural dialogue in the European Union's external policies. Accordingly, the EU Council and representatives of the governments of Member States invited Member States and the Commission, in their conclusions, to take measures to achieve **three political objectives**, one of which was “to encourage the ratification and implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (Official Journal C 320 of 16 December 2008). Of the 27 Member States, 26 are Parties to the Convention. Belgium has now completed its internal ratification process and will deposit its instrument of ratification shortly. The European Parliament has recently encouraged non-Member States to ratify the Convention (European Parliament resolution of 12 May 2011 on the cultural dimensions of the EU's external action (2010/2161(INI)).

UNIDROIT and UNESCO welcome the decision to implement a global strategy for the integration of culture into the EU's external relations policies and specific strategies with non-Member States and other regions worldwide and, in that context, recognition that the European Commission and its Member States must improve support “for the protection, preservation and promotion of cultural heritage and international cooperation to combat the theft and trafficking of cultural objects”. The study proposed by CECOJI, in which UNESCO and UNIDROIT are institutional partners, falls, naturally within this broader approach.

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not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules”.

<sup>456</sup> See [http://europa.eu/legislation\\_summaries/culture/index\\_fr.htm](http://europa.eu/legislation_summaries/culture/index_fr.htm).



### **A. Ratification of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention**

UNESCO and UNIDROIT invite the EU Council to propose that Member States and the Commission take measures to achieve the **fourth political objective** (see above), namely to **encourage ratification and implementation of the 1970 UNESCO Convention and of the 1995 UNIDROIT Convention** (as it did in regard to the 2005 UNESCO Convention).

### **B. Approximation of laws**

It is obvious that one of the legal obstacles found in this study is the negative distortion arising from the wide variety of civil and criminal instruments, which allows dealers to choose low-risk marketplaces favoured by ease of movement. The 1993 Directive aimed at mutual recognition, rather than approximation, of Member States' laws, which limits its scope because it is precisely from the diversity of laws that problems arise. In the context of the restitution and return of stolen or unlawfully exported cultural objects, approximation, **or even harmonization**, is desirable in order to combat trafficking more effectively.

One of the main features of the desired approximation of laws relates to mechanisms designed to **protect the good-faith purchaser**. There is little point in outlining differences in such mechanisms from one country to another and the impact of these differences on the location of transactions involving stolen or unlawfully exported goods and, lastly, on the likelihood of such goods being returned. However, neither the 1993 Directive nor the UNESCO Convention provide a satisfactory response to this question, since both instruments refer to domestic law (and therefore to different mechanisms). The UNIDROIT Convention removes these differences by establishing uniform and substantive rules of law.

It is obvious from recent ratifications of the 1970 UNESCO Convention by Member States that, in regard to restitution and return, those States preferred an instrument that had set a goal to be achieved by reference to domestic law or mutual recognition of national legislation. They could have taken a step forward by becoming Parties to the 1995 UNIDROIT Convention, which lays down **uniform substantive rules**. This is the goal that must be pursued.

The most recent report on the implementation of the Directive shows that it would be appropriate to improve effectiveness by widening the **scope of the Directive** (which does not cover theft of cultural property), by extending the **period of limitation** from one to three years (thus bringing it into line with the 1995 UNIDROIT Convention, heavily criticized on that score at the time) and by covering a wider range of objects. The **definition of the cultural property covered** should be less dependent on the decision of individual Member States. UNESCO and UNIDROIT can but welcome this prospect and the opportunity to cooperate with Community institutions by bringing to bear their experience in these areas.

Finally, the fact that the Directive has, to date, been little implemented (see the reasons given in the third European Union report<sup>457</sup>) as has been the 1995 UNIDROIT Convention (little information available), does not mean that these texts are not effective. The 1995 UNIDROIT Convention has a **deliberate moralizing effect** (as does the Directive) on potential purchasers (amicable restitution to avoid legal action is a positive effect).

### **C. Proposal for a single model export certificate**

The 1970 UNESCO Convention and the 1995 UNIDROIT Convention both refer to the use of export certificates for cultural goods.

On the basis of Model Export Certificate for Cultural Objects<sup>458</sup> drawn up by the UNESCO and World Customs Organization (WCO) Secretariats, which work together to combat trafficking in cultural objects, it is recommended that the EU design a similar single certificate as a practical tool specifically adapted to the growing phenomenon of cross-border movement, and therefore of illegal export, of cultural objects.

As most countries now use the same export form for “ordinary” items (computers, clothes, etc.) as for cultural objects, the model certificate meets the need to identify and trace cultural objects and is adapted to their specific nature, thus showing that these objects are not like other goods, yet it is not too burdensome for exporters and customs officials.

UNESCO recommends that the 27 EU Member States adopt, in whole or in part, a similar model export certificate for cultural property and designate it as their national export certificate for these specific objects.

This model certificate would facilitate the task of States, customs authorities and police officers within the EU and at its borders, while providing for each cultural object to have an identity form that helps to prove its provenance. The export certificate drawn up jointly by UNESCO and WCO is also intended for use by private individuals wishing to export cultural property. If it were adopted more widely at the European or international levels as an international standard, it would afford many advantages to States and would facilitate the work of units that combat trafficking in cultural property.

### **D. A single inventory standard**

Police services have long acknowledged the importance of good-quality documentation in preventing the theft of works of art, and this is one of the measures required by or mentioned in the 1970 and 1995 Conventions. Documentation is crucial to the protection of works of art and antiquities because police officers can seldom find and return to owners objects that have neither been

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<sup>457</sup> Report of the Commission to the Council, the European Parliament and the European Economic and Social Committee of 30 June 2009 – Third report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2009) 408 final – not published in the Official Journal).

<sup>458</sup> See <http://unesdoc.unesco.org/images/0013/001396/139620F.pdf>.

photographed nor properly described. Police forces hold a large number of objects recovered during their operations, but cannot return them to their owners owing to the lack of documents that could be used to identify the victims. The goal is to combat the unlawful appropriation of works of art by promoting the dissemination of documentation on the cultural property in question and by establishing links worldwide among organizations that can encourage the use of such documents. Use of a single inventory standard for cultural property is supported by law-enforcement agencies such as the Federal Bureau of Investigation (FBI) and Scotland Yard, and bodies such as UNESCO, UNIDROIT, INTERPOL, museums, cultural heritage organizations, art dealers and valuers, and insurance companies.

EU Member States should be encouraged to establish a national cultural heritage inventory system (public and/or private) and a common standard, distinct from inventories, for describing cultural objects in line with the Object ID international standard promoted by UNESCO and the International Council of Museums (ICOM).<sup>459</sup> This standard is the fruit of years of research conducted in collaboration with museums, international police forces, customs commissions, art dealers, the insurance sector and experts.

### **E. A joint response to combat Internet trafficking**

A study conducted by INTERPOL in 59 of its Member States shows that trafficking in cultural goods on the Internet is a serious and worse problem, both in countries of origin or source countries (where the theft occurred) and in importing or destination countries (where the good is sold lawfully or unlawfully).

The quantity, provenance and authenticity of cultural objects on sale on the Internet vary enormously. Some objects are of historical, artistic or cultural value, others are not; they may be of unlawful or lawful origin, they may be authentic or mere fakes. Most countries lack the resources to check all Internet sales or to investigate all doubtful items on sale. However, all countries should make an effort to combat trafficking in cultural objects on the Internet by taking appropriate measures.

UNESCO, INTERPOL and ICOM experts have considered this issue and have agreed that monitoring of the Internet was problematic for the following reasons:

- (a) the volume and range of objects on sale;
- (b) the range of marketplaces or platforms for Internet sales of cultural objects;
- (c) insufficient information for identifying the objects;
- (d) insufficient time in which to react, as auctions are quickly adjudicated;
- (e) the legal position of companies, entities or private individuals engaged in Internet sales of cultural objects;
- (f) the complexity of jurisdiction issues raised by such sales;

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<sup>459</sup> [http://archives.icom.museum/object-id/index\\_fr.html](http://archives.icom.museum/object-id/index_fr.html).

(g) objects sold are often located in a different country from the one where the Internet sales platform is located.<sup>460</sup>

Consequently, a list of basic measures has been drawn up to curb the growth of illegal Internet sales of cultural goods for the purpose of:

- urging Internet sales platforms to post a warning to purchasers and sellers on every page displaying cultural goods for sale;
- requesting Internet sales platforms to forward relevant information to the law enforcement units and to cooperate with them in investigations into the sale of cultural goods of doubtful provenance;
- establishing a central authority (for example within national police forces) mandated to protect cultural goods and to monitor constantly and control Internet sales of cultural goods;
- cooperating with national and foreign police forces, INTERPOL and the competent authorities in other States concerned;
- compiling statistics and recording information on the monitoring of Internet sales of cultural goods, on sellers and on the results of such monitoring;
- taking legal measures to seize cultural goods when there is reasonable doubt as to their provenance;
- seeing to the restitution of goods of unlawful provenance or seized goods to their rightful owners.<sup>461</sup>

UNESCO suggests that the European authorities, supported by INTERPOL and national police forces specialized in the protection of cultural goods (for example in France and Italy), encourage the 27 EU Member States to take steps to prevent Internet trafficking by establishing ad hoc police units and by approaching Internet auction sites in their countries in order to check the origin and nature of cultural goods on the Internet more effectively.

#### **F. Community-wide training methods for police and customs officers**

The measures that States Parties to the UNESCO Convention may take to enshrine in their legislation a legal and operational arsenal robust enough to protect national cultural heritage include the establishment and funding of dedicated specialist national units in order to prevent trafficking and to build institutional capacities in this area. The goal is to encourage the formation of specialist police and customs units. The pooling of the 27 Member States' resources, based on the experience of some specialist police and customs corps in countries such as Belgium, France, Greece, Hungary, Italy and the United Kingdom, could therefore lead to the provision of joint training for specialist officers in these countries. In particular, training could be provided with the support of INTERPOL and WCO experts.

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<sup>460</sup> See <http://portal.unesco.org/culture/fr/files/21559/11836449659MesuresTraficIllicite.pdf/MesuresTraficIllicite.pdf>.

<sup>461</sup> <http://portal.unesco.org/culture/fr/files/21559/11836449659MesuresTraficIllicite.pdf/MesuresTraficIllicite.pdf>.

## **G. Standard codes of ethics and register-mediated market accountability**

### **(i) Codes of ethics**

Cultural property trade professionals acknowledge the key role that cultural trade has traditionally played in the dissemination of culture and in the distribution to museums and private collectors of foreign cultural property for the education and inspiration of all peoples. At the invitation of UNESCO, UNIDROIT and ICOM in particular, they acknowledge the worldwide concern at trafficking in stolen, illegally sold, illicitly excavated and illegally exported cultural property and agree to be bound by the principles of professional practice designed to distinguish trafficked cultural property from legally traded cultural property, and they will endeavour to eliminate the former from their professional activities.

The *International Code of Ethics for Dealers in Cultural Property* was adopted by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its tenth session in January 1999 and was endorsed by the General Conference of UNESCO at its 30th session in November 1999.<sup>462</sup>

The aim of this international code is to harmonize the numerous national codes used by dealers to combat trafficking, avoid the problems raised by the provisions of such codes in the past and grant international recognition to dealers who adopt it. The code is not legally binding. It should be emphasized that codes of ethics (or due diligence codes) have had a greater impact and have risen in number since the conclusion of the UNIDROIT Convention, which provides in Article 4 (4) that, for the purpose of establishing entitlement to compensation for an object that was illegally sold and has to be returned, the fact that it was acquired from a reputable art dealer voluntarily bound by a code of professional conduct can play an important part in determining whether the possessor exercised due diligence (the “quality of the parties”).

Endorsed by the EU on behalf of its 27 Member States, such a code could be a model for national codes, although it should not be imposed on the community of art dealers and should be adopted voluntarily and in close cooperation with regional and national European art dealers’ associations. Dealers bound by such a code should not facilitate transactions involving works of art of uncertain provenance and, above all, they should not purchase, sell or value cultural goods that might have been stolen or unlawfully exported, or that might have come from a conflict country or an occupied territory. Moreover, these dealers should have the right to use a special logo or distinctive sign so as to inform potential clients of their commitment to selling cultural goods of legal origin. The display of such a logo or distinctive sign would be proof of such dealers’ credibility. National art dealers’ associations should keep a register as proof of their intention to be legally bound by the code. Such a register would prevent misuse of the logo or distinctive sign, and dealers who did

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<sup>462</sup> <http://unesdoc.unesco.org/images/0012/001213/121320m.pdf>.

abuse it would be punishable under the relevant provisions of the associations to which they belong.

It is worth noting that Article 7.2 of the ICOM Code of Ethics for museums refers to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention as the international legislative standard against which the code is interpreted and which museum policies must note. Also noteworthy is the support of the World Confederation of Art Dealers (CINOA) for both instruments.

### **(ii) Transaction registers**

Each State's history and national legislation have specific features, particularly in regard to cultural property. For that reason, UNESCO encourages its Member States, and suggests that the 27 EU Member States be likewise encouraged, to examine their national legislation and revise or strengthen provisions if necessary. Their legislation must comprise several provisions to improve the protection of cultural goods against trafficking and ensure that antique dealers, auction houses and other art market stakeholders (curators, gallerists and consignment dealers) keep a register of all transactions involving cultural goods. The register should include the following information:

- name of the seller and purchaser;
- date of purchase;
- description of the object;
- its price;
- its provenance;
- its export certificate (or import certificate where appropriate).

These data must be kept for a reasonable period of time so that they can be checked regularly and provided to the national authorities.

### **III. Standard setting in other intergovernmental bodies**

Trafficking in cultural goods is widely acknowledged as one of the most widespread international crimes. The proceeds of theft, counterfeit, ransom and organized burglaries are often used to finance other criminal activities, and the goods themselves are used as quid pro quo among criminals and as a means of laundering money.

However, in view of the debates under way in other international fora on the formulation of new standard-setting instruments to combat trafficking and promote the restitution of cultural objects, UNESCO and UNIDROIT emphasize that it is preferable to avoid the dispersal of the effort and resources allocated to international cooperation in this area and that priority should be given to ensuring full implementation of existing international and regional instruments. This must be achieved by ensuring broad ratification by all States of the treaties that have been in force for 40 and 15 years respectively (there are 120 States Parties to the 1970 Convention and 32 to the 1995 Convention) so that they would become universally applicable, as has the 1972 Convention on the Protection of World Cultural and Natural Heritage. It is vital to give full effect to the legal and operational provisions of the 1970 and 1995 Conventions, with EU support, before considering the

negotiation, drafting and possible conclusion of a new treaty which, in principle, has already been rejected by many States, particularly those with an art market.

### 3.2. INTERPOL

INTERPOL's contribution to the study on the illicit traffic in cultural goods in the EU

The main mission of INTERPOL is the promotion of international co-operation between law enforcement agencies in combating crime. In practical terms, INTERPOL develops tools and services aiming at assisting its member countries (188) in their investigations and in other relevant activities, such as crime prevention and training. All EU member countries are also members of the Organization.

While INTERPOL can offer tools and services and further develop them in making them more attractive and user friendly, the main actors in this international co-operation are the member states who decide if at all and to which extent they make use of the existing tools.

The following conditions in the member countries have a considerable impact on their capability to co-operate efficiently on an international level:

#### a) Specialized services and networks

Experience clearly shows that countries, which have installed specialized services at law enforcement level, are in a quite better position to co-operate internationally. They have gathered more expertise in the subject matter, have usually built a network with other specialized units, are in contact with specialists from other agencies, services, institutions, art trade professionals and experts. They have better knowledge of existing specific laws and regulations, and international conventions. In an ideal way, these specialized units are coordinated and can thus serve as focal points of contact, both domestically and internationally.

From INTERPOL's perspective, it would be an advantage if these contact points could be located in the country's INTERPOL National Central Bureau with all the relevant telecommunication network and database accesses already available, or at least keep a very close contact with the NCB.

The idea of setting up a parallel network of contact points sounds attractive concerning a particular police investigation with the possibility to directly get in touch with the specialists in other countries. On the other hand, a network based on individual actors needs to be constantly updated bearing in mind the frequent changes of organizational structures, re-allocation of staff, changing of tasks as a result of professional careers, etc. It seems therefore more stable to rely on an institutional structure rather than on an individual based network. Moreover, the co-existence of an institution based and an individual based network most probably results in weakening both as some countries will choose to use one rather than the other and vice versa.

Finally, the usefulness of these networks largely depends on the purpose they are supposed to serve. If the main purpose is sharing information on cultural goods thefts and details of the stolen goods, the information channel should clearly enable

the appropriate follow-up action, i. e. integration of the information in a database, which is widely accessible. In this respect, using INTERPOL channels is the only reasonable option because the infrastructure is already in place, it is being increasingly used and in particular by the EU member states with a project underway aiming at facilitating both data supply and query, see last paragraph.

Specialization limited to law enforcement agencies does not allow exploiting the full potential of intervention measures in the prosecution process. Sometimes, the magistrates use to apply general legal provisions (e. g. governing theft or receiving stolen goods), but are not always very familiar with specific legislation on cultural goods. There is clearly an incontestable advantage in installing specialized prosecution offices / courts to deal with cultural goods crime issues, as it is the case for other specialized crime areas (e. g. financial crime, money laundering). This has been put in place in Italy with undeniable success and may serve as an example for good practice in other countries.

#### **b) Domestic and inter-agency co-operation**

Effective international co-operation is necessarily based on a well functioning domestic co-operation. This co-operation has to be developed within the same sector (in the police sector between local, regional and national services, between different agencies working in the same field, e. g. gendarmerie / judicial police, Carabinieri / national police, Guardia civil / national police). An institutionalized co-operation is certainly more efficient than a co-operation depending on the initiative of the individual actors. This also includes some kind of reporting mechanism, which makes sure relevant information is shared regularly and not just by random.

Co-operation on a national level no doubt benefits from partnering with other agencies, institutions, foundations and experts. The use of INTERPOL channels would also facilitate co-operation with other international partner Organizations, such as UNESCO or ICOM.

#### **c) Continuous capacity building**

It is recommended that countries provide capacity building, which is to be refreshed and further developed as crime challenges, tools and methods develop. These efforts in capacity building should be integrated in the training programmes and curricula of law enforcement officers. They should be amended by modules focusing on the international aspect, particularly in the context of the EU. The training initiatives on cultural goods crime already conducted by CEPOL since several years are certainly a good approach and should be maintained and intensified. INTERPOL has regularly contributed to these training sessions, while the Organization has itself also conducted own training courses in other regions (Latin America, Asia). This capacity building is even more effective if it is not limited to police agencies only, but also includes customs officials, and representatives of other agencies (Ministries of Culture, museum staff).

#### **d) National stolen works of art databases**



Countries, which so far have not done so, should examine the possibility of setting up a stolen works of art database on a national level. This is an important tool for police investigations and various control activities (monitoring the art market, export controls). Countries managing a national database regularly have a genuine interest in collecting relevant domestic information from the local police services, to complete the information with missing details, to get good quality photographs. This provides them with a solid basis and enables the sharing of this information with other partners, internally and externally, including the supply of the data for integration into INTERPOL's worldwide database.

When developing a national database, countries are recommended to examine the adoption of the same or a similar data structure and search strategies already used in INTERPOL's database. Built upon findings of an international working group, they have not only proven their reliability since several years of successful use, but in addition, similar data structures have a significant impact on the transferability of data to INTERPOL's database.

### **e) Reliable inventories**

Accurate and complete documentation accompanied by high quality photographs are a precondition for search activities. Unfortunately, the lack of inventories makes it impossible to initiate targeted searches and to enter the information in databases. Encouraging the establishment of inventories is therefore a very important step. Whereas the governments may have a direct influence on the inventories and their regular updates in public collections, their role may change to a more consultative function concerning privately owned cultural goods (promotion and advice, co-operation with insurance industry, awareness-raising via the media, etc.).

A more advanced option is the development of technical assistance in establishing inventories and their subsequent storage, as recently practiced in a project conducted in Latvia with the support of the European Commission.

### **f) Prevention measures**

An effective means to fight against illicit trafficking is certainly the reduction of thefts. Therefore, efforts should be invested in setting up theft prevention programmes. For this purpose, police in general is well suited to provide specific training, consultation tailored to the specific needs, initiate awareness-raising campaigns in close partnership with other relevant organizations and institutions using the most advanced technologies and the services the media can offer.

### **g) Traceability**

Frequently, the subsequent purchases and sales over longer periods make it difficult to follow the itinerary of a stolen good once it has been detected. Legal provisions allowing tracing the way the goods have taken therefore constitute an invaluable aid for law enforcement investigations. The obligation for a professional art dealer to keep a "police register" and to document for each single item the date and place of the purchase and sale, the name with ID card number of the seller, and the description of the object itself avoids losing the trace of objects in the chain of sales and assists law enforcement in identifying intermediates, receivers and even the

thieves. This practice has yielded promising results in several EU countries, such as France and Italy. Similar legal provisions would no doubt have positive effects in other countries, as well.

#### **h) Strengthening and harmonization of legislation**

All countries should consider checking if their national legislation is still adequate to enable efficient prosecution of cultural property crimes. Possible fields to examine are the creation of specific provisions taking into account the particular character of cultural goods as opposed to any other commodities, the strengthening of sanctions in order to give them a more dissuasive quality, considering receiving of stolen goods as a continuous crime for which the limitation period does not start with the beginning of the receiving, but with the passing over of the stolen items to other hands, and as an autonomous crime (not dependent on the fact that the initial offence of theft can still be prosecuted), no limitation period for thefts of cultural goods classified as national treasures, etc. Some of these provisions are successfully practiced in France.

International co-operation is often hampered by different legislations in different countries. Regarding cases dealing with cultural goods crimes, this is particularly critical concerning the notion of acquisition in good faith and its legal consequences resulting in the rightfulness of subsequent transactions, the validation of the title of ownership, obligations for compensation, etc. As long as good faith is admitted alone with the absence of knowledge of the illicit origin of the items in question, there is a significant loophole for illicit trafficking. Efforts in national legislations and in their jurisprudence admitting good faith only following compliance with a limited catalogue of concrete actions proving the performance of a due diligence process including i. a. the verification of the lawful provenance, the consultation of relevant databases and other registers and sources, and a harmonization on EU level would no doubt make sales of stolen or illegally exported cultural goods more difficult. The provisions laid down in the 1995 UNIDROIT Convention in its art. 4 (4) can serve as a guidance in this respect.

Harmonization of export declarations for cultural goods would also contribute to optimizing the customs procedures. The World Customs Organization and UNESCO have developed a model export certificate and are promoting its use world wide. As EU countries are main import, export and transit countries for cultural goods, the more EU countries join this initiative, the higher would be the impact.

Knowledge of legal provisions in other countries is vital for a promising international co-operation. Since several years, the UNESCO has established a database of national legislations on cultural heritage, which is publicly available on their website. Again, an effective use of this already existing tool by contributing with updated national legislations and consulting the legal texts when necessary improves international co-operation.

#### **i) Information sharing**

The basic element of co-operation is the sharing of relevant information, both nationally and internationally. INTERPOL provides the technical infrastructure to enable fast, reliable, and secure information exchange through its worldwide telecommunication system I-24/7. The technology does not only allow the transmission of information, but grants also access to a number of databases including the stolen works of art database.

INTERPOL has also developed further tools of information sharing. Alerts following particular crime incidents, significant thefts or recoveries are regularly published on the Organization's web site, as well as the notification of conferences and meetings. Other instruments, such as a poster of the most wanted works of art, published twice a year, contribute to intensifying the searches for major stolen cultural property items, but are also a means of raising public awareness

### **j) INTERPOL's database project**

The most important requirement for law enforcement officers investigating art crime cases is the possibility to conduct searches in a reliable international stolen art database. INTERPOL has created this database in 1995 and has continuously upgraded its contents, functions, and accessibility. Currently, the database is holding data of c. 38, 000 individual objects reported by some 125 member countries. European countries are the most frequent users, both in terms of data provision and data query. This is not surprising as European countries suffer at the same time the most from a huge number of art thefts, but they are also among the prevailing destinations and transit areas.

The reliability of the information is supported by very strict data processing rules, which only allow the integration of data officially received by the INTERPOL NCBs in addition to some international organizations (UNESCO, ICOM) under specific co-operation agreements.

Mechanisms have been created enabling remote searches by law enforcement agencies (already since 1999), but also by the public using INTERPOL's secure website (since 17 August 2009). As a result, the number of queries against INTERPOL's stolen art database has considerably increased and will reach c. 15, 000 for the entire year 2011.

However, the usefulness of a database is also related to the wealth of information it contains. In order to increase the information in INTERPOL's database, INTERPOL has initiated a project of modernizing its database following the conclusion of the Council of the European Union (CRIMORG 166; ENFOPOL 191; 14224/2/08 dated 3 November 2008) which recognized INTERPOL's database as the tool to be used and encouraged the Organization to develop an automatic data exchange system, an automatic transfer of data from national databases, and the facilitation of the query process by using advanced technology, such as image comparison.

INTERPOL laid the foundations for this modernization project in creating a specific working group on information exchange on stolen cultural goods with the participation of several EU member countries (Austria, Belgium, Czech Republic, France, Italy Spain).

In 2011, in order to solicit financial support from the European Commission's ISEC programme for the project, a strong partnership between INTERPOL and Italy was initiated in 2011. The Italian specialised Carabinieri Unit for the Protection of Cultural Heritage which manages the world's largest national database on stolen works of art is therefore co-leading this project.

The project foresees the following steps:

- Creation of a formatted message enabling direct data integration from member countries
- Data transfer from national databases to INTERPOL's database
- Amendment of the database by an image comparison component
- Provision of training (both traditional training sessions and e-learning modules) to enable the best use of the tools

The project has been presented at the Law enforcement Working Party at two occasions in 2011. Meanwhile, 20 EU countries have already indicated their interest in and support to the project.