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The Reform of Italian Law on Cultural Property Export and Its Implications for the "Definitional Debate":
Closing the Gap with the European Union Approach or Cosmetics? Some Systemic Considerations from a Criminal Law Perspective

Abstract: Italy has a long tradition of pervasive regulation of its national cultural heritage, including strict control over the export of cultural objects. In contrast to the lack of a definition of "national treasures" which affects EU law, Italian law has striven to achieve an effective definition of the terms "cultural heritage" and "cultural property", and even more to design specific identification rules for cultural objects. Nonetheless, the issues of definition and related protection on the one hand, and identification on the other, do not always go hand in hand in a legal framework which is made even more complex by the coexistence of two separate models of criminal law protection, as well as by the frequency of reforms, the most

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recent of which directly affected the export of cultural property. So how has the legal definition of "cultural property" changed over the years within the Italian legislation? How do the peculiarities in the construction of criminal offences "muddle" the overall picture? How much has the 2017 reform affected said definition? Finally, the question arises whether and how all this will possibly impact the gap between national and EU approaches to cultural "goods". These issues are the main focus of this article.

Keywords: cultural heritage law, criminal law, Italian and EU law, legal definitions of cultural property, cultural property export

The Genesis of Italian and EU Laws on "Cultural Heritage" and "National Treasures" and Their Clash

Introduction

This article analyses the current Italian law on cultural heritage and cultural property in the broader framework of the European Union (EU) regulation of the circulation of "national treasures", with a specific focus on export restrictions. To this effect, it is important to acknowledge the very different history and "genetics" of these two legal systems, which we thus try to summarize in the following sections. To appreciate how difficult it can be to reach a working balance between these two different approaches, and even more between the Italian protectionist legal tradition and the more liberal approach of other EU countries with stronger art and antiquities markets, the article not only provides an outline of the most recent evolution of Italian administrative law towards a slightly more market-oriented attitude, but also matches it against the main – and still basically unchanged – symbolic "stronghold" of legal protectionism, i.e. the complex set of criminal law offences which (at least on paper, even if not always effectively in practice) guard the Italian cultural heritage. Our efforts thus focus on highlighting some deeply rooted constants, as well as some troubling inconsistencies, within the Italian public law framework on cultural property, in order to make a critical evaluation of the most recent reform of Italian export rules and of their realistic potential for better prevention of cultural property trafficking (a criminal phenomenon which continues to greatly affect Italy).

The roots of Italian cultural heritage law

Italy's history of legislative protection of its cultural heritage long predates the existence of the European Community and even of a unified political entity in

Italy, as many Italian States possessed some kind of cultural heritage law, starting in the 17th century with the Papal States.[1] Following the proclamation of the Kingdom of Italy in 1861, a complex process of coordination and rationalization began,[2] which culminated in the adoption of Law No. 364 of 20 June 1909 (*Legge Rosadi*),[3] the first really comprehensive Italian law on "movable or immovable things" with an "historical, archaeological, paleoanthropological or artistic interest" (Article 1).

L. 364/1909 affirmed a general principle of the inalienability of cultural property in the ownership of the State, other public bodies, or juridical persons (Article 2), and a blanket public ownership rule for *all* archaeological findings (Article 15). It also provided for strict limitations on the export of cultural objects (Articles 8-10). At the same time, L. 364/1909 provided for a "contemporary art exception", establishing that "buildings or artworks by living authors", or no older than "fifty years", were to be excluded from its application (Article 1). This exception had and still has the function of preventing an excessive limitation on artists' creativity and freedom of expression, and of easing the attainment – within one generation from the creation of their works – of an adequate consensus on their quality and value through their unhindered circulation in the broadest possible social, cultural, and economic circles.[4]

These same principles were to remain, with some changes and adjustments on mainly technical details and procedural aspects, the core of Italian law on cultural heritage as it continued to develop during the following decades.[5]

It was only natural that, during the authoritarian fascist regime (mainly with Law No. 1089 of 1 June 1939[6] on the protection of "things of artistic or historical interest"), Italian law became even more strict and detailed than previously,[7] focusing on cultural heritage as the emblem par excellence of national identity[8] and increasing the use of criminal law in its protection.[9]

In the decades following the downfall of the fascist regime, despite a slow but significant evolution towards a less static conception of cultural heritage amongst

1 See, e.g., D. Corsi, *Diritto dei beni e delle attività culturali*, Aracne, Roma 2008, pp. 35-39.

2 Ibidem, pp. 39-40.

3 *Legge 20 giugno 1909, n. 364 che stabilisce e fissa norme per l'inalienabilità delle antichità e delle belle arti* [Law No. 364 of 20 June 1909 regulating the inalienability of antiquities and fine arts], Gazzetta Ufficiale No. 150, 28 June 1909.

4 Cf. G. Sciullo, *Patrimonio e beni*, in: C. Barbati et al. (eds.), *Diritto del patrimonio culturale*, Il Mulino, Bologna 2017, p. 42.

5 Cf. G.P. Demuro, *Beni culturali e tecniche di tutela penale*, Giuffrè, Milano 2002, pp. 3-4.

6 *Legge 1 giugno 1939, n. 1089 "Tutela delle cose di interesse artistico e storico"* [Law No. 1089 of 1 June 1939 "Protection of things of artistic or historical interest"], Gazzetta Ufficiale No. 184, 8 August 1939.

7 Cf. M. Ainis, M. Fiorillo, *L'ordinamento della cultura*, Giuffrè, Milano 2015, p. 179.

8 Cf. D. Corsi, op. cit., p. 41.

9 Cf. G.P. Demuro, *Beni…*, p. 4.

experts and scholars, the main focus of the law (and especially of criminal law) remained on cultural heritage conservation and protection, much more than on its enhancement, enjoyment, development, and market significance.[10] Most significant was the introduction, in the new Constitution of 1948, of an explicit duty on the part of the Republic to safeguard the "natural landscape and the historical and artistic heritage of the Nation", as well as to promote "the development of culture and of scientific and technical research" (Article 9).[11] In 1999 a Unified Text of cultural property and landscape assets legislation (Legislative Decree No. 490 of 29 October 1999, henceforth UT)[12] was issued. It was an attempt to rationalize the existing body of laws, which had grown rapidly during the previous decades, as well as to accommodate the transposition of the European secondary legislation enacted in the meantime and, as we will see, to adjust to the partially conflicting attitude of European primary law towards "national treasures".

Finally, at the dawn of the new millennium – in a climate of fear of widespread deaccessioning policies (which some political forces had appeared to be favouring in the previous years) – the currently in force Cultural Heritage Code (Legislative Decree No. 42 of 22 January 2004, henceforth CHC) was enacted. In actual fact it provided for a broadening of the scope of cultural objects subject to regulation, together with an even more complex regime for their circulation.[13]

The emergence of European rules on the circulation of cultural "goods"

While L. 1089/1939 was still in force, a European legislation on "national treasures" started to be developed. It was built on very different premises, which were to lead, almost unavoidably, to a certain amount of conflict between the two legal systems.

As stated, at the roots of Italian cultural heritage law was the idea of the intrinsic value of "things of artistic or historical interest" and the need to protect and preserve them. They were deemed to be inextricably linked to the very identity of the nation and therefore it was necessary that they be kept (mainly) within national

[10] See S. Manacorda, *La circolazione illecita dei beni culturali nella prospettiva penalistica: problemi e prospettive di riforma*, in: *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato e internazionale*, Giuffrè, Milano 2015, p. 11.

[11] Article 9 of the Constitution has been interpreted as broadening the duties of the Italian State, from simple conservation and protection of its cultural (and natural) heritage, to include promotion of enhancement and public enjoyment of it. Yet, conservation and protection remain the primary tasks of public authorities, as the latter functions rely on the safekeeping of the heritage and on the "improvement of its conservation" (Corte Costituzionale [C. Cost.], 13 January 2004, No. 9).

[12] *Decreto Legislativo 29 ottobre 1999, n. 490 "Testo unico delle disposizioni legislative in materia di beni culturali e ambientali"* [Legislative Decree No. 490 of 29 October 1999 "Unified text of the legislative provisions relating to cultural and landscape assets"], Gazzetta Ufficiale No. 302, 27 December 1999. For further details see e.g. C. Barbati, M. Cammelli, G. Sciullo (eds.), *Il diritto dei beni culturali*, Il Mulino, Bologna 2003.

[13] See e.g. M. Ainis, M. Fiorillo, op. cit., pp. 179-183.

borders. Even if the law allowed for the export of less relevant cultural objects, provided that a licence authorizing it had been granted (Article 36 L. 1089/1939) and that a specific, progressive tax was paid (Article 37), the underlying idea was that such objects were not to be "equated with consumer goods or articles of general use".[14] This became a principle which was to be eventually expressly codified in Article 64 *bis* CHC, according to which, "with respect to the international circulation regime, the objects which are part of the cultural heritage are not to be assimilated to goods". This explains why, until the 2017 reform (Law No. 124 of 4 August 2017[15]), the Italian legal framework always appeared fiercely averse to the very idea of setting monetary value thresholds to the export of cultural objects, a concept which is so familiar to European legislation.

The EU legal framework is genetically conditioned by the peculiar consideration given to "national treasures" in Article 36 of the 1957 Treaty Establishing the European Economic Community,[16] which established a "cultural exception" to general rules on the free circulation of goods and free competition.[17] The latter provided that Member States had a duty to avoid, between themselves, customs duties on exportation and charges with an "equivalent effect", with an ensuing prohibition of quantitative restrictions, or any other measures with like effect, on import and export (Articles 16 and 30-34).

Therefore, even if in later EU treaty law the idea of a "cultural heritage of European significance", together with related duties to encourage cooperation between States and support and supplement their actions, when needed, was to make its appearance (Article 128 of the 1992 Treaty on European Union [TEU],[18] now Article 167 of the Treaty on the Functioning of the European Union [TFEU][19]), the starting point for European secondary law in this field was, and still mostly is, the balancing of EU market regulation (with its core principle of free trade) with Member States' acknowledged right to protect their interests in their own cultural heritage.[20] To this effect, Article 36 (currently TFEU) states that the general provisions are not meant to "be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of […] the protection

14 See the position of the Italian Minister and of the Deputy State Advocate General as reported in Case 7/68, *Commission of the European Communities v. Italian Republic*, 10 December 1968, ECR 423.

15 *Legge 4 agosto 2017, n. 124 "Legge annuale per il mercato e la concorrenza"* [Law No. 124 of 4 August 2017 "Annual law on market and competition"], Gazzetta Ufficiale No. 189, 14 October 2017.

16 OJ C 325, 24.12.2002, p. 33.

17 Cf. S. Regourd, *L'exception culturelle*, Presses Universitaires de France, Paris 2004, pp. 11-31.

18 OJ C 326, 26.10.2012, p. 13.

19 OJ C 326, 26.10.2012, p. 47.

20 See also B.T. Hoffman, *European Union Legislation Pertaining to Cultural Goods*, in: eadem (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge University Press, Cambridge – New York 2006, pp. 191-193.

of national treasures of artistic, historical or archaeological value", provided that said limitations do not actually "constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States".

All in all, the EU's perspective focuses on artworks and antiquities as objects possessed of commercial value and therefore to be mainly considered as *goods*, albeit with some specificities. This approach leads to the unproblematic presence of financial value thresholds – besides the more commonly adopted age thresholds – both in the original (1993) Directive on the return of cultural objects unlawfully removed from the territory of a Member State[21] and in the Regulation on the export of cultural "goods" outside the EU customs territory,[22] as well as in the new Regulation on import[23] – thresholds below which the EU rules would not apply.

Given these premises, a clash between the two legal frameworks was only a matter of time, and it actually occurred in 1964, with infringement proceedings being initiated against Italy, accusing the aforementioned export tax on cultural property (Article 37 L. 1089/1939) of having an effect equivalent to customs duties. Eventually, in 1968, the Court of Justice of the European Union (CJEU) rejected Italy's claim that the tax was a protective measure, i.e. a measure primarily meant to discourage the export of artworks and antiquities not possessing such rarity and value as to be subject to a straightforward export ban, but still considered better preserved within national borders.[24]

The use of fiscal de-marketing strategies to discourage social actors from behaviours which are not deemed fit for straightforward prohibition (for reasons of proportionality, opportunity, etc.), but are still considered undesirable in the broader public interest, is not by any means uncommon, and such a strategy has been used by other countries with respect specifically to cultural property exports.[25] Yet, the CJEU, by requiring a strict causal link between the chosen measure and the purpose of protecting the national treasures of a State (as well

[21] Cf. the Annex to Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.

[22] Cf. the Annex to Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1, and, currently, Annex I to Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1.

[23] At least with respect to objects for which an importer statement will suffice: see Part C of the Annex to 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, OJ L 151, 7.06.2019, p. 1.

[24] Cf. Case 7/68. Cf. also P. Pescatore, *Le commerce de l'art et le Marché Commun*, "Revue trimestrielle de droit européen" 1985, Vol. 21(3), pp. 451-462; A. Mattera, *La libre circulation des œuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique*, "Revue du Marché Unique Européen" 1993(2), pp. 9-31; I.A. Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law*, Edward Elgar, Cheltenham–Northampton 2011, pp. 122-126.

[25] Cf. J. O'Hagan, C. McAndrew, *Restricting International Trade in the National Artistic Patrimony: Economic Rationale and Policy Instruments*, "International Journal of Cultural Property" 2001, Vol. 10(1), p. 45.

as respect for the principles of proportionality and of minimum hindrance to trade freedom),[26] rejected the Italian argument that cultural property should be treated to some extent differently from "ordinary merchandise". In fact, the Court stated that, on the one hand, such objects were to be considered, under European primary law, as "goods" like any other tradable items (being "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions"), and thus subject to the rules of the Common Market, save only for "the exceptions expressly provided by the Treaty".[27] On the other hand, the Court explicitly provided a strict interpretation of the exception contained under Article 36 for "national treasures of artistic, historical or archaeological value", considering as admissible "prohibitions or restrictions" only measures which have an actual (and coercive) restrictive effect on "the freedom of decision" of market operators (i.e. "prohibitions, total or partial"), but not measures only affecting "the economic conditions of importation or exportation", within which the Italian tax was considered to fall.[28]

Another relevant feature of this decision, however, is its actual failure to define the concept of "national treasures" on which the "cultural exception" contained in Article 36 is built. At the time, L. 1089/1939 (Articles 1 and 35) subjected to export restrictions movable "things" (provided they were not the work of living authors, nor realized less than 50 years earlier) with an "artistic, historical, archaeological or ethnographic interest" of such relevance "that their export would cause a serious harm to national cultural heritage". The Court's failure to specifically address the definitional issue seemed to imply that the Italian law's definition and the Treaty's definition actually matched, or at a minimum were not incompatible. The lack of subsequent case law by the CJEU left the question of a specific definition of "national treasures" unresolved.[29] Thus, the idea that the formula works as a mere reference to (and as a tool to facilitate coordination amongst)[30] national legal definitions[31] has taken hold over time. This – coupled with well-known problems of translation and transposition of legal concepts between different legal frameworks[32] – led to the current cohabitation of two widely divergent interpretations of the term "national treasures",[33] resulting in an extensive attitude toward controls taken by

[26] Cf. also A. Mattera, op. cit., p. 16.

[27] Cf. Case 7/68.

[28] Ibidem. See also I.A. Stamatoudi, op. cit., p. 125.

[29] Cf. (appreciatively) M. Graziadei, B. Pasa, *Patrimoni culturali, tesori nazionali: il protezionismo degli stati membri dell'UE nella circolazione dei beni culturali*, "Contratto e impresa / Europa" 2017(1), pp. 136-137.

[30] See Directive 2014/60/EU, in particular the preliminary remarks.

[31] Cf. M. Graziadei, B. Pasa, op. cit., pp. 137-141.

[32] Cf. M. Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, "International Review of the Red Cross" 2004, Vol. 86(854), pp. 371-372; M. Graziadei, B. Pasa, op. cit., pp. 132-133.

[33] Cf. B.T. Hoffman, op. cit., p. 192; M. Graziadei, B. Pasa, op. cit., pp. 134-135.

countries which are net exporters of cultural objects (e.g. Italy), and a restrictive interpretation of the concept, and a coherent limitation of controls, in market States (e.g. the United Kingdom).[34]

Notwithstanding the criticism of those who consider a more selective attitude to be implicit in the term "national treasures" than that expressed by terms such as "national heritage",[35] this divergence was bound to increase as, on one hand, later secondary EU law began to refer even more explicitly to national legislations,[36] and on the other, in Italy, the sectorial legislation, after its latest comprehensive reform, adopted an even broader definition of "cultural property" to be subject to export restrictions.

The Italian Legal Framework on the Definition, Identification, and Export of Cultural Property between 2004 and 2017

After Case 7/68, Italy never reintroduced a tax on the export of cultural goods. Nonetheless, the scope and complexity of Italian regulation continued to increase, both in general and specifically with respect to the issue of exportation. The application of criminal law also progressively increased, building on the constitutional rank of cultural heritage, as Article 9 of the Constitution came to be considered as the source, if not necessarily of *obligations* of criminalization, at least of a broader *legitimacy* for the use of penal provisions.[37]

The conceptualization and *definition* of the object of discipline and protection, in particular, started changing quite early. In the 1930s (as well as previously), Italian legislation had referred to "things" of "artistic, historical, archaeological or ethnographic interest" (Article 1 L. 1089/1939), or to "monuments" or "other things" of "great value" for the "archaeological, historical or artistic heritage of the nation" (Article 733 Penal Code, enacted in 1930,[38] henceforth PC). This terminology pointed toward a static and mostly aesthetic-centred, even to some extent elitist, conception,[39] which was perceived by many, at least since the 1960s, as outdated and too restrictive.

[34] The United Kingdom is commonly listed amongst States with a low level of restrictions on cultural property export (cf. e.g. J. O'Hagan, C. McAndrew, op. cit., pp. 43-50).

[35] See P. Pescatore, op. cit., pp. 455-456; A. Biondi, *The Merchant, the Thief & the Citizen: The Circulation of Works of Art within the European Union*, "Common Market Law Review" 1997, Vol. 34(5), p. 1180.

[36] Cf. Article 2(1) Directive 2014/60/EU; Article 2(2) Regulation (EC) No. 116/2009.

[37] See V. Manes, *La tutela penale*, in: C. Barbati, M. Cammelli, G. Sciullo, *Diritto e gestione dei beni culturali*, Il Mulino, Bologna 2011, p. 290.

[38] *Regio Decreto 19 ottobre 1930, n. 1398 "Approvazione del testo definitivo del Codice Penale"* [Royal Decree No. 1398 of 19 October 1930 "Approval of the definitive text of the Penal Code"], Gazzetta Ufficiale No. 251, 26 October 1930 (and subsequent modifications).

[39] Cf. M.S. Giannini, *I beni culturali*, "Rivista trimestrale di diritto pubblico" 1976(1), in part. pp. 8-10.

In 1964 the so-called Commissione Franceschini[40] introduced into the Italian political and legal debate the terms "cultural property" (*beni culturali*)[41] and "cultural heritage" (*patrimonio culturale*), also building on previous international documents and conventions,[42] pushing for a broader (and according to some, *too* broad),[43] historicized, more dynamic, and basically anthropological conception[44] revolving around the idea of the value attached to any "testimony" of "civilization".[45]

This expression was meant to highlight how the conservation of culturally--relevant objects was not to be considered as a self-referential value, but was instead strictly related to the increase in historical and anthropological knowledge that a correct preservation policy could and should ensure. The same expression also provided for a residual, but at the same time all-encompassing, qualification as "cultural property" for *any* object possessing such testimonial value,[46] a qualification which would eventually pave the way for the current, extensive definition of "cultural property" subject to protective regulation. This definition, in turn, also goes in the same direction as international sources like the 1970 UNESCO Convention[47] and the 1995 UNIDROIT Convention,[48] both of which Italy would, in the ensuing decades, promote, support, and ratify. In general, the majority of the principles stated in the Franceschini Commission's final Declarations were to strongly influence future Italian legislation, starting with the idea of the declaratory value (as opposed to a constitutive one) of the administrative proceeding ascertaining and stating the cultural interest of a specific object.[49]

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[40] Commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio, established under L. No. 310 of 26 April 1964, chair F. Franceschini, in view of a comprehensive rationalization of the Italian legislation on "historic, archaeological, artistic and natural heritage". Cf. *Per la salvezza dei beni culturali in Italia. Atti e documenti della Commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio*, Vols I-III, Colombo, Roma 1967.

[41] Cf. in part. M.S. Giannini, op. cit., pp. 3-38.

[42] In particular the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240, and related preparatory reports, as well as the proceedings of the 10th UNESCO General Conference, Paris, 1958. See M. Ainis, M. Fiorillo, op. cit., p. 187; G. Sciullo, *Patrimonio…*, p. 31.

[43] Cf. L. Covatta, *I beni culturali e il mercato*, "Aedon" 2012(1-2), http://www.aedon.mulino.it/ [accessed: 22.09.2018].

[44] Cf. M.S. Giannini, op. cit., p. 14; M. Ainis, M. Fiorillo, op. cit., pp. 186-191.

[45] *Testimonianze aventi valore di civiltà*. The expression made its appearance in the Declaration I of the Franceschini Commission and persisted, with small changes, in subsequent Italian legislation. Cf. R. Tamiozzo, *La legislazione dei beni culturali e paesaggistici*, Giuffrè, Milano 2014, pp. 31-40. All in all, this categorization of "cultural property" was even broader than the current legal one (see in particular Declaration XXXIII).

[46] Cf. R. Tamiozzo, op. cit., pp. 31-33.

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

[48] Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322.

[49] See Declaration IV. See now the text of Article 13(1) CHC: "The declaration shall ascertain the existence, in the thing in question, of the interest required under article 10, section 3". On said declaratory

The first *legal* definition of "cultural property" was introduced in Legislative Decree No. 112 of 31 March 1998[50] (Article 148); the term was then used in the 1999 UT[51] and in the subsequent Lgs.D. 42/2004 (CHC), which provides the current definitions of both "cultural heritage" and "cultural property". The latter is, as has been observed, quite broad: Article 2(2) CHC states that "cultural property consists of immovable and movable things which, pursuant to Articles 10 and 11, possess an artistic, historical, archaeological, ethno-anthropological, archival, and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilization". The "cultural quality" of the object is thus related to a broad pre-juridical, historical-anthropological parameter: its value in terms of testimony of civilization.

Strictly intertwined with the definitional issue is the question of the *identification* of cultural property: Article 2(2) immediately refers to Article 10,[52] which lists and defines "cultural property" subject to the large and complex set of rules established for the "protection" of the heritage under Part II, Title I, CHC. The criteria and procedures for the identification of such cultural properties differ in accordance with their ownership regime.[53]

According to Articles 10(1) and 12, movable or immovable objects which do not constitute contemporary art (as identified according to Article 10.5) and which "possess artistic, historical, archaeological or ethno-anthropological interest" and belong "to the State, the Regions, as well as any other public body or institution, and to private non-profit associations, including ecclesiastical entities with an acknowledged legal status" are considered "cultural property" and are subject to all protection provisions unless and until a *negative* verification of their (actual) cultural interest (*verifica dell'interesse culturale*) occurs upon the conclusion of administrative proceedings. In addition, by definition "collections of museums, picture galleries, art galleries and other exhibition venues of the State, the Regions, other territorial

nature the majority of scholars and case law agree: see e.g. Consiglio di Stato [Cons. St.], VI, 8 February 2000, No. 677; Cons. St., VI, 3 April 2003, No. 1718; Cons. St., VI, 11 March 2015, No. 1257; cf. also G. Piva, *Cose d'arte*, in: *Enciclopedia del diritto*, Vol. XI, Giuffrè, Milano 1962, p. 120; M.S. Giannini, op. cit., pp. 17-18; A. Maglieri, *Dichiarazione di interesse culturale*, in: M. Cammelli (ed.), *Il codice dei beni culturali e del paesaggio*, Il Mulino, Bologna 2007, pp. 112-113; *contra*, e.g., F.S. Marini, *Lo statuto costituzionale dei beni culturali*, Giuffrè, Milano 2002, pp. 75-79; G. Sciullo, *Patrimonio*..., p. 48.

50 *Decreto Legislativo 31 marzo 1998, n. 112 "Conferimento di funzioni e compiti amministrativi dello Stato alle Regioni ed agli enti locali"* [Legislative Decree No. 112 of 31 March 1998, on the "Conferral of functions and administrative tasks of the State to the regions and local authorities"], Gazzetta Ufficiale No. 92, 21 April 1998.

51 Article 1(1) UT.

52 It also refers to Article 11, which, in turn, sets out a number of cultural properties qualified as such *only* for purposes of application of *specific* protection provisions (unless the object also meets the requirements of Article 10, in which case it will be subject to the whole Part II, Title I). See also note 64 below.

53 Cf. G. Sciullo, *I beni*, in: C. Barbati, M. Cammelli, G. Sciullo (eds.), *Diritto e gestione dei beni culturali*, Il Mulino, Bologna 2011, pp. 28-31.

government bodies, as well as of any other public body and institute", and "archives and single documents", as well as "book collections" of the same entities (even in the event they change their status over time, according to Article 13.2), "are cultural property" *ex lege*, always subject to all protection provisions (Article 10.2).[54]

However, for the objects listed in Article 10(3), which are mainly in private ownership, a *positive* declaration of cultural relevance (*dichiarazione di interesse culturale*) needs to have occurred (and to have been notified to the owner, possessor, or holder of the property) for them to be subject to the same protection provisions (Articles 13-16). Before the 2017 reform (which introduced a new sub-section), these objects included: a) "immovable or movable things of particularly important artistic, historical, archaeological or ethno-anthropological interest" which are in the possession of private individuals or of private for-profit entities (and for which the law provides detailed exemplifications under Article 10.4); b) "archives and single documents, belonging to private persons, which are of particularly important historical interest"; c) "book collections belonging to private persons which are of exceptional cultural interest"; d) immovable or movable things (regardless of their type of ownership) "which are of particularly important interest because of their reference to political or military history, to the history of literature, art and culture in general, or as testimony to the identity and history of public, collective or religious institutions"; e) "collections or series of objects" (also regardless of their type of ownership) "which through tradition, renown and particular environmental characteristics are as a whole of exceptional artistic or historical interest". Contemporary art is once again excluded from the application of the protection provisions, except with respect to issues of authenticity and genuineness (Article 10.5).

The range of cultural property protected under Italian law is therefore *extremely* broad. This fact, which is further discussed in the final part of this article, means that its protection *in practice* constitutes a huge strain on public resources and, therefore, is actually far more fragmentary than it appears "in the books". Even if, at least for objects privately owned, some kind of *qualified* ("particularly important" or "exceptional") cultural interest[55] is generally required, we are far from that strict criteria of selection that many scholars (and art-importing countries) associate with the term "national treasures". In practice, the circumscribing value of the required administrative identification is quite limited. It is affected not only by the *presumptive* nature of the cultural interest of publicly-owned (and assimilated) objects (subject to CHC provisions unless a negative verification occurs), as well as by the very existence of cultural property *ex lege*, but also by the

[54] Thus without need of a formal identification, either in the negative form, or in the positive form: cf. G. Sciullo, *Patrimonio…*, pp. 49-50.

[55] Cf. G. Pastori, *Commento all'art. 10*, in: M. Cammelli (ed.), *Il codice dei beni culturali e del paesaggio*, Il Mulino, Bologna 2007, pp. 102-103; G. Sciullo, *I beni*, p. 31.

presence of a whole set of criminal law provisions which are applicable *regardless* of any formal identification, or its lack.

This reference to "real" cultural properties – as opposed to formally "declared" ones – is one of the main features of the criminal offences against cultural heritage contained in the Italian Penal Code, as is the focus on actual harms affecting the material object of the crime.[56] Besides the above-mentioned misdemeanour set out in Article 733 PC (intentional or negligent "damage to the archaeological, historical or artistic heritage of the nation" caused by the owner – or by their legal representatives[57] – of a cultural property by way of destroying, causing deterioration of, or in any way damaging said object), the PC encompasses two felonies introduced in the 1990s. The first is intentional damage to another's "things of an historical or artistic interest" or "buildings set within historical inner cities" (Article 635.2.1);[58] and the second is "disfiguring and soiling" of another's "things of an historical or artistic interest" (Article 639.2, where the cultural feature of the object constitutes an aggravating circumstance, thus rendering immaterial the offender's actual knowledge of the "culturality" of the affected thing, as the possibility to recognize it suffices).[59]

Both scholars and the case law are adamant that, in these cases, it is up to the penal judge to *autonomously* ascertain, on a case-by-case basis, and possibly with the help of experts, the cultural relevance of the affected object.[60] The court will refer to the features of "cultural interest" as identified by sectorial law (currently the CHC), and will therefore need to inquire about the object's "artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest" and, more broadly, about its value as a testimony of civilization. At the same time, there is no need to rely on a previous formal administrative identification of said value, which therefore can be absent.[61]

[56] Cf. F. Mantovani, *Lineamenti della tutela penale del patrimonio artistico*, "Rivista italiana di diritto e procedura penale" 1976, pp. 76-79; G.P. Demuro, *Beni…*, pp. 85-101; V. Manes, *La tutela…*, pp. 293-308; S. Manacorda, op. cit., p. 21.

[57] According to prevalent case law: Corte di Cassazione (Cass.), III pen., 19 July 1991, No. 7701; Cass., III pen., 21 June 1993, No. 6199; Cass., III pen., 12 April 1995, No. 3967; Cass., III pen., 18 November 2008, No. 42893; *contra* Cass., II pen., 17 February 1987, No. 1990; Cass., III pen., 15 June 1998, No. 7129.

[58] Born as an aggravating circumstance of ordinary intentional damage, the behaviour was made into a specific offence by Legislative Decree No. 7 of 15 January 2016. Cf. G.P. Demuro, *Beni…*, pp. 98-99; V. Manes, *La tutela…*, pp. 296-298; C. Perini, *Itinerari di riforma per la tutela penale del patrimonio culturale*, "Legislazione penale", 19 February 2018, http://www.lalegislazionepenale.eu [accessed: 20.09.2018].

[59] According to the general rule set in Article 59(2) PC, as most commonly interpreted (cf. e.g. Cass., VI pen., 9 December 2016, No. 52321).

[60] See authors cited above and, for case law, e.g. Cass., III pen., 12 December 1995, No. 12215; Cass., III pen., 1 February 2001, No. 4001; Cass., III pen., 12 September 2006, No. 29927.

[61] On the other hand, if a positive appraisal of the cultural interest has been expressed by the Superintendency, the penal judge, albeit not compelled to decide in accordance with it, is nonetheless relieved from a duty to reassess it, unless specific circumstances create a reasonable doubt on the correctness of the Superintendency's evaluation: see e.g. Cass., III pen., 8 March 2018, No. 10468.

While this "disconnection" between the culturality of the object and its formal identification may be, overall, understandable in the PC – enacted well before the current CHC was even conceived – it is more surprising to find offences with a like structure within the Lgs.D. 42/2004 itself. Here criminal law provisions aimed at protecting cultural heritage are by far more numerous (Articles 169-180), but they are usually constructed as "ancillary" to administrative regulation: the *actus reus* usually refers widely to behaviours which are detailed under previous administrative provisions. These offences usually punish mere assumed dangers to cultural heritage caused by the hindering or disrespect of the public regulatory and control powers, and therefore the majority of these offences only apply to formally declared cultural property (as well as to presumptive and *ex lege* objects), as identified according to Article 10.[62] There are, however, several exceptions to this pattern, the most notable of which is in fact the felony of illicit export of cultural property set out in Article 174 CHC.

The structure of this criminal offence[63] makes no exceptions to the CHC standards, as the *actus reus* is basically built around previous administrative provisions; namely, Articles 65-74 regulating cultural property exports. According to Article 174, in fact, "whosoever transfers abroad things of artistic, historical, archaeological, ethno-anthropological, bibliographical, documental or archival interest, as well as the things indicated in Article 11, paragraph 1, letters f), g), and h),[64] without a certificate of free circulation or export licence, shall be punishable by imprisonment for a period of one to four years or with a fine ranging from € 258 to € 5,165". This crime is equated with the conduct of "whosoever, upon expiry of a term, fails to return to national territory cultural properties for which temporary exit or exportation was authorised".

Thus, in order to precisely understand which behaviours are prohibited and, therefore, punishable, one needs to refer to the administrative discipline of the export of cultural property. To start with, we discuss the situation prior to the latest reform, as the changes introduced by L. 124/2017 will be the subject of the next

[62] Cf. F. Mantovani, op. cit., pp. 75-93; S. Moccia, *Riflessioni sulla tutela penale del patrimonio culturale*, "Rivista italiana di diritto e procedura penale" 1993(4), pp. 1294-1306; G.P. Demuro, *Beni…*, pp. 81-123; idem, *D.lgs. 22.1.2004 n. 42 – Codice dei beni culturali e del paesaggio ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137 – Premessa e commento alla Parte quarta*, "Legislazione penale" 2004, Vol. 24(3), pp. 428-471.

[63] Cf. G.P. Demuro, *Beni…*, pp. 148-162; P.G. Ferri, *Uscita o esportazione illecite*, in: A. Manna (ed.), *Il codice dei beni culturali e del paesaggio. Gli illeciti penali*, Giuffré, Milano 2005, pp. 165-169; G. Pioletti, *Uscita o esportazione illecite*, in: M. Cammelli (ed.), *Il codice dei beni culturali e del paesaggio*, Il Mulino, Bologna 2007, pp. 713-719; V. Manes, *La tutela…*, pp. 299-300.

[64] In recalling Article 11, Article 174 refers to "photographs, with their relative negatives and matrixes, samples of cinematographics works, audio-visual material or sequences of images in movement, the documentation of events, oral or verbal, produced by any means, more than twenty-five years ago" (Article 11.1.f; see also E. Romanelli, *Photographs as "Cultural Property" under Italian and European Union Law: A Complex Picture*, "Santander Art and Culture Law Review" 2019, Vol. 5(2)), to "means of transport which are more than seventy-five years old" (g), and to "property and instruments of interest for the history of science and technology which are more than fifty years old" (h).

section. However, it is useful to bear in mind that any modification of administrative rules has automatic repercussions on the range of behaviours qualified as criminal under penal law.[65]

According to Articles 65-74 CHC (as read together with Articles 10-16), different typologies of cultural property are subject to different export rules. There are basically four possible scenarios, outlined below:

1) For publicly-owned cultural property and assimilated objects (i.e. objects owned by non-profit organizations) for which no *negative* verification of culturality has taken place and which cannot be qualified as contemporary works (Article 10.1, 2, and 5), the Code forbids any permanent export (Article 65). Thus no certificate of free circulation or (consequently) an EU licence[66] can be obtained, and any intentional permanent removal of the object from the national territory is, by definition, a criminal offence (as is the failure to bring back such property after the expiry of the period for which a temporary export permission was granted).

2) For (usually) privately-owned and *positively declared* cultural objects, any permanent export is also forbidden, while temporary export may be granted (provided that this is not deemed dangerous under Article 66.2) by issuing a certificate of temporary circulation under Article 71; and for export outside the EU a temporary export licence issued under Article 74(3). Therefore, any export (even temporary) which is carried out without having asked for or obtained said certificate/licence, as well as any failure to bring back a declared cultural property after the expiry of the temporary permission, is a criminal offence.

3) For a set of other objects (usually privately-owned) which are *not yet positively declared* cultural property,[67] permanent export is possible *provided that* a certificate of free circulation (plus an EU export licence, where required) is asked for and obtained. A request must be presented to the export office of the Superintendency (an administrative local organ of the Ministry for Cultural Property and Activities – MiBAC), which, however, may refuse permission in the event a cultural interest as defined by the law is envisaged in the object, in which case a proceeding to *declare* said interest will start under Articles 68-69. In addition, the Ministry or the Region may also decide a compulsory purchase of the property, under Article 70. The export of a cultural property to which this procedure is applicable

[65] Cf. Cass. 10468/2018; Cass., III pen., 29 May 2018, No. 24050. See also A. Massaro, *Illecita esportazione di cose di interesse artistico: la nozione sostanziale di bene culturale e le modifiche introdotte dalla legge n. 124 del 2017*, "Diritto penale contemporaneo" 2018(5), pp. 124-125, https://www.penalecontemporaneo.it/ [accessed: 03.10.2018].

[66] See Article 2(2) Regulation EC 116/2009 ("the export licence may be refused [...] where the cultural goods in question are covered by legislation protecting national treasures of artistic, historical or archaeological value in the Member State concerned"), as well as Article 74(3) CHC. Cf. F. Lafarge, *Esportazione dal territorio dell'Unione Europea*, in: M. Cammelli (ed.), *Il codice dei beni culturali e del paesaggio*, Il Mulino, Bologna 2007, p. 326.

[67] See Article 65(3) in the text preceding the 2017 reform. Cf. also E. Romanelli, op. cit., pp. 141-146.

without having asked for or obtained the required permission constitutes a criminal offence under Article 174.

4) Finally, for the export of contemporary works – before the 2017 reform defined as movable things which were the work of living authors or which had not been produced more than *50* years prior to export – and *only* for them, no export certificate was required, even if the would-be-exporter had a duty, under Article 65(4), to make a declaration and provide information to this effect to the export office. No criminal offence can therefore occur when an actual object of contemporary art is exported, as the failure to comply with Article 65(4) is a mere administrative offence (Article 165 CHC).[68] However, if an object which exceeds the legal age threshold is passed along as "contemporary" and exported, the criminal offence of false attestation by a private person in public documents (Article 483.1 PC)[69] will be added to the offence under Article 174 CHC.

Thus, the criminal offence set out in Article 174 does not actually require a prior declaration of cultural interest. Once again, it is the penal judge who will autonomously ascertain this issue, without the need for any administrative identification. Even if this implies an easily recognizable possibility to raise a defence with respect to the mental element of the offence – i.e. without a previously notified declaration of cultural interest the accused could defend themselves by alleging their lack of awareness – this entrenched interpretation remains a cornerstone of case law on Article 174.[70] The same case law, moreover, identifies presentation to the export office as one of the few key moments in which public authorities have a chance to "intercept" as yet unknown objects worthy of being placed under the CHC protection regime. This, in turn, is an interest deemed of public relevance, which explains why judicial decisions are adamant that the offence remains punishable even in cases where it is proven that, had the omitted certificate/licence been asked for, permission would have been granted by the export office.[71]

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[68] As is the failure to accompany the object with a copy of the export permission while operating its transfer. See G.P. Demuro, *D.lgs.*…, p. 439.

[69] See e.g. Cass., V pen., 11 February 2009, No. 6063; Cass., V pen., 14 March 2011, No. 10153; Cass., III pen., 24 February 2012, No. 7363; Cass., V pen., 25 March 2015, No. 12710.

[70] A mere possibility to recognize the cultural interest of the object not being enough to satisfy the *mens rea* requirements of an *intentional* offence. Cf. V. Manes, *La circolazione illecita dei beni artistici e archeologici. Risposte penali ed extrapenali a confronto*, in: *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato e internazionale*, Giuffrè, Milano 2015, pp. 95-96; A. Massaro, op. cit., pp. 121-124. However, case law tends to adopt an approach which ends up allowing for merely negligent behaviours to be punished as intentional, by inferring, from a general possibility to realize the cultural relevance of the object, that the indicted person, at the very minimum, knowingly and willingly accepted the eventuality they were exporting cultural property (*dolo eventuale*). Cf. e.g. Cass. 21400/2005; Cass., III pen., 11 February 2015, No. 6202. Cf. L. Luparia, *La tutela penale dei beni culturali nella dimensione processuale: avvertenze e proposte nello scenario di riforma*, in: *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato e internazionale*, Giuffrè, Milano 2015, pp. 254-255.

[71] See e.g. Cass., IV pen., 22 February 2000, No. 2056; Cass., III pen., 29 August 2017, No. 39517.

The outcome of the legal framework described above undeniably leads to a further broadening of the scope of Italy's (theoretical) control over the circulation of its cultural property, widening the gap between the Italian legal system and other, more restrictive, conceptions of "national treasures" worthy of being subjected to export checks and prohibitions.

The 2017 Reform and the Unprecedented Introduction of a Financial Value Threshold

Operators in the Italian art and antiquities market had been advocating for years for reform of the export regulations, lamenting that the broad definition of cultural property and the strict control over circulation posed an excessive burden on both private owners and professional dealers, and was an obstacle to competitiveness on the international market.[72] These factors were also considered by advocates of a more liberal approach[73] as one of the driving forces behind the massive amount of cultural property illegally trafficked outside the country.[74] To offer at least some response to these requests, in 2017 the yearly law for market and competition – L. 124/2017, Article 1(175-176) – introduced a reform of the export regime. It was to be implemented through further Ministerial Decrees which, at present, have only partially been enacted.[75] The main features of the reform include raising the

[72] Cf. e.g. G. Calabi, V. Favero, *Progetto Apollo. Verso una riforma del mercato dell'arte*, "Wannenes Art Magazine" 2017, Vol. 7(1), https://wannenesgroup.com/magazine/progetto-apollo-verso-una-riforma-del-mercato-dellarte/ [accessed: 28.09.2018]; H. Marsala, *Il Ddl concorrenza è legge. Cosa cambia per arte e beni culturali*, "Artribune", 3 August 2017, http://www.artribune.com/arti-visive/archeologia-arte-antica/2017/08/politica-mercato-ddl-concorrenza-e-legge-cosa-cambia-per-arte-beni-culturali-polemiche/ [accessed: 28.09.2018].

[73] See e.g. E.A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, "Chicago Journal of International Law" 2007, Vol. 8(1), pp. 213-231.

[74] The dark figure of cultural property trafficking is however notoriously quite high (cf. N. Brodie, J. Dietzler, S. Mackenzie, *Trafficking in Cultural Objects: An Empirical Overview*, in: S. Manacorda, A. Visconti (eds.), *Beni culturali e sistema penale*, Vita e Pensiero, Milano, 2013, pp. 19-30). Indeed, official statistics indicate that cultural objects trafficked yearly from Italy can be counted in their thousands, and economic analysis (cf. R. Fisman, S.-J. Wei, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques*, "American Economic Journal: Applied Economics" 2009, Vol. 1(3), pp. 82-96) suggests that the real numbers may be higher.

[75] On 6 December 2017 the Min.D. No. 537 was issued, providing new general directives for export offices in the evaluation of export requests for cultural property, as mandated by Article 1(176)(a) L. 124/2017, followed, on 17 May 2018, by Min.D. No. 246, updating conditions, procedures, and model forms for issuing and prorogation of export and import certificates. However, Article 1(176)(b) L. 124/2017 also required the Ministry to issue a further Decree introducing and regulating a specific "passport", having a 5 years duration, aimed at easing the exit and re-entry of cultural property, which is currently still missing. Min.D. 246/2018 actually set at 31 December 2019 the deadline for the Decree on said passport, while a further integrative Decree (No. 305 of 9 July 2018) made explicit the obligation (subtended to Article 66.2 CHC) to issue a further joint Decree, by the MiBAC and the Ministry of Internal Affairs, on the electronic registry and the updating of the SUE, i.e. the informatic system of the export offices (Article 1 Min.D. 305/2018). Export offices are, at present, *not* permitted to process declarations concerning the export of cultural property

age threshold below which the "contemporary art exception" applies, and the introduction of an unprecedented (for Italy) financial value threshold, below which cultural property may be freely exported, which is set at €13,500 (Article 65 CHC, new text).

L. 124/2017 has modified Article 10(5) CHC, excluding from the application of the protection provisions (not concerning authenticity and genuineness) all movable (or immovable) cultural property in public ownership (or assimilated) "which are the work of living authors or which were not produced more than *seventy* years ago" (emphasis added). This increased age threshold also encompasses privately-owned movable (or immovable) things "of particularly important artistic, historical, archaeological or ethno-anthropological interest" (cf. Article 10.3.a), as well as all collections or series of objects (not originally pertaining to public institutions) "which, through tradition, renown and particular environmental characteristics, or by artistic, historical, archaeological, numismatic or ethno-anthropological relevance possess, as a whole, an exceptional interest" (cf. Article 10.3.e).

However, the same L. 124/2017 also introduced a new typology of cultural property – by adding a new lett. d-*bis* to Article 10(3) CHC – namely cultural property which, irrespective of ownership, possesses an "artistic, historical, archaeological or ethno-anthropological interest which is *exceptional for the integrity and completeness of the cultural heritage of the nation*" (emphasis added). This new category of "exceptionally relevant cultural property" is subject to all protection provisions (once administratively declared), unless it is the work of a living author or was not produced more than *50* years ago (Article 10.5).

In practice, the effect of the reform is the creation of dual[76] age thresholds by keeping the previous 50-year threshold for objects deemed *essential* to the integrity of national heritage, and introducing a longer, 70-year threshold, for other property having the required (ordinary) cultural interest.

Interestingly, the new 70-year threshold does *not* match any of the age thresholds of Regulation EC 116/2009, so that in several cases where the latter sets a threshold of 50 years for export outside EU borders an EU export licence might still be needed, whereas no certificate of free circulation is any longer required[77] under Italian law. The two requirements used to go together prior to the reform, with EU secondary law normally being the *less* stringent in comparison with Italian law.[78]

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not exceeding the new financial value threshold: such objects remain currently subject to the obligation to request and obtain a certificate of free circulation. Cf. also MiBAC instructions to export offices (Ministero per i Beni e le Attività Culturali, *Circolare n. 31 del 12 luglio 2018 agli Uffici Esportazione oggetti antichità e arte*).

[76] As Article 11 establishes specific age thresholds for peculiar typologies of cultural property: cf. note 64 above and E. Romanelli, op. cit., pp. 142-143.

[77] See also MiBAC, *Circolare n. 31…*

[78] Given the *ratio* of the Regulation, it must be concluded that an EU export licence could not be legitimately denied when a certificate of free circulation has been granted (cf. R. Leonardi, *Esportazione dal terri-*

L. 124/2017 has also expressly modified, amongst others, Articles 65, 68, and 74 CHC, all of which, in turn, had an impact on the felony of illicit export (Article 174). Thus the four possible scenarios previously analysed have all been changed – some to a greater degree and some to a lesser degree – by way of this indirect modification of the criminal offence,[79] as follows:

1) For publicly-owned cultural property (and assimilated) for which no *negative* verification has taken place, and which is neither the work of a living author nor was produced less than *70* years prior to exit, permanent export is always prohibited and no certificate of free circulation or EU licence can be obtained. Thus any intentional permanent removal of the object from the national territory is, by definition, a criminal offence; as is failure to bring back such a property after the expiry of a temporary permission.

2) For (usually) privately-owned *positively declared* cultural objects, any permanent export is also forbidden, as previously, *but* said declaration can *now* take place (except in the case of things falling under Article 10.3.d-*bis*: see point 4) only for objects which are not the work of living authors, nor were produced less than *70* years prior to export. As previously, any export (even temporary) effected without having asked or obtained the required certificate or licence, as well as any failure to bring back a declared cultural property after the expiry of the period of temporary export, is a criminal offence.

3) The set of other, *not yet positively declared*, cultural property for which permanent export is actually possible, provided that a *certificate* of free circulation[80] is asked and obtained, has been *reshaped* by new Article 65(3). It now encompasses, besides the objects listed under Article 11(1)(f), (g), and (h),[81] all things, to whomever they may belong, possessing a cultural interest, which are the work of no longer living authors, were produced more than *70* years ago, *and whose financial value is above €13,500* (but *no* value threshold is applied to archaeological remains, parts of dismembered monuments, incunabula and manuscripts, and archives).[82]

torio dell'Unione europea, in: M.A. Sandulli (ed.), *Codice dei beni culturali e del paesaggio*, Giuffrè, Milano 2012, p. 648) and, even more, whenever *no* certificate of free circulation is required under current Italian law (cf. M. Pirrelli, *Import/export: in attesa dei decreti*, "Il Sole 24 Ore", 9 December 2017).

79 More broadly on changes to criminal offences mediated by the modification of referenced norms, see e.g. G.L. Gatta, *Abolitio criminis e successione di norme "integratrici": teoria e prassi*, Giuffrè, Milano, 2008.

80 The period of validity of the certificate of free circulation has been lengthened by L. 124/2017, from previous 3 years, to current 5 years (Article 68.5 CHC). The reform also extended the period of validity of the EU export licence, which passed from 6 months to 1 year (Article 74.3), i.e. the maximum allowed under Regulation EC 116/2009 and Commission Implementing Regulation (EU) No. 1081/2012 of 9 November 2012 for the purposes of Council Regulation (EC) No. 116/2009 on the export of cultural goods, OJ L 324, 22.11.2012, p. 1 (cf. also F. Lafarge, *Esportazione…*, p. 324).

81 Cf. note 64 above, and E. Romanelli, op. cit., pp. 146-151.

82 Article 65(3)(a), referring to Annex A(B)(1) CHC. In this, Italian law and EU law match, as Regulation EC 116/2009 also excludes from application of any financial value threshold the same typologies: see Annex I(B).

The Min.D. 537/2017, implementing this reform, has provided a rationalization and specification of the criteria[83] according to which export offices may *deny* the required certificate of free circulation by declaring the cultural interest of the object. Said denial, and the related identification of a cultural interest, must be accompanied by a thoroughly motivated assessment based on six possible factors: i) the artistic quality of the object (which, however, is now expressly stated as never being sufficient alone); ii) its rarity, either from a qualitative or a quantitative perspective; iii) the uncommon quality or relevance of its iconographic features, or its uncommon documentary and representative value; iv) the fact that the object originally belonged to an historical, artistic, archaeological, or monumental site or broader context, even when the latter is no longer existing nor is it possible to restore it; v) the object being an especially relevant testimony of the national or local history of collecting; vi) the object being an especially relevant archaeological, artistic, historical, or ethnographical testimony of significant relationships between different cultural areas (be they national or foreign, but in the latter case with links to Italian cultural history). Whenever a cultural property for which this procedure of authorization must be followed is exported without having asked or obtained the required certificate of free circulation, the criminal offence established in Article 174 is committed.

4) Finally, the range of objects for which *no* export certificate is required, as only a *self-declaration of free exportability* must be submitted, has also been *reshaped* by L. 124/2017. Today it encompasses, besides contemporary works (according to the new age standard), also things possessing a cultural interest and *older* than 70 years, but whose *financial value* is *below €13,500* (provided they are not archaeological remains, etc.). However, the new Section 4-*bis* of Article 65 CHC establishes that, for any such object (not being the work of a living author, and older than 50 years: cf. Article 10.5), the export office will start proceedings to declare the cultural interest (thus subjecting it to a prohibition of permanent export) whenever they have reason to consider it (cf. Article 10.3.d-*bis*) an object of such *exceptional cultural relevance* that its loss would substantially harm the integrity and completeness of national heritage. From a criminal law perspective, the result of such reshaping is that, even pending the full implementation of the reform, any export of a cultural object produced no more than 70 years before, as well as any export of older things which do not exceed a financial value of €13,500, is no longer a criminal offence;[84] *but* criminal liability may be incurred whenever the exported object (provided it is older than 50 years and its author is deceased) is found to possess a specific *excep-*

[83] The lack of uniformity amongst standards followed by different Superintendencies in according or denying export permissions was one of the problems most lamented by market operators prior to the 2017 reform, but, according to some, it even increased in the months immediately following it. Cf. M. Pirrelli, *Import/export…*, and G. Biglia, *Maggiore uniformità nell'applicazione*, "Il Sole 24 Ore", 9 December 2017.

[84] See also Cass. 10468/2018; Cass. 24050/2018.

tional relevance identified according to Article 10(3)(d-*bis*). This is a *further* feature, the scrutiny of which is thus entrusted to the autonomous assessment of the penal judge.[85]

The introduction of the financial value threshold has been widely criticized, albeit from very different perspectives. Market-oriented commentators have highlighted that a value of €13,500 appears generally to be too low to actually promote an increase in the international commerce of Italian cultural property, and in any case the choice of a single threshold for all typologies of cultural objects makes it unfit to match the broad differences in market value amongst the vast range of diverse items of cultural property. Just consider, for example, that for paintings the threshold set by Regulation EC 116/2009 is of €150,000, while for watercolours, gouaches, and pastels is of €30,000. Besides, given the export offices' power to declare a cultural interest also for some things suitable for self-certification, there are some fears that a bureaucratic mentality will prevail, slowing down proceedings.[86]

On the other hand, conservation-oriented commentators have criticized (sometimes harshly) the "commodification" of cultural property, which they highlight as the main *symbolic* message of the reform, again reaffirming the perceived "genetic" incompatibility between the historical and cultural roots of Italian cultural heritage law and a liberal and commercial approach to the subject, which in their opinion will lead to an excessive dispersion of the national heritage.[87] Indeed, from a conservation perspective the financial value of a cultural object appears to be a totally unfit selection criterion, given on one hand the high volatility of market prices, and on the other the extremely broad set of antiquities and collectibles which are "cultural property" under Italian law, and which can therefore be subject to even larger price fluctuations according to the trends in their market niches, thus increasing the risk that objects with a (currently) low market value, but with a significant value in terms of "testimony of civilization", will exit the national heritage forever.

85 Cf. in particular Cass. 10468/2018.

86 Cf. H. Marsala, op. cit. (who, however, reports also some more positive evaluations by market operators); F.E. Salamone, *Circolazione internazionale delle opere d'arte ed introduzione delle "soglie di valore": un'occasione da non sprecare*, "News-Art", 19 February 2018, http://news-art.it/news/circolazione-internazionale-delle-opere-d-arte-ed-introduzi.htm [accessed: 28.09.2018].

87 Cf. e.g. G. Azzariti et al., *L'Appello a Mattarella – "I beni culturali non sono commerciali: Presidente non firmi il Dl Concorrenza"*, "Emergenza cultura" and "Il Fatto Quotidiano", 4 August 2014, https://emergenzacultura.org/2017/08/04/lappello-a-mattarella-i-beni-culturali-non-sono-commerciali-presidente-non-firmi-il-dl-concorrenza/ [accessed: 28.09.2018].

Conclusions

The 2017 reform is an attempt to reach a very difficult compromise between the traditional (and, to some extent, constitutionally obligated)[88] conservative approach of Italian cultural heritage legislation – an approach which has led to a constant expansion of the objects which fall under the concept of "cultural property" and are thus subject to protection provisions – and the increasing pressures, by both market operators and private owners, to open up broader space for the free circulation of cultural "goods". In order to make a comprehensive assessment of the actual workability and effectiveness of this compromise we will most definitely need to await its full legal implementation (theoretically, by the end of 2019); and after that still wait a reasonable time for its *practical* implementation by Italian Superintendencies, whose interpretation and application of the new rules will decide most of the actual impact on flows of cultural property. Yet some final tentative conclusions appear possible even at this early stage, based on the analysis of the current legal framework "in the books".

The first impression is that the reform has added further layers of complexity to an export legislation which was already quite complex and challenging for both market operators and owners of objects of art and antiquities. The dual "standard" age thresholds (not to mention their intertwining with surviving "special" age thresholds),[89] and the fact that the new one (i.e. of 70 years) does not match any in Regulation EC 116/2009, while at the same time implying a check of the possible "extraordinary relevance" of the object, is the first feature which could give rise to complications. The first impressions reported by market operators are that the already considerable discretion exercised by local Superintendencies in their application of the export rules will be further increased, and thus uniformity in their application will be hindered based on the perceived differences in the praxis of different export offices, sometimes related to a form of apparent bureaucratic resistance to the changes introduced with L. 124/2017 or, at a minimum, to a failure to fully understand and process these changes.[90] Only time will tell if the attempt at making the evaluation standards more uniform, through the rules established by Min.D. 537/2017, will succeed in reducing discrepancies.

[88] According to joint interpretation of Articles 41 and 42 and of Article 9 of the Italian Constitution the need to preserve the country's cultural heritage in the interest of the whole (present and future) community shall prevail even when this requires a (proportionate) compression of individual property rights and of market freedom. See e.g. Tribunale amministrativo regionale (TAR) Lazio, II, 26 January 1990, No. 224; Consiglio di giustizia amministrativa Sicilia, 29 December 1997, No. 579; TAR Trento, I, 23 February 2012, No. 65.

[89] Cf., specifically on photographs, E. Romanelli, op. cit., p. 152.

[90] Cf. G. Biglia, op. cit.

It is true that the idea that objects, in order to be prevented from leaving the country, must be assessed as having an "artistic, historical, archaeological or ethno--anthropological interest which is exceptional for the integrity and completeness of the cultural heritage of the nation" (Article 10.3.d-*bis* CHC) appears more in line with the intrinsic strict selectivity of the European concept of "national treasures", as the latter is understood by several commentators.[91]

At the same time, however, this new category of cultural property has *not* taken the place of previous ones, nor has it restricted, from a conceptual perspective, the broad, historical-anthropological approach to "culturality" typical of Italian legislation. Instead, the new typology has been *added* to the previously existing ones as an *exception* – in terms of what we might call a *higher intensity* – to a standard which in fact received implicit confirmation of its standing validity, and as a criterion to be applied to a "contemporary-but-not-enough" set of objects between 50 and 70 years of age, which are thus subject to a sort of "dual test" (i.e. recent creation *and* lack of sufficient cultural relevance); one of which is by definition unknown in EU secondary law.

A second feature to be considered is the newly introduced (sole) financial value threshold for objects older than 70 years. The maximum of €13,500 is not only considered too low by many market-oriented commentators, but it also fails to match any of the (differentiated) thresholds set out in Regulation EC 116/2009. Thus, whenever a certificate of free circulation and an export licence are required together, a double check against different standards of value will need to be performed (together with the already mentioned double check against different age standards). Market operators, and private owners even more so, will therefore face a further layer of complexity in the evaluations they will have to make before deciding to export a particular cultural property.

This, in turn, has repercussions on the ease and immediacy of understanding the issue of when an export effected without full respect of the rules will constitute a criminal offence, or just an administrative one. This is a slippery slope, considering that the principle *ignorantia legis not excusat* still rules the Italian criminal law system:[92] a principle which case law generally extends to include ignorance or misunderstanding of (basically) *any* administrative provision referred to in a penal one.[93]

Finally, we may ask ourselves if the *overture* made to market interests will at least be able – notwithstanding the sharp criticism of several conservation-oriented commentators – to stem in part the huge flow of illegal trafficking in cultural objects which has Italy as its source. Will the reform divert an appreciable amount of cultural property towards the now (slightly) larger channels of legal export?

91 See notes 33 and 35 above. Cf. also A. Mattera, op. cit., pp. 22-23.

92 With the sole exception of *unavoidable* ignorance or mistake: C. Cost., 24 March 1988, No. 364.

93 Cf. V. Manes, *La tutela*…, p. 311.

The answer, we assume, will be mostly negative. Based on available data, even prior to 2017 the vast majority of requests presented to export offices were usually granted (an average of 97.62% between 2013 and 2015; and 98.68% of requests in the first semester of 2016).[94] The average price of cultural items currently sold via auction in Italy is also significantly below the threshold of €13,500, fluctuating between about €6,190 (2012) and €9,518 (2015).[95] The raising of the parameter of "contemporary art" to 70 years will mainly affect modern art and design works,[96] but with a stricter control over "older" contemporary objects (between 50 and 70 years of age). On the other hand, a set of cultural property traditionally heavily affected by illegal trafficking, such as archaeological remains and ancient manuscripts and incunabula, remains subject to the previous, stricter rules, as are other objects, such as photographs,[97] which are meeting with a growing interest in the market. All in all, we may presume that the relative broadening of legal export possibilities will only marginally impact on the motivations of potential offenders, whose intended targets still fall well outside the scope of legality.

Provided that the practical implementation of the reform does not take an overly-bureaucratic turn (at present a real risk), a positive effect of the new rules, in terms of the preservation of the Italian cultural heritage, might be the release of Superintendency officials from their more menial checks on (tens of thousands of) objects of very limited cultural as well as financial value, so that this unquestionably stretched personnel will be able to devote more time and resources to the evaluation of more significant cultural property, which currently often risks being overlooked because of the Superintendencies' excessive workload, and whose export could actually be of great detriment to the national heritage.[98] But in all likelihood we will only be able to assess whether such a positive outcome was a realistic hope in about 3 to 5 years from now.

In the bigger picture however, it seems likely that only a more systematic and consistent approach to the reform of cultural heritage law, coupled with a renewed effort towards the harmonization of national legislations and an even stronger investment in preventive policies – which see the use of criminal law as

[94] See the data reported by M. Pirrelli, *La riforma della circolazione dei beni culturali fa entrare l'Italia in Europa*, "Il Sole 24 Ore", 4 April 2017. The average number of denials per year, between 2013 and 2015, has been 71, with an average of six compulsory or preemptive purchases per year, of an average value of €122,956 each.

[95] Cf. M. Pirrelli, *La riforma…*

[96] Cf. *Le norme sugli scambi diverse in ogni Paese*, "Il Sole 24 Ore", 25 January 2018.

[97] Cf. E. Romanelli, op. cit., pp. 146-152.

[98] Consider for instance the recent episode of François Gérard's 1810 portrait of Prince Camillo Borghese, initially granted a certificate of free circulation, revoked after it was acquired by the Frick Collection (New York): the export office appears to have "missed" the *historical* importance of the painting, even if the identity of the sitter was clearly written on the back of the picture. Cf. S. Cascone, *The Frick Touted its Purchase of a Prized François Gérard Painting as its 'Most Significant' in 30 Years – Then, Italy Asked for It Back*, "ArtnetNews", 23 August 2018, https://news.artnet.com/art-world/italy-francois-gerard-frick-1337156 [accessed: 12.10.2018].

only the top layer of a complex "pyramid"[99] of social, educational, economic, civil, and administrative law measures – will have some real possibility of succeeding in the difficult task of controlling and reducing the illegal transnational trafficking in cultural property.[100]

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[99] Cf. S.R.M. Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Institute of Art and Law, Leicester 2005, pp. 237-254, and I. Ayres, J. Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate*, Oxford University Press, New York – Oxford 1992, pp. 38-162.

[100] See also e.g. S. Manacorda, op. cit., pp. 27-28.

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