

COMMENTARIES

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Directive 2014/60/EU and Its Effects on the European Art Market

Abstract: The art market is very important from an economic point of view. It contributes to employment and positively influences adjacent industries. The economic context is particularly meaningful to understanding the relevancy and significance of the cultural market and the need to regulate it accordingly. At the same time, the economic value of art makes it evident why this sector is of interest to criminal and/or terrorist-led organisations. The fight against the illicit global art trade seems to be very difficult given the lack of effective international rules. The aim of this paper is to analyse the effects of the Directive 2014/60/EU on the European and global art markets.

Key words: Art market, economic assessment, circulation of cultural goods in the EU

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The Art Market in numbers: The TEFAF Report 2015 and 2016

The *TEFAF Art Market Report* is a yearly report issued by one of the world's most well-known art fairs: *The European Fine Art Fair*. This fair takes place each year in Maastricht and is considered to be a highly significant annual meeting art experts, sellers, and collectors. Every year the *TEFAF* drafts a Report that examines global art market trends.¹ The Report also examines specific market sectors, such as the increase in art fairs, online sales, and the economic impact of the various segments of the art market.

According to the *TEFAF Art Market Report 2015*,² in 2014 “the global art market reached its highest ever-recorded level, a total of just over €51 billion worldwide, a 7% year-on-year increase taking it above the 2007 pre-recession level of €48 billion.” Post-War and Contemporary art dominate the art market (48% of all fine art auction sales in 2014), with modern art accounting for 28%. It should be noted that Old Master sales accounted for only 8% of the fine art auction market, even if this field has over 50% of the market share in terms of value.

In 2013, the US held the greatest share of fairs (39%), with Europe in second place (38%),³ and Asia becoming a significant market (12%). The top 22 fairs and sales generated over a million visitors, and art fairs accounted for an estimated €9.8 billion in sales. This amount is even higher if we consider that many sales took place after the fair as a result of new contacts between dealers. Dealers spent an estimated €2.3 billion attending art fairs in 2014, and world exports grew 10% on a year-to-year basis and reached a historical peak in 2013.

The digital art market is also growing rapidly, as the Internet revolutionises the sector. E-commerce in art objects has attained a significant place; online sales of art and antiques were estimated to have reached around 6% of all sales in terms of value, with the majority of sales being made in the so-called “middle market” (\$1,000–\$50,000).⁴

¹ For a legal analysis of the global art market, see F. Fiorentini, *The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions*, in: J.A. Sánchez Cordero (ed.), *La convención de la UNESCO de 1970. Sus nuevos desafíos/The 1970 UNESCO Convention. New Challenges*, Universidad Nacional Autónoma de México, Mexico City 2013, p. 103 ff.; eadem, *New Challenges for the Global Art Market: The Enforcement of Cultural Property Law in International Trade*, in *Property Law Perspectives III*, Intersentia, Cambridge 2014, p. 189 ff.; eadem, *A Legal Pluralist Approach to International Trade in Cultural Objects*, in: J.A.R. Nafziger, R.K. Paterson (eds.), *Handbook on the Law of Cultural Heritage and International Trade*, Edward Elgar, Cheltenham – Northampton 2014, p. 589.

² The report (written by Dr. Clare McAndrew, a cultural economist specialising in the fine and decorative art market) is available at: <http://www.tefaf.com> [accessed: 2.12.2016].

³ The US and UK accounted for a combined 62% of all world imports of art and antiques.

⁴ It should be noted that we should not consider only ebay; there are websites dedicated to art auctions and sales, such as, for instance, Art.com, Artspace.com, liveauctioneers.com and Gagosian.com.

The 2015 report clearly sets out just how important the art market is from an economic point of view. It contributes to employment and positively influences adjacent industries. According to the TEFAF report, “it is estimated that 2.8 million people are employed globally by around 300,000 companies trading in art and antiques. The global art trade spent €12.9 billion on a range of external support services directly linked to their businesses in 2014.”

Recently Dr. McAndrew has also released the *Tefaf Art market report 2016*,⁵ focused on the 2015 art market. According to this report, in 2015 the online space added new intermediary phases to transactions, some of which are intermediaries to intermediaries in the offline market. The highest-spending top collectors of art do not, however, require any alternative to the old system of auction houses or galleries.⁶ Therefore, top purchases via online sales are still rare. However, without a doubt for those art buyers operating below the highest levels the online art space does make art more accessible.

The *Tefaf Art market report 2016* notes that the global art market achieved sales totalling \$63.8 billion in 2015, a 7% decrease from its previous \$68.2 billion high in 2014. This marks the first time since 2011 that the art market has decreased in value. This decrease however may be explained by the higher level of sales generated over the last ten years, making it harder to ensure consistent growth, particularly in a supply-limited art market. This has caused an unavoidable slowdown as some sectors have struggled to keep up the pace.⁷

In 2015, only the US market enjoyed significant growth, with sales there attaining the best worldwide performance, registering a 4% increase over 2015. Other regions experienced a decline. In particular Chinese market sales dropped 23% and sales in the UK dropped by 9%.

The economic context is particularly important to understanding the relevance of the cultural market and the need to regulate it accordingly. In this field it would be particularly helpful to adopt a law and economics approach in order to better understand whether the rules introduced are adequate to regulate the market, or not. The economic value of art makes it evident why this sector is of interest to criminal and/or terrorist-led organisations.⁸ It happens quite often that

⁵ The report (written by Dr. Clare McAndrew) is available at: <http://www.tefaf.com> [accessed: 2.12.2016].

⁶ See the interview of Dr. McAndrew published on “Artnet News”, 9 March 2016, <https://news.artnet.com/market/clare-mcandrew-on-the-tefaf-report-274279> [accessed: 2.12.2016].

⁷ See E. Kinsella, *What Does TEFAF 2016 Art Market Report Tell Us About The Global Art Trade?*, “Artnet News”, 9 March 2016, <https://news.artnet.com/market/tefaf-2016-art-market-report-443615> [accessed: 2.12.2016].

⁸ See B. Kretschmer, *Transnational Organised Crime and Cultural Property*, in: P. Hauck, S. Peterke (eds.), *International Law and Transnational Organized Crime*, Oxford University Press, Oxford 2016, p. 308 ff.; and the article *Culture and jihad, grimly connected through the art market’s “blood antiquities”*, “Economist”, 30 November 2015, <http://www.economist.com/blogs/prospero/2015/11/antiquities-and-terror> [accessed: 2.12.2016].

cultural goods like paintings or archaeological finds are stolen and sold illicitly. The fight against this illicit global art trade proves very difficult as international rules are lacking with respect to mechanisms to return cultural property to its country of origin.⁹ For this reason the adoption of international conventions (like the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, or the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects) in this field should be encouraged.

The economic analysis also makes it clear that the art market is not confined to national boundaries. This feature of the market has effects on its regulation. As Professor Jayme¹⁰ has pointed out, “Today art law is in itself an international subject.” If someone goes to a local German flea-market and finds a Mozart autograph,¹¹ he or she may be faced with a recovery claim from the Austrian National Library.¹² In countries like Switzerland there are even “toll-free warehouses where high-priced art objects are stored, a no-man’s-land of international commerce.”¹³ In order to provide for the protection of cultural property as well as art commerce, the subject of art law as such is in urgent need of further development.

The EU and the protection of cultural property

Only in the 1990s did cultural property begin to be considered a subject of regulation by the European Community. In fact, in the European Community Treaty cultural goods were considered as only one particular aspect of the common market.¹⁴ According to Article 36 of the Treaty on the Functioning of the European Union (TFEU)¹⁵ (earlier Article 30 of the TEC¹⁶): “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] protection of national treasures possessing artistic, historic or archaeological value.” In the 1990s, the European

⁹ See C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar, Cheltenham – Northampton 2015, p. 11 ff.

¹⁰ E. Jayme, *Narrative norms in private international law, the example of art law*, offprint from the *Recueil des cours, Collected Courses*, in: *Académie de droit international de La Haye / Hague Academy of International Law*, Vol. 375, Brill-Nijhoff, 2015, p. 29.

¹¹ Cf. AG Coburg, 24.04.1992, in NJW, 1993, p. 938.

¹² E. Jayme, loc. cit.

¹³ Ibidem.

¹⁴ C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th edn., Oxford University Press, Oxford 2016, p. 163 ff.

¹⁵ Consolidated version, OJ C 326, 26.10.2012, p. 47.

¹⁶ Treaty Establishing the European Community (consolidated version), OJ C 325, 24.12.2002, p. 0033.

Community (EC) began to promulgate rules defending cultural property against illegal exportation and ensuring its return, such as Regulation 3911/92 or Council Directive 93/7/EEC.

Regulation 3911/92 was aimed at guaranteeing a standard export regime for cultural property at the Community's external borders. The Regulation was applied to those cultural goods that belonged to one of the categories listed in its Annex. Under the Regulation, an export licence valid across the EC was required to export cultural goods and its issuance could be rejected if the goods in question were a national treasure covered by national legislation.

Regulation 3911/92 was substantially amended several times and later codified by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (hereinafter: Regulation 116/2009).¹⁷ This Regulation provides uniform control measures on the export of cultural goods outside the European Union. According to Regulation 116/2009, an export licence is required to export a cultural good outside the European Union (EU)'s customs territory. A person wishing to export such goods must address a licence request to the competent EU member state authority, and an issued licence shall be valid throughout the Union. The country authority may reject an export licence only if the goods are protected by legislation covering national treasures of artistic, historical or archaeological value. The export licence foreseen by the Regulation must be presented, together with the export declaration, to the competent customs office when the customs formalities for export are being completed.

According to the Regulation 116/2009 there are three types of licence:¹⁸

- 1) A standard licence. This is normally used for each export subject to Regulation (EC) No. 116/2009 and is valid for only one year;
- 2) A specific open licence. This is particularly useful in the case of an exhibition in a third country, as it covers a repeated temporary export of a specific cultural good by its owner and is valid for up to five years;
- 3) A general open licence. This is issued to museums or other institutions to cover the temporary export of goods belonging to their permanent collection which are to be exported for an exhibition held in a third country. The general open licence is also valid for up to 5 years.

The success of the Regulation is dependent on the mutual assistance and cooperation between EU countries' authorities and on their capacity to establish an effective and dissuasive penalty system in case of infringements.¹⁹

¹⁷ 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. 1-7.

¹⁸ Annexes I, II and III of the Regulation contain models for these licences.

¹⁹ See G. Magri, *La circolazione dei beni culturali nel diritto europeo: limiti e obblighi di restituzione*, ESI, Napoli 2011, p. 118 ff.

In 1993, Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State²⁰ was put in place in order to establish a mechanism for the return of cultural objects that had been unlawfully removed from the territory of an EU country.

The Directive was aimed at securing the return of cultural objects that had been unlawfully removed from the territory of an EU country after 1 January 1993 and classified as national treasures possessing artistic, historic or archaeological value under national legislation or administrative procedures, and fell within one of the categories listed in the Annex to the Directive, or formed an integral part of a public collection (Article 1.1). Under Article 1.2, unlawful removal was considered as any removal in breach of the legislation in force in the State or in breach of the conditions under which temporary authorisation was granted.

Like Regulation 3911 (and 116), the Council Directive 93/7/EEC was based on administrative cooperation between Member States. Each country was required to designate a central authority to carry out the tasks provided for in this Directive (Article 3). The task of the central authorities was to cooperate with each other to ensure the return of illegally removed cultural objects. In particular, in accordance with Article 4, on the request of a Member State, the competent authority of the Member State to whom the request was addressed was required to seek out a specific cultural object that had been unlawfully removed from the requesting Member State's territory and to identify the possessor and/or holder and collect all useful information to find the object; notify the requesting Member State where the cultural object (which was presumptively unlawfully removed) was found; enable the competent authorities to check the cultural value of the object; take any necessary measures for the physical preservation of the cultural object; prevent, including by the adoption of interim measures, any action to evade the return procedure; and act as the intermediary between the possessor and/or holder and the requesting Member State with regard to the object's return.

In order to ensure the return of cultural objects, the Directive specified the procedures regarding the return proceedings. According to the Directive these proceedings could not be brought more than one year after the requesting EU country became aware of the location of the cultural object and the identity of its possessor or holder (Article 7.1). This limitation period was considered one of the most problematic aspects of the Directive, and was generally considered too short to guarantee the possibility to bring an action for restitution.²¹

²⁰ 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.

²¹ G. Magri, *op. cit.*, p. 60 f. and 123 ff.

In addition, restitution proceedings could not be commenced if more than 30 years had elapsed from the time of unlawful removal of the object from the territory of the requesting Member State. The only exception in this regard was for objects that are part of public collections or ecclesiastical goods, where the time-limit for bringing a restitution action was regulated by national legislation or bilateral agreements between EU countries (Article 7).

It is quite important to note that the purpose of the Directive was exclusively to secure the return of the cultural object to the requesting Member State, not to provide proof of ownership. According to Article 12 "Ownership of the cultural object after return shall be governed by the law of the requesting Member State." However, the possessor was to be awarded compensation in the event of loss of possession if he or she exercised due care and attention when acquiring such object. The compensation was to be paid by the requesting Member State, which could then claim reimbursement from the persons responsible for the unlawful removal.

For lawyers engaged in private law, the provision for compensation was perhaps the most interesting part of the Directive because of its intrinsic link to the protection of a good faith purchaser.²² Indeed, this topic has been thoroughly discussed, particularly by Italian scholars.²³ As opposed to the common law *nemo dat quod non habet* principle, in Italy a good faith purchaser is, in the case of movable property, protected under Article 1153 c.c., even in the event of stolen goods. In Italy the boundaries of Article 1153 c.c. are a matter of discussion, particularly in the field of cultural property. It is a subject of intense dispute whether this rule may also be applied, or if the particular features of cultural goods exclude them from being considered as movables.²⁴ In general it can be said that – according to case law – Article 1153 c.c. is applicable also to cultural goods. However, the purchaser's good faith is normally harder to prove than usual, in particular when he/she is a professional.²⁵

Council Directive 93/7/EEC clearly was in need of amendment in order to improve its effectiveness. In particular, according to reports from the Commission

²² See F. Fiorentini, *Good Faith Purchase of Movable in the Art Market. Comparative Observations*, in *Pravni život, Pravo i načelo savjesnosti i poštenja, 27 godina kopačkičke škole prirodnog prava*, No. 11, Vol. III, Belgrade 2014, p. 249 ff.; G. Magri, *Beni culturali e acquisto a non domino*, "Rivista di diritto civile" 2013, p. 741 ff.

²³ See, for instance, R. Sacco, R. Caterina, *Il possesso*, 3rd edn., Giuffrè, Milano 2014, p. 445 ff.; M. Comperti, *Per una diversa lettura dell'art. 1153 cod. civ. a tutela dei beni culturali*, in: *Scritti in onore di Luigi Mengoni*, Giuffrè, Milano 1995, p. 395 ff.; G. Magri, *Beni culturali...*, p. 741 ff.

²⁴ There are a few cases in which the rule was applied by Courts to cultural goods: see for instance e Cass. 24/11/1995, No. 12166, "Foro it.", 1996, I, c. 907; Cass. 14/09/1999, No. 9782, "Mass. Giust. civ.", 1999, p. 1968 and Tribunale Prato, 16/12/2008, "Foro it.", 2009, col. 1934 ff.

²⁵ Tribunale Prato, 16/12/2008, "Foro it.", 2009, col. 1934 ff.

to the Council, the European Parliament and the Economic and Social Committee,²⁶ the Directive's problematic areas could be listed as follows:

- a) lack of administrative cooperation between Member States (also taking into consideration language barriers);
- b) in the case of archaeological goods taken from illegal excavations it was too difficult to prove the object's provenance and/or the date when it was unlawfully removed;
- c) the Directive alone did not suffice for combating illegal trade in cultural goods;
- d) the Directive was only rarely applied, mainly due to administrative complexities, high costs, and the restrictive limitations and the short time periods for initiating return proceedings; and
- e) the Annex needed to be amended to include new categories of goods and/or to modify the financial threshold or the reporting rate.

Even though the Directive had numerous limitations and its implementation has had limited influence on the fight against the illegal trade in cultural goods, it cannot be considered to have been useless. Member States used administrative cooperation to search for cultural objects and to notify each other of their discovery in another EU Member State's territory. In my opinion there is no doubt that the most important result was the increase in the number of amicable returns of cultural objects carried out after the Directive entered into force.²⁷ The second influential result secured by the Directive was to increase awareness between EU countries and international traders concerning the need to improve the protection of cultural goods at the European level.²⁸ This aspect was particularly mean-

²⁶ See the Fourth Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, Bruxelles, 30 May 2013, [COM (2013) 310 final] (not published in the Official Journal – years 2008-2011); Third Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State, Bruxelles, 30 July 2009, [COM (2009) 408 final] (not published in the Official Journal – years 2004-2007); Second Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State, Bruxelles, 21 December 2005 [COM (2005) 675 final] (not published in the Official Journal – years 1999-2003); and Report from the Commission to the Council, the European Parliament and the Economic and Social Committee of 25 May 2000 on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State [COM (2000) 325 final] (not published in the Official Journal). G. Magri, *La circolazione...*, p. 115 ff.

²⁷ See in particular the Third report on the application of Council Directive 93/7/EEC.

²⁸ See the Report from the Commission to the Council, the European Parliament and the Economic and Social Committee of 25 May 2000.

ingful because, following the UNESCO and UNIDROIT Conventions, it could be contended that the rules protecting cultural property from illicit trading and exportation could be considered as a separate legal subject, and Council Directive 93/7/EEC demonstrated a real political will to protect cultural heritage, at least on the European internal market.

Directive 2014/60/EU of 15 May 2014

In 2014, the Council Directive 93/7/EEC was recast by Directive 2014/60/EU, which came into force on 19 December 2015.²⁹ The purpose of this Directive is the same as the previous: to provide cooperation mechanisms and return proceedings to secure the return of cultural objects unlawfully removed from the territory of a Member State after 31 December 1992. In order to safeguard the achievement of this goal, a considerable number of innovations are introduced compared to the previous Directive. Among others, they include the elimination of the Annex in Council Directive 93/7/EEC, the extension of the limitation periods, improved cooperation between Member States thanks to the Internal Market Information System, and changes in the allocation of the burden of the proof in cases of compensation to the possessor.

The new Directive may be applied to all cultural objects identified as “national treasures possessing artistic, historic or archaeological value under national legislation.” (Articles 1 and 2.1, Directive 2014/60/EU). This provision expands the range of objects that may become subject to recovery and puts an end to the debate between the so-called importing and exporting Member States. According to Southern European countries (so-called exporting States) the European provisions should protect any cultural good, independent of its economic value. However, according to the Northern European States (so-called importing States) only cultural goods with a significant economic value should be protected.³⁰ Council Directive 93/7/EEC opted for a halfway solution and therefore listed in its Annex those goods that could be considered cultural, while the new Directive recognises the identification of goods of cultural value, as classified by a Member State. In other words, to determine whether a good has a cultural value is now the task of each Member State.

In order to improve cooperation between national central authorities, the Directive provides for the possibility to use the Internal Market Information System

²⁹ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast), in OJ L 159, 28.05.2014, p. 1 ff.

³⁰ G. Magri, *La circolazione...*, p. 21 ff.

(IMI).³¹ The IMI should simplify the search for a specific cultural object that has been unlawfully removed; aid in identification of its possessor; simplify the notification of discovering a cultural object; enable a check on the cultural object; and act as an intermediary for its return.³²

Under the new Directive, return proceedings shall be enacted no later than *three* years after the central authority of the requesting EU Member State became aware of the location of the object and of the identity of its possessor (Article 8). This longer time frame should facilitate the return and discourage the illegal removal and trade in national treasures. Three years, rather than the previous one, may be considered as a sufficient time to file a return proceeding.³³

The new Directive is of further importance because it clarifies that the possessor of a cultural object who claims compensation, when its return has been made, shall provide proof that he or she acted with due care and attention (Article 10). The former Directive was unclear, and according to Article 9 it was questionable if the possessor had such a duty or not.³⁴ At the same time however, the precise meaning of the term “fair compensation” still remains unclear.

Closing remarks: some considerations on the impact of the Directive on the European Art Market

In order to make use of the potential of culture and cultural heritage, and to reinforce dialogue with the cultural heritage stakeholders and identify and implement coordinated policies and actions for the sustainable management and development of cultural heritage, the European Council adopted (on 21 May 2014) the *Council Conclusions on cultural heritage as a strategic resource for a sustainable Europe*³⁵. These Conclusions underline the importance of heritage in promoting economic growth

³¹ Provided by Regulation (EU) No. 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (“the IMI Regulation”), in OJ L 316, 14.11.2012, p. 1.

³² See C. Roodt, *op. cit.*, p. 196 ff.

³³ It could be interesting to compare the former provision with the new one: Article 7 Council Directive 93/7: “Member States shall lay down in their legislation that the return proceedings provided for under this Directive may not be brought more than one year after the requesting Member State has become aware of the location of the cultural object and of the identity of its possessor or holder.” Article 8 Directive 2014/60: “Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder [...]”

³⁴ G. Magri, *La circolazione...*, p. 21 f.; M. Marletta, *La restituzione dei beni culturali. Normativa comunitaria e Convenzione Unidroit*, CEDAM, Padova 1997, p. 98.

³⁵ *Council Conclusions on cultural heritage as a strategic resource for a sustainable Europe*, European Council, 21 May 2014, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/142705.pdf [accessed: 2.12.2016].

and in creating and enhancing social capital. But if one takes into consideration the European rules protecting cultural property, it immediately becomes clear that the economic value of culture is less important to the EU than the need to protect cultural heritage.

This fact is particularly evident under Directive 2014/60. The Directive aims to protect the European cultural heritage and to facilitate the return of stolen cultural goods or cultural goods that have been illicitly exported. If we read the Preamble's "Whereas" provisions, paras. 16, 17 and 18 seem to make it immediately and abundantly clear that the purpose of the Directive is also to fight the illicit market in cultural goods. The EU approach is thus not to facilitate the art market, but rather to create a legal internal art market.

According to para. 16: "In its Conclusions on preventing and combating crime against cultural goods adopted on 13 and 14 December 2011, the Council recognised the need to take measures in order to make preventing and combating crime concerning cultural objects more effective." The Council also recommended an "effective protection of cultural objects with a view to preventing and combating trafficking and promoting complementary measures where appropriate", if necessary together with ratification of the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995.

Para. 17 is dedicated to the art market professional: "It is desirable to ensure that all those involved in the market exercise due care and attention in transactions involving cultural objects." According to the "Whereas" provision, the only measure to dissuade the acquisition of a cultural object of unlawful origin is to couple "the payment of compensation" with "an obligation on the possessor to prove the exercise of due care and attention". For this reason, the Directive's provisions "stipulate that the possessor must provide proof that he exercised due care and attention in acquiring the object, for the purpose of compensation" (Preamble para. 17, and Article 10.2). These provisions, and the duty to return every kind of good considered as a treasure by its Member State of origin, can have a quite considerable impact on the functioning of the art market.

While under the previous Council Directive 93/7/EEC the duty to return an object was subject to, and delimited by, the cultural goods listed in the Annex, now there is a risk of forced return of every kind of cultural good, whatever value it has and whatever cultural interest it may hold. At the same time, the buyer has few tools by which to assess whether the good he/she purchases may be considered a cultural good from another Member State.³⁶ In addition, for a buyer it is really

³⁶ In many countries like Italy the cultural interest is declared from the administration. So it is impossible to estimate if a good will be declared or not. Sometimes it even happens that the same good, for instance an incunabulum or a Code, is declared *per se* in a Region and it is considered without cultural meaning in another one. See G. Magri, *Alcune considerazioni sul mercato del libro antico dopo la legge 6 agosto 2015, n. 125, "Aedon" 2015, Vol. 3.*

quite difficult to prove that he/she acquired the good with the exercise of due diligence. Moreover, even for a good faith buyer who paid market value it could be quite impossible to prove the due diligence required by the Directive in order to obtain compensation. Furthermore, the Directive gives no indication as to whether the “fair compensation” would be the price paid or a lower amount. The Directive, in fact, does not clarify what “fair compensation” actually means. It could correspond to the market value, to the price paid, or it could be a simple indemnification. The most reasonable solution is the market value, but in some cases (for instance when the price paid was considerably lower than the market value) this would not be the most equitable solution.³⁷

Thus in theory it is quite easy to consider the effect of the Directive as destabilising and prejudicing the art market. Fortunately however, those risks are quite limited in reality. First of all we have to take into account that the provision stipulating a duty to return all cultural goods that have been illicitly exported to another Member State does not automatically mean that all cultural goods traded in Europe may become the subject of restitution proceedings. Most of them possess documentation which demonstrates that they have been purchased lawfully. In such cases there is only a minimal risk of restitution. Furthermore, a request for restitution is an expensive matter for the requesting State. Hence, even if innumerable cultural goods could theoretically become subject to a request for return, it may be presumed that such requests will be lodged only for goods with a “high cultural interest” (and therefore a high economic value). Stolen or unlawfully exported goods having a “high cultural interest” are generally well known on the market, and it is relatively easy for the police, by consulting antique dealers’ catalogues, to find them on the “legal market”, as for instance in a public auction.

At the same time, the art market is a place where it is easy to deal in stolen goods. Consequently it is important to impose a high level of duty of care. In particular, taking into consideration the most recent actions by international terrorists, which are aimed at making money by trading in art, the Directive should make European dealers in antiques and antiquities, art sellers, and auction houses more responsible. Additionally, the art market comprises a small community; art collectors and merchants are well-known to each other, and if a good sold by a dealer or an auction house is subject to a restitution request for having been allegedly stolen or unlawfully exported, the effects on the reputation of the seller are merciless. A telling example of this is the *Girolamini* case and its effects on the reputation of the auction house Zisska & Schauer. All principal European newspapers reported that one of the leading partners of the auction house – Mr. Schauer – was arrested in Munich as a result of an arrest warrant issued by Italian authorities for his

³⁷ For more details see G. Magri, *La circolazione...*, p. 65 ff.

handling of over 400 stolen books which were found on the premises of the auction house itself.³⁸ Negative news of this kind, even before judgement is passed, can deeply influence the market and the reputation of the auction house. Zisska & Schauer indeed changed its name to Zisska & Lacher as a result of this incident. The Directive, and the connected risk of losing a purchased good in the event it is unlawfully circulated, may be expected to further dissuade such art acquisitions and transactions.

Nonetheless, it still needs to be considered whether such a rigid regulation may not become an economic burden or prejudice. Many observers argue, for instance, that the regulation of cultural property in Italy is too strict and that the effect of such strict regulation is the relocation of sellers from Italy to other countries, like the United Kingdom or the United States, which may contribute to turning a legal market into an illegal one. The question remains open whether the new Directive could have such adverse effects on the European art market. The answer would seem to be negative: the increased regulation resulting from the Directive should lead to a general diffusion of and incentivize the duty to return unlawfully exported cultural properties, reaffirming the duties arising from the UNESCO and UNIDROIT Conventions.³⁹ The new Directive and the reiteration of the duty to return could also stimulate a new paradigm on the international market: the emancipation of the international cultural market from a simple economic approach and the creation of more policy-based and ethical regulations, which would balance economic interests with the duty to protect national heritage.

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³⁸ In many European papers, we read that the books stolen from the *Girolamini* library in Napoli were ready to be sold by the auction house in Munich. See for instance the articles: J. Vasagar, *Head of German auction house arrested over theft of Italian antique books*, "The Telegraph", 28 August 2013, <http://www.telegraph.co.uk/news/worldnews/europe/germany/10271458/Head-of-German-auction-house-arrested-over-theft-of-Italian-antique-books.html> [accessed: 2.12.2016]; *Unter Verdacht*, "Frankfurter Allgemeine Zeitung", 23 August 2013, <http://www.faz.net/aktuell/feuilleton/kunstmarkt/auktionen/ermittlungen-gegen-auktionator-unter-verdacht-12544271.html> [accessed: 2.12.2016] and *Munich returns antique books to Italy*, "The Art News Paper", 1 March 2015 <http://theartnewspaper.com/search/?q=munich+auktioneer+arrested&how=d&where=> [accessed: 2.12.2016].

³⁹ See, for instance, the *ICOM statement concerning the protection of cultural property and the amendment of the law in Germany*, <http://icom.museum/press-releases/press-release/article/icom-statement-concerning-the-protection-of-cultural-property-and-the-amendment-of-the-law-in-germa/> [accessed: 2.12.2016].

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Geo Magri

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