

BRAFA Talk by V.J. Geerling

An unnecessary and flawed regulation that will harm the art market.

New regulatory challenges for collectors

Ladies and gentlemen,

Please allow me to introduce myself: I am Vincent Geerling, dealer in ancient art in Amsterdam and long-time board member of IADAA, the International Association of Dealers in Ancient Art, of which I have been chairman for the past five years. Though I am not a lawyer (but married to a senior judge) I have been involved in fighting against unfair treaties and legislation on cultural goods since 1995.

CINOA has asked me to introduce you to the “*Proposal for a regulation of the European Parliament and of the Council on the import of cultural goods*”*, to explain why the EU decided to introduce this regulation and to sketch the possible challenges this regulation could mean for you as collector and art lover.

If not improved, the regulation could have a devastating effect on the art trade in non-European cultural goods. Art dealers are the link between the previous owner of an object and the future owner, be it a museum or a private collector. The new regulation could disturb a substantial part of the international art market because it has an unclear definition, is retroactive and reverses the burden of proof. This combination could result in such uncertainty among customs officials that, during import procedures, they might seize objects that have been legal private property for years in countries outside the EU.

The story starts in 2014 in Germany, when announcing a radical new law on cultural property, the minister and a senior police official repeatedly voiced four lies on television and in the press.

The new EU proposal is based on the same lies, in spite of the fact that we have debunked them all. Those lies are:

1. “*Terrorists finance themselves by selling illicit cultural goods.*”

Until this day there is no evidence for this claim. On the contrary, various independent reports confirm that cultural goods play no role in the financing of terrorism. **

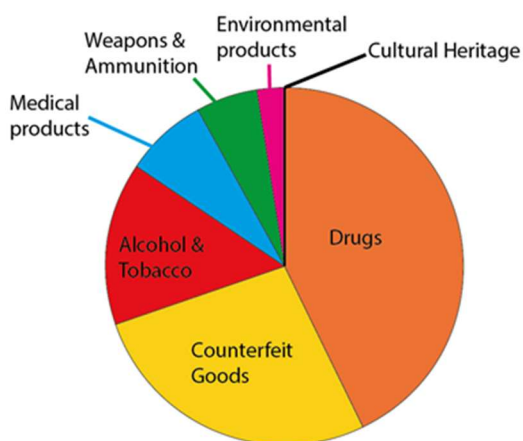
2. “*The illicit market in cultural goods comes third after drugs and weapons.*”

Our analysis***of the World Custom Organisations Illicit Trade Report 2017 shows that worldwide, the number of seizures of drugs represents 47% of the total, Counterfeit goods 24%, alcohol and tobacco 14%, medical products 7% weapons & ammunition 4% and finally cultural heritage **0.2%**. Interpol, which also makes the claim on its website, contradicts the claim on the same page.

3. “*The size of the illicit market in cultural goods is six billion Euros and increasing.*”

First of all there is no illicit market like the drugs market. We have traced this fake figure back to the year 2000 when the original invention was two billion. In fact nobody knows the value of the illicit trade in cultural goods. From the WCO figures one could deduce that the value for trafficking of cultural heritage can possibly be estimated to be a few millions only and shrinking.

Share of seizures by risk category



Number of seizures

Total: 101,024

Drugs:	43,144 (42.7%)
Counterfeit goods:	27,267 (27.0%)
Alcohol & Tobacco:	14,786 (14.6%)
Medical products:	7,629 (7.5%)
Weapons & Ammunition:	5,612 (5.5%)
Environmental products:	2,419 (2.4%)
Cultural Heritage:	167 (0.2%)

Ladies and gentlemen, during the past two years, we have presented a lot of this independently verifiable evidence in Brussels to show that there is no evidence for these false claims, which makes this regulation unnecessary. The problem for the art market is that the media nowadays is only interested in gripping one-liners about terrorism, murder and bloodshed. Very few journalists bother to check their sources. Boring facts are not selling newspapers, so the press is not interested in the true story. Many of us mock the US president for his invention of “Fake News”. Well ladies and gentlemen, the above Fake News, published in magazines and newspapers, as well as online, was used by the German government already in 2014 and by the EU Commission in 2016 as the main reason for the proposed regulation.

Because the Commission accepted at face value the unverified content of illustrated magazines, sensational television reports and questionable newspaper articles on trafficking, the illicit market and terrorist financing, they decided to take action. You would expect responsible authorities to seek expert advice first wouldn't you? Not only did the commission not do so in this case, but when offered independently verifiable expert advice by CINOA, the commission chose to ignore it.

In order to assess the size of the perceived problem, the EU Commission sent out a questionnaire to all 28 member states early in 2016. Based on experience, the art market was confident that the results would not be very alarming. In June 2017, before the proposal was finalised, the result of the commission's own survey showed that all 28 member states reported back that they had **no evidence** of terror financing within their borders, and the number of reported seizures of cultural goods was so low that it clearly was not a big problem. But the Commission chose to ignore the results of its own survey as well and proceeded as planned.

On the 13th of July 2017 the Commission introduced its *Proposal for a regulation of the European Parliament and of the Council on the import of cultural goods*. Here I quote the first line: **Reasons for and objectives of the proposal**;

“In the framework of the 2015 European Agenda on Security and of the 2016 Action Plan to step up the fight against the financing of terrorism, the Commission announced that it would prepare a legislative proposal against illicit trade in cultural goods.” Unquote.

As we, and all member states, have demonstrated that there is no evidence of cultural goods financing terrorism, the question is: why press ahead with the regulation? As you probably know, the import of cultural goods coming from Iraq and Syria has been prohibited for years, since 2003 for Iraq and 2011 for Syria. These prohibitions are simple and effective, something one cannot say about the proposed regulation.

For more than a year the European Parliament has debated in committees about the proposal and produced in total 450 amendments to it. This number was reduced to a still considerable 95, making things more complicated. Simultaneously, the Council of Europe came with its own compromise text and in November 2018 the negotiations between the Commission, the Council and the Parliament – the so-called Trilogues – began. Trilogue meetings are informal and the timing of the meetings are not known to most MEPs. There are no formal minutes taken. The use of trilogues has long raised concerns about public transparency and accountability. The trilogue negotiations, which usually take many months, were extremely short this time, and the result is a flawed Regulation.

Please let me briefly explain what an EU Regulation is: *A regulation is a legal act of the European Union that becomes immediately enforceable as law in all member states simultaneously. When a regulation comes into force, it overrides all national laws dealing with the same subject matter and subsequent national legislation must be consistent with and made in the light of the regulation. As such, regulations constitute one of the most powerful forms of European Union law and a great deal of care is required in their drafting and formulation.*

As I have already explained, this is precisely what did NOT happen.

So let us now have a look at this proposal for a European Regulation on the import of cultural goods. It still is a provisional agreement on a compromise text, and we should understand that only the first reading in the European Parliament has passed. The proposal is now being translated and needs to undergo scrutiny by the legal departments. Member states can still influence the process but the only arguments for changes can be legal ones. The proposal has to be voted on two more times in the European Parliament, so theoretically it could still be stopped, but the chance that it will pass in its current form is substantial. If it does, what would be the consequences for the trade and for private collectors?

The proposed regulation is very complicated, impractical, unclear and, above all, unnecessary. The proposal lacks a clear definition of cultural goods. The proposal reverses the burden of proof and is also retroactive, as it requires the importer to show decades old licences that do not exist anymore. It will impose on the international art market a time-consuming administrative burden. Importation procedures can take up to four months. These are the reasons why both CINOA and the EAMC have lobbied against this proposal, but unfortunately their pleas fell on deaf ears, with the exception of MEP Daniel Dalton, one of the rapporteurs.

An important change that our lobbying has achieved is that the regulation does not apply to cultural goods that were created or discovered in the territory of the European Union. This will make a huge difference.

Let us look now at some of the most important articles starting with the Definition:

Article 2: “definition”: *‘cultural goods’ means any item which is of importance for archaeology, prehistory, history, literature, art or science as listed in the Annex;*

There are actually three Annexes; A, B and C. These do not list goods but categories of goods and have different age and value thresholds for the same categories.

Article 4: “Import licence” 1. *The import into the Union of the cultural goods referred to in Part B of the Annex other than those referred to in Article 3(4) and (5) shall be subject to an import licence issued by the competent authority of the Member State.”*

Article 4 has 11 more paragraphs

Article 5: “Importer statement” 1. *The import of the cultural goods referred to in Part C of the Annex shall be subject to the submission of an importer statement.*

For both the import licence application and the importer statement one must have some sort of evidence that:

*“the goods have been exported from the country where they were created or discovered in accordance with laws and regulations of that country **at the time they were taken out of its territory**”;*

or one needs evidence that

“the country where the cultural goods were created or discovered cannot be reliably determined or

“the cultural goods left the country where they were created or discovered before 24 April 1972.”

In that case one must have evidence that

“the goods have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than 5 years.”

Can everybody still follow this? I told you it is very complicated.

Am I right in assuming that most of you understand that for objects that have been private hands for more than 40 years, objects that have changed hands and sometimes have changed country, the requested documentation will often be lost? Well, if in future you do not have the information, import into the EU could become a nightmare.

The good news is that enforcement is not likely to take place until some time into the future, because one of the important results of our lobbying efforts is the obligation for the Commission to first create an electronic system to process the import licences and importer statements from Art 4 and 5. The Commission has recently confirmed to Dalton’s team that the system of importer statements and import licencing will only start when the electronic system is up and running, and they expect this to be not earlier than 2026.

What will apply from 18 months after the date of entry into force of this Regulation is Art 3.1, at first sight an innocent article:

Article 3 “Introduction and import of cultural goods”

1. *The introduction of cultural goods listed in **Part A of the Annex** which were removed from the territory of the country where they were created or discovered in breach of laws and regulations of that country is prohibited.*

The customs authorities and competent authorities shall take any appropriate measure when there is an attempt to introduce the cultural goods referred to in the first subparagraph.

If we look at **Part A of the Annex** (= UNESCO Annex) we see a very comprehensive list of categories of cultural goods, from antiquities to objects of ethnological interest, from paintings and drawings to old books, from stamps to old musical instruments. The UNESCO Convention itself, though, is limited to very important cultural goods. By using the same annex, without any age or value thresholds, it now applies to virtually everything. This causes concern, because it appears to be an attempt to enforce the UNESCO Convention, on all imports regardless of the various ratification dates of exporting countries. And it does so without those countries' even be aware of it. This will create uncertainty with customs authorities who have to decide whether something can be imported or not.

So how does it affect us all? Apart from the time-consuming procedures, uncertainty is the keyword that comes to mind. Uncertainty that will lead to a less varied offering at art fairs such as BRAFA or TEFAF. Art dealers have searched all over the world to present you a wide variety of beautiful objects during this fair. In future, according to Art 4 and 5, a dealer or collector that wants to import a non-European cultural good from say Switzerland, the UK (after Brexit) or the USA, must be able to provide evidence that the item in question has been exported in the past according to the laws and regulations of the country of origin at that time, or it will probably be seized at the border. **If** this also applies to Art 3.1, it would cause big problems. If you buy outside the EU via internet, even from the big auction houses in London or the USA, you will be asked to supply the above information. If customs believe that it is not sufficient, they could seize your purchase.

By the looks of it, ladies and gentlemen, we are all guilty unless we can prove our innocence with decades old documents that rarely exist. This reverses the burden of proof and makes the regulation retroactive as well. In Germany this is already the case.

As I explained at the beginning, an EU Regulation becomes immediately enforceable as law in all member states and it overrides all national laws dealing with the same subject matter.

Retroactive laws are prohibited in most Member States, but this regulation could overrule that. Therefore we need to have an assurance from the Commission that the Regulation is not retroactive and there is no reversal of the burden of proof about the legitimacy of export from any source country in the past. Otherwise, millions of cultural goods that are legal private property outside the EU can no longer be imported into the EU.

Both retroactivity and the reversal of the burden of proof would endanger the property rights of millions of people outside Europe and would breach Article 1 of the United Nations Declaration on Human Rights. Let me be clear, ownership is the most comprehensive right a person can have when it comes to a thing and it is a fundamental human right, which is why it appears under Article 1. That is exactly what we have to defend. Thank you for your attention.

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Links to documents cited.

The latest version of the text of the proposed regulation.

*https://www.eumonitor.nl/9353000/1/j4nvg5kjg27kof_j9vvik7m1c3gyxp/vkue8hqc5vz6/f=/15494_18.pdf

** Cultural Property, War Crimes and Islamic State. Destruction, plunder and trafficking of cultural property and heritage by Islamic State in Syria and Iraq – a war crimes perspective. A report commissioned by the Dutch National Police, Central Investigation Unit, War Crimes Unit <https://goo.gl/rNhQgb>

*** The IADAA analysis of the 2017 WCO report, including direct link to the report.

<https://iadaa.org/wp-content/uploads/2019/01/IADAA-Analysis-2017-WCO-Illicit-trade-report.pdf>