CHAPTER 4
The Single European Market and Cultural Heritage:
The Protection of National Treasures in Europe

Michele Graziadei, University of Turin
and Barbara Pasa, IUAV University of Venice

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1. Cultural Heritage: Multiple Actors, Multilevel Actions, but One “Ultimate Authority”

Cultural heritage law is a versatile, multifaceted topic. From a European private and comparative law perspective it is a rather complex field too. Even a casual observer soon realizes that in recent decades a growing number of international treaties and European legal acts frame the law and policy on the protection of cultural heritage at the transnational level. The European Union (EU) in particular is a kind of laboratory in this respect. Across Europe several layers of sources (national/international; formal/informal; legislative/judicial; public/private) overlap, contributing to the development of eclectic solutions and the generation of normative tensions as well.

This complexity is evident in the rules governing the circulation of cultural goods. The EU does not have an all-encompassing competence to legislate on this matter, which therefore still involves general private law issues under the laws of the Member States. In those areas of the law in which the EU is competent, the directives adopted by the Union have to be transposed into national legal systems, with the effect that some or many aspects of domestic private law will have an EU basis, or will be affected by EU law. Even when the European measures are not implemented, national jurisdictions and their private law regimes are inevitably put under pressure by EU law, thus they evolve in the light of it and are thus “fertilized” by it. On the other hand, however, Member States maintain their sovereignty with
respect to their national treasures. Against this background, the Chapter contributes to the general debate on the perennial tension between the EU and the Member States by addressing some of the questions concerning the circulation of cultural goods within the internal market. The tension between the centre and the periphery, typical of a sui generis supranational actor such as the European Union, is complicated by the participation of the EU and the Member States to the international community: their policies and their national legislation cannot disregard the global framework. This Chapter then provides a short sketch of the development and the key features of the global framework, to better understand the EU legal landscape and that of its Member States. Going through fundamental UNESCO conventions, UNSC resolutions, the UNIDROIT and the Council of Europe’s legal instruments, to the self-regulation of national and international associations of museums such as AAM, AAMD, ICOM and confederation of art and antique dealer associations (such as the CINOA Confédération internationale des Négociants d’œuvres d’art), the Chapter tackles the response of the EU to current global challenges like terrorism, and present the EU as global actor and trendsetter in the area covered by our analysis. The legal framework of trade in cultural property is then examined by considering the language questions and the terminological issues arising from the reference to the notion of “national treasure” in relation to those of “cultural property” and “cultural heritage”, which are recurrent in key international and European law provisions. The Chapter also discusses the relationship between “national treasures” and the broad notion of “culture”, by addressing the “cultural exception” to free trade (WTO and TFEU), the notion of “national treasure” in the Directive 2014/60 and in some Member States’ implementation measures, to highlight the problematic legacy of the repealed Annex of the Directive 93/7. The Chapter finally casts light on the Member States great freedom to define their “national treasures”, which is in tension with other aspects of EU policy in the field of cultural heritage. We further make the point that, with respect to cultural property, any legal regime based on the stereotypical classic individual, absolute, and exclusive ownership is bound to be inadequate. In our view, therefore, even when in private hands, cultural property provides an example of “another way of owning”, bound up, as it is, with social obligations concerning its fruition.

2. Early Goals
With the aim of harmonizing the global legal (dis)order, in the aftermath of the Second World War two main actors, first UNESCO and later on UNIDROIT, proposed the adoption of international instruments for the protection of cultural heritage.\(^1\) Since the 1950s the international community has shown an increasingly shared political commitment toward targeting the illicit trade in cultural objects, both in times of peace and in wartime (1954 HAGUE Convention)\(^2\). Artworks, archaeological objects, antiquities, curiosities, specimens and collections, or high-value Indigenous objects that combine elements of sacredness and beauty all come into consideration in this respect\(^3\). The main goal has been to combat the illicit trafficking in cultural objects, regulating States’ actions to claim the return of such objects (1970 UNESCO Convention)\(^4\). For some States the general rules on the acquisition of ownership \textit{a non domino} ("possession vaut titre") impedes the efficiency of return mechanisms. This is the case in most civil law countries worldwide, while in principle the true owner prevails over all other purchasers in common law jurisdictions.\(^5\) These inconsistencies have been exploited by fraudsters and criminals involved in “artwork laundering”\(^6\). The


\(^{5}\) Italian law, for example, protects an acquisition made in good faith from a person who is not the owner, even if the goods are stolen or involuntarily lost (Article 1153 of the Italian Civil Code). Good faith is presumed (Article 1147 c. c). France (Article 2276, ex 2279 of the French Civil Code) and Germany (para. 935 BGB), protect an acquisition made in good faith only if the goods are not stolen or involuntarily lost.


\(^{6}\) Fiorentini, Hauser, Jagielska-Burdur & Jakubowski, \textit{Editorial}, cit nt. 5 at 16. In the famous case of \textit{Winkworth v. Christie Manson & Woods Ltd} [1980] Ch. 496, [1980] 1 All E.R. 1121, cultural goods stolen in England had been brought to Italy and were acquired there under Article 1153 of the Italian Civil Code by an art collector who was unaware of the fact that they had been stolen. They were then moved back to England and sold on auction. The
improvement of the return mechanisms for stolen and illegally exported cultural objects, through a uniform law approach impacting on national substantive laws concerning the good faith acquisition of cultural objects, was thus promoted by Unidroit (1995 UNIDROIT Convention).  

The drafting of these Conventions was an opportunity to highlight the importance of protecting cultural heritage as a model of public education, instilling a sense of responsibility in both the public and private sectors. Indirectly, these treaties forged a vocabulary as well, which helped to frame several other instruments. Unilateral repatriation has thus become more common following these international interventions. For example, the Denver Art Museum not only returned some 40 wooden totems, known as vigangos, to Uganda recently, but also paid for their return.  

Unfortunately, many of the States parties to the 1970 UNESCO Convention have either limited or cherry-picked their obligations. The national models for implementing the 1970 UNESCO Convention are remarkably diverse, both in terms of their black letter law and in practice. Furthermore, the number of trained officials to supervise controls over the export of cultural objects is inadequate and varies from State to State, despite agreed-upon mechanisms to increase controls on a reciprocal basis. The 1995 UNIDROIT Convention has been subjected to criticism as well, because it requires the buyer to verify the provenance of the cultural object in order to be able to obtain compensation, when compelled to return a stolen object. It has become necessary to explain the “due diligence in contrahendo” requirement both to possessors, to enable them to know what to do, and to national judges, to enable them to assess the possessor’s conduct, in accordance with the principle of legal

original owner claimed ownership, but the Court rejected the claim, stating that there had been a good faith acquisition by the art collector according to the law of Italy, where the acquisition took place.

7 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322.


9 Japan, for example, confines its Treaty obligations under Article 7 to prohibiting the importation of “specifically designated” foreign cultural objects; the United States has been hostile to the enforcement of foreign export controls, except in cases of illegally exported objects characterized as stolen property. See James A.R. Nafziger, cit previous note, at 189.


11 Nafziger cit supra note 8, at 190.
certainty. Despite these reservations, the 1995 UNIDROIT Convention provided the basis for new European rules to govern the cross-border circulation of cultural goods.\textsuperscript{12}

European developments become significant in the 1990s, with the signature of the Treaty on European Union (Maastricht Treaty, soon replaced by the Amsterdam Treaty), the Single European Market strategy, the accession of new Members States to cover almost the whole of western Europe, the Schengen Agreement, and a new process of membership negotiations with ten countries from central and eastern Europe. In those years, the EU institutions decided to establish a system of controls over the export of cultural objects, aimed at supplementing the protection afforded by heterogeneous national rules. Regulation 3911/92\textsuperscript{13} was intended to ensure uniform export controls at the EU’s external borders of national cultural objects exported outside the Single European Market, while Directive 93/7\textsuperscript{14} aimed at facilitating the return of certain cultural objects unlawfully removed from the territory of a Member State, thereby contributing to the safeguarding of national cultural heritage, and also introduced the right to fair compensation for possessors who purchased in good faith. Both instruments were applied to those cultural objects that belonged to one of the categories listed in an Annex, and both derived from the necessity to reconcile the free movement of goods with the determination of EU Member States to protect their “national treasures”. National legislative regimes indeed prohibit, or at least restrict, the export of cultural objects\textsuperscript{15}, but often the States of destination (i.e. the market nations) consider the

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\footnotesize\textsuperscript{15} This is not a recent tendency: François Lafarge, Cinzia Profeti, Les lois du Grand-Duché de Toscane relatives à l’exportation d’oeuvres d’art (1737-1859): entre perfectionnisme législatif et intérêts économiques, in Normes
import of such objects as permissible under their domestic legislation, and refuse to apply foreign legislation (i.e. that of the source nation) which prohibits, or limits, the export of cultural objects.

Cultural nationalism (namely, the identification of the State as the “ultimate authority” in this matter) has thus determined the global movement to ensure, at a supranational level, compliance with national protective regimes for cultural objects between States.

Directive 93/7 was criticized by both Member States and European institutions for its narrow scope of application, the short limitation period within which return proceedings could be initiated (within one year after the requesting Member State authority became aware of the location of the object and the identity of its possessor), and its lack of clarity as to the requirements to be met to obtain the return of the cultural object.16

3. What Next

Beginning with onset of the 21st century, UNESCO’s “soft power” has been used to promote a paradigmatic shift towards more local, community-oriented interventions for the safeguarding of intangible cultural heritage (2003 UNESCO Convention),17 seeing it as a factor enhancing intergenerational transmission. This approach also inspires the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Convention),18 which makes the in situ preservation of underwater cultural heritage as the first option, and prohibits the commercial exploitation for trade or speculation of underwater cultural heritage.

In order to support States’ actions to preserve and defend cultural and linguistic diversity, UNESCO decided next to promote and protect the diversity of cultural expressions


This new path is characterized by a growing awareness that non-European States and their intangible cultural heritage are an important factor in bringing human beings closer together and ensuring understanding among them. The international community enhanced international cooperation in the cultural heritage sphere to safeguarding global security, peace and development. UNESCO and UN Security Council (UNSC) thus strengthened their cooperation in this field. Since the wars in Kuwait (1990-1991) and Iraq (2003), the UNSC has become an important global cultural heritage lawmaker. The UNSC, acting under Chapter VII of the UN Charter, established binding obligations supplementing the existing legal frameworks in the area of cultural heritage. The tragedies in Syria and Iraq gave rise to three ad hoc instruments, strongly supported by UNESCO, but there are other ad hoc binding resolutions of the UN Security Council dealing with the illicit trafficking in cultural property. UN SC Resolution No. 2347 of 24 March 2017 creates binding obligations as it “requests Member States to take appropriate steps to prevent and counter the illicit trade and trafficking in cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance originating from a context of armed conflict”, and “urges Member States to introduce effective national measures at the legislative and operational levels where appropriate, and in accordance with obligations and commitments under international law and national instruments, to prevent and counter trafficking in cultural property and related offences”.

Besides UNESCO, also the EU strengthened its cooperation with the UN Security Council, to respond to international crime and implement UNSC binding resolutions. Since the Iraqi-Kuwait conflict, the EU announced its determination to combat the illicit trafficking of cultural property, as highlighted also by the 1992 Framework Decision on the European arrest warrant. This instrument is applicable to the offence of illicit trafficking in cultural goods, including antiques and works of art (Article 2(2)). The framework decision on the

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21 See UNSC Resolution 661 (1990) and subsequent relevant Resolutions, in particular Resolution 986 (1995) by which the Council imposed a comprehensive embargo on trade with Iraq.
22 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18/07/2002. For a broader view of the tools available to combat the trafficking of cultural property in the EU see the Study on preventing and fighting illicit trafficking in cultural
European arrest warrant is not the only measure that applies to the trafficking of cultural property; other measures fall under the scope of the Treaty on the Functioning of the European Union (TFEU), in particular with a view to avoiding distortion of competition.\textsuperscript{23} According to the European institutions, the Union’s legislation should implement all the relevant decisions of the Security Council as far as the territory of the Community is concerned. The ongoing destruction, looting and trafficking in cultural property, especially in the Middle East (Iraq, Syria, and in other countries of this region among others) demonstrated the need for the European Union to move beyond a protection regime that applied only to the cultural heritage of EU Member States. The EU thus adopted Regulation 1210/2003 on Iraqi cultural property\textsuperscript{24} and Regulation 1332/2013 on Syrian cultural property,\textsuperscript{25} both of which ban the import, export and trade in cultural objects: these regulations indicate that Europe has opted for a strong direct policy against the illicit trafficking in cultural property also outside its borders. The way the perception of illicit traffic in cultural goods has changed is reflected in the increasing visibility of cultural heritage in EU public policy.\textsuperscript{26}

A recent initiative by the European Union, stemming from the UNSC res. 2347 of 24 March 2017 (above mentioned) and from the agenda of the European Year of Cultural Heritage (2018), is the Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods presented in July 2017.\textsuperscript{27} The proposal put forward new rules to ban all illegal import and trafficking of cultural goods from outside the EU, often linked to terrorist financing and other criminal activity. The new rules foresee a number of actions that should make the importation of illicit cultural goods much more difficult. These include the introduction of a new licensing system for the import of archaeological objects, parts of monuments and ancient manuscripts and books, a more rigorous certification system for the importers, who will have to submit a signed statement or affidavit as proof that the


goods have been exported legally from the third country. With the aim of ensuring an effective protection, the proposal of the forthcoming EU Regulation introduces a new common definition for “cultural goods at importation”, which covers a broad range of objects including archaeological finds, ancient scrolls, the remains of historical monuments, artwork, collections and antiques and which applies only to cultural goods that have been shown to be most at risk (i.e. those at least 250 years old at the moment of importation). Trafficking of cultural goods through illicit importing, exporting and transferring of ownership of cultural property, is indeed a pressing issue for the European Commission. The Commission is thus considering further actions to each country’s cultural property against all the dangers resulting from organised crime, money laundering and terrorism.\footnote{The global concern for criminal activities related to cultural goods, beyond the EU dimension but affecting the internal law of the Member States, is currently reflected by the intense activity of the Council of Europe on these issues. In the same vein, indeed, more recently the Council of Europe commenced work on a new draft Convention on offences relating to cultural property. As a result, the Nicosia Convention was finalized in May 2017, and it is now open for signature. The European Convention on Offences relating to Cultural Property (Delphi, 1985) never entered into force, and as none of the international instruments deal with criminal law issues, in April 2015, the ministers responsible for cultural heritage from the 50 States parties to the European Cultural Convention (Paris, 1954) adopted the Namur Call. With this call, the ministers condemned “the deliberate destruction of cultural heritage and the trafficking of cultural property” and decided to “reinforce European cooperation to prevent and punish such acts”. They aimed to protect cultural property belonging to peoples, which “constitutes a unique and important testimony of the culture and identity of such peoples, and forms their cultural heritage”\footnote{For more information on further initiatives: \url{https://ec.europa.eu/culture/policy/culture-policies/trafficking_en} [accessed on 9.9.2017].}}

\footnote{3 May 2017, CETS no. 221.}
\footnote{23 June 1985, ETS No.119.}
\footnote{19 December 1954, ETS No. 018.}
\footnote{32 CM(2017) 32, cit. note 29.}
been just signed by seven States.\textsuperscript{34} The Convention applies to the prevention, investigation, and prosecution of the criminal offences relating to movable and immovable cultural property (Article 2), in particular their unlawful destruction or damaging, and their unlawful removal, in whole or in part (Article 10). The Convention aims to build on instruments relating to cultural property such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention in order to make it compatible with relevant existing international and supranational legally binding standards. According to Article 2 of the Nicosia Convention, States are sovereign in the designation of what constitutes their own cultural property, as was the case under the 1970 UNESCO Convention. In addition, the term “cultural property” means property which, “on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” (Article 1) the loss of which would constitute “the impoverishment of the cultural heritage of that State” (Article 2).\textsuperscript{35} So far sovereign States have the power and the ultimate authority to protect their national cultural heritage. However, in the age of global actors, national (internal) cultural States’ interests are being gradually replaced by more sophisticated and transversal aggregators of interests, grounded on different core-values, above all the preservation of and public access to the cultural heritage of mankind.

4. Self-Regulation Tools: Codes of Ethics and OMC Recommendations

Two different forces are pushing the inter-state dialogue on cultural heritage: on one hand, in this field there is a growing recourse to criminal law rules as highlighted in the previous section, and on the other, we witness the development of best practices and guidelines, namely of soft law instruments adopted by way of self-regulation. The phenomenon of soft law and the role that self-regulation plays in helping mainly professionals (but also citizens) to understand and enjoy the diversity of their cultural heritage is not hard to grasp: one may consider, as an example, the codes of ethics elaborated by a variety of subjects, such as the Code of Ethics and the Guidelines of the American Association of Museums (AAM), the Code of

\textsuperscript{34} To check the full list see http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221/signatures?p_auth=3cKMoo4F

Ethics for Museums belonging to the International Council Museums (ICOM), the Guidelines on Loans of Antiquities and Ancient art of the Association of Art Museum Directors (AAMD),° the Code of Ethics of CINOA (Confédération internationale des Négociants d’oeuvres d’art/International Confederation of Art & Antique dealer associations) and the role they play. Despite their non-binding nature, these “Codes” influence both social behaviours and market rules through their reputational effect. UNESCO has also shown to be aware of their effects, and has prepared an International Code of Ethics for Dealers in Cultural Property, a model Code of conduct establishing standards intended to influence the exchange of cultural objects.°°°° Soft law has also had a clear impact on hard law, demonstrated by the concept of due diligence contained in Article 4(1) of the aforementioned 1995 UNIDROIT Convention. Finally, soft law represents a fundamental driving force for the formation of a new international customary law applicable to the protection of cultural heritage.°°°° In fact, in accordance with both customary and codified international law, the cultural property of a foreign State enjoys immunity from execution when the cultural object belonging to the foreign State is on temporary loan to another State or foreign museum for an exhibition (the so-called “immunity from seizure”). As the Action Plan for the EU Promotion of Museum Collections’ Mobility and Loan Standards 2006, suggested, the mobility of museum collections, i.e. the lending and borrowing of cultural objects and works of art, has been


°°°° CLT/CH/INS-06/25 rev., adopted in 1999. The Code aims to give effect to the provisions of the 1970 UNESCO Convention and 1995 UNIDROIT Convention. It was developed based on the experience of French, Dutch, Swiss and the United Kingdom professional Codes of practice, as well as on the Code of conduct of the CINOA.


°°°° Nout van Woudenberg, State Immunity and Cultural Objects on Loan, Leiden – Boston: Martinus Nijhoff, 2012; also see Chapter 9 in this book.

concretized through best practices, commonly applied loan standards and guarantee schemes, provided by EU Member States and museums of various sizes and in all parts of the European Union.

The Commission Communication on a European Agenda for Culture in a Globalizing World 2007 required a wider reflection on the role of culture as a key element of the European integration process. In order to implement its objectives, it introduced a new cooperation method - the Open Method of Coordination (OMC) - as a more structured system of cooperation between Member States and EU institutions. Four groups of experts from Member States have been set up, addressing (among other issues): the mobility of collections, including the value of cooperation and reciprocity; the need to reduce the costs of lending and borrowing; the need to explore new non-traditional modalities of mobility; and the importance of assessing the essential requirements for due diligence, particularly in researching the provenance of cultural objects. Experts from 25 Member States participated in the mobility of collections working group; five sub-groups were identified and hundreds of professionals around Europe were involved in and contributed to their work. The OMC is a very fruitful method which allows detailed recommendations to be addressed to different target audiences, such as Cultural Affairs Committee representatives, Member States (officials working in ministries with responsibility for Culture; Finance, Justice and Foreign affairs ministries; and politicians), museum workers (directors, heads of collections, curators, registrars and exhibitions staff) and professional networks including NEMO (Network of European Museum Organizations) and ICOM, European Registrars Group, International Exhibitions Organisers group, and the Bizot Group of Museum Directors. However, precisely owing to this multi-faceted input, the Final Report and Recommendations to the Cultural Affairs Committee on Improving the Means of Increasing the Mobility of Collections (2010) elaborated by the OMC is complex and not easy to grasp.42

5. Cultural Heritage: a Strategic Resource

Despite what has been said above, soft standards on the one hand and criminal rules on the other are not the hallmarks of our times. Instead, the symbol of the present time is the instrumental use of culture, which is not a new phenomenon at all (in some legal systems it has been particularly noticeable\textsuperscript{43}), but one that has become a widespread global strategy. The European Union has recently defined cultural heritage as one of the “strategic resources” for a sustainable Europe, and actively seeks to strengthen the competitiveness of the European cultural and creative sectors (Creative Europe 2011).\textsuperscript{44} Article 2 of Regulation 1295/2013\textsuperscript{45} establishing the Creative Europe Programme affirms that cultural heritage is “included” in the cultural and creative sectors, whose activities are based on cultural values and/or artistic and other creative expressions, whether these activities are market- or non-market-oriented, regardless of the type of structures that carry them out, and irrespective of how that structure is financed.\textsuperscript{46} The goals are to first map all the activities with a cultural dimension within the common market, and then to foster a European cultural heritage through a variety of policies: social cohesion, tourism, environmental policy, education, and the digital agenda.

This vast programme may be considered as the European attempt to find a compromise between the logic of the market and cultural heritage protection. The debate over whether works of art should in general be a tradable commodity at all is well known.\textsuperscript{47} A compromise solution, according to the European institutions, has been reached in Regulation

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\item Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Creative Europe - A new framework programme for the cultural and creative sectors (2014-2020), COM/2011/0786 final. This is the European Commission’s framework for the promotion of the culture and audiovisual sectors.
\item "The cultural and creative sectors include, inter alia, architecture, archives, libraries and museums, artistic crafts, audiovisual (including film, television, video games and multimedia), tangible and intangible cultural heritage, design, festivals, music, literature, performing arts, publishing, radio and visual arts (…)".
\end{itemize}
on the export of cultural goods, which did not introduce major changes to its predecessor of 1992, and Regulation 1215/2012, which established, for the internal market, a rule of private international law in favour of the owner of a cultural object, who will be able to initiate proceedings as regards a civil claim for its recovery in the court of the place where the cultural object is situated at the time the court is seized (a rule already provided by Article 8(1) 1995 UNIDROIT Convention); and finally in Directive 2014/60 on the return of national treasures exported illegally from one Member State to another, which puts pressure on the owner of a cultural object, who is under the obligation to exercise due diligence with respect to its provenance. In particular the new Directive, which recasts Directive 93/7, supports the “cultural argument” for claiming the restitution of these objects. The general objective of both Regulation 116/2009 and Directive 2014/60 is to achieve a better compromise between the principle of free movement of cultural goods and the protection of cultural heritage. They do not provide a definition of “national treasure” but they restrict the perimeter of possible returns as much as possible: indeed only objects classified by the States as “national treasures” are subject to the right of return. Once more, the role played in this matter by the States is crucial.

In particular, honouring mutual trust, Member States would have to defer to another Member State’s competence over what is to be considered its “national treasure”; at the same time, they should also confirm whether a certain object is a “national treasure” under the law of another Member State. The glue that holds the States together in protecting their cultural heritage is therefore an attentive and active trust. Clearly this is no simple task. It requires taking into consideration the 15 categories listed in the previous Annexes of both Regulation

51 The possessor has to prove (by documentation) the provenance of the object, the authorization for its removal under the law of the requesting Member State, the character of the parties, the price paid, and whether the possessor consulted any accessible register of stolen cultural objects or took such other steps as any reasonable person would have taken in the circumstances. Art. 10 Directive, inspired by Art. 4(4) 1995 UNIDROIT Convention.
3911/92 and Directive 93/7, which are rather ambiguous. The Annex to Regulation 3911/92 is still in force (Reg. 116/2009) and it provides only rough filters for national cultural treasures on the basis of age and financial thresholds (while most Member States do not categorize their national treasures on the basis of monetary value). The Annex to the Directive 93/7 was repealed (Dir. 2014/60), but it is still used as a reference criterion, although it is difficult for a cultural object to be protected to meet the criteria contained in the 15 categories listed in the Annex to the previous Directive.\(^{53}\) As is well known, this has been one of the main obstacles to its application, in addition to the burden of proof with respect to possession in good faith and the short time period for Member States to initiate a return procedure.\(^{54}\)

As mentioned above, the application of both Regulation 116/2009 and Directive 2014/60 requires active trust and mutual solidarity between EU Member States. The cooperation between Member States is facilitated through the new administrative system (made available in June 2016) which enables EU Member States authorities to rapidly exchange information through the IMI system.\(^{55}\) This will require each Member State to control not only the export of the State's own national cultural property, but also the import of the national property of another Member State.\(^{56}\) In this way, the protection of a State's cultural treasure and the protection of cultural treasures belonging to other States are really the two sides of the same coin. Under this regime, the competence for cultural matters is firmly in the hands of the Member States, with only a marginal, complementary competence for the European Union. The main difficulty thus lies in defining what is a “national treasure”. Without a braver, clearer, and harmonized demarcation of this notion, it is possible that a substantial number of applications channelled through the IMI system will not actually refer


\(^{54}\) van Heese cit., previous note: “The possibly high costs of a legal procedure (lawyers’ fees, court fee, and fees for witnesses and experts, as well as seizure costs and costs for transport, storage and insurance) require one to think twice about the application of the Directive”.

\(^{55}\) Olgierd Jakubowski, *The Internal Market Information System (IMI) on the Return of Cultural Objects – Its Principles, Application, and Evaluation of Its Effectiveness for the Protection of Cultural Heritage*, Santander Art and Culture Law Review 2, no. 2 (2016): 247-262, at 290: “Central authorities must cooperate and provide consultation, using the IMI system, in order to search for a specified cultural object that has been unlawfully removed, as well as the identity of its possessor, to notify the requesting state of its discovery of such a cultural object, to enable the requesting State to check on the cultural object, and to act as an intermediary with regards to its return. The IMI module raises some questions related to the storage of personal data and to the way courts will approach these data in the context of submission of evidence in court cases for the return of cultural objects.”

\(^{56}\) Peters, cit. note 35, at 92.
to a designated category of cultural objects. The legal solutions introduced by Directive 2014/60 may thus have limited effectiveness.

6. National Treasures and Cultural Heritage: Strict Exceptions to Free Trade

As established by both the General Agreement on Tariffs and Trade (GATT) of 1947 and the 1994 WTO Agreement, as well as by the European Treaties, Member States have the right to restrict the free movement of some particular objects to protect their “national treasures” (Article XX(f) WTO and Article 36 TFEU respectively).

According to Article 36 TFEU, the Member States can deviate from the rules aimed at ensuring the free movement of goods through restrictive measures taken to protect national treasures “possessing artistic, historic or archaeological value”. These measures cannot, however, constitute a means of “arbitrary discrimination”, nor a “disguised restriction” on trade between Member States.

In fact, outstanding works of visual arts or archaeological artefacts of a certain age, typically found in museums, are under protection. It has been argued that the Member States can derogate from the internal market rules on the basis of the above mentioned exception only for a class of objects that represent the “essential and fundamental elements of national artistic patrimony”. This view, which was expressed not only with respect to art, is generally supported with reference to the cultural patrimony of a nation. A Communication issued by the Commission on the verge of the removal of the internal barriers

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57 Jakubowski, cit note 55.
61 According to the ECJ, the Italian Republic failed to fulfil the obligations imposed on it by Article 16 of the EEC Treaty by continuing to levy, after 1 January 1962, the progressive tax provided for by the Italian Law no. 1089 of 1 January 1939, on exports to other Member States of objects of artistic, historic, archaeological or ethnographic interest.
in 1992 upholds similar arguments. It seems we should test this interpretation, which is competing with other interpretations — under what circumstances today will a Member State’s national interest in keeping cultural goods on its own territory be treated as an obstacle to free trade in the Eurozone?

The fundamental issue concerns the relationship between the notions of “cultural heritage”, a liminal concept that is relevant to several non-legal disciplines as well, and of “national treasure”.


Although it is reasonable to include only the most important elements of cultural heritage within the scope of application of Directive 2014/60, it is not clear what the dynamic components of a “national treasure” are, especially in relation to the circulation of those objects which comprise a State’s “cultural heritage”.

Article 2(1) of Directive 2014/60 defines a “cultural object” as any object that is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as a “national treasure of artistic, historic or archaeological value” under national legislation or administrative procedures within the meaning of Article 63 Communication on the protection of national treasures with an artistic historical or archaeological value in the context of the removal of internal borders in 1992, COM (89) 594 final, at para. 5: “It is for each Member State to determine its own criteria for identifying cultural objects that can be regarded as «national treasures»; nevertheless, the concept of «national treasures possessing artistic, historic or archaeological value» cannot be defined unilaterally by the Member States without verification by the Community institutions... Moreover, Article 36 of the EEC Treaty – which should be interpreted restrictively since it derogates from the fundamental rules of the free movement of goods – cannot be relied upon to justify laws, procedures or practices that lead to discrimination or restrictions which are disproportionate with respect to the aim in view.”.


As discussed below, the expression “national treasure” featuring in Article 36 TUEF is a token for a concept that is not necessarily uniform, under the various language versions of the Treaty.
36 TFEU. This strengthens the protection of Member States’ national treasures, as does Regulation 116/2009.67

Unfortunately, however, the choice of “national treasure” as the key expression in the Directive is of little direct assistance in the context of restitution of cultural property between Member States. This is because the definition is likely to vary from State to State; indeed it has not been possible to achieve any sense of harmony among the different national laws.68

The European Commission’s previous Reports, presented every three years from the entry into force of Directive 93/7, reflected a range of factors that resulted in the ineffectiveness of that Directive. Amongst the most important were the requirements making it essential to classify objects as an element of national culture through a formal return procedure, i.e. they had to belong to one of the categories listed in the Annex to the Directive as well as to fulfil certain criteria relating to the value and age of the protected cultural object.

Directive 2014/60, and its reception and application so far within EU Member States, does not really improve on the status quo. Here we can tackle at least three issues. The first has to do with path dependence, which is related to the appropriateness of considering the previous Annex to Directive 93/769 as a reference point to fill in the notion of “national treasure“. Indeed, some Member States still make use of the reference to public collections listed in the inventories of museums, archives or libraries’ conservation collection, and to the inventories of ecclesiastical institutions, plus to financial or historical thresholds.70 For example, the Polish Act on the Protection and Guardianship of Monuments (APGM)71 contains

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67 According to its 7th Whereas, the Regulation is not intended to prejudice the definition of “national treasure” adopted by Member States.
69 The Annex listed, inter alia, the following categories: a. elements forming an integral part of artistic, historical or religious monuments which have been dismembered and are more than 100 years old; b. pictures and pairings… executed entirely by hand, or any material and in any medium.; c. mosaics… other than falling in categories a. and b. and drawings executed entirely by hand on any medium and in any material; d. original engravings, prints, serigraphs and lithographs with their respective posters and plates; e. original sculptures or statuary and copies produced by the same process as the original.
70 The object must be more than 50 years old (with some exceptions for certain collections), not belong to its creator, and have a minimum value of between “whatever the value” (for archaeological objects archives, incunabula and manuscripts) and “150,000 Euro” (for pictures). The works of living artists are excluded, since contemporary art is not consistent with the historical threshold, i.e. being more than 50 years old. See Barbara T. Hoffman, European Union Legislation Pertaining to Cultural Goods, in Art and Cultural Heritage, edited by Barbara Hoffman, New York: Cambridge University Press, 2006, pp. 191 - 194.
a list that is a verbatim copy of the Annex to Directive 93/7: the cultural objects which can be
classified as the Heritage Treasures List (Lista Skarbów Dziedzictwa) are those of utmost
importance for the Polish cultural heritage. In fact this list was proposed in 2014 as a special
tool to protect the most important cultural objects of Poland’s national heritage, in particular
the Lady with an Ermine, 1489-90 - a painting owned until 2016 by the Princes Czartoryski
Foundation, a private charity. Popular gossip circulates that the main reason for the list was
the government’s intention to limit international loans of the only Leonardo da Vinci painting
in Poland. In fact, the entire art collection of the Foundation has recently been purchased by
the Polish State to secure its display in the country. What the lawmaker really had in mind,
according to some domestic commentators, was a very strong control over “national
treasures”, while transferring the duty of care from the State to individual owners. Thus the
Polish provisions still impose restrictions on return based on the categories of objects defined
by their nature, age and market value, as was the case in Directive 93/7.

A second issue, which is only briefly sketched here, has to do with the fact that
“national treasure” is not a stand-alone concept. The good faith purchaser, for example, is still
treated in a different way under different national legal systems, notwithstanding the fact
that the 1995 UNIDROIT Convention provides a pragmatic uniform solution for assessing
whether the possessor had been diligent, which was adopted in Directive 2014/60.

A third issue concerns the domestic interpretations of “national treasure”, having
regard to the different official language versions of the Directive 2014/60 and of Article 36

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74 Marta Cenini, Gli acquisti a non domino, Milano: Giuffrè 2009, at 21.
75 Manlio Frigo, The Impact of the UNIDROIT Convention on International case law and practice. An Appraisal, Uniform Law Review 20 no 4 (2015): 626-636; Cornu, cit. note 52. In this regard it is inevitable that note will be
taken of the many comparative law contributions to the preparation and interpretation of international and
European rules on this matter. We can recall, for example, that the 1995 UNIDROIT Convention originated from a
previous proposal to establish a uniform regime for the good faith purchaser (an innocent party who purchases
for value a property without notice of any other party’s claim to the title of that property) against the nemo plus
iuris rule (ad alium transferre potest quam ipse habet), which means that one cannot transfer more rights than
(s)he has, i.e. a purchase from someone who has no ownership rights denies the purchaser any ownership title to
the property.
TFEU. The expression “national treasure” has been translated differently in the various authentic language versions. For example, the English and French versions refer to treasure, “trésor nationaux”, while Italian, Spanish and Portuguese texts appear to give the State a broader discretionary power to protect the patrimony/heritage, “patrimonio artistico, storico o archeologico nazionale”. It therefore seems that Italian, Spanish and Portuguese versions vest more power in the Member States as exporting countries, who would thus prefer a more extensive interpretation of what is their “national treasure”. In contrast, importing countries favour a restrictive interpretation of the notion that has been tagged as “elitist” exactly because it contains the idea of a restriction to the greatest elements of the cultural heritage of the States. But beyond this somewhat vague and formalistic distinction between exporting and importing countries, we can notice a general trend to adopt a wide and protectionist definition of what is a national treasure or national artistic heritage. Viewed in this light we can underscore that the Polish National Treasures Act (NTA Article 2 point 4) implementing Directive 2014/60 adopts a very wide definition of “national treasure”, comprising practically all cultural objects, including archives and library materials classified as National Library deposits and objects in museum inventories, even if they are not “heritage items”. The new German Cultural Property Protection Act (CPPA) implementing Directive 2014/60 adopts an extended notion of “Nationales Kulturgut” (national cultural good), which comprises public collections as well as objects of churches and religious entities. Furthermore, any cultural object designated as a “valuable cultural good” (valuable to German cultural heritage and/or because its transfer out of Germany is considered as a loss) can be registered

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77 Cornu, cit note 52, at 643.
79 Cf Piotr Stec and Wojciech W. Kowalski, cit. above.
and receive the same protection. The Italian Legislative Decree No. 2 of 7 January 2016, also implementing Directive 2014/60, amends the related provisions under the 2004 Italian Code of Cultural and Landscape Heritage, which covers the international circulation, and restitution or return, of stolen or illegally exported objects. The new definition of “beni culturali” (cultural objects) also includes cultural objects that are “merely defined” as such. This change, and the abolition of the list of categories contained in the Annex to the Directive, has considerably extended the scope of the relevant legal regime. As a consequence, under the Italian legislation requests can be submitted for the return of items of paleontological, numismatic, and items of scientific interest, even if they do not belong to collections listed in inventories of museums, archives, libraries, or ecclesiastical institutions. France, which in February 2015 was the first State to implement Directive 2014/60, applied the relevant definition provided in its Code du patrimoine to designate “trésors nationaux”. This definition is a very broad one, as Article 111(1) Code du patrimoine provides that, in addition to the categories of “cultural objects” such as collections of museums, archives, etc., which are specified in detail, the definition also includes “other goods of a significant importance for the cultural heritage from the point of view of history, art or archaeology”, all of which in practice will be determined by the relevant administrative authorities.

As pointed out in the literature on the topic, EU Member States have thus obtained an “almost unlimited freedom to define what is and what is not a cultural object which can be classified as a national treasure”. Incidentally, the Austrian Federal Act on the return of unlawfully removed cultural objects adopted, for example, two separate definitions of a cultural object: the first refers to Article 2 point 1 of Directive 2014/60 and provides that a

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83 Under the former Directive, the cultural object had to be classified as such by the Member State.
84 Frigo cit. note 16.
86 Stec, cit note 72, at 112.
cultural object is an object which under the law of an EU Member State, before or after its unlawful removal from the territory of that Member State, was classified or defined as a “national treasure” within the meaning of Article 36 TFEU; while at the same time a cultural object is an object that is protected under the provisions of a State party to the 1970 UNESCO Convention as part of the “nation’s cultural heritage”, within the meaning of Articles 1, 4 and 5 of this Convention. It remains to be seen what the Austrian interpreters will do with these two distinct reference definitions.

In conclusion, the provisions of both the EU Treaty and Directive 2014/60 allow for a potentially creative and wide protection of cultural heritage at the national level.

8. National Treasure and its link to “Culture”

The above-mentioned exceptions to free trade, encapsulated into the expression “national treasure” respectively in Article XX(f) WTO and Article 36 TFEU, avoid any reference to the word “culture”, that is to the “cultural value” the objects should have in order to be protected, while Directive 2014/60, in classifying a good as part of a “national treasure”, used the term “cultural” to mean an object with artistic, historic or archaeological value.

The first issue therefore concerns the “cultural object” defined by Directive 2014/60 in relation to “national treasure”, as just discussed above. In the mainstream literature, it is emphasized that the “national treasure” designation does not refer to all cultural objects, but only to those that have an inseparable link to the culture and history of a given country. As a consequence, a second relevant issue is raised in relation to the terms and expressions used to qualify the content of the term “national treasure”, which include such vague notions as “culture”, “history”, “artistic values”, “age value”, “use value” etc, and which are in turn eventually interpreted as flexible guidelines by the domestic Courts on a case-by-case basis.

88 Biondi, The Merchant, the Thief and the Citizen..., cit. note 62, 1173 ff.
89 The market value of these objects fluctuates a lot, depending on the social setting in which they circulate: see David Throsby, The Economics of Cultural Policy, Cambridge: Cambridge University Press, 2010. Hence market value is a relevant aspect, but not essential for the above-mentioned test.
If we look at the words chosen by the European lawmaker we can speculate on the message that the EU intended to communicate using precisely those words and not others: “treasure” evokes an object of extraordinary economic value, anchored to a monetary index. It furthermore recalls the idea of an accidental, fortuitous finder who finds something abandoned, hidden or buried, about which no one can prove (s)he is the owner. “Treasure” is, then, first of all a national property law issue, which also eventually became an international trade issue. A property right is the right to possess, use, and enjoy a specific piece of property (whether a chattel or land), i.e. a right of ownership. The owner has the right to determine how to use the property, for example whether to sell or rent it. The law can subordinate this right to the general social interest (reasons of public utility), according to the forms established by law and upon the payment of just compensation. This is a fundamental right recognized all over the world – at the international level (International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Article 1); at the regional level (European Convention on Human Rights, Article 1 Protocol 1; American Convention on Human Rights, Article 21; Charter of Fundamental Rights of the European Union, Article 17), and in national Constitutions. The fact that “treasure” is a property law issue is well illustrated in the famous Barakat case in 2007, when the Court of Appeal for England and Wales applied the lex rei sitae connecting factor and stated that: “The claim is an attempt to assert rights of ownership, not to enforce export restrictions”, and ordered the restitution to Iran of 18 carved jars, bowls and cups dating from the period 3000 BC and originating from illicit excavations in the Jiroft region of Iran. “National”, on the other hand, can refer to where the treasure was found, or to where the work of art, the object, was created, or to the nationality of the creator, or the place it represents, or to which it refers.

91 See, for example, the Italian Civil Code, Article 932, in Mara Wantuch-Thole, Cultural Property in Cross-Border Litigation: Turning Rights into Claims, Berlin: De Gruyter 2015, at 31, and compare it with the common law approach to the law of finders in Craig Forrest, International Law and ..., cit note 1, at 307-308. The law of finds is applied to historic shipwreck together with the law of salvage: see Christian Hoefly, National Treasure: a Survey of the Current International Law Regime for Underwater Cultural Heritage, Penn. St. J.L. & Int’l Aff. no. 4:2 (2016): 814 - 839.

92 Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd [2007] EWCA Civ 1374 (CA), [2009] QB 22. Comments by Frigo (2015), cit supra note 75; Nafziger (2016) cit. supra note 8, at 191. The judgment had two corollaries: a) the right of ownership under Iranian law has the same effect as under English law; b) the 1970 UNESCO Convention, Directive 93/7, and the 1995 UNIDROIT Convention had a deep influence on English law, even though the UK is not a party to the latter Convention.
In putting together the two terms “national + treasure” to form the concept of national treasure(s), the ordinary meaning of the two words seems to deviate and the expression acquires a new and different sense. A national treasure is a property belonging to a certain State, regardless of whether the constitutive elements of this property were created by one of its nationals, or within its territory, or were inspired by a subject related to that State, i.e. This leads to conclude that the search for connecting factors to its “national culture” is sometimes vain. This is a functional transformation of sense with respect to the ideal notion that these special objects belong to the nation, and not being of anyone in particular, belong in fact to all, an ideal which prevailed in States like France (soon followed by many others), and that was fundamental to ground the State’s protection of the national heritage.\(^93\) Despite the fact that States are engaged in the protection of national cultural goods, artworks in public hands are not always adequately kept: a child vomited over some bronze tiles forming part of Carl Andre’s Venus Forge at the Tate Museum in London; someone kissed a painting by Cy Twombly at the Museum of Contemporary Art in Avignon, smearing lipstick onto the canvas; while Munch’s The Scream was stolen twice from the National Gallery in Oslo (the thieves left a note reading “Thanks for the poor security”). In some cases States also banned the exposition of some artworks, and imprisoned artists for pornography and immorality, as in the case of Egon Schiele.\(^94\) Even when a national treasure is owned by private collectors, who can afford the market price of such works of art,\(^95\) the protection is not guaranteed. Some

\(^{93}\) During the tumultuous years of the French Revolution the Abbé Grégoire celebrated freedom but, at the same time, eloquently argued that that patriotism could not affirm itself by destroying monuments and artifacts that represented the legacy of the past: Abbé Grégoire suggested the recognition and protection of those objects that “incorporate the genius of past generations, which serve as incentive for creativity and talent development for future generations”. On similar premises, many objects formerly belonging to the nobility or the Church were incorporated into the State treasure (\textit{patrimoine}), or were subject to public constraints. André Chastel, \textit{Patrimoine}, Encyclopédia Universalis, Supplément, Paris, 1980; Jean-Pierre Babelon, André Chastel, \textit{La notion de patrimoine}, Paris: Éditions Liana Levi, 1994; Victor Hugo, \textit{Pamphlets pour la sauvegarde, Guerre aux démolisseurs !}, Apt: L’Archange Minotaure ed., 2006. For more on the evolution of French law, see the essays collected in the volume by Maria Luisa Catoni,(ed.), \textit{Il patrimonio culturale in Francia}, Milano: Electa, 2007, as well as Joseph M. Sax, \textit{Heritage Preservation as a Public Duty: The Abbé Gregoire and the Origins of an Idea}, \textit{Michigan Law Review} 88 (1990): 1142 - 1169.


commentators have already described what private owners of art objects have done with their valuable possessions: we can just mention here Groult, the 19th century French collector who wanted to burn his collection before he died; Ryoei Saito, the Japanese businessman who bought Renoir’s Au Mulin de la Galette and van Gogh’s Portrait of Dr. Gachet at auction and said he wanted the works to be cremated with him; or, as other examples, the works by van Eyck and Pollock, which were cut into fragments and sold separately to increase their economic value (a well-known ancient praxis applied to incunabula and books).

A provocative question could then be: should national treasures and cultural goods in general belong to those who can afford the costs for their protection, without denying citizens access to enjoyment of them? Historically, works of art and archaeological objects followed military and economic power. Western States thus accumulated these objects around the world. However, since the beginning of romanticism, the prevailing idea in many quarters is that cultural goods are connected to people and places, and that their physical location is intertwined with their aesthetic force and social significance. Some questions surface in this respect: Are States of origin able to afford the price to bring back objects already lost? Are they willing to pay for their citizens’ enjoyment of heritage resources? Can national heritage be understood to exclude those objects that where not produced locally, but have been acquired from other nations? To escape these embarrassing questions, resorting to the notion of “cultural heritage” is of little help.

9. Is there a “European Cultural Heritage” to protect?

The legal literature reflects a clear divide between those States that promote a vision of objects as inscribed in a given culture, and those that believe instead that such goods should be subject to protective regimes modelled according to worldwide uniform schemes, because they reflect universal values protecting “culture” as a human right. John Merryman, a strong advocate of the latter vision, which is also supported by a number of important museums,

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described this dichotomy using two categories: cultural nationalists and cultural internationalists. This is not merely one of many academic disputes. Salvatore Settis, Emeritus Professor of History of Classical Art and Archaeology at the Scuola Normale Superiore of Pisa and a member on many museums’ Advisory Boards, eloquently explained the reasons why the two positions represent the opposite poles of the conventional discourse on culture, and vigorously recalls the short and long-term risks arising from our inability to imagine culture as a fluctuating notion, as a living social and urban fabric ("tessuto urbano e sociale vivente") according to the Italian tradition developed throughout its history.

It is certainly true that defence of the integrity of a certain culture is typically the responsibility of a State, based on the default principle of uti possidetis. It is also true that the uti possidetis principle can give some positive results if we assume that cultural goods reflect “universal” cultural values. But the arguments against the assumptions underlying the positions taken by Merryman and others, are rather solid, as explained by Neil Brodie. Brodie rejects the internationalists’ argument that the protection of cultural heritage through restrictive measures would only encourage the illicit trafficking in cultural goods. Furthermore the position taken by Merryman is reductive at any rate, because in addition to cultural internationalists and cultural nationalists there are also cultural intra-nationalists: significant claims on cultural heritage can originate from indigenous peoples who live within and across the borders of different nations, or from small local communities who are the custodians of cultural goods by chance, and could also originate from migrants in the near future. Cultural heritage is, indeed, a vast domain not entirely represented by the totality of tangible cultural objects: it includes oral traditions, patronymics, choreographies, rituals and ceremonies, social practices and festive events, landscape, cultural spaces created by

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100 The legal definition of uti possidetis is ‘as you possess’. According to this principle of international law, the parties to a treaty can retain possession of what they have acquired by force during a war.
communities and groups in response to their environment, traditional craftsmanship, digitalization etc.\textsuperscript{102}

The issues raised by the \textit{querelles} regarding the restitution of cultural goods have much to do with the present vision of cultural heritage, providing further evidence to the effect that overzealousness is a bad adviser in this sector.\textsuperscript{103} It is naïve to believe that legal dichotomies such as hard law \textit{versus} soft law; public law \textit{versus} private law; or global law \textit{versus} national law can explain all the intricacies in a tidy scenario. The multi-faceted dimension of cultural heritage is such that it eludes sharp distinctions and clear demarcations. In fact, beyond the legal standards produced either by the formal sources of law or by way of self-regulation, there are further interests and claims of a various nature. They may be categorised as follows: a) those rooted in moral questions (equity and justice), for example related to our willingness to challenge purchasers’ unfairness and undeserved titles (reflected for instance in the events related to the restitution of property to Holocaust victims); b) other claims reflecting our sociability, i.e. our need to live in a community of people, which are closely related to the communicative function of cultural heritage; and c) other claims based on overt economic interests. The law alone cannot cope with all these interests and claims.

\section*{10. Back to Diplomatic Actions}

Notwithstanding all the international and supranational legal norms, the press does not fail to inform us, on a daily basis, about sometimes shocking events related to cultural sites or

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\textsuperscript{103} \textit{Jeanneret v. Vichey}, 541 F. Supp. 80 (S.D.N.Y. 1982), rev’d and remanded, 693 F.2d 259 (2d Cir. 1982). Comments by S. Janevicius, E. Velioglu Yildizci, M.-A. Renold, \textit{Case Matisse Painting – Jeanneret v. Vichey, Platform ArThemis} 2013 http://unige.ch/art-adr, Art-Law Centre, University of Geneva [accessed on 25.4.2017]. “A painting by Henri Matisse was unlawfully exported from Italy to New York because its owner, Anna Vichey, never acquired the mandatory export license in 1970. The painting was then sold to a Swiss art dealer named Marie Jeanneret and delivered to Geneva, Switzerland. After discovering the cloud on the title of the painting, Mme. Jeanneret was unable to sell the painting. Mme. Jeanneret sued the Vicheys for breach of implied and express warranties, fraudulent misrepresentation, and breach of contract. Before any final decision was made, Mme. Jeanneret voluntarily withdrew her action after she supposedly received an Italian judgment that allowed her to legally sell the painting”. It is unclear what Italy did to allow Mme. Jeanneret to legally sell the painting.
objects of art. The issue is now also well-documented by an abundant literature. Disputes over cultural property fascinate anyone involved in comparative law, because it is through the analysis of litigation concerning the return of cultural objects – the solutions of which quite often depend on conflicts of law rules – that we can compare the various legal regimes which intervene for the protection of cultural heritage, as well as the international dimension in which these aspects are inscribed. Usually these disputes are settled by alternative dispute mechanisms before reaching the courts: mediation, diplomatic missions, joint statements, bilateral agreements, tripartite cooperation within the UNESCO supervision, etc.

Alternative dispute mechanisms often produce solutions which satisfactory for all the parties involved. We can recall, for example, Canova’s journey to Paris to recover artworks that the French army had taken beyond the Alps. He was one of the favourite among Napoleon’s artists and this fact, together with the publication of the Quatremère de Quincy’s pamphlet on the république des arts et des sciences, based on the principle that diviser c’est détruire, helped him recover some papal State masterpieces, such as the Laocoon, the Apollon of Belvedere, the Transfiguration by Raphael, and the Deposition of Caravaggio plus several manuscripts. Canova’s journey to London and, more recently, the return of the Axum Obelisk to Ethiopia, or of the Venus of Cyrene to Libya may also be cited. However, diplomatic actions and settlement agreements do not affect legal rules and legal definitions on what constitutes “national treasures” or “cultural property”, which remain heterogeneous notions. The legal domain, in fact, contributes only in part to the understanding of the concept of cultural property. Most frequently it covers only one part of the cultural heritage, the

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105 For a comprehensive treatment: Chechi, The Settlement of International Cultural Heritage Disputes, cit note 5.
107 Removing it from the place in which it had been created means to destroy.
immensely diverse mass of “documents”\textsuperscript{109} of all types upon which our societies confer a particular artistic, historical, or ethnological interest.\textsuperscript{110}

Thus, a question arises: on the basis of what criteria do States assign the kind of “spiritual supplement”\textsuperscript{111} to the strict materiality of an object? Are they symbolic of the capacity of the society under consideration to understand and represent its present and its past, as well as those of others? The majority of these objects are potential carriers of multiple meanings and information about the history and beauty of mankind. Are all of these “documents” cultural property? What fate do States reserve for them? Whenever we encounter them – even when the definition varies and comprises intangible objects – it is a question of their “conservation”,\textsuperscript{112} with the goals of conservation being: 1) to ensure their durability; 2) to respect their integrity; and 3) to offer wide accessibility. Yet, it is a question of balancing the interests and limits imposed by conservation with the interests on the social usefulness of the cultural heritage, transmitted by the revelation of its aesthetic, historical (or other) message.

11."Another Way of Owning"

In our opinion, the relationship between cultural heritage and national treasures within the internal market (and also outside) cannot be regarded as being subject only to a legal regime based on classic individual, absolute, and exclusive ownership in the Blackstonian sense.\textsuperscript{113} On the contrary, their “common” dimension gives even tangible objects some inherent attributes of an immaterial, intangible character, which supports including them under the protective umbrella of the commons, as a tertium genus in between public and private ownership.\textsuperscript{114}


\textsuperscript{111} Berducou, cit. previous note, at 247.

\textsuperscript{112} Ibid., 250.


\textsuperscript{114} Francesco Francioni, Public and Private in the International Protection of Global Cultural Goods, European Journal of International Law, 23 no. 3 (2012): 719 – 730, at 722. For more on cultural property as a common good, following the theories by Hardin 1968 and Ostrom 1990, see: Pablo A. Gonzales, From a Given to a
Another way of owning, as Paolo Grossi wrote in his seminal work, may be the best way to properly represent this new form of owning by the community. It is based on the same paradigm that challenged the great transformation during the origins of the modern market economy, as Karl Polanyi highlights with exemplary passion in his book. By calling it an “instance of sociality”, we refer to the powerful nucleus of civic (i.e. related to citizens) expectations, that starts moving as soon as the phenomenon of appropriation – by private individuals or by public entities - collides in practice with the wider use of assets which were previously conceived of as “part of the community”, which nowadays involves many disciplines beyond just the law, from urban planning to sociology and anthropology (humanities in general). The notion of a “common good” has been closely bound up with the idea of citizenship, as a material consequence of collective actions of citizens participating in their own self-government; at the same time “commons” identifies the possibility that politics can be about more than building an institutional framework for the narrow pursuit of individual self-interest in the essentially private domain of liberalized markets. Citizens can claim a right to enjoy these common goods, as Gino Gorla pointed out in his meaningful essay. With respect to cultural heritage, “another way of owning” becomes essential.

We must acknowledge at the outset that contemporary legal concepts and the legal jargon which expresses them – especially those provided by the continental Civil codes, eventually exported to many non-Western countries through imposition (read: colonization),

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by chance (read: migration), or by prestige (read: being part of a wealthy club of nations, such as in the case of WTO, or EU) – do not help in understanding the expression “another way of owning”. The expression carries with it a sense of community and common identity. And precisely at this point comparative law can be helpful in understanding the implicit dimension of legal rules that benefit a given community, their meanings and limits, and accepting that elsewhere there is another community of people characterized by other ways of thinking, and understanding that another way of owning is possible when paradigms change because cryptotypes are revealed. The cryptotype, a term imported from linguistics into law by Rodolfo Sacco, is the underlying pattern to be revealed, or made visible by logical or non-logical inferences from an explicit rule. Individuals often operate on the basis of a “sense of what would be morally wrong or right, or even illegal or legal”, even in the absence of knowledge of the relevant rules or laws and without being able to conceptualize what would be wrong about the relevant course of action. They can have “a feeling of entering forbidden territory without having a conception of the boundaries of that territory”. Unveiling cryptotypes can foster better understanding of social and normative dynamics in cultural heritage law.


121 A cryptotype amounts to a legal formant without an explicit linguistic formulation, see Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II), American Journal of Comparative Law 39 no. 1 (1991): 1 – 34. The discovery of a cryptotype is facilitated when, as happens, a legal rule, a concept, or a principle implicit in one legal system is explicit in another legal system. Normally, jurists belonging to a given system find greater difficulty in freeing themselves from the cryptotypes of their system than in abandoning the rules of which they are fully aware. For some scholars, the subjection to cryptotypes constitutes the mentality of the jurist of a given country at a given time, and such differences in mentality are the greatest obstacle to mutual understanding between legal actors of different legal systems. Cf Pierre Legrand, Fragments on Law-as-Culture, Deventer: W.E.J. Tjeenk Willink, 1999. Although a cryptotype can be intended as a part of the mentality, it does not coincide with it. Individuals often follow rules which they are not aware of, or which they would not be able to articulate or explain. For instance, few would be able to formulate the language rule we follow when we say three dark suits and not three suits dark (Sacco 1991). See Barbara Pasa, Lucia Morra, Implicit Legal Norms, in Handbook of Communication in the Legal Sphere edited by Jacqueline Visconti, Berlin / New York: Mouton De Gruyter, 2017.

122 The tacit normative dimension is connected to the legal text through the halo of implicit meaning that intersects the “living law” where the legal text suggests, implies, or alludes. “The living law” Ehrlich wrote, is “the law which dominates life itself even though it has not been posited in legal propositions (…)” : cf Eugen Ehrlich Fundamental Principles of the Sociology of Law, Harvard: Transaction Publishers (1962), at 493.

12. Conclusions

The relationship between cultural heritage and national treasures in Europe requires a close reflection on the intricate relationship between national and international rules and standards, between formal and informal sources of law. The complexity arising from the interaction of many normative layers is well reflected in the legal language, in particular on “cultural” as an overdone adjectivisation used by the law, which may be summarised as follows: “cultural property” - was first a notion with multiple meanings, irrespective of origin or ownership, adopted by the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict and its two (1954 and 1999) Protocols. The notion of “cultural heritage” of each State - was then used in Article 4 of the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and a transfer of ownership of cultural property, and in the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects, which introduced another notion, namely: “cultural object” – indeed for the purpose of protecting cultural heritage, each State can claim the restitution (Article 1 (a))/return (Article 1 (b)) of stolen/illicitly removed cultural objects: those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to the 1995 UNIDROIT Convention.

“Cultural object” is now a quite widespread notion, articulated with respect to the quality of the object according to the context, time and space in which it is inserted, as well as

124 Cit supra note 4.
125 Cit supra note 7. See Frigo, The Impact of the UNIDROIT Convention, cit. supra note 75.
126 Annex: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.
to the messages that it conveys to different communities, since the problem of cultural objects affects all objects that express a meta-individual message.\textsuperscript{127} Unfortunately, “\textit{cultural/culture}” is a hot-button word: it is both eclectic and polyphonic. The international Conventions and supranational institutions perhaps overstate the cohesiveness of “culture”. Western intellectual traditions have conceptualized the notion. Stemming from the verb \textit{colere} in early Latin usages, culture denotes a state in which nature has been redefined by human efforts. The idea of the \textit{cultivation} of the individual is then transferred to societies, creating a meta-individual dimension of societal progress. The Age of Enlightenment expressed this idea through the French term “\textit{civilisation}”, meaning culture as a measurable quality according to universal standards, whereas the Age of Counter-Enlightenment, and particularly J.G. Herder, rejected the cosmopolitan concept and linked the term “\textit{Kultur}” to the agenda of Romantic Nationalism, which exalted diversities.\textsuperscript{128} On one hand it is a meta-national culture that instils a sense of unity for the construction of statehood; while, on the other, it is a particularistic concept identified with the uniqueness of a community within the nation-state, threatened by trends towards unification. The roots of the term “culture”, just briefly recalled here, and its slippery multi-valence meaning cast doubts on the usefulness of the concept as a heuristic tool with an explanatory function. Behaviours, which the law aspires to regulate, are also a product of the brain, an organ of our body in constant cognitive adaptation in response to social interactions, so it seems we should be seriously rethinking the role of both biological and cultural elements in shaping human behaviour. Furthermore, the polyphonic sound of the word “culture” is amplified by the circular relationship between law and culture: culture produces a set of values, rules and institutions that together create the way of acting of a given community, while legal rules and practices give normativity to a given culture. Law is a \textit{performative} language: the very act of naming the content of culture also constructs its heritage and identity as “culture”. This is not a natural fact; it pertains to the normative dimension, has a complex historicity, and it cannot be dissociated from the relationship between disciplines, regulations, and sanctions. Thus it is a fact that “European culture” is an


ambiguous concept, in a state of flux as it is specific to national contexts and historical variances and will probably never become fixed.

The European institutions were first involved in the regulation of the trade in cultural goods while laying down the rules establishing the common market. Those rules allowed for the possibility of national restrictive measures taken to protect “national treasures” “possessing artistic, historic or archaeological value”. Those measures were acceptable, provided that they did not constitute a means of “arbitrary discrimination” nor a “disguised restriction” on trade between Member States. This norm is still with us, under Article 36 TFUE. Meanwhile the Community, and then the Union, have taken several initiatives to both enable the Member States to protect their national treasures after the establishment of the single market. The EU tries to ensure that European cultural heritage is safeguarded and enhanced (Article 3(3) TEU), to strengthen the competitiveness of the cultural and creative sectors and to facilitate adaptation to industrial changes, but, at the same time, the EU has no competence over cultural legislation and it must contribute to the flowering of the Member States’ cultures, while respecting their national and regional diversity (Article 167 TFEU).129 Does this mean something more than that Member States must fully respect their different traditions, histories, and linguistic diversities? Doesn’t this mean that the EU has to protect diversity instead of bringing a “common European cultural heritage” to the fore? The EU then has taken actions to combat the illicit trafficking of cultural goods. Similar efforts are now directed towards the repression of the trafficking of cultural goods imported in Europe from other parts of the world. The latest initiative in this respect is the proposed EU Regulation issued on July 2017 on the import of cultural goods. The action of European institutions in this area of the law takes place on a terrain located in between the exclusive competence of the Member States, and the many international texts and initiatives that establish international regimes aimed at protecting cultural property, cultural objects and the cultural heritage, subject to public and private law regimes.

Considering this complex landscape, a few conclusions can be drawn. The regulation of the field can be improved by making a more parsimonious use of the notion of culture and by improving the terminology that is used to frame new rules, by rendering it more transparent,

129 See Article 167 TFEU which reads: “The Union shall contribute to the flowering of the cultures of the EU Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.
and rigorous. The adjective “cultural”, which features so prominently in the discourse over what is to be protected, does not identify a homogenous category of objects, that are all to be subject to the same policy. The protection and the fruition of archaeological discoveries poses different problems from those involved in the protection and the fruition of contemporary art, ancient paintings, or frescos, etc. Reference to “culture” in setting new rules to govern these matters is not by itself the game changing move. 130 Considering the competence of the Member States over the identification and protection of the national cultural heritage, we do not think it would be productive to push for an even broader, allcompassing legal notion of European cultural heritage. Nonetheless, we think that the support that the Union can provide to the improvement of the protection cultural heritage at the national level remains important. It can be further strengthened by showing how it does contribute to the making and the development of a European cultural landscape. On the other hand, the current protection afforded by European regulations and directives to national treasures shows some limitations. The circumstance that the Union still relies the Annex to Regulation 116/2009 for certain purposes is an example of these limitations. Unfortunately, this approach has also influenced the national legislation of a few Member States, on the occasion of their accession to the Union. Despite these shortcomings, the emergence of global norms and standards accepted at the international and at the national level is a fact. The Union, through its action, contributed, and will continue to contribute in the future to this movement, thus highlighting the gradual acceptance of the idea of a common heritage of mankind. 131

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131 This pluralistic dimension of cultural property is already reflected in the language of the 1954 Hague Convention (cit supra note 2), according to which “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world” (see the Preamble).