

RESEARCH ARTICLES

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The Implementation of Directive 2014/60/EU and the Problems of the Compliance of Italian Legislation with International and EU Law

Abstract: Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State, which replaced Council Directive 93/7/EEC, was implemented in Italy by legislative decree in January of 2016. This article provides a summary of the key provisions and changes under the recast Directive, an overview of its implementation in Italy, and an analysis of its relationship with the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The main Italian legislation on the circulation of cultural property is also examined in order to provide a critical analysis of the problems concerning its consistency with the corresponding international and EU rules.

Keywords: Cultural heritage, cultural property, free movement of goods, restitution, return of cultural property, 1995 UNIDROIT Convention

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Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State (recast)

The international legal framework on the circulation of cultural objects has certainly been enriched with the introduction of Directive 2014/60/EU on 19 December 2015.¹ The recast process, which began back in 2009, and the adoption of the new Directive on 15 May 2014, was spurred by the coming to light of various shortcomings in the previous Directive (Council Directive 93/7/EEC).² Indeed, criticism was raised not only by individual Member States but also by the European Commission, in four reports it published between 1993 and 2013. But one only has to look back at the practice of the European Union (EU) under the former Directive to see the limits of its effectiveness in the fight against the illegal trade in cultural objects.³ Three major shortcomings were unarguable: i) the narrow scope of its application; ii) the short limitation period within which return proceedings could be initiated (within a year after the requesting Member State authority became aware of the location of the object and the identity of its possessor); and iii) the lack of clarity as to the requirements to be met to obtain the return of the cultural object.⁴

The recast Directive aims at better reconciling the free circulation of cultural objects with the need for more effective protection of cultural heritage, in light of the Treaty on the Functioning of the European Union (TFEU), Articles 28 and following⁵ on the free movement of goods and the prohibition of quantitative restrictions between Member States. As further explained in the following paragraphs, these rules apply to cultural objects – as has been expressly stated by the European Court of Justice (ECJ) – but Member States may impose bans and limits on the import and export of goods when justified to protect cultural heritage within the scope of Article 36.

In brief, the recast Directive (2014/60/EU) sets out the categories of cultural objects that fall within its scope, extends the limitation period within which return proceedings may be initiated, and approximates the corresponding laws of other Member States in terms of the requirements that must be met. This approximation goal is reached in particular by ensuring a more common interpretation of the notion

¹ 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, OJ L 159, 28.05.2014, p. 1.

² 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.

³ First report, COM (2000) 325 final, 25 May 2000; second report (2005), 675 final, 21 December 2005; third report COM (2009), 408 final, 30 July 2009; and fourth report, COM (2013), 310 final, 30 May 2013.

⁴ See M. Cornu, M. Frigo, *Nouvelle Directive 2014/60/UE en matière de restitution de biens culturels. L'alliance entre le droit de l'Union et le droit international*, "Europe", No. 4, April 2015, pp. 5-10.

⁵ Consolidated version, OJ C 326, 26.10.2012, p. 47.

of “due diligence”, which the possessor must prove to have exercised in order to obtain fair compensation for the return of a cultural object.

To better appreciate the extent of the changes we need to recall that, under the former Directive, a Member State was required to return a cultural object only when: a) it qualified as a national treasure within the meaning of Article 36 TFEU; b) it fell within one of the categories of objects listed in the annex to the Directive; and c) it had left the territory of the requesting Member State after 31 December 1992. Furthermore, Article 9.2 provided that the legislation of the requested Member State governed the burden of proof, which unsurprisingly resulted in a quite inconsistent implementation and interpretation of the requirements to be met in order to bring return proceedings.

The decision to exclude the annex (which contained a list of categories of objects and, in many cases, monetary value thresholds which had to be met) from the recast Directive followed heated debate within the competent committee of the European Parliament, and marks a significant extension to the scope of the legislation on the return of cultural objects.

Italian Legislative Decree No. 2 of 7 January 2016 implementing Directive 2014/60/EU

Directive 2014/60/EU was implemented in Italy by legislative decree, as is often the case for EU Directives.⁶ The decree plainly fulfills its proper function by adapting the Italian legal system to the recast Directive and amending the related provisions under the 2004 Code of Cultural and Landscape Heritage (hereinafter: the Code).⁷

The Code is Italy’s main national legislation on the protection of cultural heritage and covers the international circulation, and restitution or return, of stolen or illegally exported objects. Its compliance with obligations or commitments of international origin, including of EU origin, is therefore essential. However, even though an Italian constitutional provision expressly states that, “Legislative powers shall be vested in the state and regions in compliance with the constitution and with the constraints deriving from EU legislation and international obligations”,⁸ an implementing national statute is nevertheless needed, particularly when a change or amendment to the existing domestic legislation is brought about by a European rule of law – typically in the form of a Directive. In Italy, the implementation of

⁶ Legislative Decree, No. 2, 7 January 2016, entitled: *Attuazione della direttiva 2014/60/UE relativa alla restituzione dei beni culturali usciti illecitamente dal territorio di uno Stato membro e che modifica il regolamento (UE) n. 1024/2012*, Gazzetta Ufficiale della Repubblica italiana, No. 7, 11.02.2016.

⁷ Through Legislative Decree No. 42, 22.01.2004, entitled: *Codice dei beni culturali e del paesaggio*, Gazzetta Ufficiale della Repubblica italiana, supplemento ordinario n. 28/L, 24.01.2004, n. 45.

⁸ Article 117.1 of the Italian Constitution: English translation available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [accessed: 17.12.2016]

EU Directives is regulated by a well-oiled legislative practice: the government is mandated by parliament to adopt *ad hoc* legislative decrees.⁹

From this perspective, the decree adopted is perfectly in line with Italian law and practice, as well as with its main goal, as it amends all the provisions of the Code so as to take account of the changes introduced in the recast Directive. This is notably the case with the provisions concerning restitution,¹⁰ providing assistance to Member States,¹¹ an action for restitution,¹² the extension of the statute of limitations from one year to three years,¹³ and compensation.¹⁴

A main subject of interest, in both the recast Directive and the (amended) Italian legislation, is the “new” definition of “cultural object”.¹⁵ Under the former Directive, the cultural object had to be *classified* as such by the Member State, whereas the definition under Article 2.1 of the recast Directive also includes cultural objects that are (merely) *defined* as such. This change, and the exclusion of the list of categories contained in the annex, has considerably extended the scope of the relevant legal regime. As a consequence, under both the recast Directive and the Italian legislation requests can be submitted for the return of items of paleontological, numismatic, and items of scientific interest, even if they do not belong to collections listed in inventories of museums, archives, libraries, or ecclesiastical institutions.

Much has been said about the elimination of the list of categories. As is known, the most puzzling point of the list was the delimitation of certain categories on the basis of their economic value. Indeed, the failure to be able to meet this essential condition sufficed to make a request for return inadmissible. The choice to exclude this list, following the request of some Member States and after thorough examination and debate within the European Parliament, has finally been made in the recast Directive with the hope of guaranteeing extended protection, at least in terms of the return of cultural objects to the European country of origin.¹⁶

⁹ Law No. 234, 24 December 2012, entitled: *Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*, Gazzetta Ufficiale della Repubblica italiana, No. 3, 4 January 2013, as amended by Law No. 115, 29 July 2015, Gazzetta Ufficiale della Repubblica italiana, No. 178, 3.08.2015 (the date format for laws/decrees changes later on in the footnotes),

¹⁰ Amendment to Article 75 of the Code, in light of Article 2.1 of the recast Directive.

¹¹ Amendment to Article 76 of the Code, in light of Article 5.3 of the recast Directive.

¹² Amendment to Article 77 of the Code, in light of Article 6 of the recast Directive and of EU Regulation No. 1024/2012.

¹³ Amendment to Article 78 of the Code, in light of Article 8 of the recast Directive.

¹⁴ Amendment to Article 79, in light of Article 10 of the recast Directive.

¹⁵ Article 2.1 of Directive 2014/60 defines “cultural object” as any object that is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as a national treasure of artistic, historic or archaeological value under national legislation or administrative procedures, within the meaning of Article 36 TFEU.

¹⁶ See M. Cornu, M. Frigo, *op. cit.*

However, the new wording of the European (and Italian) rule does not give Member States complete discretion in determining whether a given object is to be considered a national treasure possessing artistic, historic or archaeological value under national legislation or administrative provisions. In fact, both Article 2.1 of Directive 2014/60/EU and Article 75 of the Code, as amended by Legislative Decree 2/2016, explicitly confine the qualification to “within the limits of Article 36 TFEU”.

To better appreciate the limitations on Member States in this respect one must recall that Article 36 TFEU is to be interpreted bearing in mind that it belongs to Part 3 (Union Policies and Internal Actions), Title 1 (Internal Market), Chapter 3, TFEU – which deals with prohibition of quantitative restrictions between Member States. Under this Article, Member States may enact measures that restrict the import and export of goods within a set of categories, which includes that of national treasures, notwithstanding Articles 34 and 35, that set out the general rules on the circulation of goods in the internal market. In other words, the general objective of prohibiting quantitative restrictions and measures that have equivalent effects on the import and export of goods contains an exception in Article 36, which is the only provision of the Treaty that deals expressly with the circulation of works of art and cultural goods.

A comparison between the various (equally authentic) language versions of the TFEU (as well as of the former EEC Rome Treaty) shows some significant differences among them as to the scope of Article 36. At first glance, the margin of discretion of Member States appears wider under the Italian, Spanish and Portuguese versions, in that Articles 34 and 35 do not preclude prohibitions or restrictions on imports or exports of goods on the grounds of protecting a Member State’s artistic, historic or archaeological heritage. Conversely, the French and English versions refer to the more restrictive notion of national treasures of artistic, historic or archaeological value.¹⁷ In this respect, one should not forget that Article 36 contains a limited number of derogations to the general rules under Articles 34 and 35 TFEU and that, by virtue of its nature as a derogation from the ordinarily applicable rules, it cannot be interpreted broadly.

It should be stressed that no specific case concerning the interpretation of Article 36 in its multilingual versions has been dealt with by the ECJ to date. Nevertheless, the ECJ has addressed the problem of interpreting different language versions of the European Treaties’ rules on several occasions. Indeed, its decisions on this issue are grounded on a well-established doctrine. Basically, in the Court’s view: i) a single language version of a multilingual text of Community law cannot alone take precedence over other versions, since the uniform application of Community rules requires that they be interpreted in accordance with the intention of the person who drafted them and the objective pursued by the author, and in the light of the other language versions; and ii) the various language versions of a pro-

¹⁷ The German text differs slightly as it refers to “Kulturguts von künstlerischem oder archäologischem Wert”.

vision of EU law must be uniformly interpreted. Thus, in the case of a divergence between versions, the provision in question must be interpreted having reference to the purpose and general scheme of the rules of which it forms a part.¹⁸

In other words, Article 36 is a norm that, due to it being a derogation from the ordinary applicable rules, cannot be widely interpreted without infringing the normative scheme of the TFEU, as interpreted by ECJ case law.

The connections between Directive 2014/60/EU and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

If we look back at Council Directive 93/7/EEC, it is clear that the text was inspired by several articles of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention),¹⁹ or more specifically the 1990 Proposed 1995 UNIDROIT Convention text.²⁰ In fact, bearing in mind the clearly differing scopes of the 1995 UNIDROIT Convention and the Directive, it is somewhat surprising how close these two instruments are. One significant element that clearly illustrates the similarity between the two texts is the reversal of the allocation of the burden of proof. In both, the burden of proof lies on the possessor, who must prove that he/she exercised due diligence when acquiring the cultural object in order to receive compensation. At the same time, however, there are also some relevant differences between the two texts. For instance, unlike in the 1995 UNIDROIT Convention, the private owner of an unlawfully exported object cannot rely on Directive 2014/60/EU before a national court, as the right to sue the possessor is strictly reserved to Member States. Even though Council Directive 93/7/EEC was adopted some two years before the diplomatic conference that led to the adoption of the UNIDROIT Convention, the drafting process of the convention text – which the European Commission took part in – entailed a lengthy preparatory phase, dating back to at least the mid-1980s.

¹⁸ See ECJ, Case 29/69 *Stauder* (1969) ECR 419, para. 3; ECJ, Case C-219/95 *Ferriere Nord v. Commission* (1997), para. 15; and ECJ, Case C-268/99 *Aldona Malgorzata Jany and Oth. v. Staatssecretaris van Justitie* (2001), ECR, para. 47. See also ECJ, Case C-449/93 *Rockfon* (1995), ECR I-4291, para. 28; ECJ, Case C-236/97 *Skatteministeriet v. Codan* (1998), ECR I-8679, para. 28; and ECJ, Case C-257/00 *Nani Givane v. Secretary of State for the Home Department* (2003), ECR, para. 37.

¹⁹ 24 June 1995, 34 ILM 1322.

²⁰ See Article 8 of Council Directive 93/7/EEC and Article 7 (b) of the UNIDROIT Proposal, which impose no obligation to return when, “no claim for the return of the object has been brought before a court or other competent authority acting under Article 9 within five years from the time the requesting state knew or ought reasonably to have known the location of the object or the identity of the possessor, and, in any case, within twenty years from the date the object was exported”. The same applies, under Article 7 (c), when “the exportation of the object is no longer illegal when the return is requested”.

The influence of the 1995 UNIDROIT Convention on EU legislation with respect to the circulation of cultural property is quite astonishing and reaches back to at least the implementation of Council Directive 93/7/EEC. Indeed, the purpose of the Directive was to ensure, within the (then) European Community, the return of cultural objects classified as national treasures possessing artistic, historic or archaeological value under national legislation or administrative procedures (within the meaning of Article 36 TFEU), provided that they: a) fell within one of the categories listed in the annex to the Directive; and b) formed an integral part of public collections recorded in the inventories of museums, archives or libraries, or of ecclesiastical institutions. Furthermore, the reference period (cultural objects unlawfully removed on or after 31 December 1992) coincides with the abolition of the internal frontiers and the shift from the common market to the internal market. As mentioned, the recast Directive applies (as did the former one) to cultural objects unlawfully removed from the territory of a EU country. Consequently, the objects must be returned irrespective of whether they were moved within the EU or first exported to a non-EU country and then re-imported to another EU country.

An even greater influence of the 1995 UNIDROIT Convention can be seen in the recast Directive, where some of the former differences between the two texts were abandoned in favour of a solution identical to or consistent with the UNIDROIT text. For example, the scope of the recast Directive covers all cultural objects identified as national treasures possessing artistic, historic or archaeological value, under national legislation or administrative procedures; it does not include the list of categories annexed to the former Directive – thus enlarging the scope of the rules. Member states have three years from the discovery of the location of the cultural object/identity of possessor to initiate return proceedings and the possessor, in order to obtain compensation, must prove that he/she exercised due care and attention to ascertain the legal origin of the cultural object at the time of purchase. In this respect, it is remarkable that Directive 2014/60/EU – unlike Council Directive 93/7/EEC – contains a definition of the elements of due diligence (Article 10) almost identical in form to Article 4(4) of the 1995 UNIDROIT Convention.²¹

Here, once again, the pragmatic choice made by the European legislator is clear: instead of drafting a general and abstract definition of due diligence, illustrative criteria based on the model of Article 4(4) of the 1995 UNIDROIT Convention are provided. Such a solution makes a helpful contribution to the consistency of international practice.

As to the implementation in Italy of Directive 2014/60/EU through Legislative Decree 2/2016, no criticism can be raised against the legislator in this respect given that Article 4.7 of the decree entirely reproduces the wording of Article 10 of the Directive.

²¹ See M. Cornu, M. Frigo, *op. cit.*

The Italian legislation and the persistence of two kinds of restitution and return of cultural objects

Although Directive 2014/60/EU was implemented correctly – consistently with both the Italian legislative procedure for implementing EU secondary legislation and the Directive itself – some criticism can be raised concerning the provision in the Code on the return of cultural objects and its consistency with the international and EU law applicable in Italy.

In Italy, the restitution of cultural property unlawfully removed from the territory of a Member State is governed by Articles 75-86 of the Code, and the aforesaid Legislative Decree 7 No. 2 correctly implemented the recast Directive by adding a specification to Article 79 of the Code (on compensation). The specification is perfectly in line with the spirit and the letter of Article 10 of the recast Directive, which sets out the criteria courts are to follow when ruling on the return of a cultural object. In fact, Article 79.2 of the Code is clear on the issue of due diligence, and reads as follows:

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

In contrast, in dealing with preventing the unlawful international circulation of (stolen or illegally exported) cultural objects Article 87 of the Code expressly refers to the return of cultural objects listed in the annex to the 1995 UNIDROIT Convention, stating that it is governed by the convention “and the related laws of ratification and enforcement”.²² In Italy, the 1995 UNIDROIT Convention was ratified and implemented by Law No. 213/1999.²³ Article 3 of that law deals with the general mechanism to seek restitution or return before Italian courts. In (partial) accordance with the relevant provisions of the 1995 UNIDROIT Convention, Article 4.2 of Law No. 213 specifically stipulates that courts may grant compensation when the purchaser proves that he/she acted in good faith.

On the same issue, Article 87-bis of the Code expressly deals with the application of the UNESCO Convention on the Means of Prohibiting and Preventing

²² See Article 87 of the Code.

²³ Law No. 13, 7 June 1999, entitled: *Di ratifica ed esecuzione dell'atto finale della conferenza diplomatica per l'adozione del progetto di convenzione dell'Unidroit sul ritorno internazionale dei beni culturali rubati o illecitamente esportati, con annesso, fatto a Roma il 24 giugno 1995*, Gazzetta Ufficiale della Repubblica italiana, No. 153, 2 July 1999.

the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)²⁴ and the cultural objects indicated therein.²⁵

But despite all these similarities and connections between the 1995 UNIDROIT Convention and Directive 2014/60/EU, the restitution and return of cultural property is ultimately subject to at least two slightly different legal regimes in Italy – depending on the applicability of either the 1995 UNIDROIT Convention or the Directive – and considering the differences between the notions (and related legal regimes) of due diligence/due care and good faith.

One could argue in rebuttal that, by implementing the 1995 UNIDROIT Convention, the rule under Article 4.2 of Law No. 213/99 is clear in reversing the burden of proof to obtain compensation, i.e., placing it on the purchaser to prove he/she acted good faith. Furthermore, compensation is the best result the purchaser may obtain under the circumstances, as he/she is obliged to return the cultural object anyway. From the Italian standpoint this reversal of the burden of proof is, obviously, a great achievement when one considers that under the general rules on the transfer of movable *a non domino* – as in many other civil law countries – possession in itself is a valid title of ownership if the purchaser acted in good faith (Article 1153 of the Italian Civil Code²⁶); that good faith is presumed and the burden to prove the bad faith of the possessor lies on the dispossessed owner (Article 1147 of the Italian Civil Code).²⁷ Having said that, the notion of good faith is however not perfectly coincident with the notion of due diligence and the 1995 UNIDROIT Convention – exactly like the recast Directive – speaks, not by chance, of due diligence and provides concrete elements to refer to in order to ascertain whether or not it was exercised.

Problems of consistency of national statutes with EU legislation – the example of Article 64-bis.3 of the Landscape and Cultural Heritage Code

The chapter of the Code dedicated to the international circulation of cultural objects opens with Article 64-bis titled “Principles concerning the international circulation”. As may be known, in the process of updating and amending the Code after its adoption the Italian Parliament decided, in 2008, to add a third paragraph to the article expressly stating that “With reference to the regime of international cir-

²⁴ 14 November 1970, 823 UNTS 231.

²⁵ The 1970 UNESCO Convention was implemented in Italy by Law No. 873, 30 October 1975, *Gazzetta Ufficiale della Repubblica italiana*, No. 49, 24.02.1976.

²⁶ Consolidated version, http://www.normattiva.it/static/codici_civile.html [accessed: 16.12.2016].

²⁷ For more on the different legal definition of the notions of good faith and due diligence in international law, EU law, and in the positive law of some main European countries, see M. Cornu, J. Fromageau, C. Waltaert (eds.), *Dictionnaire comparé du droit du patrimoine culturel*, CNRS, Paris 2012, p. 289 and p. 400.

circulation, the objects forming the cultural heritage are not assimilated to goods.”²⁸ The aim of this new statute is quite clear in expressing an intent to provide national cultural heritage with a higher level of protection, under the umbrella of Article 9 of the Constitution, which states “The Republic supports the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the nation.”

This wording of Article 64-bis, para. 3 suggests the idea that “objects forming the cultural heritage” are no longer subject to the ordinary national and international norms and statutes governing the circulation of goods. However, if we look at the problem from both an international and EU law perspective this is not exactly the case.

From the first standpoint, if we consider the main relevant international agreements to which Italy is a party it should be noted that the general exception of GATT, Article XX i.e., the exception to the commercial policy chapter, applies. As is well known, by way of exception to the general rules of the agreement, Article XX provides as follows:

Subject to the requirement that the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...] f) imposed for the protection of national treasures of artistic, historic or archaeological value.

As has been correctly observed, subparagraph f) does not require that these measures are *necessary*, but merely that they are “imposed” to protect national treasures – unlike the other similar cases provided for under subparagraph a), namely, measures “*necessary to protect public morals*”, and those under subparagraph b), namely, measures “*necessary to protect human, animal or plant life or health*”.²⁹ It seems hardly deniable, even in the absence of case law on this specific subject, that under subparagraph f) import and export prohibitions or restrictions imposed by a contracting state to protect major examples of its cultural heritage are consistent with GATT. Yet, with reference to the above-mentioned Italian law provisions, it is unclear whether the notion of “protection of national treasures” may be interpreted as including the wider notion of “cultural property” referred to in Article 64-bis.3 of the Code. In our view, the two notions are not and cannot be interpreted as coincident, as it is clear that all national treasures are part of cultural heritage, but not all objects that form cultural heritage are national treasures.

²⁸ Para. 3 of Article 64-bis was inserted by Article 2.1 of Legislative Decree No. 62 of 26 March 2008, Gazzetta Ufficiale della Repubblica italiana, No. 84, 9 April 2008.

²⁹ Emphasis added; see O. Van den Bossche, W. Zdouc, *The Law and Policy of the World Trade Organization*, 3rd edn., Cambridge University Press, Cambridge 2013, p. 145.

From the standpoint of EU law, it is to be noted that some years ago the European Court of Justice, in interpreting the relevant articles of the (current) TFEU, ruled that cultural property is to be considered a good as long as it can be evaluated from an economic viewpoint and commercialised. In the ECJ's view, cultural objects are therefore subject to the rules governing the common market, with the exceptions and derogations provided for under the treaty.³⁰ In order to interpret the main rules on the principle of the free movement of goods, one should consider Articles 34 and 35 of the TFEU, which prohibit quantitative restrictions on imports and exports between Member States, as well as all other measures that have an equivalent effect. In this context, Article 36 of the TFEU exceptionally grants Member States the power to enact/maintain measures that restrict the import and export of goods in certain sectors.

Article 36 specifies that Articles 34 and 35 do not preclude prohibitions or restrictions on the import or export of goods on the grounds of – among other things – the protection of “national treasures of artistic, historic or archaeological value”. The above excerpt from Article 64-bis of the Code thus appears to be opposed to, if not in full contradiction with, Article 36 of the TFEU.

In my opinion, the declaration expressed by the Italian Code, which at first sight appears to influence, if not determine, the legal status of cultural property for the purposes of international circulation, is bound to have poor concrete effects particularly in the EU. In fact, a unilateral statement by a Member State via statute, such as the one in Article 64-bis which states that cultural property is not considered a good, cannot prevail over a set of principles and rules clearly stated in an EU treaty (such as Articles 34, 35 and 36 of the TFEU). The prevalence of EU obligations over domestic law is a well-established principle, affirmed by the ECJ since the mid-sixties³¹ and, as far as Italy is concerned the same principle is also clearly stressed, as we have seen, by Article 117 of the Italian Constitution.³²

The reasoning of the ECJ in the above-mentioned *Commission v. Italy* case³³ and its interpretation of the (then) EEC Treaty rules concerning the free movement of goods, the relevant obligations of the Member States, and the limits they are required to observe concerning the object and nature of the measures adopted to protect national treasures, appear to be perfectly consistent with the rules of interpretation of international treaties as codified by the 1969 Vienna Convention (Article 31-33), in that they specify (same issue as here) that cultural objects must be subject to the rules governing the common and (currently) internal market, with the only exceptions and derogations being those provided for under the treaties. This means that a Member State cannot merely enact a statute according to which

³⁰ See ECJ, Case 7/68, *Commission v. Italy* (1968), ECR, 562.

³¹ See ECJ, Case 6/64, *Costa v. ENEL* (1964), ECR, 585.

³² See the reports quoted in footnote 3.

³³ See O. Van den Bossche, W. Zdouc, *op. cit.*

cultural objects are not considered goods in an attempt to exempt them from the application of trade law provisions. On the other hand, a Member State is certainly entitled to ban the export of cultural property to the extent it falls within the scope of Article 36 of the TFEU. In this latter respect however it should be kept in mind that Article 36, being an exception to the other general rules on the circulation of goods, cannot be interpreted or applied broadly.

Concluding remarks

Directive 2014/60/EU (recast) may be considered a positive step forward in the struggle against the illicit trafficking of cultural property as it brings about considerable improvements compared to the effectiveness of the former Council Directive 93/7/EEC. It is of particular importance that the recast Directive may also represent a concrete example of the positive, mutual and – hopefully – beneficial influence between international and EU law in this domain. Even though differences inevitably remain between the two instruments, the references to the 1995 UNIDROIT Convention are evident. In order to avoid possible conflicts between the two, for those Member States that are party to the 1995 UNIDROIT Convention³⁴ Article 13.3 of the Convention provides as follows:

In relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply, as between these States, the provisions of this Convention the scope of application of which coincides with that of those rules.

From the viewpoint of formal consistency, the above rule may be of great aid in the prevention of conflict. Nevertheless, taking into consideration that the scopes of the two legal instruments are not perfectly coincident, in some cases a choice between the two must necessarily be made in order to obtain the return of a cultural object, even within the recast Directive.

Both the 1995 UNIDROIT Convention and Directive 2014/60/EU are important legal instruments from the Italian standpoint. Italy, when acting as a source country/requesting Member State, is particularly keen to have access to effective international legal instruments to obtain the restitution and return of unlawfully exported cultural objects. And as a market country/requested Member State³⁵, Italy has a similarly strong interest in being able to refer to, and rely on, a clear and efficient legal regime. For these reasons it is essential that the appropriate tech-

³⁴ This is the case for Croatia, Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

³⁵ The notions of “source nation” and “market nation” are taken from the renowned article by J.H. Merryman, *Two Ways of Thinking about Cultural Property*, “The American Journal of International Law” 1986, Vol. 80.4, p. 831 ff.

niques be used in the implementing process to ensure consistency between Italy's international and EU law commitments.

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