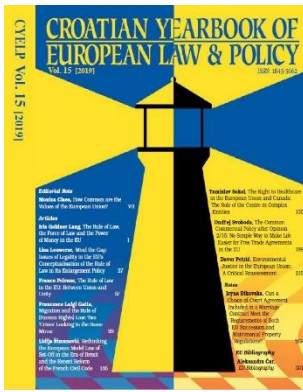




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THE EU REGULATION ON THE IMPORT OF CULTURAL GOODS: A PARADIGM SHIFT IN EU CULTURAL PROPERTY LEGISLATION?

Tamás Szabados*

Abstract: The EU has recently decided to regulate the import of cultural goods in the EU. While the new provisions have been widely criticised for various reasons, primarily for having a freezing effect on the European art trade, it cannot be overlooked that the regulation of the import of works of art is not unprecedented, either in international, regional and national legal instruments or at the level of EU legislation. The new legislation can be considered a paradigm shift. It completes the pre-existing EU legal sources that primarily aimed to protect cultural goods originating from the EU and provides equal and symmetric protection for cultural goods arriving from third countries. In this way, the EU regulation transcends a self-centred regional approach and embodies a global vision of the protection of cultural heritage.

Keywords: cultural goods, art trade, import, licence, policy change.

1 Introduction

The divergences of the rules on importing cultural goods are a clear incentive to illicit trafficking. The fact that a state prohibits the export of a cultural object from its territory does not mean that the unlawfully exported cultural object cannot be lawfully imported into another state and cannot be subject to transactions there.¹ Illicit trade moves such objects towards states with no or only relatively lenient import regulations. This is why an (ideally uniform) regulation of importing cultural objects is desirable.

Taking the above concerns into account as well, the import of stolen or illegally exported cultural property has been the subject of international, regional and national regulation for some decades. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Con-

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¹ Claudia S Quiñones Vilá, 'On the Borderline: Using National and International Legal Frameworks to Address the Traffic of Pre-Columbian Antiquities between Mexico and the United States' (2021) 7 Santander Art and Culture Law Review 51, 54; see Paul M Bator, 'An Essay on the International Trade in Art' (1982) 34 Stanford Law Review 275, 287.

vention),² the Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations adopted in the framework of the Organization of American States (OAS),³ and some domestic legislation have similarly addressed the import of cultural property. The legislature of the European Union (EU) decided to act on the regulation of the importation of cultural property from third countries only recently. The result is the adoption of Regulation 2019/880/EU on the introduction and the import of cultural goods (EU Import Regulation)⁴ and the accompanying Regulation 2021/1079/EU that implements the EU Import Regulation (Implementing Regulation).⁵

The EU Import Regulation has had an ambivalent welcome so far. Urbinati considered the proposal for the regulation as a means of contributing to a 'more complete and efficient' EU legal framework for fighting against illicit art trade.⁶ There are commentators who contend that the EU Import Regulation could have been more effective in certain respects.⁷ For others, especially art traders and their representative organisations, it is too much; they assume that, once fully applicable, it will be too strict and will unnecessarily limit the art market due to the attendant administrative and financial burden imposed on art dealers.⁸ This is why it has

² Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231, Paris, 14 November 1970.

³ Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) 16 June 1976. See Richard Mackenzie-Gray Scott, 'The European Union's Approach to Trade Restrictions on Cultural Property: A Trendsetter for the Protection of Cultural Property in Other Regions?' (2016) 2 *Santander Art and Culture Law Review* 211.

⁴ Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods [2019] OJ L151/1.

⁵ Commission Implementing Regulation (EU) 2021/1079 of 24 June 2021 laying down detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods [2021] OJ L234/67. See Giuditta Giardini, 'A Commentary to Commission Implementing Regulation (EU) 2021/1079 of 24 June 2021 Laying Down Detailed Rules for Implementing Certain Provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the Introduction and the Import of Cultural Goods' (2021) 7 *Santander Art and Culture Law Review* 183.

⁶ Sabrina Urbinati, 'The European Union Legal Framework and the Fight against the Illicit Trafficking of Cultural Property Coming from Situations of Armed Conflict' (2018) 4 *Santander Art and Culture Law Review* 51, 66.

⁷ Lewis McNaught, 'EU-wide Regulation Aims to Prevent Illegal Trafficking into European States' (*Returning Heritage*, 1 October 2019) <<https://www.returningheritage.com/eu-wide-regulation-aims-to-prevent-illegal-trafficking-into-european-states>> accessed 10 April 2022.

⁸ See Erika Bochereau talks to Alicja Jagielska-Burduk and Andrzej Jakubowski, 'Challenges and Prospects for the Art Market Vis-à-vis the Evolving EU Regime for Counteracting Illicit Trade in Cultural Objects' (2021) 7 *Santander Art and Culture Law Review* 21, 25.

been labelled ‘Draconian’⁹ or more emphatically ‘fundamentally flawed’,¹⁰ and it was also stated that ‘the regulation is likely to cripple European art markets’.¹¹ Furthermore, the way in which the EU Import Regulation was adopted was described as ‘the handing down of orders in a dictatorial manner’.¹² It was also asserted that the Regulation can weaken the position of the EU on the art trade market.¹³ In this view, due to the EU Import Regulation, fewer artefacts will be imported into the EU due to the strict import regime, and the art trade may move to other art trade centres of the world. Finally, it was warned that ‘without effective implementation the Regulation risks becoming no more than a paper tiger; impressive on paper but not nearly as daunting or effective in practice’.¹⁴

The purpose of this contribution is to examine how the provisions of the EU Import Regulation fit into the traditional paradigms of the protection of cultural property. To answer this question, the two traditional approaches of cultural property protection will first be scrutinised. Then, the article discusses the main rules of the EU Import Regulation. Although the EU Import Regulation by nature imposes restrictions on the art trade that let the representatives of traders speak of the freezing effect of the regulation, a comparative analysis demonstrates that the rules of the EU Import Regulation criticised by them are not without precedent. Nevertheless, the gradually evolving cultural property legislation in the EU points to a paradigm shift, or at least to a new policy approach, which integrates the protection of the cultural heritage of both Member States and third countries.

2 The traditional paradigms of cultural property and their critics

In cultural property protection discourse, following Merryman, two paradigms or ways of thinking about cultural property have been distinguished: cultural internationalism and cultural nationalism.¹⁵

Cultural internationalism treats cultural goods as part of the common cultural heritage of mankind and, as a corollary, it underscores the

⁹ Kate Fitz Gibbon, ‘Art Imports to EU Threatened by Draconian Regulation’ (*Cultural Property News*, 29 December 2018) <<https://culturalpropertynews.org/art-imports-to-eu-threatened-by-draconian-regulation/>> accessed 10 April 2022.

¹⁰ Pierre Valentin and Fionnuala Rogers, ‘The Proposed EU Regulations on the Import of Cultural Goods’ (*Art@Law*) <<https://www.artatlaw.com/latest-articles/the-proposed-eu-regulations-on-the-import-of-cultural-goods>> accessed 10 April 2022.

¹¹ Fitz Gibbon (n 9).

¹² Ivan Macquisten, ‘No EU Problem with Terrorist Antiquities, So Let’s Legislate for It’ (*Cultural Property News*) <<https://culturalpropertynews.org/no-eu-problem-with-terrorist-antiquities-so-lets-legislate-for-it-says-commission/>> accessed 10 April 2022.

¹³ Valentin and Rogers (n 10).

¹⁴ Anna M de Jong, ‘The Cultural Goods Import Regime of Regulation (EU) 2019/880: Four Potential Pitfalls’ (2021) 7 *Santander Art and Culture Law Review* 31, 33 and 37.

¹⁵ John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80 *American Journal of International Law* 831; John Henry Merryman, ‘Cultural Property Internationalism’ (2005) 12 *International Journal of Cultural Property* 11.

importance of ensuring access for all to the common cultural heritage. Its vision is the facilitation of the international flow of works of art in commerce by eliminating excessive and unnecessary trade obstacles. Excessive regulation stifles the art market and encourages illegal trade in art. This approach is shared by the so-called market countries, where there is high demand for cultural valuables originating from source countries. Merryman found that the 1954 Hague Convention embodies cultural internationalism¹⁶ when it protects cultural property as the cultural heritage of all mankind, the preservation of which is necessary for all peoples of the world. This is completed by establishing individual responsibility for offences against cultural property and enabling the courts of the contracting states to proceed in such instances.

Cultural nationalism, on the contrary, treats cultural goods as elements of the national cultural heritage, and therefore tends to exclude or restrict international trade, and in particular the export of goods considered as components of the national cultural heritage. This approach is mostly relied on by so-called source countries rich in cultural property. The 1970 UNESCO Convention is seen as a manifestation of cultural nationalism. To prevent the de-contextualisation of cultural property, the 1970 UNESCO Convention provides for the protection of cultural goods by their country of origin. According to critics, no limit is imposed on states as to the determination of the cultural property to be protected by way of prohibiting its exportation. Whether or not to grant an export restriction depends on the discretion of state authorities. Excessive export restrictions result in a policy of retentive nationalism in source countries and limits the room for the licit art trade. The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage goes even further when it states that the underwater cultural heritage cannot be commercially exploited. Excessively limiting or excluding trade in cultural property may also hinder transactions concerning cultural goods which do not have cultural significance or a strong cultural bond to the country prohibiting the export. A corollary of the idea of the 1970 UNESCO Convention, that cultural property belongs to its country of origin, is that countries of origin are entitled to the return of cultural property illegally removed from there.

Even though scholarly works often take the two conflicting paradigms as granted,¹⁷ some authors have called into question the dichotomy between cultural internationalism and cultural nationalism. Alternative approaches have been proposed to overcome the short-sightedness of the two ways outlined above. Criticisms have been formulated from diverse angles. It is not only the oversimplified conflict between the necessity for and rejection of regulation that has been criticised, but also the one-track state- and institution-centred thinking underlying the narratives.

¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 216, The Hague, 14 May 1954.

¹⁷ Lucas Lixinski, 'A Third Way of Thinking about Cultural Property' (2019) 44 *Brooklyn Journal of International Law* 563, 572.

As to the elimination of the obstacles to the free flow of works of art raised by state legislation, it cannot be ignored that Merryman himself qualified his position, acknowledging that 'no thinking person argues for free trade in cultural property'.¹⁸ Regulation is necessary for preserving cultural property and to promote its lawful commerce. The reality is that both source and market countries adopt certain restrictions to the commerce of cultural objects, and the free movement of cultural property remains a somewhat theoretical possibility. The 1954 Hague Convention, deemed to be a manifestation of cultural internationalism, does not primarily address the trade-related aspects of cultural property protection. As such, it is difficult to consider it as a point of departure in a debate about free or regulated art trade. The question is rather where the borderline lies between necessary and excessive regulation. Other authors unequivocally advocate a controlled legal art trade. In this vein, Bauer argues that illegal art trade cannot be entirely excluded, but controlled licit trade contributes to meeting at least part of the demand for cultural goods.¹⁹ The revenues from this licit commerce would enrich source countries and not traffickers. Cultural property appearing in the trade should be widely distributed among states and museums, and state practice should not be reluctant to issue export licences when it is not justified to keep the object in its country of origin.

Others insist on transcending the state- and institution-centred approach inherent in cultural nationalism and internationalism. Lixinski hence claims that binary thinking about cultural property excludes communities who are living in, with or around cultural heritage.²⁰ A third way of thinking about the international governance of cultural property should include communities. Finally, there is also a view that cultural heritage debates are characterised by indeterminacy and cannot be channelled into the duality of cultural nationalism and internationalism.²¹ Addressing such debates is possible if based on a plurality of approaches and by including external factors, such as human rights, into the decision-making process.

To be able to place the EU Import Regulation on the scale of cultural property paradigms, we first have to examine the provisions of the EU Import Regulation in a comparative context. It will be argued that, with the EU Import Regulation, the EU goes beyond the simple protection of cultural goods originating from EU Member States and extends the protection to the cultural heritage of third countries as well. This represents a paradigm shift for EU cultural property legislation, moving away from an

¹⁸ Merryman, 'Cultural Property Internationalism' (n 15) 12.

¹⁹ Alexander A Bauer, 'New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates' (2007) 31 *Fordham International Law Journal* 690, 714–716.

²⁰ Lixinski (n 17) 563.

²¹ Pauno Soirila, 'Indeterminacy in the Cultural Property Restitution Debate' (2022) 28 *International Journal of Cultural Policy* 1, 12–13.

inward-looking legislative approach towards the recognition of the need to protect the cultural heritage of any state.

3 The main rules of the EU Import Regulation

To understand the policy approach of the EU Import Regulation, its provisions must first be put under scrutiny. As a general prohibition clause, Article 3(1) of the EU Import Regulation states that it is prohibited to import those cultural goods listed in Part A of its Annex that were created or discovered in a third country and which were removed illegally from that country. To fall under the rules of the EU Import Regulation, the cultural object must have been created or discovered in a third country. Those works of art which originate from the EU are not covered by the Regulation, even if they are intended to be re-imported after their exportation from the EU at some point in the past.²²

The EU Import Regulation thereafter distinguishes two categories of cultural goods enumerated in two lists in its Annex (Part B and Part C): first, cultural goods, the importation of which is subject to an import licence, and second, those subject to the less demanding requirement of an importer statement.

First, the import of the most endangered cultural goods requires an import licence. Archaeological troves and dismembered elements of artistic or historical monuments or archaeological sites older than 250 years are subject to an import licence independently of their value (Part B of Annex). An application for an import licence must be filed with the competent authority of the Member State where the cultural goods are subject to customs procedures, and the import licence issued is valid throughout the EU. The burden of proof is placed on the importer to demonstrate the lawful export of the cultural goods. The application must be accompanied by supporting documents (export certificate or export licence) proving that the cultural goods were lawfully exported from the country where they were created or discovered or that no export regulation existed in the country concerned.

Second, the importation of the other category of cultural goods, which are deemed to be less in danger, presupposes an importer statement (Part C of Annex). A diverse group of cultural goods belong to this category, provided that they are more than 200 years old and have a value of more than EUR 18,000. The importer statement consists of a declaration by the holder of the goods on the lawfulness of the export from the country where the cultural goods were created or discovered and of the description of the objects.²³ The application for an import licence and the submission of the importer's statement must be made on a standardised template and in the format determined by the Commission and through a

²² Stella Sarapani, 'The Import of Cultural Goods under EU and Greek Law: A Critical Outlook' (2021) 7 *Santander Art and Culture Law Review* 203, 209-210.

²³ EU Import Regulation, Art 5(1).

centralised electronic system, to be established by the Commission under the EU Import Regulation.

Exceptionally, in the case of both the import licence and the importer statement, it suffices to prove alternatively that the cultural goods lawfully left the last country where they had been located for a period of more than five years, provided that the country where the cultural goods were created or discovered cannot be reliably determined or the cultural goods were exported from the country of creation or discovery before 24 April 1972, ie the date of the entry into force of the UNESCO Convention. This provision raises several questions. The EU Import Regulation does not expound what standard is to determine that the source country cannot be 'reliably determined'. The burden of proof is on the holder of the cultural goods. The content of the standard, and thus the conditions and the scope of the above exception, may be established by national courts if an applicant has recourse to these against a decision of the competent authority. Ultimately, the Court of Justice of the European Union may be requested to clarify the content of this exception in a preliminary ruling procedure. The choice of the date of the entry into force of the UNESCO Convention may be justified by the fact that the Convention requires states parties to introduce export certificates in order to demonstrate that the export of cultural property falling under the scope of application of the convention was authorised, and such an export certificate should accompany all items of cultural property exported.²⁴ Nevertheless, the five-year exception rule related to import licences and importer statements may be considered an incentive to ignore the previous unlawful export of the same artefact that took place before 1972. A further problem is when the date of the export cannot be ascertained.²⁵ This is because, first, it is crucial to determine whether export took place before or after 24 April 1972 and, second, because the date of export is the relevant time for establishing the rules applicable to the export of the cultural goods concerned, including whether there was any export legislation in force at all in the country of creation or discovery at the time of the export.

The EU Import Regulation recognises certain exceptions to the requirements on the import licence and the importer statement (eg, returning goods; the import of cultural goods for safekeeping; the temporary admission of cultural goods for the purposes of education, science, conservation, restoration, exhibition, and cooperation between museums). Instead of an import licence, an importer statement is sufficient if the cultural goods are brought to the EU for the purpose of exhibiting them at a commercial art fair; an import licence is required, however, if the goods are intended to be sold thereafter in the EU.

The EU Import Regulation gives Member States some leeway. The consequences of the breach of import rules is determined by the Member

²⁴ UNESCO Convention, Art 6(a).

²⁵ Fitz Gibbon (n 9); Valentin and Rogers (n 10).

States. It is for the Member States to determine what sorts of measures national authorities have to take when there is an attempt to introduce cultural goods exported illegally from other countries to the EU,²⁶ and the penalties.²⁷

At the same time, the EU Import Regulation does not answer certain questions. It does not give guidance on what happens to an object seized by the authorities if it cannot or could not have been imported into the EU. The EU Import Regulation does not regulate the restitution or return of cultural goods.²⁸ This is left to diplomatic channels, as well as to international and domestic legal provisions. Here, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects may have a role for those EU Member States which ratified it.²⁹

Private law effects are not addressed by the EU Import Regulation, including the question of ownership and possible restitution to an owner.³⁰ The EU Import Regulation limits itself to laying down public law rules on the import of cultural goods into the EU and the related administrative procedure. Therefore, the issuance of an import licence does not prove the licit provenance or the ownership of the cultural goods.³¹ Addressing the private law implications of the transactions related to works of art remains a deficiency of EU law.

Although the EU Import Regulation entered into force on 27 June 2019, its most essential provisions will only be applied from a later date.³² The prohibition on the import of illegally exported cultural goods applies from 28 December 2020, while the requirements on the import licence and the importer statement will apply from the date on which the central electronic system becomes operational, or at the latest from 28 June 2025. Regarding the central electronic system, the Commission has recently adopted more detailed provisions in the Implementing Regulation and it must be operational at the latest four years after the entry into force of the first implementing act.³³ Even though the EU Import Regu-

²⁶ EU Import Regulation, Art 3(1); Urbinati (n 6) 67-68.

²⁷ EU Import Regulation, Art 11(1); Urbinati (n 6) 68.

²⁸ European Commission, Fact Sheet, *Questions and Answers on the illegal import of cultural goods used to finance terrorism*. Brussels, 13 July 2017.

²⁹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.

³⁰ European Commission, Commission Staff Working Document, *Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods*, Brussels, SWD(2017) 262 final, 21.

³¹ EU Import Regulation, Art 4(3).

³² EU Import Regulation, Art 16.

³³ EU Import Regulation, Art 9. See also the report of the Commission on the progress of the implementation of the electronic system: Report from the Commission to the European Parliament and the Council pursuant to Article 14(3) of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods Brussels COM(2020) 342 final.

lation has not yet entered into force, its provisions and policy approach have been subject to criticism for various reasons.

4 Critical voices in relation to the EU Import Regulation

Well before its starting date of application, the EU Import Regulation has been subject to much criticism, in particular on the part of the representatives of the art trade. Counterarguments against the solutions of the EU Import Regulation are manifold. First, it is argued that the scope of application of the Regulation has not been appropriately determined. On the one hand, the scope of application is found too broad and has raised objections, primarily from representatives of antiquarian book sellers, that the EU Import Regulation compounds various types of cultural goods without due regard to their particularities.³⁴ On the other hand, the categorisation of the cultural goods covered and the minimum financial threshold set for the cultural goods listed in Part C is criticised for making a difference between important and less important cultural property.³⁵ Accordingly, the Regulation ignores that mass trade in small value goods can cause significant harm to cultural heritage and be a source of income for terrorist organisations. Second, it is stressed that it puts an unnecessary administrative and financial burden on art dealers, especially on small businesses. The import licence and importer system may cause additional costs and delay in conducting deals that may deter dealers from bringing cultural goods into the EU for sale. In particular, the 90-day deadline for deciding on an application for an import licence seems to be too long from the perspective of market players. The extent to which this can be counterbalanced by the supporting measures of the Commission, adequate technical assistance and the provision of information to small and medium-sized enterprises, as envisaged by the EU Import Regulation, is questionable.³⁶ In any case, the Implementing Regulation does not specifically address the situation of small and medium-sized enterprises. Third, sometimes it might be difficult to determine the country of creation or discovery, the export regulations of which should be taken into consideration, the exact date of exportation, and to prove the lawfulness of the earlier exportation(s) of an art object. As such, it is contended that the application of the EU Import Regulation may result in the otherwise lawful legal trade in and the import of cultural goods being restrained if no supporting documents can be provided

³⁴ Eleni Polycarpou, Diana Wierbicki and Amanda A Rottermund, 'Tick Tock: Regulations on the Import of Non-EU-cultural Goods Are Now in Effect. How Will This Affect the International Art Market?' (*Withersworldwide*, 27 June 2019) <<https://www.withersworldwide.com/en-gb/insight/tick-tock-regulations-on-the-import-of-non-eu-cultural-goods-are-now-in-effect-how-will-this-affect-the-international-art-market>> accessed 10 April 2022.

³⁵ Neil Brodie, 'Heart of Confusion? EU Regulation 2019/880 on the Import of Cultural Goods and the Fight against Terrorism' (*Market of Mass Destruction*, 17 January 2020) <<https://marketmassdestruction.com/heart-of-confusion-eu-regulation-2019-880-on-the-import-of-cultural-goods-and-the-fight-against-terrorism/>> accessed 10 April 2022.

³⁶ EU Import Regulation, Recital 28.

by the holder of the goods.³⁷ The EU Import Regulation introduces the presumption of illegality, and the importer has to demonstrate that the export was legal. This indeed causes the problem that if a lawful export took place after 1972 and then the cultural goods were subject to a series of commercial transactions, but there is no available documentation proving the lawfulness of the export (eg because it was not passed to a subsequent purchaser or otherwise disappeared in the meantime), the goods cannot be imported, even though their export had been lawful. Finally, it has been argued that the EU legislature failed to justify the need for the import legislation appropriately, because no evidence had been put forward to demonstrate that trade in looted art objects in the EU is significant or that it really contributes to financing terrorist organisations or money laundering.³⁸ Overall, these factors may have a negative impact on the role and prospects of the EU art market.

The practice related to the EU Import Regulation will demonstrate to what extent this criticism is well founded. However, we have to wait for the time being. Undoubtedly, the EU Import Regulation places an additional burden on importers. This may affect in particular non-professional importers who also have to comply with the provisions of the EU Import Regulation even if they lack expertise. However, the rules of the Regulation encourage importers and buyers to act with due diligence when acquiring a cultural object. Even though the Regulation does not unfold in detail the content of due diligence, its approach seems to be in line with the UNIDROIT Convention in this respect. Under the UNIDROIT Convention, a possessor of a stolen or illegally exported cultural object, who has to return it, is entitled to compensation only if he acted with due diligence when acquiring it.³⁹

In my view, it is premature to conclude that the new rules will either deter the flow of works of art to the EU or stifle the European art market. As will be demonstrated in the next part of this article, several states, including important market countries, such as Switzerland and the US, already now apply certain import controls. No significant fallback was noticed in the art markets concerned due to the introduction of import restrictions. Therefore, it cannot be directly deduced from the existence of import restrictions that the EU art market will shrink. The significance of the rules and policy approach of the EU Import Regulation can be properly evaluated if we consider them in comparison with the legislative solutions of states regulating the import of cultural goods, as well as in the context of the extant EU cultural property protection regime.

³⁷ Valentin and Rogers (n 10).

³⁸ Kate Fitz Gibbon, 'Critical Comments Rain Down on Draft EU Regulations' (*Cultural Property News*, 21 April 2021) <<https://culturalpropertynews.org/critical-comments-rain-down-on-draft-eu-regulations/>> accessed 10 April 2022; Brodie (n 35).

³⁹ UNIDROIT Convention, Arts 4 and 6.

5 The place of the EU Import Regulation from a comparative perspective and in the context of the existing EU cultural property protection regime

The introduction of import restrictions by the EU does not seem unique. There are international, regional and national legal instruments addressing the import of cultural goods that lay down certain restrictions. Moreover, even in the EU, the regulation of the import of cultural property is not entirely untried and the solutions of the EU Import Regulation by and large fit in with the pre-existing regulatory technique of the EU legislature.

5.1 Rules on importation at a comparative glance

First of all, the UNESCO Convention contains some provisions related to the importation of cultural property. It declares that any import effected contrary to the provisions of the convention is illicit.⁴⁰ The UNESCO Convention requires states parties to undertake to prohibit the import of cultural property stolen from a museum or a religious or secular public monument in another state party, provided that such property appears in the inventory of the institution concerned.⁴¹ The country of origin can request the state party where the cultural property is located to take appropriate steps to recover and return any such cultural property.⁴² In the case of a claim for return, an innocent purchaser or a person who has valid title to that property is entitled to just compensation. In the event of risk of pillage of its archaeological or ethnological materials, any state party may call upon other states parties to make joint efforts to take the necessary measures, including the control of imports.⁴³ States parties to the UNESCO Convention must respect the cultural heritage within the territories for the international relations of which they are responsible, and must take all appropriate measures to prohibit and prevent the illicit import of cultural property in such territories.⁴⁴ Finally, states parties undertake, consistent with their laws, to prevent transfers of ownership of cultural property likely to promote the illicit import of such property by all appropriate means.⁴⁵ Although the UNESCO Convention imposes some requirements on states parties in relation to the import of cultural property, it is far from constituting a comprehensive binding import regulation.

The UNIDROIT Convention does not provide for specific import regulations. Instead, it lays down a set of rules for the return of illegally exported cultural objects. Even if this Convention orders the return of

⁴⁰ UNESCO Convention, Art 3.

⁴¹ *ibid*, Art 7b(i).

⁴² *ibid*, Art 7b(ii).

⁴³ *ibid*, Art 9.

⁴⁴ *ibid*, Art 12.

⁴⁵ *ibid*, Art 13(a).

stolen and certain illegally exported cultural objects by their possessor and thereby encourages buyers to act carefully when acquiring and in the given case importing cultural objects, it does not establish any substantive or procedural rule on the introduction of cultural objects from one state to another. The words 'import' and 'importation' do not even appear in the text of the UNIDROIT Convention.

As far as regional-level cultural property protection regulation is concerned, the EU does not stand alone. The San Salvador Convention, adopted in the framework of the OAS, prohibits the importation of cultural property protected by the convention, unless the state owning it authorises its exportation for purposes of promoting knowledge of national cultures.⁴⁶ Additionally, the convention declares that states parties may resort to any measure they consider effective to prevent and curb the unlawful importation of cultural property, as well as measures necessary for the return of such property to the state to which it belongs in the event of its removal.⁴⁷

It must be mentioned that the more recent Nicosia Convention on Offences relating to Cultural Property adopted under the aegis of the Council of Europe, which has not yet entered into force, contains an article on illegal importation. This requires states parties to qualify the intentional importation of movable cultural property as a criminal offence if it constitutes a breach of domestic legislation on the grounds that the cultural property had been stolen, excavated or exported in violation of the law of another state and to impose criminal sanctions in such a case.⁴⁸ This article is, however, subject to reservation. Knowingly acquiring and placing illegally imported cultural property on the market must also be considered a criminal offence.⁴⁹ More generally, the Nicosia Convention also requires states parties to 'introduce import and export control procedures, in accordance with the relevant international instruments, including a system whereby the importation and exportation of movable cultural property are subject to the issuance of specific certificates'.⁵⁰

Some EU Member States provide for restrictions on the import of cultural property from third countries and require a declaration of the import or the presentation of export documentation, while others do not specifically address the importation of cultural goods.⁵¹

Some legislations explicitly prohibit the import of illegally exported cultural goods, in accordance with the applicable international and EU

⁴⁶ San Salvador Convention, Art 3.

⁴⁷ *ibid*, Art 10.

⁴⁸ Council of Europe Convention on Offences relating to Cultural Property, Nicosia, 19 May 2017, Art 5. See also Nicosia Convention, Art 6(2).

⁴⁹ Nicosia Convention, Arts 7–8.

⁵⁰ *ibid*, Art 20(b).

⁵¹ See European Commission, DG Taxud/Deloitte, *Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU*, Final report, June 2017, 84–98.

instruments, without requiring an import licence. The German *Kultur- schutzgesetz* prohibits the import of cultural goods if they are classified as national cultural goods by an EU Member State or a state party to the UNESCO Convention and if they were taken from the territory of such a state in violation of legal provisions on the protection of national cultural goods; if they were removed in breach of an EU regulation; or if they were taken contrary to the First Protocol of the 1954 Hague Convention.⁵² The importer has to demonstrate that export from the country of origin was legal by presenting an export licence or other confirmation by the country of origin.⁵³ Similarly, Austrian legislation prohibits the importation of cultural goods illegally exported from an EU Member State or a state party to the UNESCO Convention if their removal would also be illegal at the time of importation to Austria.⁵⁴ Greece requires a declaration by the importer and that the cultural goods concerned are subject to inspection as far as their origin is concerned.⁵⁵ In Italy, upon the transport or import of cultural goods from EU Member States and third countries respectively, at the importer's request, a certificate is issued on the basis of documentation that is appropriate to identify the goods and to prove the origin of the goods from the territory of the Member State or the third country from which they were transported or imported.⁵⁶ It must be noted, however, that even in Member States regulating import, the subject matter scope of application of import restrictions, ie the objects covered, differ.

Countries outside the EU have also adopted specific import regulations related to cultural property. The US and Switzerland, two states parties to the UNESCO Convention, make the imposition of import restrictions conditional upon an international agreement with the source country. The US implemented the UNESCO Convention by means of the Convention on Cultural Property Implementation Act (CPIA), which addresses import restrictions, too.⁵⁷ By virtue of the CPIA, import restrictions may not be imposed generally on the importation of cultural property, but only regarding archaeological or ethnological material.⁵⁸ The CPIA covers only objects of archaeological interest with a minimum age limit of 250 years.⁵⁹ The CPIA authorises the US president to conclude international agreements with other states parties to the UNESCO Convention with the aim of restricting the import to the US of archaeological or eth-

⁵² Kulturgutschutzgesetz vom 31. Juli 2016 (BGBl I S 1914), § 28.

⁵³ Kulturschutzgesetz, § 30.

⁵⁴ Bundesgesetz über die Rückgabe unrechtmäßig verbrachter Kulturgüter, BGBl I Nr 19/2016, § 4.

⁵⁵ Law No 3028/2002 on the protection of antiquities and cultural heritage in general; Sarapani (n 22) 218–222.

⁵⁶ Codice dei beni culturali e del paesaggio, Art 72.

⁵⁷ Convention on Cultural Property Implementation Act (CPIA) 19 USC §§ 2601-13. Patty Gerstenblith, 'The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects' (2016) 64 United States Attorney's Bulletin 5, 9-13.

⁵⁸ Gerstenblith (n 57) 10.

⁵⁹ 19 USC § 2601(2)(C)(i)(II).

nological material from the other state.⁶⁰ If the US president determines that an emergency condition applies with respect to any archaeological or ethnological material of any state party, the president may apply import restrictions to such material, even in the absence of a bilateral agreement.⁶¹ The designated archaeological or ethnological material can only be imported to the US if certificates demonstrate that export from the other state party was legal. More specifically, the 1972 Pre-Columbian Act also prohibits the importation of listed pre-Columbian monumental or architectural sculptures and murals without an export certificate from the country of origin.⁶²

Under the Swiss *Kulturgütertransfersgesetz*,⁶³ import restrictions apply to cultural goods when they are provided for by an international agreement concluded between Switzerland and another UNESCO Convention state party. Such an international agreement can be entered into provided that the object of the agreement is a cultural object of crucial significance for the cultural heritage of the contracting state concerned; the cultural object is subject to export provisions on the protection of cultural heritage of the contracting state concerned; and reciprocity is ensured.⁶⁴ In order to prevent from further damage another state's cultural heritage that is endangered due to extraordinary circumstances, importation can either be permitted, made subject to conditions, or restricted or prohibited for a determined period of time.⁶⁵ An action for the return of illegally imported cultural goods may be brought by the state from which the cultural goods were illegally exported under the *Kulturgütertransfersgesetz*, provided that the claimant state demonstrates that the cultural goods have crucial significance for its cultural heritage and were illegally imported.⁶⁶ The state claim for return may be initiated within one year from the date when the authorities of the claimant state became aware of the location of the cultural goods and of the person who possesses them but at the latest within 30 years of the illegal exportation of the cultural goods.⁶⁷ However, a good faith possessor is entitled to compensation, to be paid by the claiming state, in the event of return.⁶⁸ It must be noted that although the US and Swiss laws specify rules on importation and address the consequences of illegal import, a strong freezing effect was not demonstrated on the US and Swiss art markets due to the operation of these rules.

⁶⁰ *ibid.*, § 2602.

⁶¹ *ibid.*, § 2603.

⁶² *ibid.*, § 2091.

⁶³ Bundesgesetz über den internationalen Kulturgütertransfer (*Kulturgütertransfersgesetz*, KGTG) vom 20. Juni 2003.

⁶⁴ *Kulturgütertransfersgesetz*, Art 7.

⁶⁵ *Kulturgütertransfersgesetz*, Art 8.

⁶⁶ *ibid.*, Art 9(1).

⁶⁷ *ibid.*, Art 9(4).

⁶⁸ *ibid.*, Art 9(5)-(6).

It is to be noted that certain national laws are not limited to establishing public law rules on the import of cultural property, but also address the private law effects of illegal importation. In this sense, they go clearly beyond the EU Import Regulation. Some impose an obligation on market actors not to place illegally imported cultural goods on the market or transfer such property, and the breach of this obligation results in the nullity of the underlying contracts.⁶⁹ The Swiss *Kulturgütertransfergesetz* even imposes an obligation on persons active in the art trade and auction business to provide information to their customers regarding the import and export regulations of states parties to the 1970 UNESCO Convention.⁷⁰

5.2 The EU Import Regulation and the existing EU cultural property protection regime

Even at the EU level, the EU Import Regulation is not without precedent and its solutions fit very well with the already existing EU legal provisions on the protection of cultural goods.

First, Articles 28-30 and 34-36 TFEU,⁷¹ as well as Directive 2014/60/EU,⁷² addressed intra-EU trade, while Regulation 116/2009/EC (EU Export Regulation) deals with the export of cultural goods from the EU.⁷³ The fact that the cultural goods of EU Member States were already protected by the EU Export Regulation and Directive 2014/60/EU is why the EU Import Regulation does not apply to cultural goods created or discovered in the territory of the EU.⁷⁴ Although the specific cultural property legislation of the EU did not previously address the import of cultural property from third countries in a comprehensive way, two regulations were adopted, which also introduced import restrictions, to protect cultural property originating from Iraq and Syria. Regulation 1210/2003/EC concerning certain specific restrictions on economic and financial relations with Iraq (Iraqi Sanctions Regulation)⁷⁵ and Regulation 36/2012/EU concerning restrictive measures in view of the situation in Syria (Syri-

⁶⁹ See in Germany: Kulturgutschutzgesetz, § 40, and in Switzerland: Kulturgütertransfergesetz, Art 16.

⁷⁰ Kulturgütertransfergesetz, Art 16(2)(b).

⁷¹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

⁷² Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) [2014] OJ L159/1.

⁷³ Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods [2009] OJ L39/1.

⁷⁴ EU Import Regulation, Art 1(2).

⁷⁵ Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96 [2003] OJ L169/6.

an Sanctions Regulation)⁷⁶ already introduced import restrictions regarding cultural property originating from Iraq and Syria. Although these regulations are not specific cultural property regulations, they contain rules on its protection. As they are part of sanctions regimes, they are applied temporarily, while the sanctions regulations concerned remain applicable. The import of or introduction to the territory of the EU, as well as dealing in Iraqi cultural property illegally removed from Iraq, is prohibited by the Iraqi Sanctions Regulation. Similarly, the import of and the provision of brokering services related to Syrian cultural property are prohibited by the Syrian Sanctions Regulation, where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law. The Iraqi and Syrian Sanctions Regulations cover objects listed in their annexes. The list of these objects corresponds to the list contained in Annex I of the EU Export Regulation. Unlike the EU Import Regulation, the Iraqi and the Syrian Sanctions Regulations do not apply a reversed burden of proof.⁷⁷ It is for the authorities of the Member States to establish that the cultural goods originate from Iraq or Syria.⁷⁸ Cultural objects have been seized under the two regulations in only a few cases.⁷⁹

Second, the language of the EU Import Regulation is not new. The Iraqi Sanctions Regulation uses the notions of 'cultural property' and 'cultural items'; the Syrian Sanctions Regulation refers to 'cultural property goods'; Directive 2014/60/EU makes reference to 'cultural objects'; the EU Export Regulation refers to 'cultural goods' as the subject matter of the regulation and the EU Import Regulation does the same. Although the terminology of EU law is not entirely consistent, the use of the concept of 'cultural goods' in the EU Export and Import Regulations suggests that although culture is not in the competence of the EU, trade in works of art involves 'goods' that trigger the application of the provisions on free movement of goods within the EU and the rules of the common commercial policy in relation to third countries.

Third, the way of determining the material scope of application of the EU Import Regulation and, more specifically, the cultural goods covered, does not differ substantially. The previous EU regulations used a similar technique: the listing of cultural goods in an annex, taking their age and a financial threshold into account. The minimum 250 years age limit for cultural goods subject to an import licence corresponds to the criterion

⁷⁶ Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 [2012] OJ L16/1.

⁷⁷ European Commission, DG Taxud/Deloitte, *Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU* (n 51) 104.

⁷⁸ *ibid.*, 104.

⁷⁹ *ibid.*, 100–102.

applied by the US CPIA.⁸⁰ Although there are overlaps in the cultural goods falling under the scope of application of the EU Export and EU Import Regulation, their lists are not fully identical.⁸¹ The cultural goods listed in the EU Import Regulation correspond instead to the list of the 1970 UNESCO Convention and the UNIDROIT Convention.

Fourth, the legal basis of the EU Import Regulation is Article 207(2) TFEU, ie the commercial policy competence. The same legal basis was used for the EU Export Regulation, the relatively laconic recital of which simply states that common rules on trade with third countries are necessary for the protection of cultural goods, and for the maintenance of the internal market.⁸² At the same time, in Article 114 TFEU, the internal market legal basis was relied on regarding Directive 2014/60/EU. The selection of treaty articles that constitute a legal basis for regulating extra- or intra-EU commerce may indicate that the international art trade is considered a commercial issue, although it can also be explained by the fact that the EU has only supporting competence in the field of culture.⁸³

Taking all the above into account, one could even draw the conclusion that the EU Import Regulation uses previously existing concepts, regulatory techniques and policy approach. However, this is not entirely the case. This is because the EU Import Regulation brings certain major changes, both at the level of the rules and in its regulatory approach.

6 The addition of rules of the EU Import Regulation

Why can it be said that that the new EU Import Regulation is more than a restatement of pre-existing international or domestic cultural property import regimes? First of all, importers could profit from the divergence of legal systems. The differences between the import regimes of the Member States can result in the avoidance of the stricter import legislation of some Member States and can direct the flow of the art trade to those Member States with no or more lenient import rules, giving rise to 'port-shopping'. Once the cultural goods are in the territory of a Member State, they can benefit from the free movement of goods within the EU internal market. A clear addition of the EU Import Regulation is that it levels off the differences between national rules on importing cultural goods, providing uniform rules and preventing 'port shopping'.

As is well known, the application of the UNESCO Convention is dependent on implementation by the states parties. Of the Member States of the EU, two, Ireland and Malta, did not even ratify the UNESCO Convention and those that are parties to the UNESCO Convention have im-

⁸⁰ European Commission, Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods, Brussels, SWD(2017) 262 final, 27.

⁸¹ Urbinati (n 6) 61.

⁸² EU Export Regulation, Recital (2).

⁸³ Art 6(c) TFEU.

plemented it in different ways. Previously, importing cultural goods to the territory of the Member States belonged to the competence of individual Member States, which left room for divergent regulations.⁸⁴

In comparison to the UNESCO Convention, the scope of application of the EU Import Regulation is broader. It covers not only the treatment of cultural goods exported from states parties to the UNESCO Convention, but also from any other state. The EU Import Regulation overcomes a twofold problem to a large extent. On the one hand, the export restrictions of the source countries are very often not respected outside their territories and become simply unenforceable. The EU Import Regulation recognises the export legislation of any state and sanctions its violation. Furthermore, the regime of import licences and importer statements is founded on the recognition of the export legislation of the source country. As importation presupposes the existence of an export licence or export documentation from the country where the cultural goods were created or discovered, the EU approach also involves the recognition of such documents. One of the pillars of the EU cultural property protection regime has been mutual trust between the Member States.⁸⁵ The EU Import Regulation unilaterally puts trust in third countries, more precisely in the export legislation of third countries and their authorities issuing export certificates and other documents. On the other hand, the UNESCO Convention had already been criticised for providing blanket rules for state parties to designate broadly protected cultural property and restrict its export, and forcing other states to recognise and enforce those foreign export restrictions.⁸⁶ The same has been repeated in relation to the EU Import Regulation and it also stressed that it is done without reciprocity in the relationship with third countries.⁸⁷ However, it is to be noted that, under the EU regime, only the import of cultural goods specified by the EU Import Regulation is subject to restrictions, not all goods that were perhaps arbitrarily designated by the source country for protection.

A shortcoming of the international regimes is that they rely on state consent and implementation that sometimes fails or is incomplete.⁸⁸ The EU Import Regulation is directly applicable in the Member States and as such it gives less room to manoeuvre to the Member States. Some flexibility is recognised, for instance regarding the measures to be taken by national authorities when cultural goods are intended to be introduced illegally⁸⁹ and the penalties to be imposed in the event of the breach of the

⁸⁴ See EU Import Regulation, Recital (4).

⁸⁵ See Directive 2014/60/EU, Recital (10); Michele Graziadei and Barbara Pasa, 'Patrimoni culturali, tesori nazionali: il protezionismo degli Stati membri dell'UE nella circolazione dei beni culturali' (2017) 22 *Contratto impresa/Europa* 121, 131.

⁸⁶ Merryman, 'Two Ways of Thinking About Cultural Property' (n 15) 844-845.

⁸⁷ Valentin and Rogers (n 10).

⁸⁸ See MacKenzie-Gray Scott (n 3) 229.

⁸⁹ EU Import Regulation, Art 3(1).

rules of the EU Import Regulation.⁹⁰ This does not alter, however, the aim of the new rules, to ensure that the ‘imports of cultural goods are subject to uniform controls’ in the EU.⁹¹

7 A paradigm shift in EU cultural property legislation?

It can be argued that the EU Import Regulation does not simply introduce various new elements in regulating the import of cultural property, but heralds a new age for EU cultural property legislation. A deeper analysis of the EU Import Regulation may allow the conclusion that a paradigm shift, or at least a significant policy change, is taking place in EU cultural property law.

The justification of the Regulation already suggests a policy change. As set out above, the commercial policy competence was selected as a legal basis by the EU legislature. The choice of the legal basis and the explanation of the need for the EU Import Regulation in the recitals are not entirely in line with each other. This discrepancy already indicates a slight policy shift. The overall objective of the EU has been to create an internal market, free from the illicit trafficking of cultural objects. However, quite interestingly, the very first recital of the EU Import Regulation does not deal much with the significance of the new regulation for the art trade or common commercial interests, but underlines its importance from the point of view of preventing the financing of terrorism and related money laundering. Instead of a commerce-centred approach, the Regulation makes clear that it ‘should take into account regional and local characteristics of peoples and territories, rather than the market value of cultural goods’.⁹² It is also interesting to note that Article 3(7) of the EU Import Regulation acknowledges that the restrictions introduced by the Regulation (import licence and importer statement) do not affect other measures adopted by the EU in accordance with Article 215 TFEU. Article 215 provides a legal basis for imposing economic sanctions by the EU against natural or legal persons and groups or non-state entities. The reference reveals that similar trade restricting measures could be adopted under Article 215 TFEU, a legal basis upon which counterterrorist measures may also be rested. It is no coincidence that the same legal basis was used by the Iraqi⁹³ and Syrian Sanctions Regulations.

It is telling that the proposal for the EU Import Regulation was put forward in the framework of the Commission Action Plan for Strengthening the Fight against Terrorist Financing. This approach can, however, be contrasted by reports – mainly relied on by art dealer representatives

⁹⁰ *ibid*, Art 11.

⁹¹ *ibid*, Recital (4).

⁹² EU Import Regulation, Recital (2).

⁹³ The Iraqi Sanctions Regulation refers to Articles 60 and 301 of the EC Treaty, Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community [2002] OJ C325/1.

– that no evidence may be found for significant illegal art trade generated by terrorist organisations and thereby for money-laundering and financing terrorism.⁹⁴ Indeed, a report ordered by the European Commission refers to terrorist financing as an effect of trafficking in cultural goods mentioned in the literature.⁹⁵ At the same time, the report acknowledges that ‘hard evidence on the existence of these effects is currently often lacking’ and the survey conducted does not demonstrate any available evidence of the financing of terrorist activities related to the illicit art trade.⁹⁶

Nevertheless, the approach of the EU is not self-standing. The United Nations Security Council (UNSC) took, as a point of departure in its Resolution 2199(2015), ‘that ISIL, ANF 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’⁹⁷ and then it required the UN member states to take appropriate measures to prevent the trade in Iraqi and Syrian cultural property.⁹⁸ The need for taking measures by UN member states to fight against the illicit trade in Iraqi and Syrian cultural property was also confirmed by UNSC Resolution 2253(2015).⁹⁹ The UNSC adopted Resolution 2347(2017), in which it requested UN member states to take appropriate steps to prevent and counter the illicit trade and trafficking in cultural property originating from a context of armed conflict, notably from terrorist groups, including by prohibiting cross-border trade in such illicit items where States have a reasonable suspicion that the items originate from such a context, and which lack clearly documented and certified provenance, thereby allowing for their eventual safe return.¹⁰⁰ Additionally, it called upon UN members to cooperate in investigations, prosecutions, seizure and confiscation, as well as the return, restitution or repatriation of illicitly exported or imported cultural property.¹⁰¹ Similarly, it urged UN member states, in order to prevent and counter trafficking in cultural property illegally appropriated and exported in the context of armed conflicts, notably by terrorist

⁹⁴ Fitz Gibbon (n 9); see also Kristin Hausler, ‘The EU Approach to Cultural Heritage in Conflict and Crisis: An Elephant in the Room?’ (2021) 7 *Santander Art and Culture Law Review* 193, 197.

⁹⁵ European Commission (n 51) 120; Macquisten (n 12).

⁹⁶ European Commission (n 51) 120.

⁹⁷ UNSC Resolution 2199 (2015) S/RES/2199 (2015), para 16.

⁹⁸ *ibid.*, para 17.

⁹⁹ UNSC Resolution 2253 (2015) S/RES/2253 (2015).

¹⁰⁰ UNSC Resolution 2347 (2017), S/RES/2347 (2017), para 8. See Hans-Jakob Schindler and Frederique Gautier, ‘Looting and Smuggling of Artifacts as a Strategy to Finance Terrorism Global Sanctions as a Disruptive and Preventive Tool’ (2019) 26 *International Journal of Cultural Property* 331.

¹⁰¹ UNSC Resolution 2347 (2017), S/RES/2347 (2017), para 12.

groups, to adopt adequate and effective regulations on import.¹⁰² It may be noted that the Iraqi Sanctions Regulation explicitly refers to the relevant UNSC resolution.¹⁰³ The 2007 Taormina summit of the G7 stated that cultural 'property is a source of financing for activities of terrorist groups and organizations'.¹⁰⁴ The World Customs Organization adopted a resolution on the role of customs in preventing the illicit trafficking of cultural objects. The measures considered by the resolution were partly justified by the existence of 'linkages between illicit trafficking in cultural objects, money laundering, other criminal activities and possibly terrorism'.¹⁰⁵ Embedded in such developments, the reference to the prevention of financing terrorism and money-laundering in the EU Import Regulation demonstrates the global focus of the EU cultural property protection regime.

The UNESCO Convention and the approach of the 1970s and 1980s were considered by Merryman as the age of cultural nationalism, since countries focused only on safeguarding their cultural property located in or originating from their own territories and hindering the international art trade with a broad application of export restrictions.¹⁰⁶ At a regional level, however, the EU seems to follow a different path.

A clear policy change may be noticed regarding the EU cultural property legislation. For a long time, EU law focused primarily on the protection of the national treasures of the Member States in accordance with Article 36 TFEU and safeguarding Europe's cultural heritage as indicated in Article 3(3) TEU. Similarly, Article 167 TFEU mentions the common cultural heritage and cultural heritage of European significance, in addition to the need to respect national and regional differences. As to the trade with third countries, EU cultural property legislation has addressed the export of cultural goods from the EU. This approach simply gave cultural nationalism a broader regional dimension.

This approach was changed first by the Iraqi and Syrian Sanctions Regulations. The Iraqi Sanctions Regulation and the Syrian Sanctions Regulation undoubtedly brought a change in EU policy towards cultural property. First of all, they were the first EU measures introducing import restrictions related to cultural property. Second, they went beyond the protection of the cultural heritage of EU Member States and extended the protection to cultural property originating from these two countries.

These characteristics of the two regulations are shared by the EU Import Regulation. The change initiated by the Iraqi and Syrian Sanc-

¹⁰² *ibid.*, para 17(b).

¹⁰³ UNSC Resolution 1483 (2003), S/RES/1483 (2003).

¹⁰⁴ G7 Taormina Statement on the Fight Against Terrorism and Violent Extremism, para 12.

¹⁰⁵ Resolution of the Customs Co-operation Council on the role of customs in preventing illicit trafficking of cultural objects, Brussels, July 2016.

¹⁰⁶ Merryman, 'Two Ways of Thinking About Cultural Property' (n 15) 850; Merryman, 'Cultural Property Internationalism' (n 15) 22.

tions Regulations has thus been crowned by the EU Import Regulation. The sanction measures covered cultural goods from these two states, but not from other countries equally afflicted by war or an unstable political situation.¹⁰⁷ The extension of the territorial scope of the protection is crucial, because the application of the *ad hoc* sanctions regulations could be circumvented by falsifying the origin of the cultural goods.¹⁰⁸ The traffic in and importation of artefacts from Syria and Iraq to the EU was possible by falsely claiming that the objects originated in other countries, such as Turkey, Jordan or Lebanon.¹⁰⁹

The EU Import Regulation generalises the protection of cultural goods without specifying the countries of origin concerned to the extent that the country of origin accords protection regarding the export of the cultural goods. As such, the EU Import Regulation protects the cultural heritage of all countries of the world. An introverted regional perspective opened up gradually and turned into a global point of view guarding the protection of cultural heritage. The change in the approach of legal regulation is completed by further EU actions that promote the protection of the cultural heritage in third countries. In particular, the EU lent funding in cooperation with UNESCO to projects for safeguarding the cultural heritage in third countries, such as Mali and Ethiopia.¹¹⁰

Where can the EU cultural property protection regime – now completed by the EU Import Regulation – be located in the spectrum of cultural nationalism and cultural internationalism?

As we saw earlier, the soundness of the traditional paradigms elaborated by Merryman in the 1980s has been called into question in the legal literature. The EU Import Regulation clearly goes beyond the approach of cultural nationalism, since its aspiration is not simply the protection of the cultural objects of the EU Member States. With its legislative act, the EU also wants to safeguard cultural goods originating from outside the EU. At the same time, the EU Import Regulation does not correspond to the internationalist idea of the freest possible trade in cultural objects either. Introducing import restrictions, paying heed to the export restrictions of other countries, squarely implies an assumption that limitations to their free trade are necessary to safeguard the cultural heritage.

Instead, the EU Import Regulation transcends the commonly accepted binarity of cultural nationalism and internationalism. It takes over certain elements from both. The EU legislative approach has an internationalist vision, to the extent it aims at not only the protection of the cultural goods of the EU Member States, but also those of third countries.

¹⁰⁷ European Commission (n 51) 104.

¹⁰⁸ Sarapani (n 22) 208.

¹⁰⁹ See Neil Brodie, 'Syria and Its Regional Neighbors: A Case of Cultural Property Protection Policy Failure?' (2015) 22 *International Journal of Cultural Property* 317, 323.

¹¹⁰ European Commission, Mapping of Cultural Heritage actions in European Union policies, programmes and activities (August 2017) 38.

The goods covered by the EU Import and Export Regulation to a large extent overlap. The EU Export Regulation not only protects cultural goods of the Member States, but its protection extends equally to cultural goods from third countries in free circulation in the EU that are intended to be exported. By nature, the EU Import Regulation aims at protecting foreign cultural goods. The completed regime is protective both towards the cultural goods of the Member States as well as those of third countries treating cultural goods as part of the common cultural heritage. This gives rise to a symmetry in the protection of cultural heritage, irrespective of whether it originates from the EU or from a third country. The EU regime clearly represents a paradigm shift, from cultural nationalism towards a balanced vision that avoids the self-centredness of cultural nationalism. At the same time, it does not ignore the need for regulation to safeguard cultural heritage by imposing certain restraints on the art trade, and the import restrictions are to a large extent determined with due regard to the export legislation of the states where the cultural objects appearing in the trade were created or discovered.

8 Conclusions

The EU cultural property protection regime, which previously focused on cultural goods originating from the EU Member States and which elevated cultural nationalism to a regional level, is now completed by the EU Import Regulation. With the EU Import Regulation, the EU legislature continues to acknowledge the need for a regulated art trade and imposes certain obligations on importers, including the requirement to obtain an import licence or for an importer statement, depending on the characteristics of the cultural goods. The rules and regulatory techniques of the new regulation are, however, not entirely new. Import restrictions are not unknown in the world of the art trade. Instead, the peculiarity of the EU cultural property legislation is that, following a global vision, it provides equal and symmetric protection for cultural goods originating from the EU and for those from third countries, thanks to the introduction of the EU Import Regulation enshrining the common cultural heritage, irrespective of its origin. In this way, the EU legislature seems to pursue an approach that transcends the extremes of both cultural nationalism and cultural internationalism.



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