

Recent Legislation Projects for Import restrictions

The questionable weapon of choice against trafficking of cultural property

By Lucie Lambrecht and Zacharias Mawick

Amidst hot talks and discussions about US import tariffs and looming trade wars, one might lose sight of the wave of well-intentioned but politically highly controversial legislation projects to fight illicit trafficking of cultural goods - Nicosia Convention, EU Imports Regulation, Implementation of UNESCO 1970 and domestic projects such as the German Cultural Property Protection Act – which the art market and especially collectors are currently facing. These multiple layers of legislation leave a lot to be desired. Diverging terminology and conflicting scopes of application are potentially leading to legal uncertainty resulting in yet another encumbrance for the art market at best and chaos at worst. The future will show if these sacrifices are truly worth the effort to fight this type of art related crime.

In the context of recent wars at the borders of Europe – especially the devastating civil wars in Syria and Iraq come to mind – law and decision makers' attention has been drawn to the possible connection between illicit trafficking of cultural property and the financing of terrorism involved in this conflict. Furthermore, diplomatic pressure of numerous origin countries such as Egypt, Iran and Ibero-American countries - rich in cultural goods but vulnerable when it comes to its protection – encouraged industrial nations to reinforce their efforts to protect and return cultural property that ended up on their territory.¹ Much has been said and written about the *raison d'être* of this approach. Particularly players of the art market questioned the much stressed connection between illicit trafficking of cultural property and financing of terrorism.² The impact which severe export and import regulations might have on art market, collectors and therefore on the free circulation of cultural goods, which should be considered in the context not only of terrorism and illicit trafficking, but also of cultural exchange and cooperation, does not seem easily justifiable against this background.

Apart from the mainly political discussion about whether or not the planned import regulations are necessary, there is another side to this problem which is of a more technical nature. Within the context described above, legislative actions on different institutional levels

¹ Bericht der Bundesregierung zum Kulturgüterschutz in Deutschland (Report of the Federal Government of Germany concerning the Protection of Cultural Property in Germany.) p.5.; https://m.bundesregierung.de/Content/Infomaterial/BPA/BKM/2013-08-12--bericht-kulturgutschutz.pdf;jsessionid=CF65480307D1D4D79A59FA29D4E2C23D.s6t1?_blob=publicationFile&v=8.

² See also the Position Paper to the EC Proposal on Regulation of the Import of Cultural Goods into the European Union by The European Coalition of Art Market Organisations.

have been initiated, which may have in mind the same goal of terrorism prevention or at least the fight against illicit trafficking of cultural property, but do differ immensely in their scope of application and general conception.

Among many incongruences, two main problems caught our attention.

Firstly, the question of the material scope of application, raised by the diverging definitions of cultural goods (1) and, secondly, the territorial scope of application, depending on the respective source of legal instrument (2).

(1) Diverging definitions of cultural property

The scope of application of the restrictive importation provisions established on national, European and international level is connected to the respective definitions of cultural property. The widest definition of cultural property is used by the UNESCO 1970 Convention on Illicit Traffic³, which offers a twofold approach by defining on the one hand what is considered cultural property in general, for example by adding the decisive element of importance to the definition, and on the other hand by drawing on the respective origin country's designation of cultural property.⁴ This flexible but also unpractically wide definition of cultural property is also adopted in the context of the Council of Europe Convention on Offences relating to Cultural Property, agreed on 19 May 2017 in Nicosia,⁵ which *inter alia* requires the ratifying member states to establish criminal provisions for the illegal importation to reinforce measures taken by the exporting or origin countries.⁶

The Proposal for a Regulation on the Import of Cultural Property into the EU⁷, on the other hand, has a much narrower definition of cultural property. For example, it establishes a threshold connected to the age of the respective object which in the current proposal is set at 250 years but is still a matter of serious discussion by representatives of the Committee on International Trade and the Committee on the Internal Market and Consumer Protection of

³ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – 1970. In the following: „UNESCO 1970“.

⁴ Patrick O’Keeffe: Commentary on the UNESCO 1970 Convention on Illicit Traffic. Leicester 2000, p.35.

⁵ In the following: „The Nicosia Convention“.

⁶ Compare (i) as regards the definition of cultural property: art. 2 of the Nicosia Convention and (ii) as regards import regulations art. 5 of the Nicosia Convention.

⁷ In the following: „The EU Imports Regulation“.

the European Parliament.⁸ How old an object has to be in the end to enjoy the protection of the EU Imports Regulation is not yet foreseeable. If, as seems likely, some kind of threshold will be established, the scope of application of the EU Imports Regulation risks to conflict with both the Nicosia Convention and UNESCO 1970. Neither does establish such a threshold.

(2) Intra-or interstate application

The EU Imports Regulation will only be applicable to importation from outside the EU into the EU, while UNESCO 1970 and the Nicosia Convention are directed at each signing state individually and not to the EU-territory as an entity. In practice, this would mean that EU member states which are also parties to these two treaties would be obliged to both act according to the EU Imports Regulation and establish separate or parallel legislation that meets the requirements of these treaties, regulating imports from one EU member state to another. A twofold legislation with potentially different standards of protection for EU member states that also ratified UNESCO 1970 and the Nicosia Convention and those who did not ratify those conventions would be the result.

In addition, some EU countries already established legislation with special provisions concerning the importation of illegally exported cultural goods. For example, the German Kulturgutschutzgesetz (Cultural Property Protection Act of 31. July 2016),⁹ with yet another definition of cultural property,¹⁰ establishes import regulations that anticipated what was later agreed on within the context of the Nicosia Convention, but based on a different definition of cultural property leading to a narrower scope of application.¹¹ Should Germany intend to sign the Nicosia Convention, the still young German KGSG might already be subject of reformation.¹²

⁸ For the proposed threshold of 250 years see art. 2.1. (aa), which refers to the annex of the Proposals for the EU Imports Regulation in its version of 15 December 2017. For the ongoing discussion about the threshold see Amendments 39 – 380 of the Draft Report on the Proposal.

⁹ In the following KGSG

¹⁰ Compare Section 6 of the Cultural Property Protection Act.

¹¹ Presse und Informationsamt der Bundesregierung: „Europarat beschließt neue Konvention gegen Zerstörung und illegalen Handel von Kulturgut.“ Press release of 03.08.2017.

<https://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2017/08/2017-08-03-bkm-kulturgutschutzgesetz.html> .

¹² As has already been detected in the context of the EU Import Regulation, compare Schulz, Bernhard: "Das Gerangel geht weiter. Bernhard Schulz über die neue EU-Regelung zur Einfuhr von Kulturgütern", in: *Die Kunstzeitung*, June 2018, p. 6.

Belgium, which ratified UNESCO 1970 in 2009, is still in the process of its implementation and might still avoid this undesirable scenario. Against the background of the Proposal for the EU Imports Regulation we are tempted to caution the competent legislative authorities against taking further steps in the implementing legislative process without considering a way to overcome the incongruences between the various European and international initiatives. While multiple layers of legal provisions should be manageable from a legal point of view, the increasing complexity and hence growing legal uncertainty in practice will no doubt have adverse consequences for the art market and turn the backs of art collectors. Even if it is arguably necessary to strictly regulate the import of cultural property, the EU and its member states as well as international organisations should at any rate be encouraged to rethink and better coordinate their legislative projects to avoid at least the additional administrative and economic burden for the art market triggered by an - unnecessary - legal uncertainty.

Considering these rather bumpy attempts to fight the illegal trafficking of cultural goods, law and decision makers may have to permit the question in the following years, how they are planning to achieve this ambitious goal by the means of laws which are too unpractical to be widely used in practice. In the end, success and failure of a law depends on its practicality and acceptance – even more so in an ambit as difficult to control as the circulation of cultural goods.