

Implementation of the 1970 UNESCO Convention in Europe

Background paper¹

by

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for the participants in the

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¹ Very broadly inspired by the study on preventing and fighting illicit trafficking in cultural goods in the European Union, conducted by the Centre d'Etude sur la Coopération Juridique Internationale CECOJI-CNRS – UMR 6224 (France) Contract No. Home/2009/ISEC/PR/019-A2 Final report – October 2011, mentioned in the report on the EU study, online on the Commission's site in English and French

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The European Union has recently been studying the question of cultural-property trafficking ever more closely. The Council of the European Union³ has stated recently that the protection of “Europe’s public and private cultural heritage by combating illicit trafficking” was one of the Union’s objectives and stressed that “in view of the economic and commercial dealings which characterize it and the artistic and cultural heritage which it contains, the territory of the European Union is a favoured target for criminal organizations”. Reflection on the development of more effective means within Europe is only conceivable in close relation with internationally developed tools. One issue concerns the Union’s contribution to preventing and combating cultural-property trafficking, as developed under the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. The Council’s conclusions adopted on 13 and 14 December 2011 contain a number of lines of action in this respect.⁴

I. Status of ratifications within the European Union

State (in French alphabetical order)	Date of deposit of instrument	Type of instrument
Germany	30 November 2007	Ratification
Austria		
Belgium	31 March 2009	Ratification
Bulgaria	15 September 1971	Ratification
Cyprus	19 October 1979	Ratification
Denmark	26 March 2003	Ratification
Spain	10 January 1986	Ratification
Estonia	27 October 1995	Ratification
Finland	14 June 1999	Ratification
France	7 January 1997	Ratification
Greece	5 June 1981	Ratification
Hungary	23 October 1978	Ratification
Ireland		
Italy	2 October 1978	Ratification
Latvia		
Lithuania	27 July 1998	Ratification
Luxembourg		
Malta		
Netherlands	17 July 2009	Acceptance
Poland	31 January 1974	Ratification
Portugal	9 December 1985	Ratification
Czech Republic	26 March 1993	Notification of succession
Romania	6 December 1993	Acceptance
United Kingdom of Great Britain and Northern Ireland	1 August 2002	Acceptance
Slovakia	31 March 1993	Notification of succession
Slovenia	5 November 1992	Notification of succession
Sweden	13 January 2003	Acceptance

Most Member States have ratified the 1970 Convention (22 States), and five States (Austria, Ireland, Latvia, Luxembourg and Malta) have not yet done so.

Some States have expressed reservations on ratifying the Convention, concerning in particular the material field or the scope of some rules contained in the Convention. For example,

³ Conclusions of the Council of the European Union on preventing and combatting illicit trafficking in cultural goods, Brussels, 3 November 2008, Council of the European Union, 14224/2/08, REV2 CRIMORG 166, ENFOPOL 191.

⁴ Council conclusions on preventing and combatting crime against cultural goods.

the definition of “cultural property” that States designate as such within the meaning of Article 1 has, in some cases, been delimited by reference to value or dating thresholds.

Belgium and the United Kingdom have stated that the expression “cultural property” under the 1970 Convention must be interpreted as being confined to the list of items annexed to EEC Regulation No. 3911/92 of 9 December 1992, as amended, and in the annex to Directive No. 93/7 of 15 March 1993, as amended. Similarly, in French law, the items concerned are listed in an annex containing the categories of items listed in the original version of Decree No. 93-124 of 29 January 1993 and identical to the categories in Regulation No. 116/2009 and consequently assigned economic and dating thresholds. Sweden and Denmark, too, have limited the scope of the definition by adopting their own methods. Denmark’s legislation refers to its cultural-property and museum laws while Sweden’s law applies differing thresholds depending on whether the cultural property is Swedish, connected with Sweden or foreign.

II. Incorporation of the 1970 Convention

In Europe, a wide variety of means have been used to incorporate the 1970 Convention into domestic law. Several States have passed an incorporation law specifying procedures for implementing the Convention. Others, more selectively, have amended their law to be consistent with the 1970 Convention or to bring it closer to some principles and rules contained in the Convention. Lastly, some States have merely ratified the Convention.

Very few States (fewer than ten) have adopted incorporation laws. The study on cultural-property trafficking submitted to the Commission in 2011 reported various transposition or incorporation methods that provided for mechanisms of varying effectiveness for the restitution of illegally exported or imported cultural property, or property in which ownership has been illegally transferred. The main points vary. Some States lay emphasis on legal aspects (codification of the obligation of due diligence, time-limits on claims, restitution conditions and penalties), while others highlight operational features and the need for cooperation with services.

Several laws have been influenced by the 1970 Convention, introducing, for example, new rules, although no incorporation law has been passed.

Lastly, a number of States have ratified the Convention without always giving thought to the impact of its rules on domestic law and the need to change their legislation. Several States consider that their laws afford a sufficient level of protection. There are still, however, some grey areas (for example, infrequent import controls in Member States and checks on purchases from public institutions in particular, see below). Furthermore, some rights are influenced to varying extents by the rationale behind Community law and the principles of the free movement applicable in that legal space. Laws incorporating the 1970 Convention are sometimes enacted in connection with the transposition of Community law.

Owing to the strong emergence of a form of moral duty of restitution by States when the situation is glaringly illegal, even when no incorporation law has been passed and in cases in which the effect of the Convention does not legally entail restitution, some States rely or draw on the rules enshrined in the 1970 Convention. A number of States or institutions, when resolving such problems, refer, in particular, to the date of the Convention and, if the illegal situation arose after that date, embark more easily on the restitution procedure.⁵

In any event, owing to disparities observed nationally in the implementation of rules, it would be interesting to give thought, if not to a standard transposition law, then at least to factors that could be used to draft such a law comprising key points in which systemic disparity assuredly constitutes a trafficking risk. The question arises as to whether the exercise is relevant in the

⁵ This has been observed internationally, as noted by Lyndel V. Prutt in *Strengths and weaknesses of the 1970 Convention: an evaluation 40 years after its adoption*, CLT/2011/CONF.207/7, Paris, March 2011, UNESCO, p.3.

European or in the international sphere. As the European Union is an area in which movement is governed by European rules and, as the Union's law provide for market regulation tools on the one hand and for a specific Union border control mechanism on the other, it would not be absurd to endeavour to harmonize the systems used to control movements of cultural property and to make restitution arrangements in the event of illegal movements of cultural property. Such systemic harmonization undertaken on the basis of Community law within the limits of its levels of jurisdiction (Article 114 TFEU in particular, and specifically two tools, namely Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods and Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, the modified text of which is currently under consideration, may be relevant) could be a first step that could be expanded. Tools used as aids in implementing the Convention should generally be designed as broadly as possible.

III. Key points, difficulties and weaknesses in the implementation of the 1970 Convention and possible solutions

Difficulties have been encountered mainly in implementing Convention and are due either to disparities in the solutions found nationally, giving rise to unequal protection, depending on the State, or to failure to introduce some of the recommended rules. Some examples will be given as possible food for thought on the need to incorporate, harmonize or approximate some legal, technical or operational mechanisms. The question may be considered along two lines – within the Union and internationally. One important course of action consists in enquiring into ways and means by which Community law and institutions can assist in implementing the Convention and act as effective levers in the region and into the extent to which the model is specific to that legal order or can be rolled out to other regional bodies.

The question of approximation obviously also entails ratification of UNESCO's 1970 Convention and UNIDROIT's 1995 Convention, as recommended by the Council in its December 2011 conclusions.

1. Legal aspects, disparities between systems

In several respects, differences in the States' laws, even though they belong to the same legal order, have been spotlighted as an aggravating factor of cultural-property trafficking. Those differences are apparent in several fields – criminal law, civil law and the special cultural-heritage protection law – three areas in which States retain central jurisdiction. Some areas of competence are outlined below.

Definition of cultural property and controls on movement

A major obstacle stems from marked differences in the delimitation of cultural property on the one hand, and protection and control techniques and methods on the other. The reason lies mainly in the cultural competence vested in States, as the European Union may act in the field of culture, excluding all harmonization of laws (Article 167 TFEU). Some States have adopted the definition of cultural property contained in the 1970 Convention, but this solution is far from being generally adopted. The forms and methods of delimitation vary widely. Yet another difficulty arises in the particular EU area in understanding what States designate as being national treasures. The concept is important because it informs authorizations of restrictions based on heritage protection. Incontrovertibly more selective than the definition contained in the UNESCO Convention, it is not an independent Community law concept and falls within States' substantive sovereignty. There is room for progress in regard to knowledge of tools and methods.

The various techniques used to regulate movement of works include legal bans on removal from the country and removals subject to authorization. The methods, too, vary considerably, and the Union could act in that regard to harmonize them on the basis of two regulatory instruments of Community law (by establishing, for example, a free-movement card common to all States).

Disparity in arbitration concerning the owner/possessor of cultural property

The differences lie, in particular, in the notion of good faith, known to several States that nonetheless require compliance with different rules. There are no distinctive features in this regard within the European Union (see the EU study on the criteria and disparities regarding moral and material factors). The same holds true for differences in statutes of positive and negative limitation.

Progress could be achieved, too, by codifying the obligation of due diligence, founded on the need to regulate the art market and to produce practical supporting tools. In this regard, the UNIDROIT Convention could guide reflection. Community law could be mobilized for the first point (see EU study on the subject). The Council did not embark on this course in its conclusions of 13 and 14 December 2011 and referred this item to a group for the drafting of a guide to good practices. The various stakeholders' contribution to the discussion of good practices is crucial (ethical standards, for example, will be produced).

Disparity in criminal offences

The question of the offences of theft and receiving and the need to harmonize them have obviously been analysed as an important feature, particularly in regard to the rules on the time-limit for prosecutions, which is a particularly acute problem in regard to receiving and archaeological excavations (which raises complex evidentiary questions).

Specific proposals were made from that standpoint in the EU study on the establishment of basic rules founded on Article 82 TFEU relating to judicial cooperation in criminal matters in the European Union, which comprises the approximation of Member States' laws and regulations under some conditions.

The illegal removal of non-appropriated property found on archaeological, historical or cultural sites protected by national law must be treated in Member States' criminal law as fraudulent misappropriation of the property of another because of the specific characteristics of archaeological heritage, in particular the absence of records prior to discovery of the property. The rule would be based in this instance on the UNIDROIT Convention.

Disparity of technical tools (databases and inventories, in particular).

2. Operational aspects, dispersion of competence and shortfall in cooperation

The operational difficulties observed in the European space have several causes:

- shortfall in information;
- shortfall in inter-institutional cooperation;
- shortfall in cooperation between private and public stakeholders;
- insufficient thought to good practices (in its conclusions on 13 and 14 December 2011, the Council announced that a group of experts would be established to draft a guide to good practices;
- dispersal of responsibilities and skills.

The question of departmental coordination is of prime importance to the question of the effectiveness of prevention and control resources, a major obstacle being the speed of transmission of information about illegal situations. In a number of States, the dispersal of competences, sometimes dependent on the nature of the property or on the level of control exerted, undermines the effectiveness of operational actions. In this connection, some States have either established genuine coordination units tasked with trafficking-related matters or have

organized more informal means of coordination. In particular instances, consultation and coordination may take the form of joint action, for example on the flow of information.

3. Implementation difficulties, grey areas

Failure to increase museum and institutional responsibility

In regard to Article 7 (a), under which the States Parties have undertaken 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 the Convention, it is noted that this article does not apply to museums and similar institutions as a binding norm that prevents the acquisition of illegally exported cultural property. Furthermore, in a number of cases, the application of good-faith purchase rules will shield such operations from any claim. That said, a number of museums have taken on board the idea of excluding inadequately documented items of doubtful provenance from their collections. The due diligence standard is thus rising.

Lack of import controls

Under Article 7 (b), States have undertaken “to prohibit the import of cultural property stolen from a museum or a religious or secular public monument after the entry into force of this Convention”, while Article 13 require States “to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property”. In this regard, too, States rarely provide for import controls, and penalties for illegal imports are therefore not meted out separately from other offences (theft and receiving).

Action for recovery neutralized by the effect of good-faith purchases

Article 7 requires States “at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported” (Article 7 (b) (ii) and “to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owner” (Article 13 (c)).

Union law could help to strengthen the implementation of this provision by requiring States to enforce due diligence incumbent upon stakeholder as a dual – preventive and punitive – measure.

Lack of legislation on online sales

Online selling, a new development in cultural-property trafficking, is hardly ever addressed in legislation adopted by States, some of which have given pride of place to agreements with online sale companies.

Many complex issues must evidently be addressed in order to improve the implementation of the 1970 Convention, which requires State interaction on legal, technical and operational matters. This course of action, crucial to the Convention’s effectiveness, must indisputably be considered before any question on the desirability of changes to the Convention itself.