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The Free Movement of Cultural Goods under European Union Law

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I am really grateful to have been part of a Double Degree program, which has enabled me to study in two beautiful cities, such as Rome and Salzburg. This experience has been truly amazing.

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FOREWORD

This dissertation was written as the completion of the two master programs I followed in International Relations and European Union Studies at the LUISS University of Rome and at the University of Salzburg at the Centre for European Union Studies.

The subject of this thesis, namely "The Free Movement of Cultural Goods under European Union Law", falls within the scope of my field of study. As it will be better explained later on in the dissertation, the movement of cultural goods inside the European Union needed a set of dedicated pieces of legislation to be dealt with. I will describe the process the EU went through in order to develop the present rules governing the subject matter. Furthermore, some international aspects will also be tackled, both to give a more precise and complete framework of the circulation of cultural objects globally, but also to see how international agencies have coped with the problem of illicit traffic of artworks.

My interest towards the principal topic of the dissertation, i.e. cultural goods and their licit and illicit movement among different countries, derives from the fact that the subject matter constitutes a very pressing issue which causes important economic feedback, but also of other kinds, such as humanitarian, and criminal. Nonetheless, unfortunately few pay the proper attention to the topic, and therefore the problem is underestimated and not sufficiently regulated. The European Union, from this point of view, should, in my estimation, be taken as an example.

The thesis is divided into four Chapters plus introduction, and conclusion. Chapter 1 will focus on explaining what constitutes the illicit traffic in cultural goods, on why it is a phenomenon which deserves great consideration, and on the instruments that have been developed internationally to stop it.

Chapter 2 provides an overview of the three most important international conventions designed to regulate the movement of works of art and aimed at the defeat of the illegal trade in cultural objects. This Chapter is also important because it describes the conventions which inspired the EU in the developing of its secondary legislation with respect to the circulation of cultural goods.

Chapter 3 describes the European scenario regarding the protection of cultural heritage. I will indicate and explain the provisions of primary law and secondary legislation which deal with the adoption of measures, on the part of the EU Member States, to regulate imports, exports, and the internal trade in cultural goods.

Finally, Chapter 4 illustrates one of the most pressing challenges now faced in relation to artworks, that is, the online market of cultural goods. This phenomenon which is negative in some respects, represents an opportunity provided that it is adequately regulated. I believe the challenge of the EU should be this: to regulate the internet market of cultural objects, with the aim of rendering it more transparent, secure, and consequently making it impossible for traffickers to put stolen cultural objects on the market.

To conclude, the aim of this dissertation is to show and emphasize the difficulties of viewing cultural goods as simple goods and select which ones can be safely traded and which ones need to be protected and safeguarded. International and European agencies have developed tools and legislation to deal with this problem, mostly in recent years, with the war in Syria and the destructions shown on all major news channels perpetrated by ISIS the problem of the illicit trade in cultural goods has gained international visibility and attention. Indeed, I would like to stress that more attention should be given to the phenomenon of the traffic in cultural goods, both for its economic characteristics, and also for its political and humanitarian features.

TABLE OF CONTENTS

INDEX OF TABLES V

INTRODUCTION 1

1. CULTURAL GOODS: LICIT TRADE AND ILLICIT TRAFFIC 5

1.1 Characteristics of the illicit trade in cultural goods 5
1.1.1 Source nations, market nations, and transit nations 7
1.1.2 Relevant actors and stakeholders 8

1.2 The role of criminal and terrorist organizations 9

1.3 Responses of the international community to the illicit trade in cultural goods 12

2. SOURCES OF INTERNATIONAL LAW IN THE FIELD OF CULTURAL GOODS 15

2.1 The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflicts 17

2.2 UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 20

2.3 UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects 23

3. EUROPEAN LEGAL FRAMEWORK ON THE MOVEMENT AND PROTECTION OF CULTURAL GOODS 27

3.1 EU primary law concerning cultural goods 27

3.2 Secondary legislation pertaining the movement of cultural goods 32
3.2.1 Secondary legislation regulating the internal market between Member States: from Directive 93/7/EEC to Directive 2014/60/EU 32
3.2.2 Secondary legislation regulating the external relations between the European Union and third countries 36
3.2.2.1 Export of cultural goods: Regulation (EC) No 116/2009 on the export of cultural goods 37
3.2.2.2 Import of cultural goods: the development of Regulation (EU) 2019/880 on the introduction and import of cultural goods 38
3.2.3 Implementation process of Directive 2014/60/EU in Austria and Italy 41
3.2.3.1 Implementation of Directive 2014/60/EU in Austria 42
3.2.3.1 Implementation of Directive 2014/60/EU in Italy 48

4. ONLINE SALES OF TRAFFICKED CULTURAL GOODS: THE EUROPEAN RESPONSE 53

4.1 Structure of the online market 53

4.2 Response of the European Union and other relevant international actors 55

CONCLUSION 59

BIBLIOGRAPHY 62

SITOGRAPHY 64

CASE LAW OF THE EU COURT OF JUSTICE 65

LEGISLATION 65

ABSTRACT 68

INDEX OF FIGURES

Figure 1: A photographer holding a picture of Palmyra's Temple of Bel in front of the reamins of the temple after it was destroyed by ISIS in September 2015. Photo by Joseph Eid (Getty Images). 6
Figure 2: 12 April 1945, Gen. Dwight D. Eisenhower inspects stolen artwork in the Merkers salt mines. Behind Eisenhower are General Omar N. Bradley (left), CG of the 12th Army Group, and (right) LT Gen George S. Patton, Jr, CG, 3rd U.S. Army (National Archives and Record Administration). 17

INDEX OF TABLES

Table 1: Ratification of EU Member States to the Hague Convention of 1954 and its two Protocols. ..... **Errore. Il segnalibro non è definito.**
Table 2: Ratification of EU Member States to the UNESCO Convention of 1970. 22
Table 3: Ratification of EU Member States to the UNIDROIT Convention of 1995. **Errore. Il segnalibro non è definito.**

INTRODUCTION

"the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations. Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding is origin, history and traditional setting. […] it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export. […] to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations. […] the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO's mission to promote by recommending to interested States, international conventions to this end, considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation[1] *".*

This is how the 1970 UNESCO[2] (United Nation Educational, Scientific and Cultural Organization) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property [3] begins. Throughout the years, many international organizations have developed pieces of legislation in order to expand the rules concerning the protection of cultural heritage. The aforementioned text clearly shows why the protection of cultural heritage is so important for all humanity. First of all, having access to cultural heritage opens people's mind, increases their historical and cultural knowledge, and, overall, enriches people's life. Secondly, it constitutes one of the basic elements for civilization. Finally, it is connected with other transnational crimes. It is therefore imperative to promote the protection of cultural goods.

The looting of cultural heritage is a constantly increasing phenomenon and, consequently, the black market of stolen or illegally excavated cultural goods continues to flourish (Veres, 2014, p. 93). Moreover, there is evidence to prove that this illicit traffic is almost always chained with other criminal behaviors and often occurs alongside money laundering, and drugs and arms trafficking, which makes the traffic of cultural goods a transnational crime (European Commission, 2019, p. 112).

Moreover, it is strongly believed that criminal and terrorist organizations contribute to the illicit traffic of cultural goods and benefit from it financially (UNESCO, 2018, p. 45). A clear example of this phenomenon is ISIS[4]. Indeed, this terrorist organization, after taking over

[1] Preamble to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property.
[2] ***UNESCO*** is a specialized UN agency created with the aim of building peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information. UNESCO has 193 member states and 11 associate members. It is based in Paris, France.
[3] The content of this Convention will be broadly developed in Chapter 2.2.
[4] ***Islamic State of Iraq and Syria***, or ISIL. It is a militant group and former unrecognized proto-state that follows a fundamentalist, Salafi jihadist doctrine.

a broad area of Syria and Iraq, has become one of the major players for what concerns the traffic of antiquities (Pauwels, 2016, p. 66). The same role applies also to other criminal organizations: it is enough to look at the role of the Italian mafias in the traffic of cultural goods (Ceschi, 2019, pp. 18-30).

In fact, the illicit market of cultural goods follows the routes of the other black markets, displaying a well-developed chain of countries and actors involved. Stolen cultural goods depart from their country of origin and arrive in the licit market of cultural goods by moving through transit countries thanks to the help of smugglers, middleman, and facilitators, at the same time acquiring a licit background story (an almost indisputable proof of provenance) which makes it possible for the looted cultural good to be safely put in the legal market of cultural goods without arousing suspicion (Dehouck, 2019, pp. 9-12).

Thus, it is incredibly difficult for national and international law enforcement agencies to tackle the problem and to discover the illegal cultural objects hidden behind the curtains of their fake provenance. Moreover, one should also consider the fact that the illicit traffic of cultural goods is paired with a full licit market of cultural artworks, making it even more difficult to figure out which objects have been stolen and which ones are traded legally among different countries (European Commission, 2019, p. 69).

Nonetheless, national and international agencies have developed various instruments to fight the illegal traffic of cultural goods. Examples vary from the creation of red lists, such as the ICOM Red Lists[5], with the most valuable cultural goods and the ones most likely to be illicitly trafficked, to the creation of databases to improve the cooperation among States, where countries can report cases of stolen cultural goods, such as the INTERPOL[6]'s (International Criminal Police Organization) 'Stolen works of art' database[7].

Throughout the years, international organizations have also constantly upgraded the legal tools relating to cultural property. Initially, they were limited to bilateral or multilateral agreements. Indeed, going back to 1648, Article CXIV of the Treaty of Westphalia[8] includes provisions for the return of stolen cultural goods during the Thirty Years' War. Moreover, after the Napoleonic Wars, where several cultural objects were removed from their origin country

[5] The ***ICOM Red Lists*** are not lists of actual stolen cultural objects. The cultural goods depicted are inventoried objects within the collections of recognized institutions. They serve to illustrate the categories of cultural goods most vulnerable to illicit traffic. The database containing the ICOM Red Lists is available at: https://icom.museum/en/resources/red-lists/, (accessed on: 28 May 2020).

[6] ***INTERPOL*** is an international organization that facilitates worldwide police cooperation and crime control. Its headquarters are in Lyon, France. It has seven regional bureaus worldwide and a National Central Bureau in all 194 member states, making it the world's largest police organization.

[7] Webpage of INTERPOL: https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database, (accessed on: 28 May 2020).

[8] **1648 Treaty of Westphalia, Art. CXIV:** *"That the Records, Writings and Documents, and other Moveables, be also restor'd; as likewise the Cannon found at the taking of the Places, and which are still in being. But they shall be allow'd to carry off with them, and cause to be carry'd off, such as have been brought thither from other parts after the taking of the Places, or have been taken in Battels, with all the Carriages of War, and what belongs thereunto".*

by the Napoleonic Army, it was order that the stolen cultural objects had to be returned to their country of origin (UNESCO, 2018, p. 18).

The first international convention which covered in full the protection of cultural property was the Washington Pact of 1935. This pact was concluded between the Americas and it was established in order to safeguard some forms of cultural property during both war and peacetime. Nonetheless, the first milestone for the protection of cultural heritage during times of war is the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts drafted by the UNESCO in 1954 (UNESCO, 2018, pp. 20-21).

After this first Convention and its two subsequent Protocols, the international fora have started to develop its legal tools which are also aimed at tackling the issue of the protection of cultural property during peace times. This effort resulted in the drafting of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property. This piece of legislation is the first real attempt to set out measures for the protection of cultural goods broadly (Dehouck, 2019, p. 22). In fact, the document is based on three main pillars which extensively tackle the safeguard of cultural goods: measures for the prevention of the stealing of cultural property, the return and restitution of looted cultural goods, and international cooperation to deal with the issue (UNESCO, 2018, p. 27).

Finally, the 1995 UNIDROIT[9] (International Institute for the Unification of Private Law) Convention on Stolen or Illegally Exported Cultural Goods is the most recent crucial document dealing with the protection of cultural goods. The purpose of this Convention is to supplement and upgrade the 1970 UNESCO Convention by establishing uniform rules on the restitution and return of stolen cultural goods (European Commission, 2019, p. 145).

In these regards, the European Union has upgraded its legislation concerning the regulation of the import and exports of cultural property. Indeed, after the creation of the Single European Market in 1993, the transfer of cultural property needed to be coordinated. The EU's primary law, with the exception of Article 36 of the Treaty on the Functioning of the European Union[10] (TFEU), has no specific rules for the protection of national cultural property (Peters, 2015, p. 141).

[9] ***UNIDROIT*** is an intergovernmental organization whose objective is to harmonize international private law across countries through uniform rules, international conventions, and the production of model laws, sets of principles, guides and guidelines. It was established in 1926 as part of the League of Nations and reestablished in 1940 after the League's dissolution. It is based in Rome, Italy.

[10] **Art. 36, TFEU**: *"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 health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".*

Moreover, the legislations of the Member States greatly differ on matters of cultural property. Therefore, in order to implement common rules to establish detailed measures on cultural goods, the European Union has, throughout the years, developed its secondary legislation. Indeed, since 1992, EU provisions have started to deal with the problems related to the trade in cultural goods. Today, there are three important pieces of secondary legislation dealing with the protection of cultural property: Council Regulation (EC) 116/2009 that deals with the export of cultural goods; Directive 2014/60/EU on the return of cultural objects which have been unlawfully removed from the territory of a Member State; and, finally, the most recent Regulation (EU) 2019/880 which regulates the introduction and import of cultural goods.

The subsequent dissertation will develop as follows. Firstly, the focus will be on the characteristic of the illicit traffic of cultural goods, the routes this trade takes and the actors involved. It will move on to display the role of the criminal organizations which take part in the traffic in cultural goods and the responses of the international community with the aim of explaining why it is important to tackle the issue of the protection of cultural goods.

Secondly, the attention will shift towards the most important international legal tools in the field of cultural property. Consideration will be given to the three aforementioned international milestones (the Hague, UNESCO, and UNIDROIT Conventions) for the protection of cultural goods. The goal here is not only to show the importance the international community gives to safeguarding cultural heritage, but also to provide an outline of the pieces of legislation the EU took as examples when developing its own legislation on the subject matter.

Thirdly, the EU law will be tackled. First, attention will be given to the primary law and the evolution it had on the field of the protection of cultural goods since the establishment of the Internal Market in 1993. Secondly, EU secondary legislation will be taken into consideration. Here, special attention will be given to the regulations and directives that have developed the legislative framework on the protection of cultural goods.

Finally, the problem of online sales of artworks will be tackled. Indeed, it is important to demonstrate the phenomenon of the Internet sales in cultural goods because it is considered as an issue which has, in the present day, some peculiar negative, but also positive, features. Time will then be dedicated to the actions taken by the EU and the international community in general, and the new tools developed to address this quickly growing market.

1. CULTURAL GOODS: LICIT TRADE AND ILLICIT TRAFFIC

The illicit trade in cultural goods is a worldwide phenomenon which involves an incredible variety of actors and requires an international response to fight it.

The concept of 'cultural good' has no universal meaning. In fact, the task of giving a definition of what 'cultural goods' are is challenging. A variety of interchangeable terms, such as 'cultural patrimony', 'cultural heritage', and 'antiquities' is often used to designate the same categories of objects (Dehouck, 2019, p. 14). Empirically, the term, as Merryman (2005, p. 12) states

> *"includes all sorts of things that dealers deal in, collectors collect, and museums acquire and display: principally works of art, antiquities, and ethnographic objects".*

In general, three substantial categories of definitions can be identified. The first relates to 'open definitions': they broadly state the categories of goods which can be described as 'cultural'. The second category pertains to the definitions of exhaustive or non-exhaustive lists of goods. Finally, the last category is a combination of the previous two categories of definitions (Dehouck, 2019, p. 15).

Given this first outline, the first Chapter will proceed by describing the characteristics of the illicit trade in cultural goods by also highlighting the type of nations and actors involved. The focus will then move on to explain the role of the criminal organizations operating in the illicit trade in cultural goods and the responses of the international community in order to fight and undermine this traffic.

1.1 Characteristics of the illicit trade in cultural goods

The illegal trade in cultural goods harms cultural heritage worldwide. It is a highly lucrative underground market. Estimating the size of this illegal trade is almost impossible as there are no reliable statistics that provide a comprehensive picture of the phenomenon (EU Commission, 2019, p. 83). However, it is safe to say that its weight falls just behind that of illegal drugs, money laundering and arms trafficking (Veres, 2014, p. 94).

The importance of protecting cultural goods is evident when considering two main factors: firstly, cultural goods have a crucial artistic, archeological and historical importance for their country of origin and are part of its artistic cultural heritage; secondly, it is known that works of art are frequently illicitly trafficked and, moreover, that this traffic is connected with the work of criminal organizations[11].

[11] Web-page of the European Commission on "taxation and custom union": https://ec.europa.eu/taxation_customs/business/customs-controls/cultural-goods_en, (accessed on: 28 April 2020).

Moreover, it is necessary to emphasize the fact that the looting of works of art presents itself under two specific circumstances: the first is during times of war, during military occupation, or colonization. In this first circumstance, cultural goods are looted or taken as spoils of war and are, in most cases, put on the market to be sold. The second circumstance is when cultural objects are stolen during times of peace, stolen from collections, or illegally excavated from archeological sites. These goods are then smuggled outside the country of origin and sold in the international market (Veres, 2014, p. 94).

Therefore, the illicit trade in cultural goods is not, in any case, a harmless crime. Indeed, the loss of cultural objects is a tangible and intangible phenomenon which has tangible and intangible consequences. The destruction and lootings of cultural heritage perpetrated by the ISIS are a prime example to explain this concept: not only were the stolen or devastated items irreplaceable, but those items also constituted the identity of the Iraqi and Syrian people which is now lost forever (Balcells, 2019, p. 34).

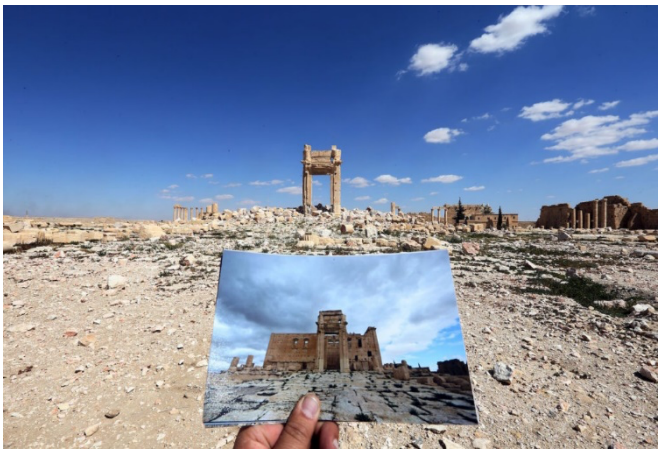

Figure 1: A photographer holding a picture of Palmyra's Temple of Bel in front of the reamins of the temple after it was destroyed by ISIS in September 2015. Photo by Joseph Eid (Getty Images).

The separation between the licit and illicit art market is not straightforward. In fact, *"the licit/illicit dynamics of the art market are to be seen as a spectrum"* (Dehouck, 2019, p. 9). The so-called 'white market' concerns those items that were legally acquired by legal excavations or by a rightful owner. However, most of the cultural goods present on the market fall under the 'grey' and 'black' ends of the spectrum. The 'grey market' concerns items that were present on the market before there were laws in place regarding cultural goods property, or for so long that any documentation concerning them has been lost. Finally, the 'black market' pertains to those items that were illicitly looted. These cultural objects are put into the legal market by hiding their real provenance and providing them with a new one, by displaying them as 'grey artworks', or by transferring them through civil law countries which favor the 'good-faith purchaser[12]' (Dehouck, 2019, pp. 9-10).

[12] A ***good-faith purchaser*** is a party that purchases a given item for value and without notice of any outstanding claims. These parties purchase goods without any knowledge of potential problems with the purchase or the good.

The existence of a fully legal art market makes it difficult to understand the entity of the illegal art market. As already stated (p. 5), the extent of this trade, just like any other illegal type of traffic, is impossible to establish. According to the European Commission (2019, p. 15), in almost 80-90% of the licit sales in cultural goods, the goods sold have an illicit provenance. However, those are only estimates and the real value of the trade is difficult to assess. What is possible to assert is the roots the illegal trade in cultural goods follows, and the relevant actors involved.

1.1.1 Source nations, market nations, and transit nations

Finding a looted cultural good only shows where the object is at a particular moment in time. The route the object has followed up to that point is very hard to establish even with the help of police and customs investigations. Nonetheless, it is clear that, just like any other type of trade, the illegal traffic of cultural goods follows the principle of supply and demand. The goods are traded in the countries where there is a market for them. However, the problem of mapping these routes arises when adding all the other relevant factors that increase the ramification of an otherwise straight itinerary from country A to country B (European Commission, 2019, p. 97).

Illicit trade in cultural goods usually originates from countries where the access to those goods is relatively easy (i.e. warzones, and countries that do not have updated technologies to monitor archeological sites, museums, churches, temples, and other relevant historical buildings). Those countries are defined as ‘source countries’ and are characterized by an abundance of cultural goods, and the lack of capability to adequately protect their cultural heritage. These States find themselves on the supply side of the art market. They include countries in the Middle East (i.e. Iraq, Egypt, Syria, …), most of the African continent, and also many Latin American countries (Dehouck, 2019, p. 5).

From ‘source nations’ cultural objects mostly end up in ‘market nations’ which have a strong and flourishing art market. The USA, some EU Member States, and Japan constitute some of the most relevant ‘market nations’ (Dehouck, 2019, p. 6).

However, two further specifications have to be made. First, sometimes countries can be identified both as ‘source nations’ and ‘market nations’. One example is Italy, which is on the demand side of the market, but, at the same time, is included within the ‘source countries’ since many of its illegally looted cultural objects circulate in the art market (Dehouck, 2019, p. 6).

Secondly, the division between ‘market’ and ‘source countries’ can be complemented with a third category of nations, that is, ‘transit nations’. Cultural objects travel through these countries on their way to their final destination. The countries which are defined as ‘transit

nations' are chosen because of their geographic location, import-export legislation, and because they have free ports (European Commission, 2019, p. 98).

Free ports are warehouses situated in free zones. Taking the European Union as an example, non-EU goods can be imported there without a custom declaration and are free from any import/export duties and taxes (Art. 158[13]-245[14] of the EU Customs Code). Free ports are designated as a temporary deposit for objects and it is where most of the transactions take place, but can be also used as long-term, or permanent locations of stolen cultural goods (European Commission, 2019, p. 98).

Finally, the dichotomy between source nations and market nations reflects another deep divide in the field of cultural heritage, that is, the competing ideologies of cultural property nationalism and cultural property internationalism. Indeed, the former term indicates those who believe that cultural goods belong to their country of origin and they should remain there. Instead, the second term refers to those who believe cultural property is the common heritage of all mankind and belongs to whole world (Anglin, 2008, p. 242). It does not come as a surprise that source nations commonly view the cultural nationalism ideology more favorably, while market countries are more inclined towards cultural property internationalism (Dehouck, 2019, p. 16).

The lootings and the subsequent passages from one country to the other are made possible by the work and employment of specific types of actors.

1.1.2 Relevant actors and stakeholders

The chain of the cultural property trade is very complex. It begins in the 'source countries' due to the work of finders, looters and thieves. This first type of actors is entitled to seize the cultural objects which then will be sold to the local, regional, or national brokers (European Commission, 2019, pp. 69-70). Among these first actors there are people who live in extreme poverty and people who are forced by criminal organizations to get involved in illegal excavations, but there are also treasure hunters and people who consider illegal digging as a way of making a living (UNESCO, 2018, p. 69).

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[13] **Reg. (EU) No 952/2013, Art. 158**: *"1) All goods intended to be placed under a customs procedure, except for the free zone procedure, shall be covered by a customs declaration appropriate for the particular procedure. 2) In specific cases, other than those referred to in Article 6(3), a customs declaration may be lodged using means other than electronic data-processing techniques. 3) Union goods declared for export, internal Union transit or outward processing shall be subject to customs supervision from the time of acceptance of the declaration referred to in paragraph 1 until such time as they are taken out of the customs territory of the Union or are abandoned to the State or destroyed or the customs declaration is invalidated".*

[14] **Ibid., Art. 245**: "*1) Goods brought into a free zone shall be presented to customs and undergo the prescribed customs formalities in any of the following cases: (a) where they are brought into the free zone directly from outside the customs territory of the Union; (b) where they have been placed under a customs procedure which is ended or discharged when they are placed under the free zone procedure; (c) where they are placed under the free zone procedure in order to benefit from a decision granting repayment or remission of import duty; (d) where legislation other than the customs legislation provides for such formalities. 2) Goods brought into a free zone in circumstances other than those covered by paragraph 1 shall not be presented to customs. 3) Without prejudice to Article 246, goods brought into a free zone are deemed to be placed under the free zone procedure: (a) at the moment of their entry into a free zone, unless they have already been placed under another customs procedure; or (b) at the moment when a transit procedure is ended, unless they are immediately placed under a subsequent customs procedure".*

The cultural object then passes into the hands of middleman and smugglers (Dehouck, 2019, p. 11). From here, these first intermediaries can take one of two potential paths: the first is for them to sell the acquired item by themselves; the second is to give the cultural object to a second intermediary (UNESCO, 2018, p. 72).

In both of the aforementioned cases, the main role of the intermediaries is to act as a link for the potential buyers abroad, to plan the itinerary of the object, to prepare the false documents necessary for the object to cross borders, and to maintain contact with facilitators. Facilitators have a major role in the transportation process of the stolen artworks. In fact, they make the job of looters and middleman possible. Among this type of actors it is possible to find: corrupt archeological sites or museums guards, policeman, civil servants, customs agents, inspectors, and archeological or museum staff (European Commission, 2019, p. 69).

Therefore, from the initial looting to the final sale, stolen items move around different countries ('transit countries'). Meanwhile, these object gain paperwork, a fake back story (the so-called 'false provenance') which gives them the legitimacy necessary to be put on to the open market. The middlemen, facilitators and transporters play a key role in this process by providing the necessary documentation and obscuring the origin of the stolen object in order to provide the final sellers with a credible story which negates the illicit provenance of that object (European Commission, 2019, p. 69).

Finally, the artwork goes on to the market. Their primary destination is art galleries, where art dealers and antiquities collectors mostly operate. Moreover, items are also sold through auction houses which operate as intermediaries between the sellers and the buyers. In some cases, auction houses sell items without an ownership story, and poor information on the current owner which makes it easy for stolen artworks to be sold there (European Commission, 2019, p. 70).

This chain of individuals, from thieves, to intermediaries, to the final sellers, is often guided by criminal and terrorist organizations who benefit the most from the trade in cultural goods.

1.2 The role of criminal and terrorist organizations

"L'arte da sempre attrae i criminali[15]*"* (Di Nicola and Savona, 1998, p. 2) because the art market is an incredibly rich market. The illicit traffic in cultural goods is highly lucrative for criminal and terrorist organizations and, in recent years, this connection has become increasingly evident (Dehouck, 2019, p. 19).

[15] *"Art has always attracted criminals".*

Even if it is impossible to estimate the exact profit, for example it is impossible to establish how many of the cultural object smuggled from Syria are directly connected to financing terrorism and how many are linked to local looters, it is evident that a strong connection between the stealing of cultural objects and criminal and terrorist organizations is present (Dehouck, 2019).

The United Nations Security Council[16] (UNSC) Resolution 2199 (2015, p. 2) states

"*that ISIL*[17]*, ANF*[18] *and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks*".

The role of ISIS is a clear example. In the context of the war in the Middle East, ISIS has perpetrated what can be called a 'cultural cleansing', which is described by the destruction of archeological sites, museums and cultural objects (Patrizi and Selitto, 2017, p. 30). The reason behind the destruction of archeological sites, such as that of Palmira or the attack at the Mosul museum (which are two of the most famous offenses towards cultural heritage), lies behind the vision of ISIS: the epuration of all ethical and religious diversities which were not linked to the extremist Sunnite beliefs (Brusasco, 2018, pp. 35-36).

The devastation perpetrated by terrorist organizations are almost always associated with the selling of cultural goods. The destructions are often used as an *escamotage* to cover the looting of cultural objects (Patrizi and Selitto, 2017, p. 32). In this context, the UN Security Council (UNSC) has adopted many Resolutions. One of the most important is the above-mentioned Resolution 2199 of 2015 which expresses the UNSC's commitment to the fight against terrorism and extends the measures banning trade in artworks which have been present in Iraq since 2003 to cover Syria (Pauwels, 2016, p. 67).

As previously stated, it is impossible to estimate the exact value that the traffic in cultural objects has for terrorist organizations. Some researches even conclude that the involvement of terrorist organizations in cultural goods trade is restricted to the territory controlled by them (Brodie, 2018, p. 74).

[16] The ***United Nations Security Council*** is one of the six principal organs of the *United Nations* (UN) charged with ensuring international peace and security. It is based in New York, USA.
[17] ***Islamic State of Iraq and the Levant***, or ISIS.
[18] ***Al-Nusrah Front***: one of the parties to the Syrian conflict.

However, Quirico[19]'s article "*Arte antica in cambio di armi, affari d'oro in italia*" (2016) displays a very different scenario. In fact, the journalist uncovers the role of ISIS in the traffic of cultural goods. In his article, Quirico illustrates his undercover mission which saw him acting as an art collector who wanted to buy some illegally excavated archeological objects from an Italian criminal organization in Calabria. Thanks to this operation he finally discovered that the objects he 'wanted to buy' came from Libyan territories controlled, at that time, by ISIS. Those objects were used by the terrorist organization as a means of exchange to buy arms.

Moreover, as shown in the previous paragraph, it is not only terrorist organizations who benefit from the trading in cultural objects. Many criminal organizations are also present in the illicit market of cultural goods.

These organizations are connected with the illicit traffic in cultural goods in, at least, three ways. Firstly, looted cultural goods and drugs have been found together by police raids, suggesting that cultural objects and drugs are traded together from 'source' to 'market' countries. Secondly, the trade in cultural goods is also used to launder money from other criminal activities (Dehouck, 2019, p. 7). Thirdly, stolen cultural goods are found to be used as a means of payment in drug deals. One example in this direction is that of the two Van Gogh paintings[20] stolen in 2002 from the Van Gogh Museum in Amsterdam which were found in 2016 in Italy at Catellammare di Stabbia (Naples, Italy) in a property owned by a Camorrist clan. The paintings, the Italian police discovered, were bought by the clan and kept with the purpose of guaranteeing drug trafficking, representing a form of insurance for the Latin American drug dealers with whom the Camorrist clan was in business (Ceschi, 2019, pp. 24-25).

Therefore, the phenomena of organized criminality, terrorism financing, and illicit traffic of cultural goods are strongly correlated. The illegal trade in cultural goods is significant for these organizations: cultural objects can either have an economic or symbolic importance for them, what is clear is that the market on stolen artworks is relevant for these organizations. The high monetary value presented by cultural objects, the very low risk of criminal convictions linked to the stealing of cultural objects, and the high request of these goods represent the incentive for which criminal and terrorist organizations are so interested in these types of goods (Ceschi, 2019, p. 31).

In order to fight and possibly stop the illicit traffic in cultural goods many international actors have tried to implement reliable measures and instruments. However, it is necessary to

[19] **Domenico Quirico** (Asti, 18 December 1951) is an Italian reporter. He works for the newspaper *La Stampa* as foreign editor. As war reported, he was kidnapped in Lybia in 2011 and in Syria in 2013 and then released.
[20] *View of the Sea at Scheveningen* (1882) and *Congregation Leaving the Reformed Church in* Nuenen (1884).

clarify that, without a good understanding of the size of the problem, it is sometimes difficult to give the most suitable methods to fight the phenomenon of the illegal trade in cultural goods (European Commission, 2019, p. 14).

1.3 Responses of the international community to the illicit trade in cultural goods

There is a general lack of awareness and adequate information for what concerns the illicit traffic in cultural goods, its nature and its size, and what this trade really entails. This situation results in the fact that politicians, not only have little knowledge of the problem, but, consequently, give very low priority in their politics to the agenda of protection of cultural goods (European Commission, 2019, pp. 158-159).

Notwithstanding this, many international organizations and national entities have worked for a long time to protect cultural heritage. However, it was because of the recent wars in the Middle East and the destruction and lootings perpetrated by the different parties that the international community decided to take a major step towards the protection of cultural heritage and the fight against the traffic of cultural goods (Russo and Giusti, 2018, p. 844).

The most important international organization designated to the protection of cultural heritage is the previously mentioned United Nations Educational, Scientific and Cultural Organization (UNESCO). This UN agency is a pioneer in the battle against the illegal traffic of cultural goods and has the difficult task of coordinating different countries, national, and international actors in the effort of improve the cooperation among them. In fact, international support among judiciary and law enforcement agencies is essential in this field[21].

Alongside this agency there are other two international actors that encourage and coordinate cross-border cooperation: INTERPOL and WCO[22] (World Customs Organization) (European Commission, 2019, p. 142).

INTERPOL is by far the most significant agency in terms of criminal law enforcement. The main task of INTERPOL is to make cooperation among national police forces possible. In fact, through INTERPOL, police officers are able to receive information and establish direct communications with foreign counterparts, which facilitates and accelerates the work process. Moreover, INTERPOL created a database for stolen or lost cultural objects, which is constantly updated by national police agencies. In this context, INTERPOL also keeps national police forces up-to-date with the 'most wanted' cultural items. Finally, the agency is particularly important in supporting operations which are jointly planned by several countries, with the

[21] Webpage of the UNESCO on the sharing of good practices to combat illicit trafficking of cultural property: https://en.unesco.org/news/countries-share-good-practices-combat-illicit-trafficking-cultural-property, (accessed on: 3 May 2020).
[22] The ***WCO*** is an intergovernmental organization headquartered in Brussels, Belgium.

collaboration of other international organizations and actors (European Commission, 2019, p. 142).

The World Customs Organization is the international agency designated to provide support to customs authorities around the world. Its effort to fight the illicit traffic in cultural goods has become more prominent in recent years with the intensification and growing international awareness of the problem. Its main task is to assist custom agencies in joint operations and support them with ARCHEO, a specialized platform through which customs authorities can communicate safely (European Commission, 2019, p. 142).

This framework cannot be completed without mentioning the institutions at the EU level that support the fight against the traffic of cultural goods.

The most notable organization in this sense is EUROPOL[23] (European Union Agency for Law Enforcement Cooperation). This agency, which could be considered the European INTERPOL, serves the purpose of assisting the planning and conducting of joint investigations and operations between States (Block, 2011, p. 18). EUROPOL has also developed many tools to help police forces to combat crimes. One such instrument is SIENA (Secure Information Exchange Network Application) which permits EU Member States, EUROPOL officers and third parties to exchange information on strategies and crime combatting operations[24].

Finally, for what concerns customs, the European Commission has established EU Expert Groups in order to boost and facilitate the coordination of customs agencies for issues related to the protection of artworks and the fight against the illicit traffic of cultural goods (European Commission, 2019, p. 148).

What is clear is that international law enforcement agencies are becoming a crucial element in the fight against cultural property crimes. Indeed, all of the above-mentioned agencies, together with national authorities, play a role in this fight. A striking and concrete example of the results to which this collaboration can lead is Operation ATHENA. This first-time global customs and police operation, codenamed ATHENA, took place in 2017. It was coordinated by WCO and INTERPOL with the collaboration of 81 countries. The Spanish *Guardia Civil*[25] and EUROPOL conducted the operations in Europe, codenamed Operation PANDORA II (Hufnagel, 2019, p. 90). During Operation ATHENA, more than 41,000 cultural

[23] The ***EUROPOL*** is the law enforcement agency of the European Union formed in 1998 to handle criminal intelligence and combat serious international organized crime and terrorism through cooperation between competent authorities of the EU Member States. It is based in The Hague, Netherlands.
[24] Webpage of EUROPOL: https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena, (accessed on: 3 August 2020).
[25] The ***Guardia Civil*** is the oldest police agency covering the whole of Spain.

goods were recovered thanks to the monitoring of the internet art market and the tens of thousands checks and controls at border crossing points, auction houses, and private homes[26].

The use of these tools has been accompanied by the implementation of various international conventions and resolutions in an effort to prevent the destruction and theft of cultural goods, both during armed conflicts as well as in times of peace. The second Chapter will focus on the most important international conventions that confer a central position to the protection of cultural heritage and the fight against the illicit trafficking of cultural goods.

[26] Webpage of eucrim: https://eucrim.eu/news/global-customs-police-operation-seizes-41000-cultural-goods/, (accessed on: 3 May 2020).

2. SOURCES OF INTERNATIONAL LAW IN THE FIELD OF CULTURAL GOODS

The system of international law regulating the protection of cultural heritage derives almost entirely from the multilateral conventions drafted after the Second World War (Dehouck, 2019, p. 22). The international interest was concentrated at first in delineating a convention dedicated to the protection of cultural property during war times. In fact, the international community, mindful of the recent war, and the recent destruction and lootings perpetrated by the Nazis, conveyed and drafted the Hague Convention for the Protection of Cultural Heritage in the Event of Armed Conflict which was adopted in The Hague, together with its First Protocol (the more recent Second Protocol was drafted in 1999), on the 14th of May of 1954 (Howe, 2012, p. 408).

After this first Convention, others have followed in order to cover the protection of cultural goods during times of peace. In this sense, a milestone of international law perpetrating this effort is the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (Dehouck, 2019, p. 23).

Moreover, since the protection of cultural heritage has recently become, as previously stated in Chapter 1 (p. 12), a more pressing issue for the international community, international law has focused increasingly on cultural property and has expanded the legal tools aimed at its protection. Indeed, a great effort was made in order to update and complete some rules regarding the protection of cultural goods. This is, for example, the case with the Second Protocol of the Hague Convention of 1954 drafted in 1999 and with the adoption of the UNIDROIT Convention of 1995, which aimed to fill several gaps in the private law of the UNESCO Convention of 1970 (Francioni and Gordley, 2013, p. 1).

At the same time, considerations on cultural heritage and its protection had started to develop in other areas of international law (Francioni and Grodley, 2013, p.1). In fact, in the fields of human rights and humanitarian law, but also in international criminal law, rules on cultural heritage protection have started to spread, influencing these areas of international law, and, in parallel, being influenced by them (Dehouck, 2019, p. 3).

The connection between human rights and cultural rights grew at the beginning of the 21st century. A clear testimony of the increasing importance of cultural heritage protection is the decision of the UN Human Rights Council[27] (UNHRC) to establish an independent expert to deal with cultural rights (Ringelheim, 2017, p. 4).

Article 27 of the Universal Declaration of Human Rights (1948) thus cites:

[27] ***UNHRC*** is a UN body whose mission is to promote and protect human rights around the world. Its headquarters are in Geneva, Switzerland.

"1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production which he is the author".

The result of this mutual link between human and humanitarian rights and cultural rights is the construction of a sort of bidirectional relationship between individuals and the protection of cultural goods. Therefore, individuals, under these terms, turn into actors of international law with rights and obligations to protect cultural heritage (Papaioannou, 2017, pp. 261-262).
Thus, the application of the law in the area of cultural property requires a persistent interaction and hybridization of a plurality of legal orders, national and regional, private and public, domestic and international. These orders '*coexist, interact, and collide*' (Francioni, 2013, p. 9).

Finally, it is necessary to point out that the process of creating, ratifying, and implementing the international law for the protection of cultural heritage has not been easy. In fact, the drafting of the international conventions which will be analyzed in this second Chapter was the result of achieving a balance between the needs and viewpoints of different actors (Dehouck, 2019, p. 2).

The Chapter will proceed with the analysis of the three major conventions that created the primary set of rules for the protection of cultural goods and towards which the European Union made and still makes reference to build its legislation on the circulation of cultural goods.

It is important to notice, in this context, that all the conventions taken into consideration in this Chapter can be signed and/or ratified only by the Member States of the European Union, and not by the EU itself. Indeed, the cooperation between UNESCO and the then CEE dates back to 1964 when the two organizations decided to act together in order to achieve some common objectives in the fields of culture. Since then, the collaboration has expanded towards the developing of a proper partnership between the two entities. Furthermore, UNESCO and the EU share many values, highlighted in the 2012 Memorandum of Understanding, such as: the respect for human dignity, freedom, democracy, and equality, but also the safeguard of cultural diversity, and cultural heritage (Paladini, 2019, pp. 2498-2499). However, for what concerns the direct participation between the two entities and the forms it takes, it is necessary to highlight that UNESCO enables, in its founding treaty, membership only to States (just like the EU). Therefore, the two organisms have found different modes of cooperation. In fact, UNESCO, which is responsible for the drafting of the conventions outlined in this Chapter, has given the EU the *status* of observer. The admission of the latter category is ruled by Art. 4(e)

of the UNESCO Constitution[28], according to which those entities can participate to the works of the General Conference. However, this participation is conditionate by the absence of voting rights for these institutions. Nonetheless, the EU has been a great supporter and partner of UNESCO since its creation (EU's voluntary funding represents the 3rd largest extra-budgetary founding source for UNESCO)[29].

2.1 The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflicts

Wars, whether engaging multiple States or developing only within one country, pose threats to cultural heritage. The looting of cultural objects is one of the most significant. Examples date back to antiquity: from the Roman Empire, to the looting of art across Europe perpetrated by the Napoleonic army, all the way to World War II, and finally to the most recent and famous destructions and lootings carried out in Syria and Iraq, cultural goods have been removed illegally from their place of origin and transported around the world (Renold, 2016, p. 6).

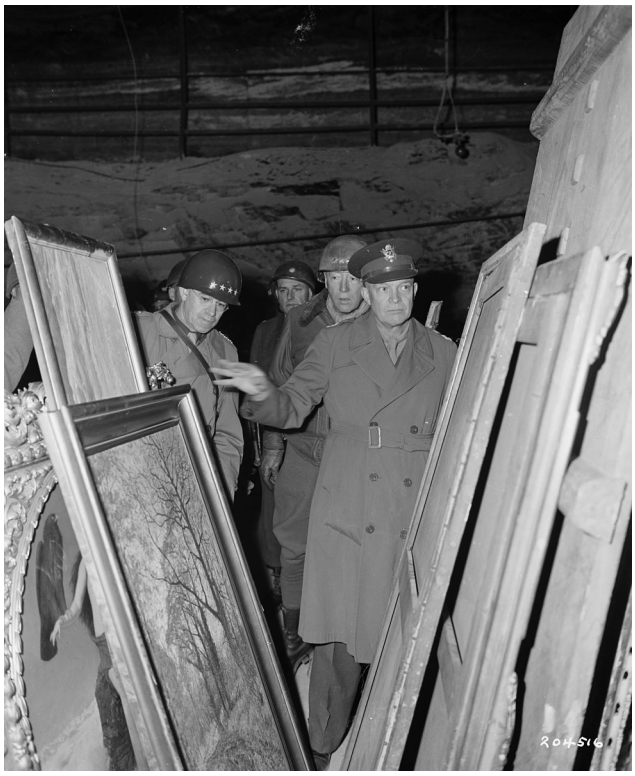

Figure 2: 12 April 1945, Gen. Dwight D. Eisenhower inspects stolen artwork in the Merkers salt mines. Behind Eisenhower are General Omar N. Bradley (left), CG of the 12th Army Group, and (right) LT Gen George S. Patton, Jr, CG, 3rd U.S. Army (National Archives and Record Administration).

By the end of the 19th century, provisions protecting cultural objects in war territories were adopted by the international community. However, they have been mostly ignored until the end of World War II. In fact, it was only after the Second World War, given the nature and the extent of the Nazi looting during the war, that the international community adopted the first international convention entirely committed to the protection of cultural property. The Hague Convention, adopted together with its First Protocol in 1954, regulated the circulation of cultural property during times of war. It was then completed in 1999 with the addition of a Second Protocol

[28] **UNESCO Constitution, Art. 4(e):** *"13. The General Conference, on the recommendation of the Executive Board and by a two-thirds majority may, subject to its rules of procedure, invite as observers at specified sessions of the Conference or of its commissions representatives of international organizations, such as those referred to in Article XI, paragraph 4. 14. When consultative arrangements have been approved by the Executive Board for such international non-governmental or semi-governmental organizations in the manner provided in Article XI, paragraph 4, those organizations shall be invited to send observers to sessions of the General Conference and its commissions"*.

[29] Webpage of the European External Action Service on the relations between UNESCO and the EU: https://eeas.europa.eu/diplomatic-network/unesco/12347/unesco-and-eu_en, (accessed on: 6 May 2020).

meant to reinforce the protection system of the Convention (Renold, 2016, pp. 9-10). It is important to note that States can be party to the Hague Convention without becoming a party of the two Protocols.

The Hague Convention (1954) sets out in its preamble the principle that:

"damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind […]. The preservation of the cultural heritage is of great importance for all peoples of the world and […] it is important that this heritage should receive international protection".

Accordingly, Article 1 defines 'cultural property' as an autonomous legal category which deserves international protection given the inherent value it has to all mankind (Jakubowski, 2015, p. 152).

Thus, the Convention sets out provisions to apply to all cultural property. Article 1 defines the objects which can be placed under the category of 'cultural property'. The aim was to narrow the definition of protected objects so that they could gain better protection (Howe, 2012, p. 408). Moreover, the Convention provides rules to protect cultural property during peace times (Art.3[30]), to prevent the use of historic sites and areas surrounding cultural objects for military purposes (Art.4(1)[31]), conditions and rules for cultural goods placed under 'special protection' (Chapter II of the Convention), and sanctions for those violating the Convention (Art. 28[32]) (Howe, 2012, pp. 409-410).

The First Protocol was codified in 1954 together with the Hague Convention. The main purpose of the Protocol is to prohibit the exports of cultural property from an occupied area. It also demands the restitution of the cultural good to the territory of the State from which it was taken (Jakubowski, 2015, p. 153).

In 1999, after a Diplomatic Conference in The Hague, the Second Hague Protocol was drafted. Its role is to supplement the provisions contained in the Convention. It therefore enriches the rules for the safeguard and respect of cultural property during conflicts (Jakubowski, 2015). In detail, it creates a new category to upgrade the protection of '*tangible cultural heritage that is of greatest importance for humanity*' (Art.10). This new system of enhanced protection for particular cultural objects and sites replaces the 'special protection' scheme implemented under Chapter II of the Hague Convention.

[30] **1954 Hague Convention, Art. 3**: *"The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate".*

[31] **Ibid., Art. 4(1)**: *"The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property".*

[32] **Ibid, Art. 28**: *"The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention".*

At present, almost every EU Member State is party to the Hague Convention. Many of these States also ratified the First and Second Protocol of the Convention. The modes of ratification taken into consideration to build the following *Table 1*[33] consist in the acts of ratification[34], accession[35], and notification of succession[36].

Nations	Hague Convention (1954)	First Protocol (1954)	Second Protocol (1999)
Austria	1964	1964	2002
Belgium	1960	1960	2010
Bulgaria	1956	1958	2000
Croatia	1992	1992	2006
Cyprus	1964	1964	2001
Czechia	1993	1993	2007
Denmark	2003	2003	2018
Estonia	1995	2005	2005
Finland	1994	1994	2004
France	1957	1957	2017
Germany	1967	1967	2009
Greece	1981	1981	2005
Hungary	1956	1956	2005
Ireland	2018	-	2018
Italy	1958	1958	2009
Latvia	2003	2003	-
Lithuania	1998	1998	2002
Luxemburg	1961	1961	2005

[33] The Table was constructed taking into consideration the tables made available by UNESCO on the website: http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/, (accessed on: 7 May 2020). The data were extrapolated by taking into consideration only the EU Member States and the year in which those states have ratified (through either ratification, accession, or notification of succession) the Hague Convention and its Protocols.

[34] ***Ratification*** defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act.

[35] With the term ***accession*** is considered an act by which a State signifies its agreement to be legally bound by the terms of a particular treaty. It has the same legal effect of ratification, but it is not preceded by an act of signature.

[36] The term ***notification of succession*** signifies, in relation to a multilateral treaty, any notification, however phrased or named, made by a successor state expressing its consent to be considered as bound by the treaty.

Nations	Hague Convention (1954)	First Protocol (1954)	Second Protocol (1999)
Malta	-	-	-
Netherlands	1958	1958	2007
Poland	1956	1956	2012
Portugal	2000	2005	2018
Romania	1958	1958	2006
Slovakia	1993	1993	2004
Slovenia	1992	1992	2004
Spain	1960	1992	2001
Sweden	1985	1985	2017

Table 1: Ratification of EU Member States to the Hague Convention of 1954 and its two Protocols.

In addition to this, given the increasing importance the protection of cultural goods is gaining internationally due mainly to the turbulence in the Middle East, the European Union has decided to develop its own legislation (Council Regulation (EU) No 1332/2013 of 13 December 2013) regulating the imports of cultural goods coming from war zones and easing their return (Jakubowski, 2015).

2.2 UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The illicit trade in cultural goods was first recognized only in connection with armed conflicts. It was only in 1970 that the international community recognized, through the adoption of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, that the phenomenon of illicit traffic in cultural property was not exclusively limited to times of war, but also included times of peace. Thus, the UNESCO Convention establishes, in broader terms, rules for the protection of cultural goods from illicit activities (European Commission, 2019, p. 143).

Therefore, at the level of public international law, a growing number of 'source' and 'market' countries have ratified the 1970 UNESCO Convention (Francioni, 2013, p. 13). The Convention does not entirely prohibit the export of cultural goods, but it aims to establish rules to govern the trade in cultural property and fight its illicit traffic (Dehouck, 2019, p. 22). Indeed, the Preamble of the 1970 Convention reads as follows:

"it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export".

The provisions contained in the 1970 Convention must be implemented through national legislation and they include three main pillars. The first one is comprised of general rules that are to be applied at the national level. In fact, it requires States to create inventories and lists of their cultural property and objects that need to be protected, releasing export certificates for objects to be traded legally. Moreover, it requires that States prohibit their museums and other analogous institutions to acquire stolen cultural property. Finally, the first pillar deals with the preventive measures States should take. These include the training of police officers, museums staff, customs officers and other cultural heritage professionals, and the creation of campaigns to raise awareness (UNESCO Convention, 1970, Artt. 1-6).

The second pillar sets out measures to guide States in the restitution of illegally exported cultural objects. These provisions are mainly outlined in Article 7(b)(i)(ii) of the 1970 Convention. It is clear from the following text (in particular by (ii)), that the burden of proof falls upon the requesting State and that the stolen cultural property is returned in exchange of a fair compensation for the innocent possessor:

"The States Parties to this Convention undertake: […] (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) 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. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party".

Finally, the third pillar deals with international cooperation. The aim of this pillar is not only to make State Parties cooperate and assist each other when their cultural heritage is in danger, but also it makes possible for State Parties to have bilateral agreements with the objective of extending the scope of the Convention (UNESCO Convention, 1970, Artt. 16-17).

Nonetheless, the 1970 UNESCO Convention presents different shortcomings that, in some ways, restrict its success. First of all, it only takes into consideration objects that have already been discovered and catalogued objects, without taking into account undiscovered, uninventoried or unexcavated objects (Prott, 2012, p. 4). Secondly, it imposes a time constraint on restitution claims: the return of illegally exported cultural objects can take place only if they

have been imported into another country "*after the entry into force of this Convention in both States concerned"* (Article 7(b)(ii) of the 1970 UNESCO Convention). Moreover, the Convention does not harmonize national rules for the protection of the good faith purchaser or the limitation periods for restitution. Finally, and most importantly, the 1970 UNESCO Convention does not provide any instrument to ensure the implementation of the mentioned Convention by an acceding State (European Commission, 2019, p. 144).

On the other hand, the achievements of the 1970 Convention should not be underestimated either. According to Prott (2012, p. 3), the 1970 UNESCO Convention has achieved many successes. First of all, it was able to build up a set of rules which are the result of opposed positions. Secondly, the most obvious success is the way it changed the attitudes of media and scholars, but also among museums, which now adopt the 1970 Convention as the decisive mark when it comes to enquiries regarding provenance. Thirdly, many countries have now updated their national legislation in order to comply with the abovementioned Convention. Finally, a fourth achievement concerns the influence of the Convention on the development of other conventions and the evolution of instruments for the protection of movable cultural heritage.

In this context, the European Union has taken from the 1970 UNESCO Convention in many ways. First of all, as it is shown in *Table 2*[37], most EU Member States have ratified the Convention and have become Parties to it. Moreover, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property have influenced EU legislation and have become one of the grounds on which the EU based its measures in the field of illegally exported cultural property (Thatcher, 2019, p. 596).

Nations	**UNESCO Convention (1970)**	**Nations**	**UNESCO Convention (1970)**
Austria	2015	Italy	1978
Belgium	2009	Latvia	2019
Bulgaria	1971	Lithuania	1998
Croatia	1992	Luxemburg	2015

[37] The Table was constructed taking into consideration the table made available by UNESCO on the website: http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha, (accessed on: 10 May 2020). The data were extrapolated by taking into consideration only the EU Member States and the year in which those States have ratified (through either ratification, accession, or notification of succession) the UNESCO Convention of 1970.

Nations	UNESCO Convention (1970)	Nations	UNESCO Convention (1970)
Cyprus	1979	Malta	-
Czechia	1993	Netherlands	2009
Denmark	2003	Poland	1974
Estonia	1995	Portugal	1985
Finland	1999	Romania	1993
France	1997	Slovakia	1993
Germany	2007	Slovenia	1992
Greece	1981	Spain	1986
Hungary	1978	Sweden	2003
Ireland	-		

Table 2: Ratification of EU Member States to the UNESCO Convention of 1970.

In order to deal with the problems and shortcomings presented in the 1970 Convention, the international community adopted several measures. The most prominent attempt has been, at present, the adoption of the UNIDROIT Convention of 1995 on Illicit Traffic of Cultural Property.

2.3 UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization. The goal of this organization is to develop methods and strategies to modernize, harmonize and coordinate private law between States and to build up uniform law instruments, principles and rules to achieve those aims[38]. Indeed, the choice of UNESCO to ask UNIDROIT to work in the area of the protection of cultural heritage came to be because of their specialization in harmonizing national laws (Prott, 2009, p. 215).

On 1 July 1998, the UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects came into force. The Convention, just like the 1970 UNESCO Convention, deals with the protection of cultural heritage (Francioni, 2013, p. 14). It concerns matters of

[38] Webpage of the European Law Institute: https://www.europeanlawinstitute.eu/membership/institutional-members/unidroit/, (accessed on: 11 may 2020).

private international law and is designed to develop and upgrade the provisions contained in the 1970 UNESCO Convention. The aim for the adoption of such Convention was to define uniform legal measures to deal with the issues of return and restitution of cultural goods (UNESCO, 2018, p. 39).

Unlike the 1970 UNESCO Convention, the UNIDROIT Convention applies to all cultural goods, including unregistered, unexcavated, and undiscovered cultural objects (those categories were in fact, as previously stated in p. 21, not taken into account by the UNESCO Convention of 1970) (European Commission, 2019, p. 145).

Moreover, the 1995 Convention makes it clear to what objects the term 'stolen' can be applied. Indeed, Art. 3(2) of the Convention states the following:

"For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place".

The wording of this provision is a clear attempt to overcome the plurality of views and legal orders, which either see cultural heritage as a public property, or as having a private ownership. In fact, the aim here is to provide a more efficient protection of cultural objects by interacting different legal orders and trying to find a solution to accommodate them all to support the fight against the traffic of cultural heritage (Francioni, 2013, p. 14).

Furthermore, the Convention of 1995 embodies the principle of international public policy by which the legal purchase of a stolen cultural good cannot be allowed in any case, and rules that the owner of a stolen cultural object shall be obliged to return it (Francioni, 2013, p. 14; Art. 3 of the UNIDROIT Convention[39], 1995). In this context, the UNIDROIT Convention was able to bridge the gap between incompatible domestic legal orders by using principles of international public law (Francioni, 2013, p. 14). On the one hand, it establishes the mandatory requirement that the possessor of a stolen cultural good shall return it in all cases (Dehouck, 2019, p. 25). On the other hand, it lays down provisions for the *bona fide* purchaser[40] to receive

[39] **1995 UNIDROIT Convention, Art. 3**: *"(1) The possessor of a cultural object which has been stolen shall return it. (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place. (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant 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 time of the theft. (4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor. (5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation. (6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession. (7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by: (a) a Contracting State; (b) a regional or local authority of a Contracting State; (c) a religious institution in a Contracting State; or (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest. (8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections".*

[40] Or good-faith purchaser (v. note 12).

a "*fair and reasonable compensation"* (Art. 4(1)[41] and Art. 6(1)[42] of the UNIDTROIT Convention, 1995) for the return of a stolen cultural good provided that he/she can prove to have exercised all the necessary due diligence (Art. 4(1) of the UNIDTROIT Convention, 1995).

The concept of 'due diligence' was introduced by the UNIDROIT Convention. Indeed, the legislator, instead of narrowing down the definition of 'good-faith purchaser', indicates the behavior a purchaser should follow in order to be considered legitimate. In fact, the purchaser should have exercised all the necessary due diligence, as required by Art. 4(1) of the Convention. The aspects of the checks a purchaser has to make to ensure due diligence are specifically described in Art. 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"* .

Notwithstanding this, the problem behind the 1995 Convention is that it did not have much success among States. In fact, within the 63 Member States UNIDROIT has[43], at present only 46 countries have ratified the Convention and, only 15 of them are EU Member States, as it is shown in *Table 3*[44].

Nations	UNIDROIT Convention (1995)	Nations	UNIDROIT Convention (1995)
Austria	-	Italy	1999
Belgium	-	Latvia	2019
Bulgaria	-	Lithuania	1997
Croatia	2000	Luxemburg	-
Cyprus	2004	Malta	-
Czechia	-	Netherlands	Signed in 1996, but not yet ratified it
Denmark	2011	Poland	-

[41] **Ibid., Art. 4(1)**: *"The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, 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"*.

[42] **Ibid., Art. 6(1)**: *"The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported"*.

[43] Webpage of the UNIDROIT: https://www.unidroit.org/about-unidroit/overview, (accessed on: 11 May 2020).

[44] The Table was constructed taking into consideration the table made available by UNESCO on the website: https://www.unidroit.org/status-cp, (accessed on: 11 May 2020). The data were extrapolated by taking into consideration only the EU Member States and the year in which those States have ratified (through either ratification, accession, or notification of succession) the UNIDROIT Convention of 1995.

Nations	UNIDROIT Convention (1995)	Nations	UNIDROIT Convention (1995)
Estonia	-	Portugal	2002
Finland	1999	Romania	1998
France	Signed in 1995, but has not yet ratified it	Slovakia	2003
Germany	-	Slovenia	2004
Greece	2007	Spain	2002
Hungary	1998	Sweden	2011
Ireland	-		

Table 3: Ratification of EU Member States to the UNIDROIT Convention of 1995.

According to the European Commission (2019, p. 146), the main obstacle to ratification lies in the implementation process. Indeed, the 1995 Convention is directly applicable, therefore it does not require an implementing legislation at the national level, and it does not allow for reservations (Dehouck, 2019, p. 27). Interestingly enough, this is also the principal strength of the Convention, which establishes the creation of a coordinated legal framework across the State Parties (European Commission, 2019, p. 146).

In this context, something curious happened after the 1995 UNIDROIT Convention came into force. In fact, many States (mostly part of the aforementioned 'market countries'), considering that the vaguer requirements of the UNESCO Convention of 1970 were preferable to the stricter ones contained in the 1995 Convention, started to ratify the 1970 UNESCO Convention (Dehouck, 2019, p. 26).

Finally, for what concerns the European Union, the fact that not all Member States have ratified the 1995 Convention meant that the disparities between the various legal systems concerning the protection of cultural heritage and the fight against illicit trafficking grew wider. This resulted in a different treatment of the trade in cultural objects between European countries (Dehouck, 2019, p. 26). In order to cope with this problem, the EU has tried to develop its own legislation on the export of cultural property by drawing from the UNIDROIT Convention. This led to the adoption of Directive 2014/60/EU which deals with stolen or illegally exported cultural objects (Thatcher, 2019, pp. 596-597) and which will be dealt with in the following Chapter 3.

3. EUROPEAN LEGAL FRAMEWORK ON THE MOVEMENT AND PROTECTION OF CULTURAL GOODS

As mentioned in the Introduction (p. 3), the European Union has, throughout the years, developed its own legislation in the field of cultural heritage. Indeed, the value of the sales in the EU art markets raised up to $21.1 billion in 2018 (The Art Market Report, 2019, p. 45) and, although we have to see how the situation will change with Brexit[45], the demand for works of art and antiquities has the obvious result of increasing the traffic and the theft of cultural objects, and looting and destruction of archeological sites (Renold, 2018, p. 3).

Indeed, EU law contains different provisions for cultural property. However, the content of these previsions only pertains to the movement and trade in cultural goods. In fact, the provisions fall within the context of the SEM[46] (Single European Market) and the free movement of goods, thus determining the economic orientation of the approach taken by the European Union law when dealing with cultural property (Peters, 2015, p. 141).

In addition to this, the competences for the preservation of cultural heritage remain to a large extent, in the hands of the Member States (Art. 167(1) of TFEU[47]), leaving the EU with a complementary competence[48] in cultural matters in relation to Member States (Galletti, 2013, p. 2).

An overview of the existing EU legal framework in relation to cultural goods and their protection will be presented in the following pages. First, the primary law concerning cultural goods will be introduced and explained. Then, the focus will shift on to the secondary legislation of the EU and the directives and regulations[49], which set out rules and measures to deal with the trade and traffic in cultural goods.

3.1 EU primary law concerning cultural goods

As previously stated, EU Member States have different national laws regulating the protection and circulation of cultural goods (Renolds, 2018, p. 11). This is mainly due to the fact that Member States regard the matter with different approaches when it comes to the concepts of 'market' and 'source' nations outlined in Chapter 1.

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[45] The UK is one of the major art markets, together with China and the USA (The Art Market Report, 2019).

[46] The ***Single European Market*** is a single market which seeks to guarantee the free movement of goods, capital, services and labor within the EU. It was established in 1993.

[47] T**FEU, Art. 167(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"*.

[48] According to the EU, ***complementary competences*** can be broadly classified as areas where Member States have not transferred any of their own competences to the EU, but they have endowed the EU with certain powers to complement, coordinate or assist internal activities of the Member States.

[49] **TFEU, Art. 288**: *"To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force"*.

In the current EU legal framework there are several references to cultural matters. In EU primary law, both TEU (Treaty on the European Union) and TFEU contain provisions to deal with cultural heritage.

In fact, as established by Article 3(3) of TEU, the EU has the task of monitoring and safeguarding European cultural heritage. Indeed, the Article states that the Union:

"3. […] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

Moreover, Title XIII of TFEU deals with cultural matters. Its Article 167 states the following:

"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 organisations in the sphere of culture, in particular the Council of Europe. 4. The Union shall take cultural aspects into account in its action under other provisions of the 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 harmonisation of the laws and regulations of the Member States; the Council, on a proposal from the Commission, shall adopt recommendations".

Art. 167 therefore affirms the EU's support and supplements the Member States action in the conservation and safeguard of European cultural heritage (Art. 167(2)) by adopting incentive measures but without trying any harmonization of the Member States' laws (Art.167(5)). This, as stated above, gives the European Union additional power when dealing with cultural property of Member States (Galletti, 2013, p. 4).

Hence, the law of cultural goods seems to be confined to national borders. Indeed, the mere definition of 'cultural good' and 'cultural heritage' is very different within the national legislations of Member States leaving the subject matter poorly harmonized (Galletti, 2013, p. 3).

Nonetheless, the reference to Europe's cultural heritage made in Art. 3 TEU is an obvious sign of the involvement of the EU institutions in cultural politics. However, the notion of culture is very flexible and, even though, as described in Chapter 1 (p. 5), this is a characteristic of the culture sector, a more labeled definition should have been provided by the European legislator, thus hampering the development of stronger Community policies (Galletti, 2013, p. 3).

Consequently, when it comes to culture, the EU is struggling between the need to grant more power to the Union, and, on the other hand, the Member States' opposition to give a larger 'slice' of sovereignty to the EU. Therefore, culture remains a prerogative of the Member States. This view is confirmed by Article 107(3)(d) TFEU which, when dealing with Member States' aid, is defined to be compatible with the internal market measures:

"(d) […] promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest".

Moreover, as previously stated, most of the provisions related to cultural goods have a strong economic connotation. In fact, they lay within the context of the SEM and of the free movement of goods. With the creation of the SEM on the 1st of January of 1993, customs controls have been abolished in order to establish the free movement of goods within Member States (Peters, 2015, p. 141).

Indeed, some EU norms have been created specifically to guarantee fundamental freedoms, and, in particular, that of the free movement of goods. In fact, Article 26(2) TFEU sets out a general rule for the internal market:

"The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

Also, Article 28(1) TFEU[50], part of the Title II which deals with the free movement of goods, focuses on the custom union, stating that such a union between Member States shall involve the prohibition of custom duties and other taxes having an equivalent effect on imports and exports inside Europe, and the adoption of a common tariff in relation with third countries.

Article 34[51] and 35[52] of TFEU can also be considered of great importance. These articles, set out two general rules prohibiting quantitative restrictions on imports and exports, as well as measures which have an equivalent effect.

As can be clearly noted, those dispositions make no reference to 'cultural goods', but are relevant norms for what concerns 'goods'. The difficulty is understanding whether it is possible to equate the concept of 'good' with the concept of 'cultural good'. The European Court of Justice[55] (ECJ) has ruled in a judgment of 1968[56] on this matter, establishing that *"the*

[50] **TFEU, Art. 28(1)**: "*1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries".*
[51] **TFEU, Art. 34**: *"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".*
[52] **TFEU, Art. 35**: *"Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States".*
[55] The ***European Court of Justice***, or Court of Justice, is the supreme court of the EU in matters of EU law. It was established in 1952 and is based in Luxembourg. It is composed of one judge per Member State although it normally hears cases in panels of three, five or fifteen judges. The Court has been led by Koen Lenaerts since 2015.
[56] **ECJ**, 10 December 1968, **Case C-7/68**, *Commission of the European Communities v Italian Republic*, p. 562.

rules of the common market apply to articles possessing artistic or historic value subject only to the exception provided by the treaty[57] *".*

The general rule set out in Art. 34 and 35 of TFEU finds its fundamental exception in Article 36 TFEU, the only Article in the Treaty which has specific rules dealing with the movement of cultural property. The Article allows Member States to justify certain restrictions to the free movement of goods:

"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 health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

The basis for this exception lies mainly in the need to reconcile the free movement of goods with the protection of national cultural patrimony.

However, the different linguistic versions of Art. 36 TFEU show the different approaches EU Member States have to the protection and safeguard of cultural goods. The Italian, Spanish and Portuguese texts seem to leave great discretion to the States, by referring to *"national treasures"* (Art. 36 TFEU) as *patrimonio artistico* (Italian) *patrimonio artístico* (Spanish), and *património nacional de valor artístico* (Portuguese). These notions have the clear intent to allow those States to justify certain restrictions with the need to protect their national cultural heritage (Galletti, 2013, p. 8-9).

On the contrary, other linguistic versions, in particular the French (*trésors nationaux*) and English (*national treasures*) limit national prerogatives. It is clear that, while in the case of the English and French version the categories falling within the protection of national treasures are narrowed, in the case of the Italian, Spanish, and Portuguese linguistic versions, the categories of goods subject to a protection regime are wider and comprehend goods which cannot be included in the first case (Galletti, 2013, p. 8-9).

The Court of Justice, when dealing with the interpretation of norms of primary law or secondary legislation which have different meanings in different linguistic versions, has applied some criteria. Firstly, in the judgment of the Case 29-69 *Erich Stauder v. City of Ulm*[58], the Court of Justice ruled that

"When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation

[57] Reference here is made to the EEC Treaty.
[58] **ECJ**, 12 November 1969, **Case C-29/69**, *Erich Stauder v. City of Ulm*, point 3. See also: **ECJ**, 17 July 1997, **Case C-219/95**, *Ferriere Nord Spa v. Commission*, point 15; **ECJ**, 20 November 2001, **Case C-268/99**, *Adona Malgorzata et al. v. Staatssecretaris van Justuitie*, point 47.

but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages".

Secondly, the different linguistic versions, according to a 1977 judgment of the ECJ, have to be interpreted uniformly and, in cases of disconformity, the norm has to be interpreted referring to the *"purpose and the general scheme of the rules in which it forms a part*[59]*"*.

By referring to the interpretative rules presented above, Art. 36 TFEU conforms better with the English and French texts. Indeed, the Article comprehends a limited number of exceptions to the general rule contained in Article 34 and 35 TFEU. Being a derogation to the main rule, an extensive interpretation of it would be contrary to the Treaty, incompatible to the obligations arising therefrom, and the competences of the Member States.

Before moving on to the secondary legislation concerning the movement of cultural goods, it is necessary to outline the legal basis on which the EU can act and set out the rules concerning the import and export of cultural objects. Indeed, Article 3 TFEU[60] outlines the areas in which the Union has exclusive competence[61], among which the exclusive power to legislate on trade matters and to conclude international trade agreements is present. Specifically, Art. 207 TFEU[62] establishes the principles on which the common commercial policy has to be based. These represent the legal bases allowing the EU to establish the rules concerning the procedures to safely import and export cultural goods presented in the secondary legislation.

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[59] **ECJ**, 27 October 1977, **Case C-30/77**, *Regina v. Pierre Boucherau,* point 14. See also: **ECJ**, 7 December 1995, **Case C-449/93**, *Rockfon A/S v. Specialarbejderfordindet i Danmark*, point 28; **ECJ**, 17 December 1998, **Case C-236/97**, *Skatteministreriet v.. Codan*, point 28; **ECJ**, 9 January 2003, **Case C-257/00**, *Nani Givane v. Secretary of State for the Home Department*, point 37.

[60] **TFEU, Art. 3:** *"1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope"*.

[61] ***Exclusive competence*:** only the EU can act in the areas in which it has exclusive competence.

[62] **TFEU, Art. 207:** *"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. 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 organisations 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 organisation 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 harmonization"*.

3.2 Secondary legislation pertaining the movement of cultural goods

The EU secondary legislation has advanced throughout the years and it has been developed with the aim of creating more harmonized rules for Member States when dealing with the movement of cultural goods. From the establishment of the Internal Market and the abolition of barriers within the borders of the European Union, the European legislator has upgraded the system on the matters of cultural goods. The directives and regulations which will be tackled below are the result of the influence that international conventions on the protection of cultural goods have had in Europe, but also of the change of perspective the European Union went through regarding the protection of cultural goods, both European and not.

Regulation 3911/92 on the export of cultural goods and Directive 93/7/EEC on the return of cultural objects which have been unlawfully removed from the territory of a Member State introduced a Union system for the protection of Member States' cultural objects. From here, the EU upgraded its secondary legislation for the export of cultural goods with Regulation (EC) No 116/2009 which codifies the 1992 EU Regulation, and for the internal market through Directive 2014/60/EU on the return of cultural objects which have been unlawfully removed from the territory of a Member State and revises the 1993 Directive.

Finally, the EU had not, until recently, created a secondary legislation document concerning the import of cultural goods inside the EU borders. Indeed, the only two Regulations on that matter were related to the import of Iraqi[63] and Syrian[64] cultural objects. Only in 2019 the Union finally established a regime for the import of cultural goods from third countries, that is, Regulation (EU) 2019/880 on the introduction and import of cultural goods.

3.2.1 Secondary legislation regulating the internal market between Member States: from Directive 93/7/EEC to Directive 2014/60/EU

With the establishment of the SEM, the European Union adopted its first piece of secondary legislation setting up measures to govern the circulation of cultural goods within the borders of the European Union.

Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State was the first attempt to merge the fundamental principle of the free movement of goods with the *"protection of national treasures possessing artistic, historic or archaeological value"* as established in Article 36 TFEU.

[63] The reference is to **Council Regulation (EU) No 85/2013** of 31 January 2013 amending Reg. (EC) No 1210/2003 concerning financial restrictions on economic and financial relations with Iraq.
[64] The reference is to **Council Regulation (EU) No 1332/2013** of 13 December 2013 amending Reg. (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria.

While the Directive draws inspiration from the 1970 UNESCO Convention, it is not, unlike the 1970 Convention, a document which only tackles the issue of the illicit traffic in cultural property. Indeed, its primary goal is to compensate for the abolition of national frontiers and, consequently, of national customs controls among Member States which used to control and suppress the illegal transport of cultural property within the now Single Market (Peters, 2015, p. 144).

It is important to remember that, unlike regulations, directives are not directly applicable within Member States, but require national implementation by each Member State. Therefore, the aim of Directive 93/7/EEC and its successor, Directive 2014/60/EU, is to set the minimal standards for transposition into the national laws of the Member States. By using a directive, the goal of the EU is to create harmonized minimal standards, at the same time leaving the Member States the power to set higher ones, if deemed proper (Peters, 2015, p. 145).

Directive 93/7/EEC is no longer in force. However, it is necessary to focus on some of its features in order to better understand the subsequent Directive 2014/60/EU. Firstly, the earlier Directive establishes administrative cooperation in order to facilitate the return of cultural goods[65].

Therefore, Member States have a number of responsibilities under the Directive. Indeed, they have to appoint central authorities[66] which have the task of establishing and assisting cooperation with other Member States[67]. Nonetheless, the obligation to return the cultural object does not fall within the competences of the requested Member State, but rather within the competences of the so-called 'possessor'[68].

As a consequence, the requesting Member State shall *"initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the*

[65] **Directive 93/7/EEC, Preamble**: *"Whereas administrative cooperation should be established between Member States as regards their national treasures, in close liaison with their cooperation in the field of stolen works of art and involving in particular the recording, with Interpol and other qualified bodies issuing similar lists, of lost, stolen or illegally removed cultural objects forming part of their national treasures and their public collections".*

[66] **Directive 93/7/EEC, Art. 3**: *"Each Member State shall appoint one or more central authorities to carry out the tasks provided for in this Directive. Member States shall inform the Commission of all the central authorities they appoint pursuant to this Article. The Commission shall publish a list of these central authorities and any changes concerning them in the C series of the Official Journal of the European Communities".*

[67] **Ibid., Art. 4**: "*Member States' central authorities shall cooperate and promote consultation between the Member States' competent national authorities. The latter shall in particular: 1. upon application by the requesting Member State, seek a specified cultural object which as been unlawfully removed from its territory, identifying the possessor and/or holder. The application must include all information needed to facilitate this search, with particular reference to the actual or presumed location of the object; 2. notify the Member States concerned, where a cultural object is found in their own territory and there are reasonable grounds for believing that it has been unlawfully removed from the territory of another Member State; 3. enable the competent authorities of the requesting Member State to check that the object in question is a cultural object, provided that the check is made within 2 months of the notification provided for in paragraph 2. If it is not made within the stipulated period, paragraphs 4 and 5 shall cease to apply; 4. take any necessary measures, in cooperation with the Member State concerned, for the physical preservation of the cultural object; 5. prevent, by the necessary interim measures, any action to evade the return procedure; 6. act as intermediary between the possessor and/or holder and the requesting Member State with regard to return. To this end, the competent authorities of the requested Member States may, without prejudice to Article 5, first facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested State and provided that the requesting State and the possessor or holder give their formal approval".*

[68] **Ibid.**, **Art. 4(6)**.

holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory […]" (Art. 5 of Directive 93/7/EEC). Furthermore, the requesting Member State has the task of demonstrating that the artwork belongs to its national cultural property and that the object was unlawfully removed from its territory after the 1st of January 1993[69]. If the requesting State fails to do so, the 1993 Directive does not provide a legal obligation for the object to be returned. Finally, the scope of the Directive, as established in Article 1(1)[70], is restricted to goods classified in the Annex of the Directive.

Nonetheless, due to the limitations of securing the return of cultural objects, only a small number of artworks have returned to their Member State of origin since 1993 (Peters, 2015, pp. 145-146), the European Parliament and the Council, after a proposal by the European Commission for the revision of Directive 93/7/EEC, have adopted Directive 2014/60/EU of 15 May 2014 in order to overcome the shortcomings present in the previous Directive.

Indeed, as it is stated in Recital 8 of Directive 2014/60/EU:

> *"The objective of Directive 93/7/EEC was to ensure the physical return of the cultural objects to the Member State from whose territory those objects have been unlawfully removed, irrespective of the property rights applying to such objects. The application of that Directive, however, has shown the limitations of the arrangements for securing the return of such cultural objects. The reports on the application of that Directive have pointed out its infrequent application due in particular to the limitation of its scope, which resulted from the conditions set out in the Annex to that Directive, the short period of time allowed to initiate return proceedings and the costs associated with return proceedings".*

Directive 2014/60/EU contains four substantial modifications in comparison to the former one. First of all, as set out in Recital 9 and Article 2(1), it extends its scope by revoking the Annex, establishing that all cultural objects identified as 'national cultural property' within the meaning of Art. 36 TFEU by the Member States must be returned, and also that the restrictions concerning age or financial thresholds need to be eliminated[71].

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[69] **Ibid., Art. 13**: *"This Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993".*

[70] **Ibid., Art. 1(1)**: *"For the purpose of this Directive: 1. 'Cultural object' shall mean an object which: is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty, and belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of - public collections listed in the inventories of museums, archives or libraries' conservation collection. For the purpose of this Directive, 'public collections' shall mean collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority; the inventories of ecclesiastical institutions".*

[71] **Directive 2014/60/EU, Recital 9**: *"The scope of this Directive should be extended to any cultural object classified or defined by a Member State under national legislation or administrative procedures as a national treasure possessing artistic, historic or archaeological value within the meaning of Article 36 TFEU. This Directive should thus cover objects of historical, paleontological, ethnographic, numismatic interest or scientific value, whether or not they form part of public or other collections or are single items, and whether they originate from regular or clandestine excavations, provided that they are classified or defined as national treasures. Furthermore, cultural objects classified or defined as national treasures should no longer have to belong to categories or comply with thresholds related to their age and/or financial value in order to qualify for return under this Directive"*; **Directive 2014/60/EU, Art. 2(1)**: "*'cultural object' means an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 TFEU".*

Secondly, the new Directive extends the time limit to initiate proceedings for the return of cultural objects which have been unlawfully removed from the territory of a Member State. According to Article 8(1)

"Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder".

The reasoning behind this is to give more time (in the previous Directive the return proceedings could not be brought forward more than a year after the requesting Member State became aware of the location of the cultural good and of the identity of the possessor[72]) for the investigation process and more time to allege the claim against the possessor of the cultural object under investigation.

Third, the revised Directive strengthens the cooperation among States and national authorities by requiring them to use the Internal Market Information System (IMI) in order to advance the exchange of information and makes it easier for the competent authorities to keep a record of them[73].

Finally, the 2014 Directive, contrary to the 1993 Directive, in cases when the return of the requested cultural good is instructed by the competent national authority, shifts the burden of proof for what concerns the receipt of compensation. Indeed, Article 10[74] of the Directive establishes a new level of *"due care"* (i.e. due diligence) making it the possessor of the requested cultural object (and not, anymore, the requested Member State, as established in Art. 9 of Directive 93/7/EEC[75]) the party whom is responsible for providing evidence that they exercised the necessary due diligence when acquiring the cultural object in order to receive compensation from the buying Member State:

"In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen

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[72] **Directive 97/3/EEC, Art. 7(1)**: *"Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder".*

[73] **Directive 2014/60/EU, Art. 5**: *"[…] In order to cooperate and consult with each other, the central authorities of the Member States shall use a module of the Internal Market Information System ('IMI') established by Regulation (EU) No 1024/2012 specifically customised for cultural objects. They may also use the IMI to disseminate relevant case-related information concerning cultural objects which have been stolen or unlawfully removed from their territory. The Member States shall decide on the use of the IMI by other competent authorities for the purposes of this Directive*".

[74] **Ibid., Art. 10**: *"Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object. In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances. In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by those means. The requesting Member State shall pay that compensation upon return of the object".*

[75] **Directive 93/7/EEC, Art. 9**: *"[…] The burden of proof shall be governed by the legislation of the requested Member State […]".*

cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances".

According to this wording, Article 10 can be viewed as *"a binding standard of due diligence"* (Peters, 2015, p. 145) for the trade in cultural property. Moreover, it is interesting to note that the article mentioned corresponds in its entirety to the due diligence provisions contained in Art. 4(4)[76] and Art. 6(2)[77] of the 1995 UNIDROIT Convention.

Indeed, like the UNIDROIT Convention, the recast Directive requires an obligation of due diligence on the part of the possessor of a cultural good, whom has to check the legal origin of the object. The 2014 Directive follows the same method of the 1995 Convention by concentrating on giving a pragmatic definition of the attitudes and behaviors suitable with a diligent conduct (Cornu, 2017, p. 13).

This is notable for two main reasons. First of all, it is a proof of the fact that the EU has developed its secondary legislation taking greatly into account the international conventions on cultural goods. Secondly, it is impressive given the fact that, as shown in *Table 3* (pp. 25-26), only close to half of the EU Member States have ratified the 1995 Convention.

3.2.2 Secondary legislation regulating the external relations between the European Union and third countries

It is fundamental for the EU to regulate the imports and exports of cultural property with third countries. Indeed, as previously mentioned (pp. 31-32), Member States transferred their sovereignty on matters of trade policy to the Union, which now has exclusive competence over it (Artt. 3 and 207 TFEU[78]). In order to compensate for the abolition of the customs controls within the Union, the EU adopted some regulations to control the import and export of cultural goods. However, while for the export of cultural goods the first provisions date back to 1992, with Regulation 3911/92, it took more time to develop the rules for the import of cultural goods to EU Member States.

First, the Regulation on the export of cultural goods will be addressed. Secondly, the focus will shift on the import of cultural goods and the development of the legislation on that matter.

[76] **1995 UNIDROIT Convention, Art.4(4)**: *"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".*

[77] **1995 UNIDROIT Convention, Art.6(2)**: *"In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, 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".*

[78] v. notes 60-62.

3.2.2.1 Export of cultural goods: Regulation (EC) No 116/2009 on the export of cultural goods

As previously stated (p. 32), in 1992 the EU adopted Council Regulation (EEC) No 3911/92 on the export of cultural goods with the aim of ensuring that the export of cultural property outside the Internal Market would be subject to uniform export controls. Indeed, the decision of adopting a Regulation, rather than a Directive, was to ensure its direct applicability in all Member States. Consequently, the Regulation is directly enforceable within Member States without the need of transposition into national law, in this way, the provisions contained in the Regulation are uniformed.

The 1992 Regulation has been subsequently codified by Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods. However, no major changes were made to its content.

On the basis of the 2009 Regulation, the export of Member States' national cultural property outside the Union's custom territory shall be subject to the presentation of an EU export license[79]. Moreover, the authorities entitled to issue the license are the competent authorities as designated by the Member States[80].

An export license is required for all the objects that fall within one of the categories listed in Annex I of the Regulation[81]. The Annex comprehends 15 categories and it establishes the type of object covered, the age and the financial threshold. However, there are some types of objects, such as contemporary art, which are completely exempted from the export licenses of the EU[82].

Moreover, the application to issue a license under the current Regulation can be refused on the basis of Article 2 para. 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".*

Therefore, Member States are enabled to check whether a cultural good falls or should fall under the classification of 'national cultural property' and, consequently, national authorities can prohibit the export of the object in question.

Nonetheless, the Regulation has been criticized for several aspects. Peters (2015, p. 146) summarizes the problems of the 2009 Regulation in three main points. Firstly, given the fact

[79] **Council Regulation (EC) No 116/2009, Art. 2(1)**: *"The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export licence".*
[80] **Ibid., Art. 2(2)(a)**: *"The export licence shall be issued at the request of the person concerned: (a) by a competent authority of the Member State in whose territory the cultural object in question was lawfully or definitively located on 1 January 1993".*
[81] **Ibid., Art. 1**: *"Without prejudice to Member States' powers under Article 30 of the Treaty, the term 'cultural goods' shall refer, for the purposes of this Regulation, to the items listed in Annex I".*
[82] The table of the listed cultural objects of **Annex I of Council Regulation (EC) No 116/2009** can be found on the text of the Regulation.

that Member States not only have to control the export of their own national cultural property but also the export of the cultural property of the other Member States, it is difficult for one Member State to determine if a cultural good is included among the national cultural property of another Member State. Secondly, the categories of Annex I[83] are ambiguous. In practice, there have been difficulties interpreting them. Third, the Regulation gives an age and financial threshold to establish Member States' national cultural property. However, Member States do not label their national cultural property on the basis of monetary values, thus making it difficult to establish with a sufficient level of clarity whether a cultural object is part of a Member State national cultural property or not.

3.2.2.2 Import of cultural goods: the development of Regulation (EU) 2019/880 on the introduction and import of cultural goods

As previously stated (p. 32), with the sole exceptions of Council Regulation (EC) No 85/2013 concerning financial restrictions on economic and financial relations with Iraq and Council Regulation (EU) No 1332/2013 on restrictive measures in view of the situation in Syria, there has been no EU legislation concerning the import of cultural goods from third countries until recently.

Indeed, cultural goods imported in the EU from third countries (other than Iraq and Syria) were treated as any other goods. This finally changed with the introduction of Council Regulation (EU) 2019/880 on the introduction and import of cultural goods. The new Regulation has the goal of creating uniform measures to prevent the introduction, import and storage in the European Union of cultural goods coming from third countries[84].

In drafting the 2019 Regulation, the European Union took into account the feedback from UNESCO on the illicit trade in cultural goods and the external factors which contribute to its growth. Consequently, the EU decided that even if some Member States introduced rules and requirements to address the problem of the illegal trade in cultural objects, their individual effort, not only was certainly less effective than measures at the EU-level, but it also resulted in an uneven treatment of items entering the borders of the EU (Binder, 2019, p. 2). Indeed, as stated in Recital 1 of Regulation 2019/880:

"[…] common rules on trade with third countries should be adopted so as to ensure the effective protection against illicit trade in cultural goods and against the loss or destruction, the preservation of humanity's cultural heritage and the prevention of terrorist financing and money laundering through the sale of pillaged cultural goods to buyers of the Union".

[83] Ibid.

[84] **Council Regulation (EU) 2019/880, Recital 4**: *"In view of different rules applying in Member States regarding the import of cultural goods into the customs territory of the Union, measures should be taken in particular to ensure that certain imports of cultural goods are subject to uniform controls upon their entry into the customs territory of the Union, on the basis of existing processes, procedures and administrative tools aiming to achieve a uniform implementation of Regulation (EU) No 952/2013 of the European Parliament and of the Council".*

Thus, the importance for a European import Regulation was jointly addressed by Italy, Germany and France in 2015. However, it was only in 2017 that the European Commission presented its proposal for an import Regulation within the framework of the 2016 EU Action Plan to fight terrorism financing[85]. Subsequently, between 2017 and 2018 the Commission's proposal was discussed between the Member States. Based on the negotiations between Member States, the proposal of the EU Commission was entirely redrafted until the final talks between the Council, the Parliament and the Commission took place. The legislative process was then completed with the vote by the Parliament and by the final approval of the Council on the 9th of April of 2019 (Peters, 2019, p. 103).

The 2019 Regulation, which entered into force the 28th of June of 2019, makes reference to the 1970 UNESCO Convention and to the 1995 UNIDROIT Convention in defining artworks in the context of imports[86] and provides a common definition of cultural goods, according to which *"'cultural goods' means any item which is of importance for archeology, prehistory, history, literature, art or science as listed in the Annex"* (Art. 2, Regulation 2019/880).

Moreover, it unifies and strengthen the protection of non-European cultural goods against being trafficked into the SEM[87] with the aim of making organized crime related to cultural goods more difficult, especially when connected to terrorism financing[88].

Furthermore, the Regulation establishes a regime for the introduction of cultural goods. First, it defines the categories of goods for which the import shall be prohibited. It is important to point out that on this matter, the Regulation follows the simple rule that cultural goods that are illegally exported are considered as being illegally imported (Peters, 2019, p. 105). Indeed, as Article 3(1) of the Regulation states:

"The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited.
The customs authorities and the competent authorities shall take any appropriate measure when there is an attempt to introduce cultural goods as referred to in the first subparagraph".

[85] More information available on the website of the European Commission at: https://ec.europa.eu/home-affairs/what-we-do/policies/counter-terrorism/fight-financing-terrorism_en, (accessed on: 31 May 2020).
[86] **Council Regulation (EU) 2019/880, Recital 7**: *"Many third countries and most Member States are familiar with the definitions used in the Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property signed in Paris on 14 November 1970 ('the 1970 Unesco Convention') to which a significant number of Member States are a party, and in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signed in Rome on 24 June 1995. For that reason the definitions used in this Regulation are based on those definitions".*
[87] **Council Regulation (EU) 2019/880, Recital 5**: *"[…]The common rules introduced by this Regulation should cover the customs treatment of non-Union cultural goods entering the customs territory of the Union. For the purposes of this Regulation, the relevant customs territory should be the customs territory of the Union at the time of import".*
[88] **Ibid., Art. 1(1)**: *"This Regulation sets out the conditions for the introduction of cultural goods and the conditions and procedures for the import of cultural goods for the purpose of safeguarding humanity's cultural heritage and preventing the illicit trade in cultural goods, in particular where such illicit trade could contribute to terrorist financing".*

Secondly, it determines a system of import licenses and importer statements for certain categories of goods listed in the Annex of the Regulation[89]. An import license is therefore required for cultural goods which are at most risk, as listed in Part B of the Annex[90]. Whereas, other cultural objects (the ones part of Part C of the Annex) require an import statement[91]. Art. 4(4) of the 2019 Regulation states that the application of an import license:

"shall be accompanied by any supporting documents and information providing evi- dence that the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country or providing evidence of the absence of such laws and regulations at the time they were taken out of its territory".

On the other hand, the importer statement, consists of a signed declaration stating, as written in Article 5(2)(a), *"that the cultural goods have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country at the time they were taken out of its territory"*.

The Regulation also identifies certain exemptions to these rules, where neither an import license nor an importer statement is necessary. These apply to all the cultural objects listed in Article 3(4) of the Regulation 2019/880[92].

In addition, the EU Import Regulation defines a new time limit: 24 April 1972. This date is significant, since it is when the 1970 UNESCO Convention, according to Article 21 of the Convention[93], entered into force. In fact, as established both in Article 4(4)[94] and Article 5(2)[95], when it is not possible to determine the country where the cultural good was discovered or created, or if the creation, export, or discovery was prior to 1972, it is sufficient for the

[89] **Ibid., Art. 3(2)**: *"The import of cultural goods listed in Parts B and C of the Annex shall be permitted only upon the provision of either: (a) an import licence issued in accordance with Article 4; or (b) an importer statement submitted in accordance with Article 5".*

[90] **Ibid., Art 4(1)**: *"The import of cultural goods listed in Part B of the Annex other than those referred to in Article 3(4) and (5) shall require an import licence. That import licence shall be issued by the competent authority of the Member State in which the cultural goods are placed under one of the customs procedures referred to in point (3) of Article 2 for the first time".*

[91] **Ibid., Art. 5(1)**: *"The import of the cultural goods listed in Part C of the Annex shall require an importer statement which the holder of the goods shall submit via the electronic system referred to in Article 8".*

[92] **Ibid., Art. 3(4)**: *"Paragraph 2 of this Article shall not apply to: (a) cultural goods that are returned goods within the meaning of Article 203 of Regulation (EU) No 952/2013; (b) the import of cultural goods for the exclusive purpose of ensuring their safekeeping by, or under the supervision of, a public authority, with the intent to return those cultural goods, when the situation so allows; (c) the temporary admission of cultural goods, within the meaning of Article 250 of Regulation (EU) No 952/2013, into the customs territory of the Union for the purpose of education, science, conservation, restoration, exhibition, digitisation, performing arts, research conducted by academic institutions or cooperation between museums or similar institutions".*

[93] **UNESCO Convention of 1970, Art. 21**: *"This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession".*

[94] **Council Regulation (EU) 2019/880, Art. 4(4)**: *"[…] By way of derogation from the first subparagraph, the application may be accompanied instead by any supporting documents and information providing evidence that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transhipment, in the following cases: (a) the country where the cultural goods were created or discovered cannot be reliably determined; or (b) the cultural goods were taken out of the country where they were created or discovered before 24 April 1972".*

[95] **Council Regulation (EU) 2019/880, Art. 5(2)**: *"[…] By way of derogation from point (a) of the first subparagraph, the declaration may instead state that the cultural goods in question have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transhipment, in the following cases: (a) the country where the cultural goods were created or discovered cannot be reliably determined; or (b)the cultural goods were taken out of the country where they were created or discovered before 24 April 1972".*

importer to provide evidence (in case of the Art. 4 of the 2019 Regulation) or to declare (in case of Article 5 of the Regulation) that the cultural good in question has been *"exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transshipment"* (Article 4(4) of Regulation 2019/880). Indeed, the next years will be a test to see if the wording of the abovementioned provision will constitute a loophole in the effectiveness of the Regulation, since, as seen in Chapter 1 (p. 8), it is very common for trafficked cultural property to be stored for several years until it is put on the international art market.

Finally, in order to better organize and facilitate the administrative work of the national authorities, the Regulation establishes that a centralized electronic system is to be developed by the EU Commission. The creation of the electronic system is created, as reported in Article 8(1) of the Regulation, *"for the storage and the exchange of information between the authorities of the Member States, in particular regarding import licences and importer statements"*.

This Regulation, which will be applied from June 2025[96], will complete the European Union system for the movement of cultural goods.

3.2.3 Implementation process of Directive 2014/60/EU in Austria and Italy

Once EU directives are adopted, Member States have to enact a process of transposition and implementation within their national legislative systems. Directives are, as written in Article 288 TFEU[97], binding upon Member States as to the result to be achieved leaving national authorities the decision of the form and method for its transposition. Nonetheless, Member States are required to transpose directives timely, effectively, and precisely. The transposition process is usually done by States through primary or secondary legislation, with a clear predisposition for the second choice (Voermans, 2018). The process is, according to Article 17(1) TEU[98], monitored by the European Commission under the control of the Court of Justice of the European Union.

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[96] **Council Regulation 2019/880, Art. 16**: *"1. This Regulation shall apply from the date of its entry into force. 2. Notwithstanding paragraph 1: (a) Article 3(1) shall apply from 28 December 2020; (b) Article 3(2) to (5), (7) and (8), Article 4(1) to (10), Article 5(1) and (2) and Article 8(1) shall apply from the date on which the electronic system referred to in Article 8 becomes operational or at the latest from 28 June 2025. The Commission shall publish the date on which the conditions of this paragraph have been fulfilled in the 'C' series of the Official Journal of the European Union"*.

[97] **TFEU, Art. 288:** *"To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force"*.

[98] **TEU, Art. 17(1)**: *"The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements"*.

Therefore, it is important to tackle the implementation of the only EU Directive pertaining to the protection of cultural goods in two very different countries such as Austria and Italy, with the aim of describing the mechanisms used by the two Member States and the difficulties faced in the process.

3.2.3.1 Implementation of Directive 2014/60/EU in Austria

The implementation of Directive 2014/60/EU into national legislations was meant to be carried out by the 18 of December of 2015, as reported in Article 19(1) of the Directive[99]. However, some national legislators were not able to fulfill this requirement. The implementation process was also delayed in Austria (Łukańko, 2016, p. 120), where the *Bundesgesetz über die Rückgabe unrechtmäßig verbrachter Kulturgüter* (*Kulturgüterrückgabegesetz – KGRG*), the act implementing the Directive, was published on the 13th of April of 2016 and came into force on the 14th of April of 2016[100].

Nonetheless, there is a historical precedent in Austrian law, the Austrian Act of 5 December 1918 on the protection of cultural goods and control on exports[101]. This Act had a major impact on the effort towards the protection of cultural objects from illicit exports Lukańko, 2016, pp. 120-121) and was finally repealed by Art. 2(1) point 1[102] of the Federal Act of 1999[103], regarding restrictions in the disposal of objects of historical, artistic or cultural importance.

[99] **Directive 2014/60/EU, Art. 19(1)**: *"By 18 December 2015, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with point (1) of Article 2, point (3) of the first paragraph of Article 5, the second paragraph of Article 5, the third paragraph of Article 7, Article 8(1), the first and the second paragraphs of Article 10 and Article 17(1) of this Directive […]".*

[100] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter Kulturgüter, Art. 26**: *"Dieses Bundesgesetz tritt nach Ablauf des Tages seiner Kundmachung in Kraft"* [this federal law enters into force one day after its publication].

[101] Ausfuhrverbotsgesetz für Kulturgut (AusfVKG), StGBl. No. 90/1918 [Austrian Act of 5 December 1918 on the protection of cultural objects and the ban on exports of cultural objects].

[102] **Bundesgesetz betreffend den Schutz von Denkmalen wegen ihrer geschichtlichen, künstlerischen oder sonstigen kulturellen Bedeutung (Denkmalschutzgesetz – DMSG), Art. 2(1) point 1**: *"Bei Denkmalen gemäß § 1 Abs. 1 und 3, die sich im alleinigen oder überwiegenden Eigentum des Bundes, eines Landes oder von anderen öffentlich-rechtlichen Körperschaften, Anstalten, Fonds sowie von gesetzlich anerkannten Kirchen oder Religionsgesellschaften einschließlich ihrer Einrichtungen befinden (sowie bei Denkmalen, auf die die Bestimmungen des § 6 Abs. 1 zweiter und dritter Satz zur Anwendung kommen), gilt das öffentliche Interesse an ihrer Erhaltung so lange als gegeben (stehen solange unter Denkmalschutz), als das Bundesdenk- malamt nicht auf Antrag einer Partei (§ 26f) auf Feststellung, ob die Erhaltung tatsächlich im öffentlichen Interesse gelegen ist oder nicht, bzw. von Amts wegen (Abs. 2) eine bescheidmäßige Entscheidung über das tatsächliche Vorliegen des öffentlichen Interesses getroffen hat (Unter- schutzstellung kraft gesetzlicher Vermutung). Diese gesetzliche Vermutung gilt auch dann, wenn das alleinige oder überwiegende Eigentum juristischer Personen gemäß dem ersten Satz lediglich durch eine Mehrheit der Miteigentumsanteile der genannten Personen zustande kommt"*. [For monuments according to § 1 paragraph 1 and 3, which are the sole or predominant property of the federal government, a state or other public bodies, institutions, funds as well as legally recognized churches or religious societies including their institutions (and in the case of monuments to which the provisions of Section 6 (1) second and third sentences apply), the public interest in their preservation is deemed to exist (as long as they are under monument protection) as long as the Federal Monuments Office does not request a party (§ 26f) to determine whether the conservation is actually in the public interest or not, or has made an official decision (para. 2) about the actual existence of the public interest (protection under legal presumption). This legal presumption also applies if the sole or predominant property of legal persons according to the first sentence is only achieved by a majority of the co-ownership shares of the named persons].

[103] Bundesgesetz betreffend den Schutz von Denkmalen wegen ihrer geschichtlichen, künstlerischen oder sonstigen kulturellen Bedeutung (Denkmalschutzgesetz – DMSG) vom 19. August 1999 [Federal law on the protection of monuments because of their historical, artistic or other cultural significance (monument protection law – DMSG) of 19 August 1999]. Full text available at: https://www.ris.bka.gv.at/Dokumente/BgblPdf/1999_170_1/1999_170_1.pdf, (accessed on: 19 May 2020).

Furthermore, the transposition of Council Directive 93/7/EEC was enabled by the Federal Act of 15 May 1998[104], which was then repealed by the Federal Act on the return of unlawfully removed cultural objects of 2016 (*Kulturgüterrückgabegesetz – KGRG*).

The Draft Act[105] of the Austrian Federal Act on the return of unlawfully removed cultural objects was submitted by the Federal Chancellery on the 8th of June of 2015. The aim of the Draft Act was not only to implement Directive 2014/60/EU, but also, as clearly stated in the document[106], to set out rules that implemented into national legislation the measures on the protection of cultural goods contained in the 1970 UNESCO Convention, which was ratified by Austria in 2015, as shown in *Table 2* (p. 22-23). The federal legislator derives the powers to implement legislation from Article 10(1) points 2, 6, 8, and 13 of the Austrian Constitution[107]. Indeed, Art. 10(1) outlines all the fields in which the implementation of legislation is a Federal matter, among which the regulation of the trade in goods is present. Therefore, this is the reason why the implementation process of Directive 2014/60/EU was in the hands of the Federal Government and not in the hands of the *Länder*.

As stated before, the Draft Act delineates the goal to be achieved by the new law, that is, the implementation of the Directive and of the 1970 UNESCO Convention. As it will be mentioned later on in p. 48, the Draft Act was adopted with minor changes by the Parliament on the 13th of April 2016. Therefore, reference will be made below to the approved Act and not to the Draft Act.

Article 2 of the Act presents two different definitions of 'cultural good'. The first one references the 2014 EU Directive. Indeed, it establishes that a 'cultural object' is an object that, according to the legislation of a European Union Member State, before or after its illegal shipment from the territory of that Member State, was labeled as a national treasure within the meaning of Article 36 of TFEU. The second definition refers to Articles 1, 4 and 5 of the 1970 UNESCO Convention, which describe cultural objects as objects protected by a State Party to the Convention as being part of their national cultural heritage[108].

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[104] Bundesgesetz zur Umsetzung der Richtlinie 93/7/EWG über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaates der Europäischen Gemeinschaft verbrachten Kulturgütern, BGBI.I 1998, Pos. 67 [Federal law implementing Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State of the European Community].

[105] Ministerialentwurf, Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG).

[106] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art. 1**: *"Dieses Bundesgesetz regelt die Umsetzung der Richtlinie 2014/60/EU über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaates verbrachten Kulturgütern und zur Änderung der Verordnung (EU) Nr. 1024/2012 (Neufassung), ABl. Nr. L 159 vom 28.5.2014 S. 1, sowie die Erfüllung des UNESCO-Übereinkommens über Maßnahmen zum Verbot und zur Verhütung der unzulässigen Einfuhr, Ausfuhr und Übereignung von Kulturgut, BGBl. III Nr. XXX/2015"* [This federal law regulates the implementation of the directive 2014/60 / EU on the return of cultural objects illegally removed from the territory of a Member State and for modification Regulation (EU) No. 1024/2012 (new version), OJ. L 159, 28.5.2014 p. 1, and the compliance with the UNESCO Convention on Measures to Ban and Prevent inadmissible import, export and transfer of cultural property, Federal Law Gazette III No. XXX].

[107] English text available at: http://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf, (accessed on: 19 May 2020).

[108] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art. 2**: *"Als „Kulturgut" im Sinne dieses Bundesgesetzes gilt ein Gegenstand, der 1. nach den Rechtsvorschriften eines Mitgliedstaates der Europäischen Union vor oder nach seiner rechtswidrigen Verbringung als nationales Kulturgut im Sinne des Art. 36 des Vertrags über die Arbeitsweise der Europäischen*

The reason behind this 'double' definition lies in the diversified nature of national legislations. Indeed, it was necessary to make reference to a notion which would clearly determine whether a good is a protected cultural good (Łukańko, 2016, p. 123). To this aim, Article 7 of the Act establishes the possibility to conclude agreements with the States Parties to the 1970 UNESCO Convention with the aim of simplifying the recognition of an object as a cultural good[109].

Furthermore, the Federal Act, in Article 3, provides a definition of 'unlawful removal of a cultural object' making reference, for what concerns EU Member States, to Article 2(2) of the Directive 2014/60/EU[110] including in the definition the failure to return a lawfully exported cultural object in due time. The Act also introduces the start date from which the protection against the illicit removal is applicable, that is, the 1st of January 1992. On the other hand, for what concerns the UNESCO Convention, the date from which the protection comes to force is the 1st of January 2016[111].

Moreover, for what concerns imports, Article 4 of the Act[112] establishes a ban on imports to Austria if the imported cultural property of the Member State or of the Contracting Party to the 1970 UNESCO Convention was unlawfully removed.

The Federal Act also delivers a list of legal definitions in Article 5 taking from Article 2 of Directive 2014/60/EU[113] but also widening it to include a definition of 'State Party to the 1970 Convention' and 'religious institutions'[114].

Furthermore, as required by Article 4 of the 2014 Directive[115], the Act delivers, in Article 6(1), a list of central authorities entitled to carry out the tasks provided for in the

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Union (AEUV) eingestuft oder definiert ist oder 2. nach den Rechtsvorschriften eines Vertragsstaates als Teil des kulturellen Erbes im Sinne der Art. 1, 4 und 5 des UNESCO-Übereinkommens geschützt ist und als solches ohne unzumutbaren Aufwand erkennbar ist".

[109] **Ibid., Art. 7**: *"(1) Der Bundeskanzler bzw. die Bundeskanzlerin kann, sofern er oder sie gemäß Art. 66 Abs. 2 B-VG dazu ermächtigt ist, mit den Vertragsstaaten Abkommen zu schließen, die eine Erkennbarkeit von Kulturgut gemäß § 2 Z 2 durch die Bestimmung von Kategorien oder konkreter Objekte ermöglichen. (2) Die Abkommen haben Bestimmungen zu enthalten, die die Geltendmachung von Rückgabeansprüchen der Republik Österreich in dem Vertragsstaat erleichtern".*

[110] **Directive 2014/60/EU, Art. 2(2)**: *"'unlawfully removed from the territory of a Member State' means: (a) removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of regulation (EC) No 116/2009; or (b) not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal".*

[111] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art. 3**: *" Ein Kulturgut ist unrechtmäßig verbracht, wenn es 1. nach dem 31. Dezember 1992 aus dem Hoheitsgebiet eines Mitgliedstaates a) entgegen dessen Rechtsvorschriften zum Schutz nationaler Kulturgüter oder b) entgegen der Verordnung (EG) Nr. 116/2009 über die Ausfuhr von Kulturgütern, ABl.Nr. L 39 vom 10.02.2009 S. 1, 2. ausgeführt wurde, 3. nach dem 31. Dezember 2015 aus dem Hoheitsgebiet eines Vertragsstaates a) ohne Ausfuhrbescheinigung gemäß Art. 6 des UNESCO-Übereinkommens oder b) infolge eines Diebstahls im Sinne des Art. 7 lit. b des UNESCO-Übereinkommens ausgeführt wurde oder 4. nach Ablauf der Frist für eine vorübergehende rechtmäßige Verbringung, die nach dem 31. Dezember 1992 bzw. dem 31. Dezember 2015 endete, nicht in den Mitgliedstaat bzw. Vertragsstaat rückgeführt wurde".*

[112] **Ibid., Art. 4**: *"Die Einfuhr eines Kulturgutes nach Österreich ist unrechtmäßig und verboten, wenn das Kulturgut aus einem Mitgliedstaat oder Vertragsstaat unrechtmäßig verbracht wurde und diese Verbringung auch im Zeitpunkt der Einfuhr nach Österreich unrechtmäßig wäre".*

[113] v. notes 71 and 109.

[114] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art. 5**: *"(1) „Mitgliedstaat" ist ein Mitgliedstaat der Europäischen Union. [...] (6) „Religiöse Einrichtungen" sind die gesetzlich anerkannten Kirchen und Religionsgesellschaften einschließlich ihrer Einrichtungen, die staatlich eingetragenen religiösen Bekenntnisgemeinschaften und die in einem Mitgliedstaat oder Vertragsstaat gleichzuhaltenden Einrichtungen. [...]".*

[115] **Directive 2014/60/EU, Art. 4**: *"Each Member State shall appoint one or more central authorities to carry out the tasks provided for in this Directive. Member States shall inform the Commission of all the central authorities they appoint pursuant to this Article. The Commission shall publish a list of those central authorities and any changes concerning them in the C series of the Official Journal of the European Union".*

abovementioned Directive. Indeed, the Austrian central authorities nominated are the Austrian Federal Monuments Office (*Bundesdenkmalamt*) and, for archive records, the Austrian State Archives (*Österreichisches Staatsarchiv*). Following the wording of Article 5 of Directive 2014/60/EU, these authorities have the task of assisting States in their request for the return of their illicitly removed cultural property and to cooperate and consult with other Member States' national authorities through the use of IMI (Internal Market Information System) [116]. Accordingly, Article 8 of the Federal Act establishes measures concerning States that in the event of exceptional circumstances, such as natural disasters or armed conflicts, are not able to protect their cultural property against unlawful exportation[117].

Furthermore, Article 9 of the Act[118] sets up measures of due diligence: it establishes very accurately the obligations for persons whom work in the trade of cultural objects. Firstly, professionals working in the trade of cultural goods shall take precautions not to transfer cultural property which was illegally imported into Austria (Art. 9(1)). Secondly, before transferring cultural goods, professionals in the trade in cultural goods are required to clearly advise the buyer of the origin of the cultural property (Art. 9(2)). Finally, Article 9(3) obligates those involved to keep records to make the cultural object identifiable, establishing its origin, the purchase and the sales price, and the export license. The records must be kept for seven years from the transfer of the cultural good. According to Łukańko (2016, p. 125), in order to justify this provision, it was claimed that the art market obliges the buyer of a cultural good to have reliable information concerning the origin of the object, in this way lowering the risk of claims by the former owners for the return of a cultural object. The violation of the obligations set out in Article 9 of the Act are subject to a fine, as stated in Article 23 of the Federal Act[119].

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[116] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art. 6**: *"(1) Das Bundesdenkmalamt und – in Fällen, die Archivalien gemäß §25 des Denkmalschutzgesetzes DMSG, BGBl. Nr. 533/1923, in der jeweils geltenden Fassung, betreffen – das Österreichische Staatsarchiv, sind in Österreich die Zentralen Stellen gemäß Art. 4 der Richtlinie 2014/60/EU. Soweit es sich um Kulturgut gemäß § 2 Z 1 handelt, haben die Zentralen Stellen die ersuchenden Staaten bei der Identifizierung unrechtmäßig verbrachten Kulturgutes zu unterstützen. (2) Die Zentralen Stellen haben auch unter Verwendung eines auf Kulturgüter abgestimmten spezifischen Moduls des mit der Verordnung (EU) Nr. 1024/2012 über die Verwaltungszusammenarbeit mit Hilfe des Binnenmarkt-Informationssystems, ABl. Nr. L 316 vom 14.11.2012 S. 1, eingeführten Binnenmarkt-Informationssystems („IMI")[...]".*

[117] **Ibid., Art. 8**: *"Ist ein Vertragsstaat auf Grund außergewöhnlicher Umstände, wie zB Naturkatastrophen oder bewaffneter Konflikte, außerstande, sein Kulturgut gegen eine unrechtmäßige Verbringung gemäß § 3 Z 2 zu schützen, und ist dessen Einfuhr nach Österreich zu erwarten, kann die Bundesregierung durch Verordnung eine Identifizierung dieses Kulturgutes durch die Bestimmung von Kategorien oder konkreter Objekte ermöglichen".*

[118] **Ibid., Art 9**: *"Wer gewerblich mit Kulturgut handelt, hat mit der Sorgfalt eines ordentlichen Unternehmers 1. Vorsorge zu treffen, dass er bzw. sie kein Kulturgut, das unrechtmäßig nach Österreich eingeführt wurde, entgeltlich oder unentgeltlich übereignet, 2. vor der Übereignung des Kulturgutes den Erwerber bzw. die Erwerberin unaufgefordert und nachweislich über die Herkunft des Kulturgutes aufzuklären, sowie 3. Aufzeichnungen zu führen, die das Kulturgut identifizierbar machen, seine Herkunft, den Ankaufs- und Verkaufspreis sowie die Ausfuhrbewilligungen zu dokumentieren und diese Aufzeichnungen sieben Jahre ab Übereignung des Kulturgutes aufzubewahren".*

[119] **Ibid., Art 23**: *"(1) Wer vorsätzlich 1. ein Kulturgut entgegen den Bestimmungen des § 4 nach Österreich einführt oder entgegen den Bestimmungen des § 9 Z 1 entgeltlich oder unentgeltlich übereignet oder 2. Sicherungsmaßnahmen gemäß § 22 vereitelt oder gegen sie verstößt, ist von der Bezirksverwaltungsbehörde mit einer Geldstrafe bis zu 50 000 € zu bestrafen. Der Versuch ist ebenfalls strafbar. (2) Wer 1. es vorsätzlich unterlässt, gemäß § 9 Z 3 Aufzeichnungen zu führen, oder 2. diese vorsätzlich vorzeitig vernichtet, ist von der Bezirksverwaltungsbehörde mit einer Geldstrafe bis zu 30 000 € zu bestrafen. (3) Wer es vorsätzlich unterlässt, 1. gemäß § 9 Z 2 nachweislich über die Herkunft des Kulturgutes aufzuklären oder 2. gemäß § 21 Auskünfte zu erteilen, ist von der Bezirksverwaltungsbehörde mit einer Geldstrafe bis zu 30 000 € zu bestrafen.(4) Wer es vorsätzlich unterlässt, 1. entgegen den Bestimmungen des § 9 Z 2 nachweislich über die Herkunft des Kulturgutes aufzuklären oder 2. entgegen den Bestimmungen des § 21 Auskünfte zu erteilen, ist von der Bezirksverwaltungsbehörde mit einer Geldstrafe bis zu 5 000€ zu bestrafen".*

The second Section of the Act, concerning Art. 10 to 17, deals with the return claims of cultural objects in Austria. Following the wording of Directive 2014/60/EU[120], the national legislator provides for the possibility of initiating proceedings for the return of illicitly removed cultural objects no later than three years after the competent central authority of the requesting Member State comes to know the location of the cultural object and the identity of the possessor or holder. Nonetheless, with the exceptions provided for in the Act, proceedings cannot be brought after a period of 30 years from the illegal removal of a cultural good from the territory of the requesting Member State.

The subject matter and territorial jurisdiction of the court ruling on claims for the return of cultural objects is regulated by Article 11 of the Federal Act[121]. Indeed, the application for the restitution of a cultural property has to be submitted to the Regional Court (*Landesgericht*) competent for civil cases in the territory where the defendant has their general place of jurisdiction.

Complying with Articles 8(2) and 9 of Directive 2014/60/EU[122], Article 13 of the Act[123] deals with the limited validity of proceedings. That is, the court has to verify if the cultural object was subject to an unlawful removal and it also needs to check that the claim will not have expired by the time the case is brought before the court. Finally, Article 13(2)[124] establishes that the burden of proof shall rests within the requesting State.

The rules for compensation provided for in Article 10 of the 2014 EU Directive[125] are implemented in the Federal Act through Article 15[126], which entirely follows the wording of

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[120] **Directive 2014/60/EU, Art. 8**: *"1. Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder. Such proceedings may, in any event, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. However, in the case of objects forming part of public collections, defined in point (8) of Article 2, and objects belonging to inventories of ecclesiastical or other religious institutions in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States providing for a period exceeding 75 years. 2. Return proceedings may not be brought if removal of the cultural object from the national territory of the requesting Member State is no longer unlawful at the time when they are to be initiated".*

[121] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art 11**: *" (1) Der Antrag auf Rückgabe eines Kulturgutes ist bei demjenigen für bürgerliche Rechtssachen zuständigen Landesgericht einzubringen, in dessen Sprengel der Antragsgegner seinen allgemeinen Gerichtsstand hat. Soweit in diesem Bundesgesetz nichts anderes bestimmt ist, richtet sich das Verfahren nach dem Außerstreitgesetz, BGBl. I Nr. 111/2003, in der jeweils geltenden Fassung. (2) Handelt es sich beim ersuchenden Staat um einen Mitgliedstaat, hat das Gericht die zuständige Zentrale Stelle in Österreich von dem Antrag sowie seiner Entscheidung über diesen Antrag unverzüglich in Kenntnis zu setzen. (3) Der Republik Österreich kommt in allen Verfahren auf Rückgabe eines Kulturgutes Parteistellung zu".*

[122] For **Art. 8(2) of Directive 2014/60/EU** v. note 119; **Dir. 2014/60/EU, Art. 9**: *"Save as otherwise provided in Articles 8 and 14, the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of point (1) of Article 2 and to have been removed unlawfully from national territory".*

[123] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG, Art 13**: *" (1) Das Gericht hat mit Beschluss die Rückgabe des Kulturgutes an den ersuchenden Staat anzuordnen, wenn es als erwiesen annimmt, dass es sich um ein Kulturgut handelt, das gemäß § 4 unrechtmäßig eingeführt wurde, die Verbringung aus dem Hoheitsgebiet des ersuchenden Staates auch im Zeitpunkt der Antragstellung unrechtmäßig wäre und der Rückgabeanspruch noch nicht erloschen ist. (2) Die Beweislast trifft den ersuchenden Staat".*

[124] Ibid.

[125] v. note 74.

[126] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art 15**: "1) Im Falle der Rückgabe hat das Gericht den ersuchenden Staat zu verpflichten, dem Eigenbesitzer eine angemessene Entschädigung Zug um Zug gegen die Herausgabe des Kulturgutes zu leisten, wenn dieser nachweist, beim Erwerb des Kulturgutes mit der erforderlichen Sorgfalt vorgegangen zu sein. (2) Bei der Entscheidung, ob der Eigenbesitzer mit der erforderlichen Sorgfalt vorgegangen ist, sind alle Umstände des Erwerbs zu berücksichtigen, insbesondere die Unterlagen über die Herkunft des Kulturgutes, die nach dem Recht des ersuchenden Staates erforderlichen

Article 10 of the abovementioned Directive by stating that the court shall require the requesting Member State to award the possessor with a fair compensation, provided that the owner was able to demonstrate that he/she has exercised due care and attention when acquiring the cultural object. Moreover, Article 15(2)[127] follows step by step Article 10 of the Directive 2014/60/EU in giving a definition of 'due care and attention'. The latter states as follows:

"In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances".

Furthermore, Section 3 of the Act deals with the return proceedings brought by the Republic of Austria. Indeed, according to Article 18(1)[128] of the Act, for extrajudicial and judicial proceedings the enforcement of the claims for the return of cultural objects shall be executed by the designed central authority.

Finally, the last Section contains the final provisions. They entail criminal liability provisions (Article 23[129]), and provisions concerning the coming into force of the Act (Article 26[130]).

After the drafting of the Act, the latter was submitted to the Chancellery Office in order to comprehensively consult and approve the Act. Several entities[131] expressed their opinions on the Draft Act (Łukańko, 2016, p. 128).

Subsequently, the Draft act was submitted to the lower house of the Austrian Parliament and, at the 101st session of the National Council, the draft was then delivered to the Commission for Culture (*Kulturauschuss*). Then, submitted to the Commission on the 2nd of March 2016, Article 9 of the Act was amended to better detail the provision and extending the period according to which records of a cultural good must be kept from 7 to 30 years. The act was adopted during the 119th session of the National Council on the 17th of March 2016 and, on the 21st of March 2016, the amended Act was submitted to the upper house of Parliament (*Bundesrat*, i.e. the Federal Council) and then delivered to the Commission of Education, Art

Ausfuhrgenehmigungen, die jeweiligen Eigenschaften der Beteiligten, der gezahlte Preis, die Einsichtnahme des Eigenbesitzers in die zugänglichen Verzeichnisse entwendeter Kulturgüter, alle einschlägigen Informationen, die der Antragsgegner mit zumutbarem Aufwand hätte erhalten können, und jeder andere Schritt, den eine vernünftige Person unter denselben Umständen unternommen hätte. [...]*".*

[127] Ibid.

[128] **Bundesgesetz über die Rückgabe unrechtmäßig verbrachter (Kulturgüterrückgabegesetz – KGRG), Art 18(1)**: *"Die außergerichtliche oder gerichtliche Geltendmachung des Anspruchs auf Rückgabe von unrechtmäßig verbrachtem Kulturgut durch die Republik Österreich als ersuchenden Staat erfolgt, soweit es sich um Kulturgut gemäß § 2 Z 1 handelt, durch die Zentrale Stelle. Vor einer gerichtlichen Geltendmachung ist – außer bei Gefahr im Verzug – die Zustimmung des Bundeskanzlers bzw. der Bundeskanzlerin einzuholen".*

[129] v. note 119.

[130] v. note 100.

[131] These entities comprehend: the bar council, and the offices of provincial governments: Salzburg, Vorarlberg, Tirol and Upper Austria, the Austrian Economic Chamber, and the Federal ministries of the Interior, of Justice, of Finance and for Europe, Integration and Foreign Affairs.

and Culture (*Ausschuss für Unterricht, Kunst und Kultur*) which did not raise objections to it. Finally, the amended Draft Act was examined by the Parliament in its 852nd session and approved without further objections. The Federal Act was published in the Official Journal (*Bundesgesetzblatt für die Republik Österreich*, pp. 1-7) on the 13th of April 2016 (Łukańko, 2016, pp. 129-130).

Putting together the implementation of Directive 2014/60/EU into Austrian legislation and the ratification of the 1970 UNESCO Convention in 2015 it is possible to conclude that the country's interest to fight the illicit traffic in cultural goods has grown significantly.

Nonetheless, some shortcomings can be found in the Federal Act of 2016. Firstly, as Łukańko (2016, p. 131) clearly suggests, the subjective scope of persons accountable for supervising the trade in cultural goods is too narrow. Indeed, Article 9 of the Act only applies to professionals working in the field of the trade in cultural goods. Moreover, a matter of great importance is the absence of provisions relating to objects which were stolen between 1933 and 1945 by Nazi Germany.

Notwithstanding these problems, the Federal Act, with the abovementioned provisions, is likely to have an impact on the fight against the illicit traffic of cultural goods.

3.2.3.1 Implementation of Directive 2014/60/EU in Italy

Moving on to the implementation of Directive 2014/60/EU in the Italian legislation, the Directive was implemented in Italy by legislative decree. This is the most common procedure to implement EU Directives in Italy (Frigo, 2016, p. 73).

The Legislative Decree, No. 2 of 7 January 2016 (Legislative Decree 2/2016), entitled *Attuazione della Direttiva 2014/60/EU relativa alla restituzione dei beni culturali usciti illecitamente dal territorio di uno Stato Membro e che modifica il Regolamento (UE) n. 1024/2012*[132], was published in the Italian Official Gazette (*Gazzetta Ufficiale della Repubblica Italiana*, pp. 7-12) in 2016. Indeed, just like in Austria, the implementation process in the Italian legislative system was delayed.

The function of the Legislative Decree, i.e. adapting the Italian legal system to the 2014 Directive, was plainly fulfilled thanks to the related amendments brought by the Decree to the 2004 Code of Cultural and Landscape Heritage (*Codice dei beni culturali e del paesaggio*) (Frigo, 2016, p. 73).

The Code of Cultural and Landscape Heritage (the Code) is Italy's most important piece of legislation pertaining to the protection of cultural heritage. The code covers the international

[132] *Implementation of Directive 2014/60/EU relative to the restitution of cultural goods illicitly exported from the territory of a Member State and modifying Regulation (EU) No 1024/2012.*

circulation, the restitution or return, of stolen and illegally exported objects. Therefore, it is essential for the Code to comply with international and EU obligations (Frigo, 2016, p. 73).

The process of implementing EU Directives into the Italian legal system is administered by a well-functioning legislative practice: the government is authorized by the parliament to adopt *ad hoc* legislative decrees. Therefore, the decree adopted to implement Directive 2014/60/EU is perfectly in line with the Italian law and practice (Frigo, 2016, p. 74).

Thus, the provisions of the Code of Cultural and Landscape Heritage have been amended taking into account the changes introduced in the 2014 Directive.

The first important modification concerns measures providing assistance to other Member States. In this regard, Article 76 of the Code was amended through the Legislative Decree 2/2016 by adding a new paragraph[133] requiring the Italian central authority, which is entitled to carry out the tasks provided for in the 2014 Directive, (Art. 4, Directive 2014/60/EU[134]) to use the IMI system for cooperation and to consult with other Member States, as provided for in Article 5 of Directive 2014/60/EU[135].

The second change brought by the Legislative Decree 2/2016 was the extension of the statute for limitation from one year to three years. The Article of the Code dealing with limitation periods is Article 78, which was modified by simply changing the wording of para. 1 of the Article[136], revising the term period from one year to three years in light of Article 8(1) of Directive 2014/60/EU[137].

Furthermore, for what concerns the action for restitution, and in particular the implementation of Art. 5 point 3 of the 2014 Directive, the Legislative Decree 2/2016 has amended Article 77(5)[138] of the Code by adding more detailed measures to the ones already present in the legislation.

The amended Code of Cultural and Landscape Heritage also includes a new definition of 'cultural goods' thanks to the amendment of the Legislative Decree 2/2016 brought to Article

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[133] **Code of Cultural and Landscape Heritage, Art. 76(2-bis)**: *"L'autorità centrale, al fine di cooperare e consultarsi con gli altri Stati membri e per diffondere tutte le pertinenti informazioni correlate a casi relative ai beni culturali rubati o usciti illecitamente dal territorio nazionale, utilizza un modulo del sistema d'informazione del mercato interno, di seguito "IMI", stabilito dal regolamento (UE) n. 1024/2012, specificamente adattato per i beni culturali".*

[134] v. note 115.

[135] v. note 73.

[136] **Code of Cultural and Landscape Heritage, Art. 78(1)**: *"L'azione di restituzione è promossa nel termine perentorio di tre anni a decorrere dal giorno in cui l'Autorità centrale richiedente ha avuto conoscenza che il bene uscito illecitamente si trova in un determinato luogo e ne ha identificato il possessore o detentore a qualsiasi titolo".*

[137] v. note 120.

[138] **Code of Cultural and Landscape Heritage, Art. 77(5)**: *"Il Ministero notifica immediatamente l'avvenuta trascrizione alle autorità centrali degli altri Stati membri, utilizzando un modulo del sistema IMI stabilito dal regolamento (UE) n. 1024/2012, specificamente adattato per i beni culturali"* [the Ministry immediately notifies the successful transcription to the central authorities of the other Member States using a module of the IMI system established by Regulation (EU) No 1024/2012 specifically customized for cultural objects].

75(2)[139] in light of Article 2(1) of Directive 2014/60/EU[140]. Indeed, with the exclusion of the categories listed in the Annex of Directive 93/7/EEC, the scope has been considerably widened in the 2014 Directive. Consequently, under the Italian legislation, there is the possibility to submit requests for the return of items of numismatic, paleontological, and scientific interest, even if they are not part of collections listed in inventories of archives, libraries, museum, or ecclesiastical institutions (Graziadei and Pasa, 2019, p. 100).

Nonetheless, the wording of the 2014 Directive, as well as the wording of the Italian Code, does not leave complete discretion in establishing whether a good is in fact a national treasure having artistic, historic or archeological value. In both legislations the definition provided is confined *"within the limits of Article 36 TFEU"* (Art. 75(2) of the Code of Cultural and Landscape Heritage[141] and Article 2(1) of Directive 2014/60/EU).

Despite the correct implementation of Directive 2014/60/EU in the Italian legislative system, there are some criticisms to be raised concerning the provisions of the Code dealing with the return of cultural objects (Frigo, 2016, p. 78).

The restitution of cultural property which has been unlawfully stolen from the territory of a Member State is regulated in Italy by the provisions contained in Articles 75-86 of the Code. The Legislative Decree 2/2016 correctly implemented the 2014 Directive by modifying Article 79(2) of the Code with the addition of some specifications concerning compensation and due diligence. The modification of Article 79 is in line with the wording of Article 10 of the 2014 Directive[142], entitled to establish the criteria courts must follow in the rulings for the return of unlawfully removed cultural goods. Indeed, the adjusted Article 79(2) of the Code of Cultural and Landscape Heritage is clear on the issue of due diligence by stating that

"In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, particularly the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the nature of the parties, the price paid, and whether the possessor consulted any accessible register of stolen cultural objects and or other relevant information which he/she could reasonably have obtained, or took steps that a reasonable person would have taken in the circumstances[143] *".*

[139] **Code of Cultural and Landscape Heritage, Art. 75(2)**: *"Ai fini della direttiva UE, si intende per bene culturale un bene che è stato classificato o definito da uno Stato membro, prima o dopo essere illecitamente uscito dal territorio di tale Stato membro, tra i beni del patrimonio culturale dello Stato medesimo, ai sensi dell'articolo 36 del Trattato sul funzionamento dell'Unione europea".*
[140] v. note 71.
[141] v. note 139.
[142] v. note 74.
[143] **Code of Cultural and Landscape Heritage, Art. 79(2)**: *"[…] Per determinare l'esercizio della diligenza richiesta da parte del possessore si tiene conto di tutte le circostanze dell'acquisizione, in particolare della documentazione sulla provenienza del bene, delle autorizzazioni di uscita prescritte dal diritto dello Stato membro richiedente, della qualità delle parti, del prezzo pagato, del fatto che il possessore abbia consultato o meno i registri accessibili dei beni culturali rubati e ogni informazione pertinente che avrebbe potuto ragionevolmente ottenere o di qualsiasi altra pratica cui una persona ragionevole avrebbe fatto ricorso in circostanze analoghe".*

On the other hand, when tackling the issue of preventing the unlawful circulation of cultural goods internationally, Article 87 of the Italian Code[144] makes specific reference to the return of cultural objects contained in the Annex of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, stating that the UNIDROIT Convention rules must be applied for the international return of cultural property which is illicitly exported or stolen.

The 1995 UNIDROIT Convention was ratified by Italy in 1999, as shown in *Table 3* (p. 25-26), and implemented in the Italian legislation with Law No 213/1999[145] of 7 June 1999. Indeed, Article 3 of Law No 213/1999[146] deals with the rules governing the restitution or return of stolen cultural objects before Italian courts by stating that the request for the return of the cultural object has to be brought before the court of the place where the cultural property is located, with the exceptions being specified in the same Article. Moreover, the issue of compensation is dealt with in Article 4(2) of Law No 213/1999[147] which, in agreement with the provisions of the 1995 UNIDROIT Convention[148], affirms that courts shall grant compensation when the purchaser is able to prove he/she acted in good faith.

Therefore, as suggested by Frigo (2016, p. 79), despite the commonalities between the 1995 UNIDROIT Convention and Directive 2014/60/EU, which were also previously highlighted in this Chapter, the restitution and return of illegally exported cultural property in Italy is subject to two different legal regimes depending on when to apply the UNIDROIT Convention or the 2014 Directive, and also taking into account the different meaning of 'due diligence/due care' and 'good faith'. Indeed, the notion of 'good faith' does not perfectly coincide with the notion of 'due diligence' and both the 2014 Directive and the 1995 UNIDROIT Convention provide detailed instructions in order to make a distinction between the two possible.

Another problem present in the Italian implementation is that of Article 64-bis[149] of the Code of Cultural and Landscape Heritage. When the Code was initially revised in 2008, the

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[144] **Code of Cultural and Landscape Heritage, Art. 87**: *"Resta ferma la disciplina dettata dalla Convenzione dell'UNIDROIT sul ritorno internazionale dei beni culturali rubati o illecitamente esportati, adottata a Roma il 24 giugno 1995, e dalle relative norme di ratifica ed esecuzione, con riferimento ai beni indicati nell'annesso alla Convenzione medesima"*.

[145] **Legge del 7 giugno 1999, n. 213**, entitled: *Ratifica ed esecuzione dell'Atto finale della Conferenza diplomatica per l'adozione del progetto di Convenzione dell'UNIDROIT sul ritorno internazionale dei beni culturali rubati o illecitamente esportati, con annesso, fatto a Roma il 24 Giugno 1995* [Ratification and execution of the final Act of the diplomatic Conference for the adoption of the UNIDROIT Convention project on the international return of stolen or illegally exported cultural objects, with annex, made in Rome the 24 June 1995.

[146] **Legge del 7 giugno 1999, n. 213, Art. 3***: "Ai fini della dichiarazione di cui all'articolo 16 della Convenzione: a) la domanda di restituzione o di ritorno dei beni culturali rubati o illecitamente esportati si propone dinanzi al tribunale del luogo in cui si trova il bene. Nel caso in cui tale luogo sia sconosciuto o il bene non si trovi nello Stato, la domanda si propone dinanzi al tribunale del luogo in cui il convenuto ha la residenza o il domicilio o, se questi sono sconosciuti, dinanzi a quello del luogo in cui il convenuto ha dimora. Se il convenuto è una persona giuridica o un'associazione non riconosciuta, si applicano le disposizioni dell'articolo 19 del codice di procedura civile; b) le domande di restituzione o ritorno dei beni sono proposte per le vie diplomatiche e consolari"*.

[147] **Legge del 7 giugno 1999, n. 213, Art. 4(2)**: *"Per ottenere l'indennizzo di cui al comma 1, il soggetto interessato deve provare di aver acquisito il possesso del bene in buona fede"*.

[148] v. note 41.

[149] **Code of Cultural and Landscape Heritage, Art. 64-bis**: *"1. Il controllo sulla circolazione internazionale è finalizzato a preservare l'integrità del patrimonio culturale in tutte le sue componenti, quali individuate in base al presente codice ed alle norme previgenti. 2. Il controllo di cui al comma 1 è esercitato ai sensi delle disposizioni del presente capo, nel rispetto degli indirizzi e dei vincoli fissati in ambito*

Italian Parliament suggested the addition of a third paragraph to Article 64-bis, which states: *"With reference to the regime of international circulation, the objects forming cultural heritage are not assimilated to goods"*. The aim here, as suggested by Frigo (2016, p. 79), is to give to national cultural heritage a higher level of protection, following the wording of Article 9 of the Italian Constitution[150], which clearly affirms the support of Italy for the safeguard of the historical and artistic heritage of the nation.

The wording of Article 64-bis of the Code suggests that the *"goods forming cultural heritage"* of a nation must not be subject to the national and international legislation governing the circulation of cultural goods. Nonetheless, the notion of *"national treasures"* contained in Art. 36 TFEU, to which both the Italian Code and Directive 2014/60/EU make reference, cannot possibly comprehend the wider notion of *"cultural heritage"* present in Article 64-bis of the Code. It is in fact clear that *"all national treasures are part of cultural heritage, but not all objects that form cultural heritage are national treasures"* (Frigo, 2016, p. 80).

From the Italian perspective, being Italy both a 'source' and 'market' country, the 1995 UNIDROIT Convention and Directive 2014/60/EU are significant legal instruments. Indeed, when acting as a 'source' country or requesting Member State, Italy is particularly devoted to the use of legal instruments to obtain the return of its unlawfully exported cultural objects. On the other hand, when acting as a 'market' country or requesting Member State, it has a strong interest in being able to rely on a clear international legal regime.

comunitario, nonché degli impegni assunti mediante la stipula e la ratifica di Convenzioni internazionali. Detto controllo costituisce funzione di preminente interesse nazionale. 3. Con riferimento al regime della circolazione internazionale, i beni costituenti il patrimonio culturale non sono assimilabili a merci".

[150] **Costituzione Italiana, Art. 9**: *"La Repubblica promuove lo sviluppo della cultura e la ricerca scientifica e tecnica. Tutela il paesaggio e il patrimonio storico e artistico della Nazione"*.

4. ONLINE SALES OF TRAFFICKED CULTURAL GOODS: THE EUROPEAN RESPONSE

4.1 Structure of the online market

For many years, the role of auction houses as the primary market to buy and sell artworks has been imperative. Today, their position in the art market is still very important but it has been in some ways eroded. Indeed, the internet is increasingly flourishing as a platform for the sale of cultural goods (Dehouck, 2019, p. 12). Since the creation of eBay in 1995, the internet market of cultural goods has grown to become a widely diversified and sophisticated market. In fact, along with eBay, other platforms have been created, including virtual galleries which sell directly to the public, and internet auctioneers (Brodie, 2017, p. 4).

On the one hand, this event has been considered positive for the democratization of the art trade and for increasing the transparency of the prices, sales, and provenance of the objects on sale. On the other hand, though, there is a strong opposition for the internet sales of cultural property for two main contrasting reasons. The first one is that online sales makes it much harder to control and regulate the art trade. As Brodie (2015, p. 11) states, academic work clearly displays that, from the 1990s, a large part of the European illicit trade in cultural object has moved online. Secondly, some people working in the art market are afraid that the new level of transparency will make it much harder for them to do business the way they used to (Dehouck, 2019, p. 12).

Indeed, it is true that regulating the online market is rather difficult since commonly the items on sale have little or no documentation of provenance. Moreover, the number of people on the internet and the volume of the sales is vast. For example, in 2018 eBay had more than 162 million users and over 800 million objects on sale (Renold, 2018, p. 16).

Another problem with the internet market is that, as previously stated, it is very hard to control. There are several reasons lying behind this aspect: the sales usually take place rapidly; the buyers and sellers can stay anonymous; the law enforcement agencies responsible for the protection of cultural goods are often unable to operate and intervene in illicit online trade because the seller, object and buyer are located in different jurisdictions; finally the online market, which puts together geographically distant buyers and sellers, has progressively increased the demand for small, low-priced objects which were not profitable for the traditional illicit trade (Renold, 2018, p. 16). Consequently, the character of the lootings has also changed. Indeed, minor cultural institutions and archeological sites, which were not considered as worth looting by the thieves in the past, are now viewed as profitable by criminals (Brodie, 2017, p. 5).

Furthermore, the unique characteristics of the online trade in cultural goods favor the participation of consumers from an extensive range of socioeconomic backgrounds. This was not the case with the more traditional trade. Indeed, both for sellers and consumers, the entry threshold is much lower than before. This facilitated access is damaging for traditional dealers who retain physical galleries in luxury location such as Paris, London and New York.

Nonetheless, it is beneficial for the new business model which entails the storage of a large number of cultural goods in inexpensive locations, yet sold all over the world (Brodie, 2017, p. 5).

The shift to online sales allowed sellers of cultural goods to transfer most of the financial and legal risk in trading cultural goods which are likely to be illicit to the buyer. Indeed, thanks to online sales, stolen cultural goods can be kept in their origin or intermediary country, and then shipped to the buyers when sold. This structure of the market reduces the risks connected with the transportation of the objects and, since sellers are no longer required to spend money moving cultural goods across borders, they have the possibility to invest an increased amount of resources in the creation of a false documentation, which consequently improves the possibilities for the stolen items to cross the border, and reach the buyer (European Commission, 2019, p. 107).

Indeed, this has serious consequences for the consumers, both because they are the one risking the most and also because they may unknowingly finance criminal and terrorist organizations. The best way for the buyers to protect themselves is to request proof of provenance and of the provenience (or "findspot", for archeological excavations). A verifiable story for the provenance and provenience of the object in question entails the tracing of a definite and coherent chain of ownership from the object's place of discovery and its sale, guaranteeing in this way the authenticity and legitimacy of the artwork. Differently, when this chain lacks some steps or is missing some information, it is likely that illegally acquired cultural objects are rendered legitimate and genuine. Yet, given the increasing size of the market, consumers are either unaware of the risks they face, or they are aware and decide to ignore them (Brodie, 2017, p. 7).

Moreover, social media and communication apps such as WhatsApp facilitate trade for criminals. In fact, they are used by looters and traffickers to arrange deals and to show images of stolen cultural objects to the possible buyers (Giglio and al-Awad article, 2015). Antiquities are also increasingly sold on social media such as Facebook, Twitter, and Instagram. Furthermore, it is believed that online discussion forums are used with the same intention (Brodie, 2017, p. 6).

The final issue is related to the dark web. Indeed, the deep web of non-indexable websites is seen as a potential virtual location where trafficked antiquities are being sold. Nonetheless, there is no evidence corroborating the scenario outlined above (European Commission, 2019, p. 108). The explanation, as suggested by Brodie (2017, p. 6), could be the fact that there is not an actual necessity for the use of the deep web. In fact, looted cultural goods can be openly sold on accessible websites with low risk for sellers.

Aside from all the negatives and threats posed by the online sale of cultural goods, there are, at least, two positive outcomes of the increase use of the internet.

Firstly, it is commonly known that the internet market is strongly able to continuously re-create and adapt itself to meet new commercial opportunities. Indeed, famous auction houses like Sotheby's[151] and Christie's[152] have started to move into internet trading by beginning to live stream auctions and, as Christie's did in 2011, establishing their own online platforms. Consequently, the participation in online trade by such famous companies will improve the consumers' confidence in online sales (Brodie, 2017, p. 6).

In relation to the first outcome, online sales have also enormously expanded the market's consumer base. Indeed, they have allowed buyers to actually acquire objects from their homes and wherever in the world they live. The modes of transportation have, in this sense, changed as well. While before countries and dealers had to physically move, a lot of items are now sent by regular post. This, however, is also good for traders in stolen cultural goods since the goods are send often 'on consignment', making it possible for the receiver of the artwork to deny any knowledge of the content and, consequently, avoiding any criminal responsibility (European Commission, 2019, p. 106).

Given these premises, it is safe to say that the online market of stolen cultural object is having a destructive impact on cultural heritage. Nonetheless, this relatively new market has some positive peculiarities and it could be brought under control if a series of systematic and sustained policies were implemented by the States all over the world (Brodie, 2017, p. 13).

4.2 Response of the European Union and other relevant international actors

The growing demand of cultural goods on the online market requires a response by the international community to tackle the problems related to it. Indeed, the sales on the digital market have grown from $2.53 billion in 2015 to $3.27 billion in 2016 and they are expected to grow to reach $9.58 billion in 2020 (The Hiscox Online Art Trade Report, 2016, p. 4).

[151] ***Sotheby's*** is the world's fourth oldest auction house in continuous operation. It was established on 11 March 1744 in London.
[152] ***Christie's*** is a British auction house founded by James Christie in 1766. In 2017, the *Salvator Mundi* was sold for $450.3 million at Christie's in New York, at the time the highest price ever paid for a single painting at an auction.

Therefore, the e-commerce may become the future of art trade, with enormous consequences for cultural heritage.

In 2006, UNESCO, the International Council of Museums (ICOM) and INTERPOL developed a set of *Basic Actions concerning Cultural Objects being offered for Sale over the Internet* with the aim of responding to the growing trade in antiquities on the internet. Within the document, the three institutions acknowledge that the trade in cultural goods online is becoming a *"very serious and growing problem"* and ask States to take the appropriate measures, outlined in the text, to combat the illicit trade in cultural goods online. Importantly, they invite States to encourage internet sales platforms to post the following disclaimer on their artworks' 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"*[153].

Nonetheless, even if more than a decade has passed since the publication of the *Basic Actions*, this disclaimer is not present in any webpage of sellers of works of art (Dundler, 2019, p. 2312).

Moreover, the lack of resources to combat the illicit trade in cultural goods persists. Many law enforcement agencies do not have big enough teams to efficiently perform all the tasks and, at the same time, they lack experts in data gathering and analysis, and creation of statistics. Therefore, regular monitoring and research of the online market is impossible for many national law enforcement agencies (European Commission, 2019, p. 165).

Specifically, for the European Union, the monitoring of the online sales is carried out by the law enforcement agencies of the Member States. A striking and positive example in this regard is the Italian Carabinieri. The special unit of the Comando dei Carabinieri Tutela Patrimonio Culturale[154] has a team dedicated to manage the unit's database and to monitor internet sales (European Commission, 2019, p. 168).

Furthermore, technical investigative tools focusing on the internet marketplace are incredibly useful. At the European level there has been a growing use of web-crawling[155] and scraping[156] applications to investigate the sale of artworks. Through these tools, users can target specific websites and types of data based on their specific needs. Consequently, agencies are

[153] Ibid.
[154] Carabinieri's unit for the protection of cultural heritage.
[155] ***Web-crawling*** refers to the use of internet software to systematically index one or a set of websites.
[156] ***Web-scraping*** refers to the automated harvesting of data from the indexed sites gathered through web-crawling.

able to rapidly gather information relevant to the sale of cultural goods in auction houses, sale sites, and the wider web. Notwithstanding this, in order to process the data gathered human eyes, expertise, and training are required. Therefore, as stated in the previous page, as many police agencies lack staff capacity to process data it is difficult to tackle the problem (European Commission, 2019, p. 177-178).

Likewise, for what concerns social media, the relevant European agencies have progressively made use of social network analysis. The term 'social network analysis' refers to the investigation of human interactions throughout the social structures that we create. This tool is commonly used by police forces, the military, and security analysts for various forms of crime investigation, including investigations concerning trafficking. Indeed, social network analysis has the ability to broaden the scope of investigations of network-based crimes like the illicit trade in cultural goods by pinpointing the links in trafficking chains (European Commission, 2019, p. 179).

Moreover, the use of databases to tackle the illicit traffic of cultural goods and gather information is expanding: existing databases are continuously upgraded (i.e. INTERPOL database for stolen works of art, ICOM's Red list, …) and other new databases have been created. One example is PSYCHE (Protection SYstem for Cultural HEritage) and its follow-up ID-ART. The establishment of this database is the result of a joint effort by INTERPOL and the Italian Carabinieri (supported by the EU). This system allows law enforcement agencies to insert, modify, and delate information thanks to a dedicated web messaging tool. Additionally, an innovative feature has made PSYCHE an advanced system, the image recognition tool. Indeed, the latter allows users to compare and upload images of a suspected stolen cultural objects with the ones already present in the system and to match them[157].

In conclusion, some steps still need to be taken both at national and international level. In fact, the first major improvement that could be made is that all websites selling cultural goods put a statement about ascertained provenance similar to the one recommended by the *Basic Actions* established by UNESCO, ICOM, and INTERPOL in plain sight.

Another step would be increasing consumer awareness to the risks of the online sales of cultural goods. This is already done by important international and national institutions, but websites that sell cultural goods, such as eBay, should improve consumer awareness.

Finally, and most importantly, it is necessary to monitor the online sale in antiquities through the tools outlined above. As a consequence, it is necessary to provide law enforcement

[157] Webpage of the Carabinieri: http://tpcweb.carabinieri.it/SitoPubblico/psyche/generic, (accessed on: 24 May 2020).

agencies with the means and resources to investigate and prosecute the illicit traffic in cultural goods.

These tasks can be difficult to achieve. However, as Campbell (2013, p. 135) puts it, it is important to consider that even though the internet is global, users are nonetheless physically located somewhere and, as previously stated, criminal transactions on websites selling cultural goods have a new level of transparency, which records information on criminals' addresses and banking data.

CONCLUSION

The illicit traffic of cultural goods is a persistent phenomenon. Throughout the years, it has taken on different shapes and facets, and new technologies have been created to deal with it. Nonetheless, the groundwork has remained the same. Indeed, cultural objects are constantly being stolen or illegally excavated, and moved across countries to finally end up in their destination country. This is made possible thanks to various actors whom have a specific role in this trade, as described in Chapter 1. From looters, to middleman, to facilitators, all the way up to the dealers, works of art are moved around to be, in the end, introduced in to the market of cultural goods.

The black market of cultural goods, which is usually linked to other crimes, is in continuous growth. For this reason, criminal and terrorist organizations, the examples of the Italian mafias and of ISIS were previously described, have entered this flourishing market taking advantage of the monetary benefits that this market can give them.

International agencies have only recently started to give enough importance to the phenomenon, by starting to develop new instruments to fight it and actually use the legal tools present. However, since most countries' state apparatus have not yet given the proper attention to cultural heritage and to its protection, law enforcement agencies do not have adequate resources to prevent and safeguard cultural heritage.

Politicians of most States should begin to change their behavior towards cultural heritage, the latter becoming more and more important and being associated with human rights (Art. 27 of the Universal Declaration of Human Rights[158]).

Towards this end UNESCO has made a move, by developing and promoting awareness campaigns, but mostly by drafting two of the major conventions regarding the protection of cultural heritage. These two conventions, completed by the adoption of the UNIDROIT Convention of 1995, are the most important international legal tools for the safeguard of works of art.

Also, the three conventions are important because they have inspired, throughout the years, the legislations of most countries on matters of circulation of cultural goods. They have become even more important if one thinks about the fact that the European Union also took inspiration from these documents to define its legislative framework on the circulation of

[158] **Universal Declaration of Human Rights, Art. 27:** *"1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production which he is the author".*

cultural property, making it its mission to build adequate legislation for the protection of cultural goods.

As shown in Chapter 3, the European legislation has evolved from the creation of the Internal Market and the elimination of frontiers, with the necessity to put some limits to the free trade of goods, and so, as was previously mentioned when dealing with European primary and secondary legislation, also to the trade in cultural goods. Nonetheless, with the increasing importance given to cultural heritage almost worldwide, EU law has moved not only towards the creation of a better regulation of the trade, but also towards a greater protection of cultural property. The most recent example of this is Regulation 880/2019 which finally puts a limit to the imports of cultural goods from third countries.

However, it is clear the difficulty of considering cultural goods as mere goods, but, on the other hand, it is also hard to conceptualize which of those goods can be safely traded and which ones need to be preserved and protected from being trafficked. Indeed, not only globalization is changing and expanding definitions related to cultural heritage, but also the European legal framework is constantly divided between the consistent growth of the free movement of goods and the necessity of outline which cultural goods need to be safeguarded from being trade because of their belonging to a category of cultural objects which are considered as "national treasures" (Vitale, 2011, p. 216).

Finally, it is important to make reference to a more recent phenomenon, that of the online market of artworks. As previously stated in Chapter 4, this new market is flourishing, and it is becoming very important. In fact, it will probably become the primary market of cultural goods in the future.

The internet market is, in some respects, dangerous. Indeed, with the spreading of online sales, it has become much more difficult to control and regulate the market: the volume of people and of sales is vast, the financial and legal risks are almost totally transferred to the consumers and, most importantly, the characteristics of the looting have also changed creating a whole new situation for law enforcement agencies to deal with (Brodie, 2017, p. 12).

There are, however, some positives to this new market worth mentioning. In fact, it is believed that the internet market is actually marking a democratization of the art trade. Furthermore, it increases the transparency of the prices, sales, and provenance of the objects displayed for sale.

On this regard, European and international resources should certainly move towards the fight against the illicit trade deriving from this market, but they should especially develop and

use the existing tools to diminish the possibilities for art traffickers to place stolen artworks on the online market, and consequently, increase consumers safety and market transparency.

Overall, it is safe to say that the EU, notwithstanding the difficulties given by the Member States' different legislations and different ways of regarding cultural heritage, has created a comprehensive secondary legislation on the circulation of cultural goods. However, it is necessary for the EU to constantly implement and upgrade the resources to fight the illicit traffic of cultural goods. Moreover, States' cooperation is imperative in this field.

Finally, it is necessary for the EU to deploy adequate tools to regulate the online market of cultural goods. This new market, as already emphasized, could result as safer than the traditional market of cultural goods, but it requires governing measures. Therefore, the EU should move in this direction.

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ABSTRACT

The main aim of this dissertation is to develop a well-structured text about the protection of cultural goods inside the European Union, focusing on the primary law and the secondary legislation delivering the rules regulating the free movement of cultural goods. Indeed, the text focus firstly on the reason why the safeguard of cultural goods is so important and why this issue deserves great consideration. Then, it disentangles the international legislation concerning the protection of cultural goods and cultural heritage. In fact, throughout the years, many international organizations have developed pieces of legislation in order to expand the rules concerning the protection of cultural heritage. Consequently, the European legislation related to the movement of cultural goods is tackled. Developing first the international legislation on the matter and then the European one is made in order to show that the latter is very much influenced by the former, taking it as the main example. Finally, the dissertation takes into account one of the latest issues for the protection of cultural goods, that is, the increasing online sales of cultural goods.

The illicit trade in cultural goods is a worldwide phenomenon which involves an incredible variety of actors and requires an international response to fight it. It is, indeed, a highly lucrative market. However, estimating its size is almost impossible since there are no reliable statistics that give a comprehensive picture of the phenomenon. Nonetheless, it is safe to say that its weight falls just behind that of illegal drugs, money laundering and arms trafficking.

Moreover, it is important to point out that the looting of works of art presents itself under two specific circumstances: the first is during times of war, during military occupation, or colonization. In this first circumstance, cultural goods are looted or taken as spoils of war and are, in most cases, put on the market to be sold. The second circumstance is when cultural objects are stolen during times of peace, stolen from collections, or illegally excavated from archeological sites. These goods are then smuggled outside the country of origin and sold in the international market.

However, a clear demarcation between the licit and illicit trade in cultural goods is impossible to establish. Indeed, the so-called ‘white market’ concerns items that were legally acquired by legal excavations or by a rightful owner. However, most of the cultural goods present on the market fall under the ‘grey’ and ‘black’ markets. The ‘grey market’ concerns items that were present on the market before there were laws in place regarding cultural property, or for so long that any documentation concerning them has been lost. Finally, the

'black market' pertains to those items that were illicitly looted. These cultural objects are put into the legal market by hiding their real provenance and providing them with a new one, by displaying them as 'grey artworks', or by transferring them through civil law countries which favor the 'good-faith purchaser'. Indeed, contrary to all the other illicit traffics, the trade in cultural goods can also be legal, making it very hard to tackle the illicit side of it.

Finding a looted cultural good only shows where the object is at a particular moment in time. The route the object has followed up to that point is very hard to establish. Nonetheless, it is clear that goods depart from countries where the access to cultural goods is relatively easy, the so-called "supply counties", and arrive in countries where there is a market for them ("market countries"). However, determining what happens between the departure and arrival of the stolen item is challenging.

First of all, it is important to highlight that sometimes countries can be identified both as 'source nations' and 'market nations' (i.e. Italy, which is on the demand side of the market, but is also included in the "source countries" because of the many artworks stolen in its territory). Moreover, the role of "transit nations" is very important. Through these countries, looted cultural goods find their ways to their final destination. They are usually chosen because of their geographic location, import-export legislation, and because they have free ports.

Furthermore, there are some typologies of actors involved in the illegal traffic of cultural goods. It all begins with the work of finders, looters, and thieves that steal the cultural artwork. Then, the good passes into the hands of middlemen and smugglers, the first intermediaries, whom can either sell the acquired item by themselves, or give the cultural object to a second intermediary. In both cases, the main role of the intermediaries is to act as a link for the potential buyers abroad, to plan the itinerary of the object, to prepare the false documents necessary for the object to cross borders, and to maintain contact with facilitators, i.e. corrupt archeological sites or museums guards, policeman, civil servants, customs agents, inspectors, and archeological or museum staff. Therefore, from the initial looting to the final sale, stolen items move around different countries ('transit countries'), while gaining paperwork, and a fake back story (the so-called 'false provenance') which gives them the legitimacy necessary to be put on to the open market. Finally, the artwork is put on to the market to be sold.

This chain of individuals is often guided by criminal and terrorist organizations who benefit the most from the trade in cultural goods. Even if it is impossible to estimate the exact profit, it is evident that a strong connection between the two phenomena is president. Indeed, UNSC Resolution 2199 of 2015 condemning any trade with ISIL, suggests the link between the looting and smuggling of artworks and terrorist organizations, such as ISIL, ANF, and other

individuals, groups, undertakings and entities associated with Al-Qaida, whom gain income from directly or indirectly stealing cultural goods (p. 2 of Resolution 2199).

These organizations are connected with the illicit traffic in cultural goods in, at least, three ways. Firstly, looted cultural goods and drugs have been found together by police raids, suggesting that cultural objects and drugs are traded together from 'source' to 'market' countries. Secondly, the trade in cultural goods is also used to launder money from other criminal activities. Thirdly, stolen cultural goods are found to be used as a means of payment in drug deals.

The high monetary value presented by cultural objects, the very low risk of criminal convictions linked to the stealing of cultural objects, and the high request of these goods represent the incentive for which criminal and terrorist organizations are so interested in these types of goods. In order to fight and possibly stop the illicit traffic in cultural goods many international actors have tried to implement reliable measures and instruments. However, it is necessary to clarify that, without a good understanding of the size of the problem, it is sometimes difficult to develop the most suitable methods to fight it.

There is a general lack of awareness and adequate information concerning the nature and size of the illicit traffic in cultural goods. Notwithstanding this, many international organizations and national entities have worked for a long time to protect cultural heritage. The most important international organization designated to the protection of cultural heritage is UNESCO. This UN agency is a pioneer in the battle against the illegal traffic of cultural goods and has the difficult task of coordinating different national and international actors in the effort of improving the cooperation among them.

Alongside UNESCO many other agencies work to fight the illegal traffic of cultural goods and to coordinate cross-border cooperation. The most important are INTERPOL, which makes the cooperation among national police forces possible, has created a database for stolen or lost cultural goods, and is particularly important in supporting operations jointly planned by several countries; and the WCO, which is the international agency designed to provide support to customs authorities worldwide, assists custom agencies in joint operations and support them with the platform ARCHEO with which they can safely communicate. Moreover, at European level the most notable organization is EUROPOL. This agency, which is, in some ways, the European version of INTERPOL, has the task of assisting and help planning and conducting joint operations between international organizations and States' police offices.

What is clear is that international law enforcement agencies are becoming a crucial element in the fight against cultural property crimes. Indeed, all of the above-mentioned

agencies, together with national authorities, play a role in this fight. A striking and concrete example of the results to which this collaboration can lead is Operation ATHENA. This first-time global customs and police operation took place in 2017. It was coordinated by WCO and INTERPOL, with the collaboration of 81 countries. During Operation ATHENA, more than 41,000 cultural goods were recovered thanks to the monitoring of the internet art market and the checks and controls at border crossing points, auction houses, and private homes.

This international effort has been accompanied by the implementation of various international conventions and resolutions in an attempt to prevent the destruction and theft of cultural goods, both during armed conflicts as well as in times of peace.

The process of creating, ratifying, and implementing international law for the protection of cultural heritage has been carried forward mostly by UNESCO in the form of international conventions. However, before delineating the three major international conventions concerning the protection of cultural goods, it is necessary to make some considerations.

Firstly, it is important to notice that the application of the law in the area of cultural property requires a persistent interaction and hybridization of a plurality of legal orders, national and regional, private and public, domestic and international, which coexist, collide and interact with one another.

Secondly, the process of drafting and implementing international law protecting cultural heritage has not been an easy one. Indeed, the conventions which will be analyzed below are the result of achieving a balance between the needs and viewpoints of different actors.

Finally, since, as stated before, the European Union has made and still makes reference to the three major international conventions to build its legislation on the movement of cultural goods, it is important to point out that the EU cannot sing and/or ratify these conventions and transfer them to its legal order. Indeed, UNESCO enables, in its founding treaty, membership only to States, therefore only States (thus, also EU Member States) can sign and/or ratify the conventions. Nonetheless, the cooperation between UNESCO and the then CEE dates back to 1964 when the two organizations decided to act together in order to achieve some common objectives in the fields of culture. Since then, the collaboration has expanded towards the developing of a proper partnership between the two entities.

The system of international law regulating the protection of cultural heritage derives almost entirely from the multilateral conventions drafted after the Second World War. The international interest, having in mind the destructions and lootings of cultural goods perpetrated during the war, was concentrated at first in delineating a convention dedicated to the protection of cultural property during war times. Therefore, the international community conveyed and

drafted on the 14th of May of 1954 the Hague Convention for the Protection of Cultural Heritage in the Event of Armed Conflict, together with its First Protocol. It was then completed in 1999 with the addition of a Second Protocol meant to reinforce the protection system of the Convention.

Thus, the Convention sets out provisions to apply to all cultural property by defining the objects which can be placed under the category of 'cultural property' in order to narrow the definition of protected objects so that they could gain better protection, and by setting out rules to prevent the use of historic sites and areas surrounding cultural objects for military purposes and sanctions for those violating the Convention. The First Protocol sets out rules to prohibit the exports of cultural property from an occupied area. It also demands the restitution of the cultural good to the territory of the State from which it was taken. Finally, the Second Protocol enriches the rules present in the Convention. At present, almost every EU Member State is party to the Hague Convention. Many of them also ratified the First and Second Protocol of the Convention.

It is only in 1970, with the adoption of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, that the international community delineated rules for the protection of cultural goods in times of peace. The provisions contained in the Convention can be divided into three main pillars. The first one sets out general rules to be applied at the national level. It requires States to take preventive measures to protect cultural goods (i.e. create inventories of cultural objects, train police forces, and museums staff on the matter, and create campaigns to raise awareness). The second pillar defines the rules for the restitution of illegally exported cultural objects. In particular, it is important to outline that the burden of proof falls upon the requesting State and that the stolen cultural property is returned in exchange of a fair compensation for the innocent possessor. Finally, the third pillar deals with international cooperation in dealing with the protection of cultural heritage.

Nonetheless, the 1970 Convention presents different shortcomings that have restricted its success. First of all, it does not take into account undiscovered, uninventored, or unexcavated cultural objects, thus limiting its scope of action. Secondly, it imposes a time constraint on restitution claims, i.e. the date of the entry into force of the Convention (24 April 1972), thus not taking into account objects stolen before that date. Finally, and most importantly, the UNESCO Convention does not provide any instrument to ensure the implementation of the mentioned Convention by an acceding State. However, the achievements of the UNESCO Convention should not be underestimated either. It was able to build up a set of rules which are

the result of opposed positions; it increased awareness of media, scholars, and museums on the protection of cultural heritage and on the issue of provenance; also, many countries have updated their legislation to comply with the rules of the Convention; finally, the 1970 text has influenced the international community to draft new conventions and continuously evolve the instruments for the protection of cultural goods.

Indeed, the EU has taken from the 1970 UNESCO Convention in many ways. Firstly, all Member States (with the exception of Ireland and Malta) have ratified the text and have become Parties to it. But, most importantly, the European Union has used this Convention as one of the main grounds on which it based its legislation on the protection of cultural property.

Finally, the third most important and most recent international piece of legislation concerning cultural goods is the UNIDROIT Convention of 1995, concerning stolen or illegally exported cultural objects. Indeed, the choice of UNESCO to ask UNIDROIT to work in the area of the protection of cultural heritage came to be because of its specialization in harmonizing national laws. The text deals with private international law and is designed to develop and upgrade the provisions contained in the 1970 UNESCO Convention. It aims at defining uniform legal measures to deal with the issues of return and restitution of stolen cultural goods.

Indeed, contrary to the 1970 Convention, the UNIDROIT Convention applies to all cultural goods, including unregistered, unexcavated, and undiscovered cultural object. Moreover, it makes clear that to these goods the term 'stolen' can be applied *"when consistent with the law of the State where the excavation took place"*, in a clear attempt to overcome the plurality of views and legal orders, which either see cultural heritage as a public property or as having a private ownership, by making them interact, thus providing a more efficient protection of cultural objects. Furthermore, the 1995 Convention rules that the owner of a stolen cultural good is obliged to return it in all cases, but, at the same time, it lays down provisions for the *bona fide* purchaser to have a fair compensation provided that he/she can prove to have done all the necessary due diligence (i.e. the behavior a purchaser should follow in order to consider the purchase legitimate) before acquiring the stolen cultural object.

Nonetheless, the problem with the UNIDROIT Convention is that it did not have much success among States because of the more stringent rules contained in the text. Indeed, within the 63 Member States UNIDROIT has, at present only 46 countries have ratified the Convention, and only 15 of them are EU Member States. For what concerns the European Union, the non-ratification of most Member States to the 1995 Convention brought to the growth of disparities between the various legal systems concerning the protection of cultural heritage and the fight

against illicit trafficking. In order to cope with this problem, the EU has tried to develop its own legislation on the export of cultural property by drawing from the UNIDROIT Convention and from the other two pieces of legislation already described.

Indeed, EU law contains different provisions for cultural property. However, the content of these previsions only pertains to the movement and trade in cultural goods. In fact, the provisions fall within the context of the SEM (Single European Market) and the free movement of goods, thus determining the economic orientation of the approach taken by the European Union law when dealing with cultural property. In addition to this, the competences for the preservation of cultural heritage remain, to a large extent, in the hands of the Member States (as set out in Art. 167(1) of TFEU), leaving the EU with a complementary competence in cultural matters in relation to that of the Member States.

Nonetheless, in the current EU legal framework cultural issues are broadly taken into consideration. In European primary law, both TEU and TFEU contain provisions to deal with cultural goods. Indeed, Art. 3(3) TEU establishes that the EU has the important task of monitoring and safeguarding European cultural heritage. Moreover, Title XIII of TFEU contains provisions concerning cultural heritage. In particular, its Art. 167 affirms the EU's support to the Member States action in the conservation and safeguard of European cultural heritage (Art. 167(2)) by adopting incentive measures, but without trying any harmonization of the Member States' laws (Art.167(5)). Hence, the law of cultural goods seems to be confined to national borders. Consequently, when it comes to culture, the EU is struggling between the need to grant more power to the Union, and, on the other hand, the Member States' opposition to give a larger 'slice' of sovereignty on the matter to the EU.

Moreover, as previously stated, most of the provisions related to cultural goods have a strong economic connotation. In fact, they lay within the context of the SEM and of the free movement of goods. Indeed, some EU norms have been created specifically to guarantee fundamental freedoms, including that of the free movement of goods (26(2) TFEU). Also, Article 28(1) TFEU focuses on the custom union, stating that such a union between Member States shall involve the prohibition of custom duties and other taxes having an equivalent effect on imports and exports inside Europe, and the adoption of a common tariff in relation with third countries. Finally, Article 34 and 35 of TFEU set out two general rules prohibiting quantitative restrictions on imports and exports, as well as measures which have an equivalent effect. These dispositions make no reference to 'cultural 'goods', but are relevant norms for what concerns 'goods'. The difficulty here is understanding whether it is possible to equate the concept of 'good' with the concept of 'cultural good'. The European Court of Justice (ECJ) has ruled in a

judgment of 1968 (Case C-7/68) on this matter, establishing that *"the rules of the common market apply to articles possessing artistic or historic value subject only to the exception provided by the treaty"*.

The general rule set out in Art. 34 and 35 TFEU finds its fundamental exception in Art. 36 TFEU, the only Article in the Treaty which has specific rules dealing with the movement of cultural property. This Article allows Member States to justify certain restrictions to the free movement of goods, thus allowing limitation to protect 'national treasures' possessing artistic, historic, or archeological importance. However, the different linguistic versions of Art. 36 TFEU show the diverse approaches EU Member States have to the protection and safeguard of cultural goods, some leaving great discretion to the States, and others limiting national prerogatives. On this matter, the ECJ has applied some criteria. First, the wording of a text, when addressed to all Member States, has to be interpreted on the basis of both the real intention of the author and the aim he wants to achieve (Case C-29/69). Secondly, the different linguistic versions have to be interpreted uniformly and, in cases of disconformity, the norm has to be interpreted referring to the purpose and the general scheme of the rules to which it is part. Indeed, Art. 36, being a derogation to the general rule, conforms better to a limited interpretation of the goods comprised within the 'national treasures'.

Moving on the European secondary legislation, from the establishment of the Internal Market and the abolition of barriers within the borders of the European Union, the European legislator has upgraded the system on the matters of cultural goods. The directives and regulations which will be tackled below are the result of the influence that international conventions on the protection of cultural goods have had in Europe, but also of the change of perspective the EU went through regarding the protection of cultural goods, both European and not.

With the establishment of the SEM, the European Union adopted its first piece of secondary legislation setting up measures to govern the circulation of cultural goods within the borders of the European Union. Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State was the first attempt to merge the fundamental principle of the free movement of goods with the *"protection of national treasures possessing artistic, historic or archaeological value"* as established in Article 36 TFEU. It is important to remember that, unlike regulations, directives are not directly applicable within Member States and require national implementation by each Member State. By using a directive, the goal of the EU is to create harmonized minimal standards for the transposition into the Member States' international laws, at the same time leaving them the power to set

higher ones, if deemed proper. Directive 93/7/EEC is no longer in force due to the limitations of securing the return of cultural objects and was substituted in 2014 by Directive 2014/60/EU.

The latter piece of legislation still contains many provisions of the 1993 Directive. Nonetheless, it has made four substantial modifications to the earlier text. First, as set out in Recital 9 and Art. 2(1), it extend its scope by establishing that all cultural objects identified as 'national cultural property' within the meaning of Art. 36 TFEU by the Member States must be returned, and also that the restrictions concerning age or financial thresholds need to be eliminated. Secondly, it extends the time limit (from 1 year to 3 years) to initiate proceedings for the return of a cultural object unlawfully removed from the territory of a Member State. Thirdly, it strengthens the cooperation among States and national authorities by requiring them to use the Internal Market Information System (IMI) in order to advance the exchange of information. Finally, the 2014 Directive, contrary to the 1993 Directive, in cases when the return of the requested cultural good is instructed by the competent national authority, shifts the burden of proof for what concerns the receipt of compensation. Indeed, Art. 10 of the Directive establishes a new level of due diligence making it the possessor of the requested cultural object (and not, anymore, the requested Member State, as established in Art. 9 of Directive 93/7/EEC) the party whom is responsible for providing evidence that they exercised the necessary due diligence when acquiring the cultural object in order to receive compensation from the buying Member State.

For what concerns the external relations between the EU and third countries, the European Union has exclusive competence on matters of trade policy (Artt. 3 and 207 TFEU) and has, therefore, the task of regulating the trade with external parties. In order to compensate for the abolition of the customs controls within the Union, the EU adopted some regulations to control the import and export of cultural goods.

Dealing with exports, in 1992 the EU adopted Council Regulation (EEC) No 3911/92 on the export of cultural goods with the aim of ensuring that the export of cultural property outside the Internal Market would be subject to uniform export controls. Indeed, the decision of adopting a Regulation, rather than a Directive, was made to guarantee its direct applicability in all Member States. The 1992 Regulation has been subsequently codified by Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods. However, no major changes were made to its content. Indeed, the export of Member States' national cultural property outside the Union's custom territory shall be subject to the presentation of an EU export license which shall be issued by the Member States competent authorities. The license is required for all the objects falling within the categories listed in Annex I of the

Regulation. Moreover, an export license can be refused on the basis of Art. 36 TFEU, thus if the object is a "national treasure". Nonetheless, the Regulation has been highly criticized for its ambiguity and indetermination.

On the other hand, for what concerns imports, with the sole exceptions of Council Regulation (EC) No 85/2013 concerning financial restrictions on economic and financial relations with Iraq and Council Regulation (EU) No 1332/2013 on restrictive measures in view of the situation in Syria, there has been no EU legislation concerning the import of cultural goods from third countries until 2019 and the esteblishment of Council Regulation (EU) 2019/880 on the introduction and import of cultural goods. The 2019 Regulation, which entered into force the 28th of June of 2019, makes reference to the 1970 UNESCO Convention and to the 1995 UNIDROIT Convention in defining artworks in the context of imports and provides a common definition of cultural goods, according to which *"'cultural goods' means any item which is of importance for archeology, prehistory, history, literature, art or science as listed in the Annex"* (Art. 2).

Moreover, it strengthens the protection of non-European cultural goods against being trafficked into the internal market; it establishes a regime for the introduction of cultural goods ruling that artworks illegally exported are considered as being illegally imported; it determines a system of import licenses and importer statements for certain categories of goods following the principle that cultural objects most at risk shall have greater protection. In addition, the EU Import Regulation defines a new time limit: 24 April 1972 (just like the 1970 UNESCO Convention). In fact, as established in the Regulation, when it is not possible to determine the country where the cultural good was discovered or created, or if the creation, export, or discovery was prior to 1972, it is sufficient for the importer to give evidence that the cultural good in question has been exported following the laws of the last country where the good was located for more than five years. Finally, in order to better organize and facilitate the administrative work of the national authorities, the Regulation establishes the creation of a centralized electronic system to storage and exchange information. This Regulation, which will be applied from June 2025, will complete the EU system for the movement of cultural goods.

In order to better understand the process of transposition and implementation of European directives into national legislative systems, two case studies will now be taken into consideration: the implementation process of Directive 2014/60/EU in Austria and in Italy. This is done with the aim of describing the transposition mechanisms used by such different Member States and the difficulties faced in the process.

Starting with Austria, the implementation of the abovementioned Directive, which was due by the 18th of December of 2015, was delayed and came into force on the 14th of April of 2016. Nonetheless, there is a historical precedent in Austrian law, the Austrian Act of 5 December 1918 on the protection of cultural goods and control on exports. This Act had a major impact on the effort towards the protection of cultural objects from illicit exports and was finally repealed by Art. 2(1) point 1 of the Federal Act of 1999, regarding restrictions in the disposal of objects of historical, artistic or cultural importance.

Directive 2014/60/EU was transposed into Austrian national law with the Federal Act of 2016 on the return of unlawfully removed cultural objects[159] (*Kulturgüterrückgabegesetz – KGRG)*. The aim of the act is to implement the 2014 Directive and the measures contained in the 1970 UNESCO Convention, signed by Austria in 2015. Indeed, Art. 2 of the Act presents two different definitions of 'cultural goods', the first related to the Directive, thus referring to the definition contained in Art. 36 TFEU, while the second applies the definition contained in the UNESCO Convention which describes cultural objects as objects protected by a State Party to the Convention as being part of their national cultural heritage.

Furthermore, the Act provides a definition of 'unlawful removal of a cultural object' making reference to Art. 2(2) of the 2014 Directive. It also puts a ban on imports of cultural property which was illegally removed from the territory of an EU Member State or a State Party to the 1970 UNESCO Convention. Moreover, the Act sets measures of due diligence; measures to initiate proceedings for the return of illegally removed cultural objects and rules for compensation; and, finally, it deals with the return proceedings brought by Austria.

After some minor amendments, the Federal Act was published in the Official Journal (*Bundesgesetzblatt für die Republik Österreich*, pp. 1-7) on the 13th of April 2016. Nonetheless, some shortcomings can be found in the Act. Firstly, the subjective scope of persons accountable for supervising the trade in cultural goods is too narrow. Indeed, Article 9, related to this matter, only applies to professionals working in the field of the trade in cultural goods. Moreover, a matter of great importance is the absence of provisions relating to objects which were stolen between 1933 and 1945 by Nazi Germany. Notwithstanding these problems, the Federal Act is likely to have an impact on the fight against the illicit traffic of cultural goods.

Moving on to the implementation of Directive 2014/60/EU in the Italian legislation, the Directive was implemented in Italy by legislative decree. This is the most common procedure

[159] According to the Austrian law, the federal legislator derives the powers to implement legislation from Art. 10(1) points 2,6,8, and 13 of the Austrian Constitution. Furthermore, Art. 10(1) outlines the fields in which the implementation of a legislation is a Federal matter, among which the regulation of the trade in goods is present. This is the reason which the implementation process of Directive 2014/60/EU was in the hands of the Federal Government and nor in the hands of the *Länder*.

to implement EU Directives in Italy: the government is authorized by the parliament to adopt *ad hoc* legislative decrees. The Legislative Decree No. 2, implementing the Directive, came into force the 7th of January of 2016, amending the 2004 Code of Cultural and Landscape Heritage (*Codice dei beni culturali e del paesaggio*), Italy's most important piece of legislation pertaining to the protection of cultural heritage. Indeed, some important changes where brought to the Code by the Decree by extending the statute of limitation to bring proceeding for the return of cultural property from one year to three years; and by setting out a new definition of 'cultural goods', thus widening its meaning to categories previously not taken into consideration (always within the limits of Art. 36 TFEU).

Nonetheless, despite the correct implementation of the 2014 Directive, some criticisms can be raised to the revised Code. First of all, the restitution of cultural property illegally removed from the territory of a Member State is regulated by the provisions contained in Artt. 75-86 of the Code, which correctly implement the Directive. However, when tackling the issue of preventing the unlawful circulation of cultural goods internationally, Article 87 of the Italian Code makes specific reference to the provisions on the return of cultural objects contained in the 1995 UNIDROIT Convention, stating that the UNIDROIT Convention rules must be applied for the international return of cultural property illicitly exported or stolen. Therefore, despite the commonalities between the 1995 UNIDROIT Convention and Directive 2014/60/EU, the restitution and return of illegally exported cultural property in Italy is subject to two different legal regimes depending on when to apply the UNIDROIT Convention or the 2014 Directive.

Secondly, the Code tries, in Art. 64-bis, to give a higher level of protection to national cultural heritage by suggesting that goods which are part of 'national cultural heritage' must not be subject to the national and international legislation governing the circulation of cultural goods. This goes against the wording of Art. 36 TFEU, which, as stated previously, cannot comprehend a wide notion of 'national treasures'.

From the Italian perspective, being Italy both a 'source' and 'market' country, the 1995 UNIDROIT Convention and Directive 2014/60/EU are significant legal instruments. Indeed, when acting as a 'source' country or requesting Member State, Italy is particularly devoted to the use of legal instruments to obtain the return of its unlawfully exported cultural objects. On the other hand, when acting as a 'market' country or requesting Member State, it has a strong interest in being able to rely on a clear international legal regime.

The final focus of this dissertation is on the online market of cultural goods and the growing concerns it is raising towards the international community and Europe, and, in

particular, the tools developed by the EU to regulate this market. Indeed, for many years, the role of auction houses as the primary market to buy and sell artworks has been imperative. Today, their position in the art market is still very important but it has been in some ways eroded. The internet is increasingly flourishing as a platform for the sale of cultural goods. Since the creation of eBay in 1995, the internet market of cultural goods has grown to become a widely diversified and sophisticated market. In fact, along with eBay, other platforms have been created, including virtual galleries which sell directly to the public, and internet auctioneers.

On the one hand, this event has been considered positive for the democratization of the art trade and for increasing the transparency of the prices, sales, and provenance of the objects on sale. On the other hand, there is a strong opposition for the internet sales of cultural property. Indeed, regulating the online market is rather difficult. There are several reasons lying behind this aspect: the number of people on the internet and the volume of the sales is vast (i.e. in 2018 eBay had more than 162 million users and over 800 million objects on sale); the sales usually take place rapidly; the buyers and sellers can stay anonymous; the law enforcement agencies responsible for the protection of cultural goods are often unable to operate and intervene in illicit online trade because the seller, object and buyer are located in different jurisdictions; finally, the online market, which puts together geographically distant buyers and sellers, has progressively increased the demand for small, low-priced objects which were not profitable for the traditional illicit trade (thus changing the character of the looting).

Furthermore, the unique characteristics of the online trade in cultural goods favor the participation of consumers from an extensive range of socioeconomic backgrounds. This was not the case with the more traditional trade. Indeed, both for sellers and consumers, the entry threshold is much lower than before. This facilitated access is damaging for traditional dealers who retain physical galleries in luxury location such as Paris, London and New York. Moreover, thanks to online sales, stolen cultural goods can be kept in their origin or intermediary country, and then shipped to the buyers when sold. This structure of the market reduces the risks connected with the transportation of the objects and, since sellers are no longer required to spend money moving cultural goods across borders, they have the possibility to invest an increased amount of resources in the creation of a false documentation. This has serious consequences for the consumers, both because they are the one risking the most and also because they may unknowingly finance criminal and terrorist organizations. The best way for the buyers to protect themselves is to request proof of provenance and of the provenience (or "findspot", for archeological excavations).

Aside from all the negatives and threats posed by the online sale of cultural goods, there are, at least, two positive outcomes of the increase use of the internet. Firstly, it is commonly known that the internet market is strongly able to continuously re-create and adapt itself to meet new commercial opportunities. Indeed, famous auction houses like Sotheby's and Christie's have started to move into internet trading by beginning to live stream auctions and establishing their own online platforms. Secondly, online sales have also enormously expanded the market's consumer base. Indeed, they have allowed buyers to actually acquire objects from their homes wherever they live.

The growing demand of cultural goods on the online market requires a response by the international community to tackle the problems related to it. Indeed, according to the Hiscox Online Art Trade Report (2016), the sales on the digital market have grown from $2.53 billion in 2015 to $3.27 billion in 2016 and they are expected to grow to reach $9.58 billion in 2020. Nonetheless, the lack of resources to combat the illicit trade in cultural goods persists. Many law enforcement agencies do not have big enough teams to efficiently perform all the tasks and, at the same time, they lack experts in data gathering and analysis, and creation of statistics. Therefore, regular monitoring and research of the online market is impossible for many national law enforcement agencies.

For what concerns the EU, the monitoring of online sales is carried out by the Member States' law enforcement agencies. Technical investigative tools, such as web-crawling and web-scraping, have also been used at the European level. Moreover, the relevant European agencies have progressively made use of social network analysis. Indeed, social network analysis has the ability to broaden the scope of investigations of network-based crimes, like the illicit trade in cultural goods, by pinpointing the links in trafficking chains. Moreover, the use of databases to tackle the illicit traffic of cultural goods and gather information is expanding.

Lastly, some steps still need to be taken both at national and international level. Indeed, increasing consumer awareness to the risks of online sales of cultural goods and upgrading the tools to better monitor the internet sales in antiquities are the most urgent needs in order to provide a safe and more transparent online market.

In conclusion, the illicit traffic of cultural goods is a persistent phenomenon. Throughout the years, it has taken on different shapes and facets, and new technologies have been created to deal with it. Nonetheless, as it was shown in the previous pages, the groundwork has remained the same. International agencies have, throughout the years, tried to regulate this market and raise awareness towards its dangers. In this sense has moved also the EU by creating a specific legislation for the free movement of cultural goods. However, it is clear the difficulty

of considering cultural goods as mere goods, but, on the other hand, it is also hard to conceptualize which of those goods can be safely traded and which ones need to be preserved and protected from being trafficked. Indeed, not only globalization is changing and expanding the definitions related to cultural heritage, but also the European legal framework is constantly divided between the consistent growth of the free movement of goods and the necessity to outline which cultural goods need to be safeguarded from being trade because of their belonging to a category of cultural objects which are considered as "national treasures".

Overall, it is safe to say that the EU, notwithstanding the difficulties given by the Member States' different legislations and different ways of regarding cultural heritage, has created a comprehensive secondary legislation on the movement of cultural goods. However, it is necessary for the EU to constantly implement and upgrade the resources to fight the illicit traffic of cultural goods. Finally, it is necessary for the EU to deploy adequate tools to regulate the online market of cultural goods. This new market could result as a safer tool than the traditional market of cultural goods, but it requires governing measures. Therefore, the EU should move in this direction.

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