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Anna Kędziorek* talks to Andrzej Jakubowski**

The Role of the European Union in Combatting the Illicit Trafficking of Cultural Objects – Towards a New Action Plan

Andrzej Jakubowski (AJ): On behalf of the editorial board of the “Santander Art and Culture Law Review”, I would like to thank you very much for agreeing to this interview.

We are talking online during the fourth wave of Covid-19. How has the global pandemic affected your work?

Anna Kędziorek (AK): Thank you very much for inviting me to talk about the protection of cultural heritage against looting and trafficking. It is an important topic and we need to make effort to help public understand that collecting artefacts is not necessarily a harmless hobby of a handful of *aficionados*.

To reply to your question, the workload during the pandemic has increased. The European Commission had to take various measures to limit Covid’s negative social and economic impact. In the case of my unit, we of course focused on providing support to the cultural and creative sectors. They are among the hardest hit sectors by the Covid-19 pandemic, which is the

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result of cancelled performances, shut down venues, halted productions and thus directly impacted revenues and income, making the situation of cultural and creative professionals even more precarious. Initial Commission estimates of May 2020 foresaw a drop in turnover of more than 50% in 2020, without taking into account further lock-down periods.¹ According to Ernst&Young study “Rebuilding Europe”, the cultural sectors lost around 31% of its revenues in 2020, with the performing arts experiencing a 90% drop in turnover between 2019 and 2020. Music lost 76%!² This has led to an unprecedented mobilization for the support of the sectors at the EU level. To give just a few examples, the Recovery and Resilience Facility allocates an average of 2%, more than €9 billion, to the cultural and creative sectors. In addition, the Creative Europe’s (EU dedicated programme for culture) budget has been increased to €2.5 billion to support artists and creative professionals to cross borders and reach new audiences. On the research and innovation front, Horizon Europe has nearly €2 billion dedicated to cultural heritage research and innovation-driven projects in the areas of our creative industries. And let us not forget React EU – the important support that has already been mobilized for culture through the Structural Funds in various areas of intervention.

However, during the lockdown we also anxiously followed information about the impact of the lockdown on cultural heritage sites. What we have seen is that the closure of museums and other heritage institutions has made the work of thieves more complicated. Yet, where they thrived were in the archaeological sites that were not sufficiently protected during the lockdown.

AJ: What is the role of the Directorate General for Education and Culture (DG EAC) when it comes to the fight against illicit trafficking in cultural goods?

AK: The safeguarding of cultural heritage in principle falls within the exclusive competence of the EU Member States. However, Article 167 of the Treaty on the Functioning of the European Union (TFEU) defines the EU’s role as one of encouraging, supporting, and supplementing the actions of the Member States in this regard.

In practice, this means that the EU cannot adopt legislative acts to implement the EU cultural policy on the basis of Article 167 TFEU. Therefore the DG EAC does not have legislative instruments at hand. However, we do cooperate with the Member States, cultural heritage experts, and international organizations to exchange experiences, provide support, and in capacity building activities.

Moreover, we cooperate closely with other Directorates Generals of the Commission that are in charge of policies where the EU has the competence to legislate,

¹ European Commission, *Commission Staff Working Document: Identifying Europe’s Recovery Needs*, 27 May 2020, SWD(2020) 98 final.

² See <https://www.rebuilding-europe.eu/> [accessed: 19.01.2022].

including areas such as trade, customs, the internal market, and fighting financial and organized crime. For example, we were associated to the process of drafting the proposal of Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State³ or, more recently, of the Regulation (EU) 2019/880 on the introduction and the import of cultural goods.⁴

In addition, we use our knowledge of the cultural and creative sectors while preparing work plans for the EU funding programmes relevant for the protection of heritage, such as Creative Europe, Horizon Europe, the Neighbourhood, Development and International Cooperation Instrument (NDICI), and others. For example, we closely cooperated with DG Research and Innovation on the preparation of the call for a social platform against illicit trafficking, which led to setting up of the NETCHER network.⁵

Finally, we support financially relevant projects aiming to curb trafficking in cultural goods, which focus amongst others on providing capacity building and awareness raising activities. For example, the project currently implemented by UNESCO⁶ offers capacity development for a diversity of professionals in the EU Member States, the Member States in the Western Balkans, and the partner countries of the European Neighbourhood Instrument (ENI) South.

AJ: In the last years, the European Union has taken an impressive volume of legal and policy measures aimed at curbing the illicit trafficking of cultural goods. Could you outline the main elements of this action?

AK: It is true that in recent months the fight against illicit trafficking has become an integral part of combatting organized crime and money laundering.

The need for reinforced EU action on trafficking in cultural goods was identified in the EU Security Union Strategy⁷ of July 2020 and the EU Strategy to Fight Organised Crime⁸ for 2021-2025 adopted in April 2021. The latter sets out a comprehensive approach to fighting organized crime – including the illicit trade of cultural goods. To implement this commitment, the strategy provides for the adoption of an Action Plan on tackling the illicit trade in cultural goods in 2022. Its objectives will include improvement and strengthening of the monitoring, information exchange, and cooperation between law enforcement, customs authorities, and

³ 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), OJ L 159, 28.05.2014, p. 1.

⁴ Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, OJ L 151, 7.06.2019, p. 1.

⁵ See <http://www.netcher.eu> [accessed: 19.01.2022].

⁶ See <https://en.unesco.org/fighttrafficking/eu-cooperation> [accessed: 19.01.2022].

⁷ COM(2020) 605 final.

⁸ COM(2021) 170 final.

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other relevant actors in the field. In addition, this strategy emphasizes the importance of involving a wide range of stakeholders, including archaeologists, art historians, and cultural heritage experts. Moreover, the Commission is now looking into, amongst other things, possible actions to improve the online and offline traceability of cultural goods in the internal market and to enhance closer cooperation with third countries where cultural goods are looted, in line with the 2021 Council Conclusions on the EU Approach to Cultural Heritage in Conflicts and Crises.⁹

What is more, the EU is also stepping up the fight against money laundering. Here, the risks associated with trading in cultural goods have been taken into account. The anti-money laundering framework proposed by the Commission in July¹⁰ maintains the obligations on traders or intermediaries in the trade of certain works of art, introduced by the 5th anti-money laundering directive in 2018.¹¹ They fall within the category of so-called “obliged entities” which are required to put in place anti-money laundering controls and conduct “customer due diligence” or “know-your-customer” policies (e.g. identify the customer and verify identity; identify the beneficial owner; identify the purpose and intended nature of a business relationship; and conduct ongoing monitoring of business relationships, including scrutiny of transactions). The Commission also keeps working on the implementation of the Regulation (EU) 2019/880 on the introduction and the import of cultural goods, and just a few months ago adopted the implementing regulation.

AJ: Decision (EU) 2017/864 of the European Parliament and the Council on a European Year of Cultural Heritage (2018) and the earlier (2014) Commission’s Communication “Towards an integrated approach to cultural heritage for Europe” emphasized the need for strengthening cultural heritage policy cooperation at all levels. How do you assess the overall implementation of these objectives?

AK: Yes, indeed the fight against illicit trafficking was one of the key actions of the European Year of Cultural Heritage (EYCH). The EYCH certainly contributed to raising the awareness of policy makers at both the national and EU levels on the implications of the illicit trade in cultural goods. The legacy of the year is included in the *European Framework for Action on Cultural Heritage*,¹² where combatting illicit trade constitutes part of the pillar “Cultural heritage for a resilient Europe”.

⁹ <https://www.consilium.europa.eu/media/50557/st09837-en21.pdf> [accessed: 12.12.2021].

¹⁰ https://ec.europa.eu/info/publications/210720-anti-money-laundering-counteracting-financing-terrorism_en [accessed: 12.12.2021].

¹¹ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.06.2018, p. 43.

¹² European Commission, *European Framework for Action on Cultural Heritage*, Publications Office of the European Union, Luxembourg 2019, <https://op.europa.eu/en/publication-detail/-/publication/5a9c3144-80f1-11e9-9f05-01aa75ed71a1> [accessed: 12.12.2021].

The European Parliament, our very precious ally when it comes to safeguarding cultural heritage, was a strong supporter of designating 2018 as a Year of Cultural Heritage. For years they have also been very vocal about the need for a comprehensive set of measures to fight the trafficking in cultural goods, and adopted several resolutions in this regard. For example, already in the Resolution on the destruction of cultural sites perpetrated by ISIS/Da'esh of April 2015¹³ the Parliament called on the European Commission to devise a coordinated approach in this regard.

And while it is true that the EU and its services had been engaged in combatting the illicit trade in cultural goods for a certain period of time, these were rather uncoordinated activities which, albeit very needed, sometimes lacked coherence. To give you just a few examples, in 2012 the EU Council established EU CULTNET, an informal expert network of stakeholders from law enforcement in the field of cultural goods, but did not ensure any budget for its operation. Between 2013 and 2015, the EU supported the ICOM's Observatory on Illicit Trafficking in Cultural Goods, but once the financing finished, the project struggled to continue and ICOM had to look for other sources of financing.

On the external side, the EU had taken concrete actions to address the systematic looting of heritage sites in Syria and Iraq: the Council adopted the regulations banning imports of cultural goods coming from these two countries if they are suspected of having been removed illegally (Regulation 1210/2003 in respect of Iraq, Regulation 1332/2013 in view of the situation in Syria). Apart from that, the EU co-financed projects aiming to protect cultural heritage in third countries, for example in Mali (2012-2013) and Syria (2014-2017), and we also organized in 2014 a pan-African workshop on the protection of cultural goods against plunder, theft, and illicit trafficking in Morocco – within the framework of Joint Africa-EU strategic partnership. But these were singular punctual actions rather than part of a well-prepared strategy.

Things finally started to move in early 2016, following the terrorist attacks in Paris and Brussels. In February of that year the Council adopted Conclusions on the fight against the financing of terrorism¹⁴ and the Commission adopted an Action Plan to strengthen the fight against terrorist financing.¹⁵ Both documents acknowledged the links between trafficking in cultural goods and financing terrorism. As a result, the Commission commenced drafting the proposal of a regulation on imports of cultural goods into the EU, which was finally adopted in 2019 as Regulation (EU) 2019/880.

¹³ https://www.europarl.europa.eu/doceo/document/TA-8-2015-0179_EN.html [accessed: 12.12.2021].

¹⁴ <https://www.consilium.europa.eu/en/press/press-releases/2016/02/12/conclusions-terrorism-financing/> [accessed: 12.12.2021].

¹⁵ COM(2016) 050 final.

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AJ: Among the Commission's activities in recent months, much effort has been put into implementing the new import regime for cultural goods, established by Regulation (EU) 2019/880. Could you indicate the main practical arguments for introducing this novel system of import controls?

AK: Yes, the Commission had to adopt implementing provisions (Commission Implementing Regulation (EU) 2021/1079)¹⁶ within two years from the entry into force of the basic act (Regulation (EU) 2019/880). Elements of implementing arrangements already existed in the basic act (e.g. the deadline of 90 days for the competent authority to make a decision on granting an import licence), but the implementing Regulation supplemented those with additional detailed arrangements in order to create a coherent system. Another major reason for adopting implementing provisions within a set deadline was to progress with the establishment of a centralized electronic system ("the ICG system") for the import of cultural goods.

AJ: How would you respond to some critical voices who argue that the new import regime may be too restrictive and therefore difficult to implement in practice, and that it may negatively affect the development of cultural exchanges and the associated cultural industries?

AK: The Union legislators, i.e. the European Parliament and Council, identified the need to combat the illicit trade of cultural goods and protect world cultural heritage and tasked the Commission with proposing legislative measures to regulate the particularly opaque art market. In general, any attempt to create and implement a given market regulation triggers a reaction from the professionals concerned. However, the positive rewards for law-abiding art dealers should not be underestimated, as the requirements to provide proof of licit provenance or at least that due diligence has been done to ensure licit provenance will increase the trust of potential clients in the goods that the art dealers are offering for sale.

AJ: Since each Member State introduces different criminal sanctions for infringing the Regulation, may this result in a "map" of countries (jurisdictions) with greater and lesser risks for traffickers? In other words, could such differences make certain EU Member States more likely to be chosen as gateways for the importation of illicitly traded cultural goods?

AK: The Commission is currently in the process of assessing the notified national legislation on the matter. If significant disparities are identified, it will confer with the specific Member States in order to seek possible improvements.

AJ: How do you assess the current state of implementation of the import control system?

¹⁶ OJ L 234, 2.07.2021, p. 67.

AK: The establishment of the ICG system is fully on schedule. It should be noted that, as all the formalities required are to be carried out in a paperless environment, the import control system cannot apply before the ICG system becomes fully operational, i.e. by 2025 at the latest.

AJ: Thank you very much for these clarifications. I would also like to ask how you assess the current state of cooperation between the Commission and competent international organizations. Could you give some examples of this cooperation? How has the visibility of the Union's participation been ensured?

AK: Indeed we do cooperate with the competent international organizations. In the end, trafficking in cultural goods is a cross-border, even global phenomenon which needs to be tackled on an international level. Therefore, different Commission services cooperate with their relevant counterparts. For example with respect to customs, my colleagues from DG TAXUD (Directorate General for Taxation and Customs Union) work with the World Customs Organization, and as regards organized crime the EU cooperates with Interpol, UNODC, etc.

In DG EAC we work with the Council of Europe, whom we support in promoting the Nicosia Convention on offences against cultural property. With UNESCO we undertake joint actions supporting concrete activities. For example, since 2017 over 600 professionals participated in tailor-made workshops and have become multipliers for raising awareness and supporting the fight against illicit trafficking. Joint activities have included the ongoing (2019-2021) project that I mentioned earlier – “Inter-regional and crosscutting action aiming to strengthen the fight against illicit trafficking of cultural property”, which addresses beneficiaries of the EU Member States, as well as of pre-accession countries of the Western Balkans and partner countries of the European Neighbourhood Instrument (ENI) South. Different activities have been or will be put in place for representatives from cultural heritage authorities and museums, the banking sector, the media, judiciaries, law enforcement, and ministries.¹⁷ Among the thematic and sub-regional online workshops, the peer-to-peer exchanges are an innovative form consisting of gathering three pilot countries in a series of online meetings. The pilot countries represent one source country, one transit country, and one destination/market country: i.e. Algeria, Serbia, and the Netherlands; each represented by five experts from different national institutions, such as specialized police forces, customs services, and the ministries of culture and of justice. In thematic sessions, the experts meet their respective counterparts and discuss their organizational structures, working methods, ways of information exchange, and cooperation in project networks.

¹⁷ Please see UNESCO's website for details: <https://en.unesco.org/fightrafficking/eu-cooperation>; <https://en.unesco.org/Illicit-Trafficking/previous-eu-funded-projects>; <https://en.unesco.org/Illicit-Trafficking/eu-funded-projects-publications-and-resources> [all accessed: 12.12.2021].

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In 2017-2018, the EU financed a project implemented by UNESCO on engaging the European art market to provide trainings on due diligence; existing policies and regulations at the international and EU level; the use of existing tools; the role of police and customs; and illicit trafficking and related crimes. In 2018, we cooperated on training judicial and enforcement authorities in the Member States on the identification, investigation, and cooperation with respect to this crime, providing magistrates, lawyers, judges, prosecutors, police officials, and customs agents with e-learning modules and the toolkit *Fighting the Illicit Trafficking of Cultural Property: A Toolkit for European Judiciary and Law Enforcement*.¹⁸

These are all very concrete and measurable actions that not only improve the capacities of the professionals concerned, but also make it possible to establish an informal network of contacts and give opportunities for peer learning.

AJ: What about the implementation of EU objectives on the participatory governance of cultural heritage and multi-stakeholder dialogue regarding the struggle against illicit trafficking of cultural property? How does the Commission ensure the realization of these goals?

AK: Following the European Year of Cultural Heritage, the DG EAC decided to set up an informal expert group on cultural heritage in order to maintain the spirit of cooperation and policy dialogue. The group provides the Commission with advice and expertise and serves as a platform for consultations and exchange of information on cultural heritage policies to support the implementation of the Framework for Action on Cultural Heritage. It is composed of the Member States' representatives and stakeholders operating in the area of culture and cultural heritage.

At one of the last meetings of the Expert Group a session was devoted to fighting illicit trade in cultural goods. The Commission and the External Action Service presented the recent policy developments, including the preparation of the Action Plan against illicit trafficking. We invited the experts to come up with suggestions and ideas on how to strengthen their cooperation with the enforcement authorities and to participate in the Public Consultation on the Action Plan. This should be launched in the weeks to come – and I also invite you and your readers to follow it closely and provide us with your feedback.

AJ: Thank you very much for the invitation. Certainly many of our readers are very interested in participating in this Public Consultation. On behalf of the editorial team and our readers, I would also like to express our gratitude for your time and this very generous and informative interview.

¹⁸ Z. Boz, *Fighting the Illicit Trafficking of Cultural Property: A Toolkit for European Judiciary and Law Enforcement*, UNESCO, Paris 2018.