Joint European Commission-UNESCO Project

“Engaging the European Art Market in the fight against the illicit trafficking of cultural property”

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FIGHTING ILLICIT TRAFFICKING IN CULTURAL OBJECTS, SEARCHING FOR PROVENANCE AND EXERCISING DUE DILIGENCE IN THE EUROPEAN UNION

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FIGHTING ILICIT TRAFFICKING IN CULTURAL OBJECTS,
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Scope, application and limits
The vigilance of persons involved in the provenance of works in circulation due to varying circumstances is a key aspect in fighting illicit trafficking in works of art. It concerns both the persons involved in the art market (sellers, agents and buyers) and the cultural institutions (museums, particularly in their function of enriching collections), even if it is not applied under entirely the same terms depending on the professional field considered. From this point of view, one of the key concepts, to support verification of the regular provenance of works and objects of art, is the concept of due diligence. More familiar to the Anglo-American systems, this concept appeared in the body of international and European laws, before spreading to certain national legislations. This study concerns the obligation of due diligence imposed on EU Member States, it being understood that this obligation concerns objects originating both from Member States and from third countries. Initially, it may be worth briefly mentioning the main concepts applied from this perspective (I. we will come back to this in greater detail as developments are made in international law, European law and national laws). Secondly, in order to understand the way in which the States apply or could apply the criterion of due diligence, it is important to consider the various supranational systems (II). Some of these concern more specifically objects originating from countries in a situation of conflict with regard to trade from the Middle and Far East in particular (III). With this in mind, the means of control over provenance introduced by the States provide an essential stance (IV). Since the question of due diligence requires standards of behaviour of the various persons involved to be established, it is essential for a code of ethics to also be applied (V). The efficacy of the system depends on good connections between these various sources.
I. KEY CONCEPTS, INITIAL OVERVIEW

1. The basis of the obligation of due diligence: the concept of cultural objects

The concept of cultural objects is not uniform, either in national laws (each State developing its own conception of what it classifies as a cultural object), or in European law, or even in international texts. Each of the international conventions sets out its own definition, even if similarities and borrowings may be seen. For example, the definitions of cultural objects are very similar in the UNESCO Convention of 14 November 1970 and in the UNIDROIT Convention of 24 June 1995. It can also be seen that some States have based their legislation on the definition given by the UNESCO Convention (France for example, for certain provisions on fighting illicit trafficking introduced by the Law of 7 July 2016 or even the LTBC in Switzerland).

We will not enter into a full analysis of the various concepts here. A study of the various sources of the law on cultural objects simply indicates that it is possible to isolate several circles of cultural projects defined fairly restrictively. Depending on the purpose of the legislation considered, the concept of cultural object will be more or less selective. In some cases, it designates major elements of State heritage or elements likely to be incorporated (first and second circles). Certain legislations may also aim to clean up the art market in general. If they can assist in protecting heritage, by preventing the circulation of objects in principle exempt from trade in that they form part of the national heritage of States for example, they also have a broader vocation by seeking to regulate the functioning of the market of works and objects (third circle).

What is certain is that the obligation of due diligence is expressed within these various circles, all the more so as general vigilance over the art market is beneficial not only for a better functioning of the market itself but also for the protection of heritage, participants having every interest in not risking the circulation of cultural objects protected by special laws and statutes.

1.1. The first circle of the legal concept of cultural objects designates the most important objects, the objects forming part of the heritage of States which they consider should remain within their territory and under their control. These include, for example, national treasures as defined by Article 36 TFEU and Directive 2014/60/EU of 15 May 2014. Certain States have incorporated a definition of national treasure (as in the case of France), while others prefer other names (cultural objects of national importance in Germany, objects of cultural interest in Italy, etc.).

They are mostly subject to prohibition from export and some are subject to statutes of unavailability (non-transferability, imprescriptibility).

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1 Referred to as the UNESCO Convention in this study.

2 Referred to as the UNIDROIT Convention in this study.
The second broader circle of the legal concept of cultural objects concerns cultural objects that could potentially be included in this bracket of most important cultural objects. They are just not as yet identified as such and so are not as yet protected and are found in circulation on the market. The States exercise a form of vigilance over the movements of this second circle to be able either to identify a situation of illegal circulation or, where appropriate, to incorporate them into their heritage, hence the need to define a broader scope over which to exercise such vigilance. This concept of cultural objects is more broadly understood in the texts on export control or even in the State’s authoritative acquisition mechanisms (such as the pre-emptive right). In the European Regulation on control over exports to third countries, goods falling into categories listed in an annex and affected by thresholds of value and/or age are subject to export authorization. These thresholds allow this exercise of vigilance to be concentrated on goods which could potentially, owing to their price and age, constitute national treasures. For example, a painting leaving the territory will be subject to this if it is valued at 150,000 euros or over, if it is more than 50 years old and if is not in the hands of its painter. Certain national laws adopt the same definition technique. This is the case of French law, which is largely inspired by European Union law in the drafting of its export rules, it being understood that each Member State has developed its own system. Italy, for example, applies a far more extensive level of control over the export of cultural goods, applicable to goods more than 50 years old but without referring to financial thresholds. Hungary may also be mentioned, which adopts this same timescale of 50 years.

These first two categories are applied in order to protect State heritage, both in national laws and in EU law. If we start from the Community wordings, we can see that the definition of cultural object does not have the same breadth in Regulation (EC) No. 116/2009 and in Directive 2014/60/EU. More restrictive in the Directive, which only relates to national treasures, i.e. the most important cultural objects, it is more extensive in the Regulation, as it exercises control over export from the customs territory of the Union. This control does not aim to stop all exports, but simply to check that they have proper export authorization or that they do not include national treasures.

The third circle of the legal concept of cultural objects is distinguished from the first two. It includes cultural goods, works and objects of art in circulation on the art market. The idea here is to regulate this particular market and to curb the risks of trafficking, whether it relates to objects removed from national heritage or any cultural objects circulating illegally, such as stolen or concealed goods. Several legislations on commercial or criminal matters are based on a very broad definition of cultural objects. This is the case for example of the legislation on the obligation for art dealers to keep a register, the obligations falling upon professionals, the obligations of due diligence exercised over the origin of the work frequently reinforced in this field of art law, but also the tax wordings and even the legislations on copyright or art forgery. It is the illegal market that is referred to here above all, even though the motives thus applied allow cases of circulation of heritage objects to be prevented and fought at the same time.

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3 Regulation (EC) No. 116/2009 on the export of cultural goods
**Comments**

The fact that the concept of cultural objects is so different, owing not only to the sovereignty of States in deciding on their cultural heritage but also the variations seen in the definition of cultural objects depending on the purpose of the rule, clearly complicates matters. These differences are one of the causes of the increase in trafficking⁴. Difficult to overcome owing to questions of competence, this situation requires States to make a particular effort in defining the various categories of cultural objects protected or classified by law as clearly as possible.

2. The concept of provenance closely connected with the obligation of due diligence

Although this concept, which is essential to prevent and fight illicit trafficking, does not actually constitute a legal category, it may be used in different ways. The term rarely appears in the international wordings. A few occurrences can be found for example in the UNESCO Convention of 14 November 1970 (Article 7, which mentions cultural objects originating from a State Party to the Convention that have been exported illegally, or even Article 10 on the requirement for antique dealers to keep registers mentioning the provenance of the objects, and also the Article that states that “elements of artistic or historical monuments or archaeological sites which have been dismembered”) and in the 1954 Convention (with regard to cultural objects originating from occupied territories).

It also appears in national legislations, with regard to several provisions such as the obligation to check the provenance of an object before any acquisition (particularly for museums), and the obligation to provide information on the provenance of the object (for example in registers kept by antique dealers or obligations held by art dealers).

As these various uses of the term of provenance develop, it may be defined as “a body of information relating to the origin of a work and serving to identify it”⁵, and to ensure the traceability thereof, it being understood that such information may be different in nature. It may be historic, scientific or legal. The information may relate “the context in which the work was created (such as the date and place of production, author and subject), its various owners (person commissioning it, purchaser at public sale, collector, and so on) and the place of the work in art history and in history (publication in descriptive catalogues, exhibition catalogues, reviews, and so on).”⁶, the origin (the soil from which the object is extracted, the monument from which it is detached, the context in which it appeared, the State or community from which it originates).

From a legal point of view, the legality of the provenance, a concept which must consequently be related to the question of circulation of the object, will be discussed. The provenance is lawful when there is no misappropriation, when import or export takes place in accordance...

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⁴ In this sense, CECOJI Study.

⁵ Study on preventing and fighting illicit trafficking in cultural objects in the European Union - Contract no. Home/2009/ISEC/PR/019-A2, CECOJI, 2011, p. 188 et seq., referred to as the CECOJI Study in this study.

⁶ Ibid., p. 189.
with the legislation applicable to the object.

Comments

What is certain is that there are many essential issues involved in checking provenance in terms of preventing and fighting illicit trafficking in cultural objects. Firstly, research into the provenance enables illegal situations to be exposed. A case of dubious provenance may lead to an acquisition not being made and will, if necessary, lead to proceedings against the person placing that type of object on the market. It also provides security for the purchaser who, purchasing it after making diligent searches as to its provenance, reinforces his right as he can invoke his good faith and diligent measures, two other fundamental concepts.

3. Neighbouring, concept of country of origin of the objects

This concept is sometimes used as a synonym for country of provenance. It is hardly distinguished from it or, more correctly, it indicates and specifies the particular links between the State and the objects in question7. In this respect, the Convention of 14 November 1970 states that “The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country’s cultural property against all the dangers resulting there from”. Probably clearer is this special link established by the Resolution of the Institute of International Law which suggests a definition of the country of origin taking the cultural dimension into account: “For the purpose of this Resolution [...] ”country of origin” of a work of art means the country with which the property concerned is most closely linked from the cultural point of view”8.

That being the case, the removal of an object from its country of origin and its transfer to a third country does not mean that the situation of such an object is unlawful in every case. This is recalled by the Convention of 14 November 1970 which mentions among the cultural objects forming part of State cultural heritage “cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property”. The European Court of Human Rights also ruled to this effect in the Beyeler case, noting that “As regards works of art by foreign artists, the UNESCO Convention of 1970 accords priority, in certain circumstances, to the ties between works of art and their country of origin (see Article 4 of that Convention - paragraph 73 above). It notes, however, that the issue in this case does not concern the return of a work of art to its country of origin. That consideration apart, the Court recognises that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way public access to them, in the general interest of universal culture”9.

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7 This concept may also apply to objects belonging not to a State but to a community.

8 Resolution of the Institute of International Law, Basel sessions, 1991, The international sale of works of art from the point of view of protection of cultural heritage, (Twelfth Commission, Reporter: M. Antonio de Arruda Ferrer-Correia) (The French wording is authentic. The English wording is a translation).

9 ECHR, judgment of 5 January 2000.
The link between the concepts of good faith and due diligence

It is with regard to the acquisition and return of cultural objects that these concepts will be considered here.

The concept of good faith – The legal concept of good faith allows the purchaser to reinforce his right of ownership, even when he has purchased the object from a person who is not the owner (acquisition a non domino). Most countries of Romano-Germanic tradition have incorporated this concept with regard to the rule whereby “in the case of movable property, possession is equivalent to title”, even if it obeys variable rules on determining the content of the concept and the legal consequences attached to recognition of good faith. Since the concept of good faith is a framework concept, the criteria are generally assigned to the judge, hence the differences in appreciation among the States (we will come back to this).

It may be defined as the purchaser’s belief at the time of purchasing the object that he is purchasing it from the true owner. He benefits in this respect from the rule of presumption of good faith. It is up to the person contesting the reality thereof to prove either that the possessor was aware or even should have been aware, taking his skills and knowledge into account. This development of the assessment of good faith is welcomed insofar as proof of knowledge of an unlawful situation is almost impossible to provide. From this point of view, the judgment will not be the same in the presence of a professional on the art market or a novice. The criterion of due diligence may then be applied to reach a conclusion regarding good or bad faith.

The concept of due diligence – The two concepts of good faith and due diligence are not unrelated. The latter will reinforce the former. That is because a purchaser will have exercised the necessary diligence for him to be deemed to have acted in good faith. The two concepts have different meanings, however. While the concept of good faith refers to the belief held by the purchaser at the time of the sale, the concept of due diligence designates a rule of behaviour. The question is one of knowing whether the purchaser has sought to carry out certain checks, particularly with regard to the provenance of the work. The obligation of due diligence applies, in the wordings, to this key question of provenance of the work.

The degree of diligence will be measured having regard in particular to the checks carried out in the databases or in the documents circulated by the ICOM (red lists), to the attention paid to documents such as the export or import certificate, and to the origin of the object, for example the fact that it may originate from a State in a situation of crisis or war, a major factor to be taken into consideration. Moreover, certain indications may assist the judge in his assessment of good or bad faith: too high a price, a succession of sales made in very short times. The judges may consider that these various aspects should have alerted people to the dubious provenance of an object (on all these points, see below).

The concept of due diligence was initially introduced into the body of international law by the UNIDROIT Convention in 1995 and was subsequently incorporated under very similar terms into Directive 2014/60/EU, then spreading to the law of the Member States. It is incorporated
independently and distinctly into certain national laws (Swiss law, German law, Dutch law and Italian law) as a rule of the art market and based on variable terms.

II. THE CONCEPT OF GOOD FAITH AND DUE DILIGENCE IN THE INTERNATIONAL AND EUROPEAN AREA

The two concepts of good faith and due diligence are present in international and European law, particularly in the UNESCO Convention of 1970, the UNIDROIT Convention and Directive 2014/60/EU of 15 May 2014.

1. Concept of good faith in the Convention of 1970 with regard to the return of cultural objects stolen or illegally exported

As recalled by M. Frigo, “the question of return represents [...] one of the main aspects of interest of the Convention, as it relates not only to tracing the nature of one of the most important obligations deriving from the Convention as a result of its violation, but also to checking the degree of efficacy of the system: it establishes”\(^{10}\). Legal action and the rules surrounding return are set out in Articles 7 and 13 of the Convention.

Article 7 mentions in particular compensation for the *bona fide* purchaser in the event of the return of a stolen or illegally exported object. The consideration of good faith also appears somewhat hollow as some of the provisions of the Convention reserve the application of national legislation. This is the case of Article 13 in particular, which thus conditions the application and implementation of the Convention to a large extent.

1.1. Compensation for the *bona fide* purchaser within the meaning of Article 7 of the Convention of 1970

Article 7 of the Convention contains several interesting obligations relating more particularly to objects stolen from museums, civil or religious public monuments or other similar institutions. It indicates that cultural objects of great importance to States (first circle of the legal concept of cultural objects) are at issue here. The Convention deals with the question of compensation in particular.

In this respect, pursuant to Article 7 b), States undertake to “take appropriate steps to recover and return any such cultural property stolen and imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser who has valid title to that property”.

The burden of proof falls upon the requesting State and the property is returned in exchange for just compensation for the benefit of the innocent possessor.

If Article 7(b)(ii) were found to apply, a double question arises, that of the reality and burden of proof and that of payment of compensation. The Operational Guidelines for implementation of

\(^{10}\) M. Frigo, p. 248.
the Convention of 1970 provide several explanations on this double aspect.

With regard to proof of good faith, the wording recommends having recourse to the concept of due diligence in the sense understood by the UNIDROIT Convention. Article 4.1 of the UNIDROIT Convention on stolen or illegally exported cultural objects of 1995 stipulates that “The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object”, which measures the necessary link between recognition of good faith and assessment of the diligence applied by the possessor. Whatever the case, as recalled by the Operational Guidelines for the implementation of the Convention of 1970, it would appear that “Recent practice suggests little use of the compensation provision of the Convention”.

Comments – The question arises of knowing what scope to recognize for this provision. According to M. Frigo, it is an “additional tool for obtaining repatriation” of a certain category of cultural objects that falls outside ordinary legal channels, “which may be used if the State of origin does not manage to obtain the return based on the provisions of the national law of the State in which the object is situated”. But if the States do not adopt suitable measures to ensure the recovery and return of such objects, the national legislation may neutralize the provision in the systems that preserve the bona fide purchaser’s right, hence the limit of the exercise. The question of compensation actually arouses marked reluctance on the part of the States which do not have the means to provide such compensation or which, in principle, are opposed to the idea of compensation for important national heritage. Some States issued reservations on this point of view at the time of Ratification. This is the case of Guatemala in particular. But other States do have this frame of mind with regard to heritage that is in principle unavailable.

1.2. Articles 7(a) and 13 and compliance with national legislation

Pursuant to Article 7(a), the States undertake “to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform the State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States”. The case referred to is specifically the acquisition of cultural objects by museums or other similar cultural institutions.

More generally, Article 13 relates to all cultural property forming the subject of illegal transfer of ownership or transfer11. It requires States to prevent, by all appropriate measures, transfers of ownership of cultural objects likely to promote the illicit import or export of such property (13(a)); to “ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner” (13(b)); to “admit actions

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11 In this sense, M. Frigo, p.248.
for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners” (13(c)), to “recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported” (13(d)).

Comments - The obligations provided for in Article 13 and in Article 7(a) mentioned above encounter a major limitation in the requirement of compliance with the national legislation, however. That is where the rule applicable to bona fide acquisition may purely and simply neutralize requests for return. As the possessor’s right is reinforced by his good faith, he may assert his right against any request for recovery or return based on Articles 13 and 7(a) of the UNESCO Convention.

The main obstacle therefore arises from the fact that the law of the States may remove any efficacy from the Convention in the fundamental aspects of return of property of illegal provenance, hence the need for the development of such national laws. Certain States have committed themselves to this effect (particularly the Swiss, Italian and French laws, etc., a few examples of which are given below).

2. The incorporation of the legal concept of due diligence into the UNIDROIT Convention

The concept of due diligence is introduced into the UNIDROIT Convention for the first time, in 1995. This instrument, adopted in the wake of the UNESCO Convention, aims to mitigate some of the limitations observed in the obligations undertaken by the States pursuant to this Convention and in particular to adopt a minimum body of common legal rules for the restitution and return of cultural objects between contracting States in order to “promote the preservation and protection of cultural property in the interests of all”12. The UNIDROIT Convention is a uniform instrument of law. One of the notable contributions made by the UNIDROIT Convention was to impose a rule of return not connected with the rule of good faith. The discussion around good faith recurs, but only when the question of compensation for the possessor forced to return the property is discussed. In actual fact, a distinction should be made here between two types of cases even though they are often connected. The first concerns the category of stolen cultural objects that give rise to return. The second deals with the return of illicitly exported cultural objects. The concept of due diligence is specified in both cases.

2.1. Return of stolen cultural objects

The UNIDROIT Convention imposes the return of a stolen cultural object, an obligation that “represents one of the most characteristic aspects of the Convention with regard to the

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12 Preamble to the UNIDROIT Convention signed in Rome on 24 June 1995, on the creation of this provision, L. V. Prott, P. O Keefe, commentary on the UNIDROIT Convention, article by article.
affirmation of the principle, as well as the solutions regarding forfeiture and limitation”\textsuperscript{13}. The obligation of return, without taking into consideration the good or bad faith of the possessor, constitutes an exception to the principle of \textit{bona fide} acquisition applicable in several legal systems in Continental Europe\textsuperscript{14}. The discussion of good faith is not totally cleared, however, returning in connection with the compensation to which the \textit{bona fide} possessor alone is entitled. The wording here reverses the burden of proof, insofar as the right to the payment of fair compensation is subject to the condition that the possessor did not know or ought not to have reasonably known that the object was stolen and that he can prove that he acted with the diligence required at the time of the purchase (Art. 4.1.). The demonstration of good faith here involves proof of having taken all necessary steps for the purchaser to believe that he is purchasing an object of lawful provenance. The technique adopted by the Convention is one of great pragmatism. Rather than seek to limit a common concept of good faith\textsuperscript{15}, the legislator emphasises the behaviour that one may legitimately expect of a purchaser. This rule of behaviour consists in checking and ensuring the lawful origin of the work from this double aspect of ownership and the State of provenance. The favoured option was not to pose a general rule, but to specifically describe the aspects of checks that a purchaser must make to ensure the lawful origin of an object. The UNIDROIT Convention ultimately starts from practical considerations. In short, the basic reactions to try and define what is meant by taking all the steps required with regard to the acquisition of works of art.

These aspects are specified in Article 4.4. of the UNIDROIT Convention:

“In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.

\textit{The circumstances of acquisition} – Among the material aspects likely to determine the degree of diligence, one classically finds low price (the sale of a painting well below its value is suspicious), the circumstances of acquisition (close successive sales, method of payment, unusual place of the transaction), the absence of documents accompanying the sale providing information on the origin of the work (even though the text does not mention it, one could reasonably think that the absence of any document certifying the capacity of an object to circulate in the international area should be taken into account, particularly in cases of the return of objects illicitly exported (Art. 6, see below)). Based on this initial examination, the

\textsuperscript{13} CECOJI Study, p. 32, for a detailed analysis of the UNIDROIT Convention, M. Frigo.

\textsuperscript{14} Cecoji Study, p. 32.

\textsuperscript{15} Several reasons have led to this solution of adopting a common concept of good faith not being adopted (difficulty in generalizing a rule that is common in appearance but very variable in application, legal uncertainty on account of these variations, strong resistance to a provision likely to overturn the presumption of good faith, in France in particular some of our dealers have complained of the unconstitutionality of the system). Moreover, the concept of good faith hardly applies in certain States. The adoption of a uniform rule on the concept of due diligence was far more relevant in this respect.
existence of any doubt as to the lawful situation of the object should warn the purchaser and encourage him either not to make the purchase if the doubt remains or to obtain more information to dispel the doubt.

*The provenance* - The situation or origin of the object, for example the fact that it may originate from a State in a situation of crisis or war is also a major factor to be taken into consideration in assessing good faith. Enhanced vigilance is certainly required here, all the more so as the legal framework has developed towards requirements of prohibition (see below to this effect; see also the ICOM due diligence record, below).

*The capacity of the parties* forms part of the due diligence assessment. The same level of diligence may not be required of a professional on the art market, a museum curator and an ordinary purchaser. The cultural or heritage field will also probably have to be taken into consideration. The practices and customs are not the same in the different sectors (that of archaeology, museums and archives) and this dimension of practices may affect the judgment of good faith (on the importance that the rules of ethics place and specify this concept of ethics, see below).

*The obligation to obtain information* – Consulting registers and relevant documentation or bodies will be aspects of judgment in the assessment of due diligence, provided they are reasonably accessible. The standard of behaviour used here is that of a reasonable person whom one would expect to carry out such checks. Being content with consulting a single source should not be considered to be a reasonable attitude bearing in mind the risks of illicit trafficking.

2.2. **The return of illicitly exported objects**

The question of good faith and due diligence arises under fairly similar terms with regard to the return of illicitly exported cultural objects. However, a more restrictive definition is given of goods likely to be returned. It is not just the illicit nature of the export that will give rise to the return process. The requesting State also has to establish “that the removal of the object from its territory significantly impairs” either “the physical preservation of the object or of its context” or “the integrity of a complex object”; or “the preservation of information of, for example, a scientific or historical character”; or “the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State”.

Pursuant to Article 6 of the UNIDROIT Convention, “the possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported”. The formula is the same as that used with regard to stolen cultural objects. The same connection with the concept of due diligence is provided, although the formula is less detailed: “In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the
circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State”.

The wording also provides for an alternative to the payment of compensation when the possessor decides to remain the owner – it then forfeits possession but retains its right - or even when it decides to transfer ownership of the object “against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees”.

Comments

The major difficulty affecting the UNIDROIT Convention is the reluctance of several importing States to ratify it. And yet the Convention indirectly influences both national legislations (the LTBC in Switzerland in particular) and European law with the recasting of the Directive on the return of national treasures.

What is certain is that the introduction of this obligation of due diligence has had both a unifying effect and a ratchet effect in the adoption of this provision in the various legislations.


Certainly “the process of recasting, undertaken in 2009, clearly falls within a context of fighting illicit trafficking in cultural objects”\(^\text{16}\). In line with the conclusions of the Council of the European Union of 13 and 14 December 2011, clause 17 states that it is desirable for “all those involved in the market exercise due care and attention in transactions involving cultural objects. The consequences of acquiring a cultural object of unlawful origin will only be genuinely dissuasive if the payment of compensation is coupled with an obligation on the possessor to prove the exercise of due care and attention. Therefore, in order to achieve the Union’s objectives of preventing and combating unlawful trafficking in cultural objects, this Directive should stipulate that the possessor must provide proof that he exercised due care and attention in acquiring the object, for the purpose of compensation”.

The Directive, recast in 2014, borrows largely from the UNIDROIT Convention, imposing\(^\text{17}\) an obligation of diligence on the part of the possessor, the real cornerstone in the field of circulation of cultural objects. The possessor must check the lawful origin of the work. As in the UNIDROIT Convention, the Directive of 2014 concentrates on this rule of due diligence by following the same method of providing a pragmatic definition stipulating the criteria by which diligent behaviour may be recognized.

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16 In this sense, M. Cornu, M. Frigo, New Directive 2014/60 on the return of cultural objects, the alliance between the law of the Union and international law, Revue Europe.

17 On the idea that the solution of the UNIDROIT Convention constitutes a model since, contrary to the solutions deriving from the application of the rules of ordinary law of the civil-law countries on the circulation of movable property, it imposes a duty of restitution (Articles 3 and 4) and of return (Article 5) of the object even for the *bona fide* possessor who simply has a right to fair compensation. See CECOF-CNRS, Study on preventing and fighting illicit trafficking of cultural objects in the European Union, Final report October 2011, p. 286.
According to Article 10 of the recast Directive: “Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object. In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object’s provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances. In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by those means. The requesting Member State shall pay that compensation upon return of the object”.

The choice of preferring an abstract and general definition of the obligation of due diligence, a concept that operates more on “the model of Article 4.4. of the UNIDROIT Convention, seems, in itself, to be fully convincing”\(^{18}\). This is the stance taken in the Study on preventing and fighting illicit trafficking in cultural objects in the European Union of 2011: “the goal is not specifically to reconcile different and sometimes far removed legislations, but to provide secondary and highly practical criteria to the interpreter who is required to apply the law. At the same time, the interpreter must enjoy considerable freedom in applying the rule, since it concerns the gathering of elements and criteria aimed at an accurate evaluation of human behaviour”\(^{19}\).

**Comments**

One might regret the fact that the obligation of due diligence only really has any effect in disputes over the outcome of national treasures. That being the case, bearing in mind the significant risk encountered on the market of these items of major importance to the heritage of States, this obligation should encourage participants to act prudently and thus permeate all transactions of works and objects of art. What is certain is that this concept of due diligence develops the consideration of good faith. Moreover, being incorporated into the legal systems of the Member States, the argument of incompatibility with the rule of presumption of good faith no longer holds. The recasting of the Directive could raise several points of resistance to the ratification of the UNIDROIT Convention from this point of view.

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\(^{18}\) M. Cornu, M. Frigo, op. cit.

\(^{19}\) Study conducted at the end of 2011, at the request of the Commission by the Centre d’Étude sur la Coopération Juridique Internationale CECoji-CNRS-UMR 6224 France, Study on preventing and fighting illicit trafficking in cultural objects in the European Union. Final report, September 2011. The study is available in French and in English: http://ec.europa.eu/homeaffairs/doc_centre/crime/docs/Rapport%20Trafic%20des%20biens%20culturels%20UE_E%20-%20FR.pdf#zoom=100.
III. THE SITUATION IN THE MIDDLE AND FAR EAST AND DEDICATED TOOLS WITHIN THE UN AND THE EU

The very worrying state of illicit trafficking in cultural objects originating from the States of the Middle and Far East has given rise to the production of legislation at all levels, starting with the resolutions of the UN Security Council, passed on by European law and certain national legislations. The large-scale plundering of objects originating from museums or archaeological plundering feeds an illegal market, crimes that several international organizations are endeavouring to fight.

1. The resolutions of the UN Security Council

These resolutions require States to take the necessary measures to prevent such trafficking. Several resolutions have been passed, starting with Resolution 1483 (2003) on Afghanistan whose principles have been reaffirmed with regard to Iraqi and Syrian cultural objects. “The Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people.”

Comments

This requirement goes further than the obligations imposed within the scope of the UNESCO Convention of 1970. It is mandatory legislation imposed on the States without their having any “capacity to interpret or assess”20. The States are bound by an obligation “to transcribe into domestic law, the conditions giving effect to the peremptory norm”21. It encounters a double limitation, however, firstly as the obligation concerns the adoption of measures, which assumes that the States will legislate or act on the matter. The second limitation concerns the issue of a penalty if the States fail to take any action.

To reduce these difficulties, it is noted that, at European and national level, legislative relays have been established. This is the case with the European regulations in particular.

2. Illicit trafficking of objects originating from the Middle and Far East and the relay of European Regulations

Two Regulations were adopted in 2003 and 2014, in the wake of the UN Security Council Resolutions, namely Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain

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20 V. Négri, Legal study on protecting cultural heritage through resolutions of the UN Security Council, Study for UNESCO, March 2015, p. 8 and on this issue of the scope of this legislation more generally.

21 Ibid., p. 8.
specific restrictions on economic and financial relations with Iraq and repealing Council Regulation (EC) No 2465/1996 amended by Council Regulation (EU) No 791/2014 of 22 July 2014 amending Regulation (EC) No 1210/2003 concerning certain specific restrictions on economic and financial relations with Iraq, and for Syria Council Regulation (EU) No 1332/2013 of 13 December 2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria. These wordings lay down prohibitions on objects originating from Iraq and Syria but, as recalled by the press release of 13 July 2017, “there is no general EU framework for the import of cultural goods” and “Current rules can be exploited by unscrupulous exporters and importers”. Moreover, the disparity in the legislations is a cause for the increase in illicit trafficking and makes it necessary to adopt uniform rules on import at the external borders of the EU, just as there are uniform rules on export to third countries22.

21. **Regulation (EC) No 1210/2003** amended, just as the Security Council Resolution supporting it, does not specifically concern cultural objects. Other goods are referred to by the rules on restrictions, including restrictions on “trade in goods belonging to Iraq's cultural heritage with the objective of facilitating the safe return of those goods” indicated in Article 3 in particular.

According to this provision:*

<table>
<thead>
<tr>
<th>The following shall be prohibited:</th>
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<tr>
<td>a) the import of or the introduction into the territory of the Community of,</td>
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<tr>
<td>b) the export of or removal from the territory of the Community of, and</td>
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<tr>
<td>c) the dealing in Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance including those items listed in Annex II, if they have been illegally removed from locations in Iraq, in particular, if:</td>
</tr>
<tr>
<td>(i) the items form an integral part of either the public collections listed in the inventories of Iraqi museums, archives or libraries’ conservation collection, or the inventories of Iraqi religious institutions, or</td>
</tr>
<tr>
<td>(ii) there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their legitimate owner or have been removed in breach of Iraq's laws and regulations.</td>
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2. These prohibitions shall not apply if it is shown that either:

   (a) the cultural items were exported from Iraq prior to 6 August 1990; or

   (b) the cultural items are being returned to Iraqi institutions in accordance with the objective of safe return as set out in paragraph 7 of UNSC Resolution 1483 (2003).

The objects referred to in Article 3 are defined fairly broadly (second circle of the legal concept

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22 Security Union: Cracking down on the illegal import of cultural goods used to finance terrorism, Brussels, 13 July 2017.
of cultural objects, which ensures vigilance over all cultural objects that may include items of importance to the heritage of these States, but also objects circulating on the market, depending on the same method of definition as that adopted in the Regulation concerning the export of cultural goods to third countries (system of categorization of goods combined with thresholds of value and age). The circle is thus limited to certain goods assumed to represent a certain value.

From this point of view, it is interesting to note that the prohibition on trade, on the import and export of cultural goods, is imposed not only when the goods form part of public collections but also if “there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their legitimate owner or have been removed in breach of Iraq’s laws and regulations”. This provision concerns not only objects of Iraqi heritage but more generally cultural goods illegally removed that may have been fraudulently taken from the owner, for example. The doubt, here, should rule out any possibility of circulation of the goods. This provision consequently requires a certain degree of diligence to check the lawful provenance or the lawful method of circulation of the goods. The difficulty lies in interpreting the reasonable nature of the doubt. Are goods imported from Iraq after the period considered without any documents or information confirming their legal circulation not of dubious provenance on that account? It could be suggested here that the degree of diligence should be enhanced in this respect, that in a way one might consider that, in the absence of any tangible elements, there is a form of presumption of dubious provenance in this respect. One can probably take the practical measures suggested by Article 4.4 of the UNIDROIT Convention here to ensure the legal provenance of the goods.

It should also be noted that the prohibition is lifted if the goods were exported before 6 August 1990 or if they have been returned under Resolution 1483. In this case, the burden of proof falls upon the person invoking the lifting of the prohibition, a mechanism that is entirely useful when one is aware of the difficulties in dating the movements of cultural goods. This detail agrees with the idea that one is working here on a form of presumption of an illegal situation in these categories of cultural goods originating from Iraq.


The Regulation of 2012 did not contain any reference to cultural objects, which was introduced by the amending Regulation of 2013, “In order to facilitate the safe return to their legitimate owners of goods constituting Syrian cultural heritage which have been illegally removed from Syria, it is necessary to provide for additional restrictive measures in order to prohibit the import, export or transfer of such goods”. The terms of the new Article 11 quater closely follow the Regulation concerning Iraq with a few sometimes different wordings.

According to this new Article,

“1. It shall be prohibited to import, export, transfer, or provide brokering services related to the import, export or transfer of, Syrian cultural property goods and other goods of archaeological,
historical, cultural, rare scientific or religious importance, including those listed in Annex XI, where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law, in particular if the goods form an integral part of either the public collections listed in the inventories of the conservation collections of Syrian museums, archives or libraries, or the inventories of Syrian religious institutions”.

Reasonable uncertainty is replaced by “reasonable grounds to suspect” that such goods are in an unlawful situation. But one may consider that, essentially, the two texts express the same degree of requirement as to due diligence, even if the term diligence is not specifically mentioned.

“2. The prohibition in paragraph 1 shall not apply if it is demonstrated that:
   
a) the goods were exported from Syria prior to 9 May 2011; or
   
b) the goods are being safely returned to their legitimate owners in Syria”.

Comments

This relay of EU law is entirely essential in that it stipulates the prohibition measures provided in the UN Security Council Resolution and that these measures form an integral part of national legislations.

The customs services may consequently take effective action on the basis of these texts to recover cultural objects originating from these countries. The report states that, on 12 October 2012, 13 archaeological objects originating from Iraq were recovered by French customs agents. The system regarded this as inadequate, however, in view of the extent of the illicit trafficking in works and objects of art and antiquities originating from these countries. In December 2015, the French, Italian and German governments alerted the European authorities to the urgent need to reinforce the existing system with a new monitoring device, which should “accompany the implementation, in the countries of export, of policies requiring export authorization and clear documentation on the origin of these objects”.

23 Control over the import of cultural objects originating from third countries

The proposed Regulation on the import of cultural goods should concern firstly “the most threatened cultural objects, resulting from excavations, remains of historic monuments, manuscripts, antiquities and collections at least 250 years old at the time of their import”. It would introduce a system of licences which importers would have to obtain for any import into the territory of the European Union. A system of declaration certifying that the objects have

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24 Letter from Fleur Pellerin (French Republic), Monica Grütters MdB (Federal Republic of Germany) and Dario Franceschini (Italian Republic) sent to Maggy Nagel, Tibor Navrasci and Pierre Moscovici, 7 December 2015.
been legally exported from the third countries would also be introduced for the other cultural objects (the system would therefore be different depending on the circle considered, being more protective and demanding for heritage at risk). The formalism required here would clearly weigh on the obligations of the parties involved, while at the same time protecting the market and acquisitions and facilitating the production of proof of due diligence if disputed.

This text should make it possible to cover other geographical areas highly exposed to illicit trafficking, such as the Yemen which “is currently subject to an unprecedented destruction of its archaeological sites and its urban heritage”, as recalled by the Minister of Culture of France in reply to a written question stating that his Ministry “works in close collaboration with the Ministry of Foreign Affairs and International Development, UNESCO and the International Council of Monuments and Sites ICOMOS to alert the international community to the importance of preserving the heritage of the Yemen, within the scope of the measures conducted for the heritage destroyed in the Near and Middle East. The Ministry of Culture and Communication, in association with its museums and other institutions, proposes to meet Yemenite professionals training in France to enable a generation of professionals to be trained and in a position to act once the conflict is over.

To fight theft and illicit trafficking in cultural objects, France (Ministry of Culture and Communication) has drawn the attention of UNESCO and ICOM international” to the trafficking to which the Yemenite heritage could be subject.25

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IV. The means of control over provenance by States, the essential relay of actions undertaken at national level

Responsibility for taking control over the provenance of works clearly does not fall solely upon the market operators and the institutions involved. It is also in the hands of the States. Control over or monitoring of provenance may take several forms, making it easier for the persons involved to exercise diligence under more certain conditions and thus render the various international and European rules on fighting the illicit trafficking of cultural objects effective. Several approaches may be adopted to this end. It should also be noted that case law is tending to take the concept of due diligence increasingly into consideration in questions of return and in arbitration between the right of the bona fide purchaser and the rights of the owner dispossessed in favour of illicit trafficking. Swiss, Belgian and Portuguese case law provide an interesting illustration of this in particular.

1. Information and training tools

These are essential to enable the parties involved to check the legality of provenance of cultural objects. They may take several channels: websites providing access to the main wordings and rules in force (national websites but also the UNESCO database on heritage legislation in force in the Member States), websites of customs and administrations (culture authorities but other authorities may also have competence in cultural matters – see in particular the German and French customs and Ministries of Culture websites). Several States have developed websites providing useful information on the subject. The central authorities responsible for implementing Directive 2014/60/EU of 15 May 2014 must also cooperate in particular in exchanging information on the illegal removal of cultural objects using the internal market information system. According to the Regulation, “the Internal Market Information System ("IMI") is a software application accessible via the internet, developed by the Commission in cooperation with the Member States, in order to assist Member States with the practical implementation of information exchange requirements laid down in Union acts by providing a centralised communication mechanism to facilitate cross-border exchange of information and mutual assistance”.

The question of training persons involved (judges and customs officers in particular) is clearly of great importance, with regard to raising awareness of the question of loss of substance of national heritage and of a finer knowledge of the state and nature of trafficking in cultural objects.

2. Cultural object identification tools

Access to databases containing inventories of cultural objects forming part of the national heritage and to databases of stolen or illegally exported cultural objects is one of the criteria evoked in the concept of diligence as indicated in the UNIDROIT Convention and Directive 2014/60/EU of 15 May 2014.

But although possession of a cultural object listed as stolen in the INTERPOL database is certainly of such a nature as to indicate the possessor’s bad faith, conversely, when the object is not found to be referenced in it, simple consultation of a database (e.g. INTERPOL) is not sufficient to establish a possessor’s good faith. A series of checks need to be carried out27.

One may also evoke here the presence of specialist police able to gather finer information on illicit trafficking. From this point of view, one may question the recent closure of the arts and antiquities unit in Belgium which, at the time of preparing the draft transposition of the UNESCO Convention, seems to be a step backwards in the protection measures28.

3. The legal instruments

One of the great weaknesses of the system for fighting illicit trafficking lies in the dispersion of rules and the content thereof (differences in the definition of cultural objects, differences in application and interpretation of the concept of good faith and differences in determining offences). The adoption of international and European rules partly reduces this failing, hence the interest in the States’ implementing these common measures in their national legislation. Before reviewing the various approaches useful for determining and consolidating diligent behaviour, a few words should be said about the means and methods of incorporation or transportation of the international rules, particularly the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995.

3.1. Methods of incorporation of international law and different practices

Some States have been anxious to give real effect to the provisions of the Convention of 1970 on return. This is the case of Switzerland in particular with the adoption of the LTBC. France has not adopted the technique of the law of transposition and one can see that the ratification in 1997 was not accompanied by much thought in this respect, the legislator at the time seeking first and foremost to resolve the equation of the circulation of goods in relation to the

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27 For a vade mecum of checks to be carried out at the time of purchase, intended for art market dealers, see the CECOJ Study, p. 292, which reviews the various checks to be made concerning the seller, the price, the object itself, the documents to be requested, the method of payment and consultation of the ICOM databases and red lists and which, if uncertainty still remains after these various tests, recommends not purchasing the cultural object.

28 As commented in an article published in Le Soir BE, “in this respect, the Belgian situation is of concern. Until December 2016, the federal police had an “Arts and antiquities” unit. Being the only point of contact able to answer questions raised by INTERPOL, customs or foreign police, it was composed of two persons who worked on an average of 400 to 500 objects reported as stolen every year. Since the beginning of the year, this unit no longer exists. Officially, its activities are incorporated into the regular work of the police. But, as reported by a specialist in fighting against this type of trafficking, no information has been fed into the Belgian database of stolen works of art since the beginning of the year. The INTERPOL database of stolen works in Belgium has also been dormant for six months”, Trafic d’œuvres d’art: la Belgique est trop laxiste le Soir BE, 13 July 2017.
protection of national treasures. The recent law on the freedom of creation, heritage and architecture of 7 July 2016, on the other hand, introduces several interesting mechanisms which indicate a change of direction in anxiety over illicit trafficking in cultural objects. Until then, the tools of French law were primarily aimed at preserving the national heritage without much concern for the heritage of other States29. The law of 2016 changes perspective, laying down several provisions specifically intended to preserve the heritage of other parties and in particular to facilitate procedures for return. Thought on the obligation of due diligence and an increased perception of the concept of provenance are invited in this direction.

Germany, which ratified the UNESCO Convention of 1970 in 2007, adopted a law of transposition, which “in practice proved to be ineffective, on which account the matter was considered based on a federal government report to reinforce the tools for preventing and fighting illicit trafficking30. As a result, a bill was adopted at the Council of Ministers that “restructures the protection of cultural objects (...) into a single law and creates clear rules on the import and export of cultural objects”, on the understanding that one of the major contributions made is the introduction of an obligation of due diligence over goods placed on the market31.

Belgium ratified the Convention of 1970 in 2009 but has not yet adopted any law of transposition.

Comments – As these examples arise, one can see the very different ways of incorporating rules drawn from the body of international law. It leaves differences in the formation of solutions able to combat illicit trafficking. The fact remains that the process has favoured the approximation of legislations and the development of better-designed rules enabling the lawful provenance of the work to be assured. Several legal approaches are useful in this respect, such as the export and import legislations, codification of the obligation of due diligence and controls over public acquisitions.

3.2. Export and import legislations

Export control and the formalities it generates (requirement for documents certifying the capacity to circulate within the European Union and to third countries) is an important part of the system. Very many States have such a system, organized in different ways (expert certificates, licences or other forms of authorization for removal from the territory), it being understood that European law has unified the control over exports from the territory of the

29 This is also the case for a large number of States. See for example the decrees of the competent communities in Belgium, but also many others. See in this respect the study of the European legislations, CECOJ study, p.

30 Robert Peters, Research, legislation and international cooperation at the heart of the German action plan, in L’art en otage, Juris art, Dalloz, n° 32, February 2016, p. 32.

31 Ibid, p. 34
European Union to third countries. This uniform control aims to create a form of solidarity among Member States with regard to the protection of cultural heritage. However, it leaves every State free to exercise more extensive control over its own heritage. This is the case of Italy and Hungary, which exercise control over the movement of all cultural goods more than 50 years old while the European Regulation provides for control for cultural goods more than 50 years old for certain categories and control for those more than 100 years old for others. Conversely, the United Kingdom, in its Decree of 2003, reproduces the provisions of the Annex to the European Regulation of 1992 in full.

Although the existence of export control is very widely shared, on the other hand, and despite the mention of such control in the Convention of 1970, very few States have implemented import control. And yet this would be very useful in fighting illicit movements. A common import control system has long been considered to be too complex to implement from a practical point of view. Several techniques could be envisaged, which would be fairly easy to implement: import declaration, import certificate or control over import with a document certifying the possibility of export issued by the State of provenance. The CECOJI study of 2011 on the means of preventing and fighting illicit trafficking mentions several countries (Greece, Spain and Italy) that provide for a declaration of import of cultural goods in variable terms (which is optional in Spain and Italy however). Since then, several legislations have developed this question. The French law of 7 July 2016, adopting the definition of cultural goods as defined by the Convention of 14 November 1970, requires the import of cultural goods “belonging to one of the categories provided for by Article 1 of the Convention on the measures to be taken to prohibit and prevent the illicit import, export and transfer of ownership of cultural goods, drawn up in Paris on 17 November 1970, originating directly from a non-Member State of the European Union and party to this Convention to be subject to the production of a certificate or any other equivalent document authorizing export of the goods drawn up by the exporting State when the legislation of that State so provides. Failing presentation of the aforesaid document, import shall be prohibited”.

In Swiss law, according to Article 25 OTBC,

“Anyone who imports a cultural object shall be required in the customs declaration (Art. 25 OTBC):

1. To indicate the type of object (e.g. a statue); to provide as accurate information as possible on its place of manufacture, or its place of discovery if it was obtained from archaeological or palaeontological excavations; and

Regulation (EC) No 116/2009 on the export of cultural, goods, see the Eur-lex website.

Law no. 64 2001 on the protection of cultural heritage, Decree no. 17 of 18 October 2001 of the Ministry for the Protection of Cultural Heritage regarding detailed rules on authorization for the export of cultural goods.

2. To state whether the export from a State Party of the cultural object is or is not subject to **authorization** according to the legislation of that State. If so, present the necessary export authorization.”

The question of import control should also develop within the European Union which is working on the preparation of a Regulation on the subject (see above). Until then, Member States could adopt a rule for checking the presence of export authorization. The adoption of such a rule would facilitate proof of diligence for the possessor of a cultural object and protect the market.

Criminal offences of illegal import are “not generally provided for by the criminal law of the Member States. Only a few States provide an exception to this, including Germany, Austria and Hungary\(^{35}\).”

### 3.3. **Codification of the obligation of due diligence**

Although the influence of the UNIDROIT Convention has appeared in European law with an almost slavish repetition of the concept of diligence by the Directive on the return of cultural objects, and through certain case laws (see below on Belgian and Swiss case law), the concept of due diligence in national legislations remained hardly codified until recently. In 2011, the CECOJI study noted that only the Netherlands had “taken a real step to codify the concept of due diligence. The entry into force of the law of transposition of the UNESCO Convention of 1970 clearly defines the circumstances of acquisition that must be taken into account in the definition of good faith (Art. 87.a) and the steps that purchasers must take. The purchasers are also differentiated into purchaser (Art. 87.a § 1), professional dealer (Art. 87.a § 2) and auctioneer (Art. 87.a § 3)”\(^{36}\). The Swiss federal law on the international transfer of cultural objects (LTBC)\(^{37}\) also lays down rules of due diligence to which both purchasers and intermediaries are subject. Article 16 of the Law provides that art dealers and auction houses may not proceed with a transaction if they have the slightest doubt as to the provenance of the goods. This type of solution gives requests for return a real chance of success and forces the persons involved in the art market to be attentive to the provenance of the works. One can see here that, even if the outline is not precisely defined, the obligation of due diligence is expressed with force. Contrary to other wordings, doubt is not specifically described (serious, reasonable). The existence of doubt over the provenance should logically jeopardize any transaction.

A development will be seen here too. Firstly, the concept of due diligence which must be proven by the possessor necessarily falls into the body of national legislations through the effect of the transposition of Directive 2014/60/EU of 15 May 2014. The argument previously put forward of the incompatibility of this rule with the system of presumption of good faith cannot be usefully applied from this point of view. Secondly, some countries have legislations that provide a firmer and therefore more secure legal basis for the question of provenance and due diligence.

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35 CECOJI Study, p. 159.
36 Ibid.
This is the case of German law, in particular, in which, according to R. Peters\textsuperscript{38}, the essential provision is the obligation to indicate the provenance of the cultural object. Few national legislations have this type of provision, as dealers invoke the need for confidentiality with regard to sellers. But the extent of this illicit trafficking and the greater need to check provenance invites further thought on the rules of control over provenance. This provision in German law which imposes on art dealers an obligation to provide information is for the benefit of the consumer but also for the benefit of the art market itself, as noted by R. Peters.

3.4. Control over public acquisitions

\textit{a) Obligation to request the authorization of the supervisory administration or an ad hoc authority}

Among the legal instruments for controlling the lawful provenance of works, several States have introduced procedures for controlling public acquisitions which are applied in different ways (control over institutional protection, advisory bodies, etc.). This control generally aims to check the validity of an acquisition, particularly at a scientific and heritage level. Control over provenance may be exercised to favour these procedures. The degree of requirement varies depending on the States. In the French system, the museums of France have to consult a scientific commission before making any acquisition. In the file established for this purpose, the indication of provenance must be stated. Until recently, no particular control was exercised over this information. It would appear that awareness has developed and that control over provenance is more meticulous. As pointed out in the CECOJI study, “In Greece, control covers the import and export documents, the certificate of acquisition and any other information concerning the provenance (owners, possessors, previous holders, catalogues, photos, etc.). Control over acquisitions is effected by the Ministry of Culture and Tourism”. The cases of Portuguese, Estonian and Slovak law are also mentioned, which also establish control over the origin of goods and the need to obtain the relevant documentation. In Swiss law, a provision prohibits the acquisition of works of illicit provenance by the national museums (Art. 15 LTBC).

\textit{b) The existence of uncertainty at the time of acquisition}

The rule whereby uncertainty rules out acquisition is generally followed by professionals. In some States, it would appear that, without there being restrictive provisions, the museums do not make acquisitions if there is any uncertainty over the provenance of the cultural object (Austria). The CECOJI Study evokes several cases of control that may lead to a prohibition on acquisition or even a restitution or return:

“In the Netherlands, in the event of a sale, a bequest or a donation to a museum, archives or a library, if there is any uncertainty as to whether the object concerned by the transaction could be the product of illicit trafficking of cultural objects, the institutions in question turn to the

\textsuperscript{38} Op.cit.
Netherlands Police Agency/Police or the Cultural Heritage Inspectorate. These services conduct an inquiry in order to determine the origin of the object. If it turns out to be illicit, the necessary measures are taken to return the object in question to its lawful owner”.

“In Austria a prohibition exists on private museums acquiring or holding cultural objects on loan or on trust for which there are signs that they have been stolen or come from illicit excavations or any other illicit action or that they have been acquired or exported in breach of the legislation of the State of origin. Refraining from making acquisitions in the event of uncertainty also applies to public museums”.

c) Public acquisitions and heritage at risk

The fact that an object may originate from a conflict zone generally leads to heightened vigilance by the parties involved (mentioned by the Museum of Regional History in Bulgaria). Further advice is requested.

The German museums concerned (BSGS, RGZM and SPK) take cultural goods originating from conflict zones into consideration. The RGZM (Romisch Germanisches Zentralmuseum) applies special diligence to objects originating from zones of political conflict (particularly Iraq) and seeks to ensure the recovery of objects by the police for it to return them.

4. The development of case law on the assessment of due diligence and good faith

As pointed out by M.-A. Rénold, “in general, case law is developing in civil-law jurisdictions towards a more precise definition of the requirements of good faith in transactions concerning works of art”, inspired by Article 4.4 of the UNIDROIT Convention39 and by Article 10.2 of the European Directive on return, in its revised wording of 201440. Several examples illustrate this development in Belgium, in Switzerland and in Portugal. Even though one may certainly think, in the first two cases, that the origin of the goods (objects resulting from Iranian excavations) and the nature thereof (plundered goods) may have influenced the solution. Although, in some cases, the judges continue to apply the presumption of good faith without any subtlety41, the fact remains that these judgments are significant in developing an understanding of good faith and the behaviour expected of purchasers.

The Khurvin case in Belgium – This concerns the export of objects found during excavations originating from Iran (340 objects that were returned to Teheran following lengthy legal

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39 For the characteristics of the obligation of due diligence, see Article 4, paragraph 4, of the UNIDROIT Convention and Article 10, paragraph 2, of Directive 2014/60/EU (note 52 above).


41 See in particular to this effect the symbolic case of the Virgin of Saint Gervasy, CECON Study, in which the low price of the acquisition and the antique dealer's knowledge of a statue classified as a historic monument were disregarded in the assessment of good faith, Riom, 3 June 2004: JCP 2004, IV, 1069, decision approved by the Court of Cassation, 1st Civil Division, 16 May 2006, Cne de Saint Gervasy vs De Cortejarena: D. 2007, p. 132.
proceedings). The facts are old as they date back to the ’50s and ’60s. The case is complex, several persons claiming ownership of these objects: a collector, a researcher bringing the objects into Belgium and the Iranian State.

The Court admitted the claim made by the Iranian government which provided proof of ownership of the archaeological objects, considering that, in the absence of a valid export licence, good faith could not be recognized. To be specific, the judges here, while admitting foreign public law, are dealing with the question of good faith. Which they refuse for the possessor. In a commentary on the decision, L. Lambrecht and M.-S. de Clipelle explain that, by thus admitting the application of foreign laws, case law will tend towards looking favourably upon a request made by the original owner, at least in the absence of a valid export permit. This is a measure of the decline in the famous rule “possession is equivalent to title”.

Swiss case law - The Swiss judge has also recently ruled on the subject of a request for return. This case is commented on by M.-A. Rénold.

Swiss law has incorporated into the LTBC several provisions on due diligence. The possessor of a work of art can thus not invoke “his good faith if he cannot prove that he was sufficiently attentive to the circumstances at the time of acquisition. Purchasers must check the origin of the work of art of interest to them, as well as the status of the person transferring ownership thereof. The lack of any reasonable effort to investigate the provenance of the work of art forming the subject of the transaction may imply that due diligence was not exercised”. The judges have had the opportunity to indicate this need for reasonable effort in checking the origin of cultural objects in a case brought before the Swiss Federal Court. The judges considered “that an art collector had failed to observe his duty of diligence (based on the definition of good faith provided by Article 3 of the Civil Code) at the time of acquiring a painting by Kasimir Malevitch, when it was found to have been stolen, as he had disregarded a “rumour” reported to him by the expert who had examined the painting with a view to determining whether it was authentic, a rumour that a painting by Malevitch had been stolen and was on the market in Europe”.

Portuguese case law – A request for the return of a bell from the Santa Maria Caravel may also be mentioned, based on Directive 2014, made by the Portuguese authorities before the Spanish courts. This bell had been found at the bottom of the sea in Portuguese territory and auctioned in Spanish territory. The judges considered it to be a cultural object within the meaning of Article 1 of Law 36/1994 and that the possessor had not acted with due diligence either at the time of acquisition or when it was a question of exporting it outside Portuguese territory. He was also criticized for failing to inform the Portuguese authorities that he was in possession of

42 On a commentary on the decision pointing out the ambiguities, Lucie Lambrecht and Marie-Sophie de Clippele, published on the Lambrecht Law website on 31/08/2015.

43 Marc-André Renold, Legal obstacles to requests for the return of plundered cultural objects, Mélanges J. Fromageau, Maré Martin, 2017, in press.

44 A. vs B., ATF 139 III 305, 18 April 2013, Journal des tribunaux 2015 II 79. See also Insurance X vs A.M., ATF 122 III 1, 5 March 1996.
the bell, (for not) applying for authorization to transfer it and not even informing the authorities of its removal 45.

V. The code of ethics, an essential support but still under-invested at international, European and national level

The definition of correct behaviour, good practices and the assessment of due diligence clearly cannot escape from the legal requirements and the way in which the judge interprets them under the guidance inspired by the UNIDROIT Convention and Directive 2014. The code of ethics must accept the rule of law, it is subservient to it but the law may also accept the code of ethics, and more precisely there is every interest in that. The code of ethics constitutes an essential support for defining good practices with regard to checking the provenance of works in circulation 46. It is essential for the efficacy and the effectiveness of the rules of law. This is particularly true in the implementation of this concept of due diligence in relation to the concept of provenance.

The Collinet report on the ethics of conservation appropriately recalls that: “Regulating is not sufficient. One also has to create the conditions of as broad a knowledge as possible of the complexity and diversity of the situations through which the responsibilities of the conservation and enrichment of heritage are exercised and may be apprehended. This knowledge necessarily involves a dialogue among those responsible for it. This dialogue is often lacking today, while it alone, by comparing experiences and questioning, can feed this thought that forms the basis of a shared ethic” 47.

Reflection on the process of checking must consequently also come from the parties involved, taking into account their skills, their practices, their networks and their tools. Although certain reactions may be common to all these parties, it is clear that a specific reflection is also useful depending on the sector and the professional segment. Several tools have been prepared at international, European and national level, a few of which we will mention here.

1. Codes of ethics and museums

1.1. The ICOM Code of Ethics

The ICOM Code contains several recommendations on the enrichment of collections and checking provenance. With regard to acquisition policy in particular, the Code stipulates that

45 Alfonso-Luis Calvo Caravaca, Celia M. Caamiña Domínguez, the incorporation into the Spanish legal system of Community legislation on the return of cultural objects, www.bibliojuridica.org.

46 On the role of the rules and codes of ethics, M. Frigo, op. cit.

47 Ethical mission for the conservation and enrichment of the cultural heritage, Report to M. Renaud Donnedieu de Vabres, Minister of Culture and Communication submitted by M. Collinet in 2005.
“The governing body for each museum should adopt and publish a written collections policy that addresses the acquisition, care and use of collections”. Where appropriate, this provision supplements the rules adopted on control over public acquisitions by the administration (see above). Moreover, under the heading: “Valid Title”, Article 2.2 provides that “No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title”. Finally, Article 2.3 deals with the question of Provenance and Due Diligence: “Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item since discovery or production”.

The wording consequently evokes the need to carry out checks. It is up to the professionals to state specifically which types of checks may be made (see the vade mecum and records prepared by the CECOJI study attached).

Article 2.4 evokes the question of excavated objects for “Objects and Specimens from Unauthorised or Unscientific Fieldwork”. In this case: “Museums should not acquire objects where there is reasonable cause to believe their recovery involved the unauthorised, unscientific, or intentional destruction or damage of monuments, archaeological or geological sites, or species and natural habitats. In the same way, acquisition should not occur if there has been a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities”.

Article 6.4 of the Code mentions objects originating from occupied territories which the museums must refrain from acquiring, echoing the international provisions of the Hague Convention of 1954.

Here again, for this type of heritage at risk, there is a form of presumption of illegality of cultural objects transferred outside these territories.

The ICOM has also specified aspects of such a nature as to prevent the acquisition of objects plundered, stolen and/or illicitly exported by preparing records recalling very specifically the effort required and the type of check that the museums must make48. It is stated in particular that “due diligence implies all the necessary verifications regarding the legal provenance of a cultural object, i.e. its full history and ownership from the time of its discovery or creation to the present day, through which authenticity and ownership are determined”.

“The issue of provenance being one of the most important concepts when addressing the mobility of collections and the transfer of ownership of cultural property, due diligence is therefore one of the best practices for preventing the illicit trade of cultural objects”.

“In this regard, people and organizations involved in transactions concerning cultural objects should apply high ethical standards of due diligence, but many heritage professionals and art dealers are not made aware on due diligence concept and requirements, and its ethical

48 http://obs-traffic.museum/due-diligence-good-faith
framework”.

The importance of the requirements and definition of due diligence are also recalled in Articles 4.1 and 4.4 of the UNIDROIT Convention and in EU Directive 2014/60/EU. Encouraging States to “adopt the ethical framework of the UNIDROIT Convention as a guiding principle for the matter of acquisitions of cultural goods and the practice of due diligence, as well as the 1970 Convention’s provisions on acquisitions, export authorisation and obligations for dealers. They are also invited to incorporate or adopt provisions from the ICOM Code of Ethics for Museums and other codes of ethics or conduct that are relevant to due diligence”.

Among the guidelines, several aspects are recalled, refraining in the event of suspicion, the fact of informing “vendor, donor, or lender that the purchaser is unable to acquire or borrow items unless due diligence has been satisfactorily undertaken”.

Several recommendations are subsequently made on the checks to be carried out, some of which agree with the provisions of the UNIDROIT Convention, while being more detailed: information on the price, the vendor's identity, his reliability, types of documentation to be obtained (licences, export certificates), an in-depth examination of the object, attention paid to zones particularly exposed to illicit trafficking, consultation of databases, searching for information on the legislations of the countries of origin. It is also stipulated that it may be “useful to seek for the assistance of specialists from several individuals, institutions or organisations, depending on their field of expertise about the object's category: experts, museums, universities, embassies, ICOM, UNESCO, national authorities, legal advisers, etc.”.

Some situations also call for enhanced vigilance when “the provenance or the authenticity of the art object itself raises serious doubts. Enhanced due diligence involves, at least, the following efforts: Obtaining additional independent expertise, (...) Checking of additional databases, registers and listings, Professional background check on the seller (previous art trade activities, information requests to law enforcement authorities, etc.)”.

If any uncertainty remains, it is recommended that the object is not acquired or borrowed. On the other hand, “In case of acquisition, and if the verification of provenance proves satisfactory, it is recommended that a file on the object be created and conserved in a safe place, including the precise details on the means by which due diligence has been exercised, and all the related documents”.

1.2. The AAM Code of Ethics

The American Alliance of Museums' Code of Ethics also lays down provisions on the circulation of cultural objects. In this respect, “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials”.

1.3. National codes of ethics on provenance

These requirements may also result from national codes of ethics. Practical guides sometimes
deal with acquisitions made by museums (particularly in the United Kingdom, the Museums Association’s 2004 Ethics of Acquisition).

Finally, some museums develop practices of vigilance when making acquisitions. Some German museums send their requests to an institution competent to research the provenance. The concept of provenance is more important today in museum practices.50

The Romisch Germanisches Zentralmuseum (RGZM) has pointed out that proof of the legal provenance of the object concerned was decisive at the time of acquisition. Proof may be provided by the production of valid official documents (such as the authorization of excavations or export or the announcement of finds) or by proof of an uninterrupted change of legitimate owners.

2. The Codes concerning stakeholders in the art market

The CINOA Code of Ethics requires it members, when there is serious doubt as to the legality of their import and when the country of origin is claiming the return, “do everything that is possible to them according to the current laws to cooperate in returning the object to its country of origin. In the case of a purchase in good faith by the antique dealer, an amicable refund may be agreed to”. The rule here is hardly restrictive, maintaining the laws in force, only admitting serious doubt, without specifying the participants’ obligations to obtain information. With the new wordings on import controls, participants should make use of this change to reconsider the extent of their obligations with regard to checking provenance.

Thus the obligation of due diligence is dealt with by various sources which it is important to link together. Although the UNIDROIT Convention has had a catalytic effect and favoured links, the project to standardize laws is still topical today. States have significant responsibility from this point of view. We are well aware of the extent to which the disparity of solutions is one of the weaknesses of the system in that it increases illicit trafficking in cultural objects even further.

50 In this respect, symposium on provenance with the INP.