CINOA Position paper on the proposed implementation rules for the Import of Cultural Goods (ICG) into the EU regulation (EU) 2019/880

Submission for EC Have Your Say on ICG -April 20, 2021

As we were only given four weeks to provide comments to this proposal, despite continuous requests for information during the drafting of these rules, we do not feel that we had adequate time to study the complicated implementation of this regulation which could have far reaching consequences for the art and antiquities market in the EU.

CINOA's preliminary analysis of the proposed detailed rules for implementing certain provisions of Import of Cultural Goods (ICG) Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction of the regulations reveals that the legality of some of the rules may be questionable. Many of the rules are unnecessary complicated, burdensome, and disproportionate for the majority of ordinary cultural goods that are traded legally and unworkable unless modified. The rules will limit the circulation of cultural property that has been legally owned for decades or even centuries, without succeeding in its prime objective of combatting terrorist financing.

We have some concerns about the overall scope of the proposed implementation of the regulation and how it compares and if it is compatible with other legislation, particularly the Export Licence Regulation (EU) 116/2009 which is considerably simpler, and the simplicity of which it should mirror. It would now be more complicated to import cultural goods than to export them.

We believe that there are legal problems inherent in Regulation (EU) 2019/880 stemming from the requirements to know third countries' export laws, (not just their current laws, but those in existence during all periods in history when cultural property was created) if citizens are not provided an opportunity to consult a code or official journal, in the official languages of the member states, to inform them whether their actions are compliant with the law. The *nulla poena sine lege scripta* principle has not been followed; Article 4(4) of Regulation (EU) 2019/880 requires holders of goods to provide "evidence of the absence of such laws" without being provided access or tools to obtain the information. It is an arbitrary law since a citizen cannot readily know whether they are in breach of it or not. From a human rights perspective, how can it be possible for a law-making body to pass a regulation that entirely depends on rules which

the body itself has failed to codify and make available in written form?[1] Additionally, from a practical point, how can the competent authorities themselves evaluate the applications if they do not have easy access to the information. Therefore, measures should be added requiring the creation by the Commission of a database written in all the official languages of the European Union which provides the necessary information to evaluate whether exports are compliant with the law of non-EU states.

We also call attention to the fact that the Regulation 2019/880 sits uncomfortably with member states' laws on the restitution of third countries' cultural property. Only a limited number of member states of the EU have implemented the 1970 UNESCO Convention into national law, so in the event of an import licence being declined by member states, then there would be no legal basis for the return of these goods to their country of creation and doing so would violate the property rights of the importer. Preventing their import into the EU is inappropriate and disproportionate if they cannot be lawfully returned to their country of creation.

We believe that Regulation EU) 2019/880, as well as the draft implementing rules, should be evaluated by the Regulatory Scrutiny Board (RSB) to consider whether it meets its prime objectives and the proportionality principle, as well as considering its incompatibility with other legislation, before undertaking the development of the IGC electronic system.

Some of the detailed rules for implementing certain provisions of Regulation (EU) 2019/880 are unrealistic for the art market professionals, private individuals and the competent authorities who must adhere to them. The proposal lacks the precise practical details which would need to be completed prior to Regulation (EU) 2019/80 becoming fully operational.

Key prerequisites are:

1) accurate definitions of key words and terms such as "of importance", "licit provenance", "provenance", "country of export" used in the implementation proposal are crucial for adding clarity and avoiding misunderstanding by those who wish to adhere to the regulation, as well as the correct translation of the term "antiquities" used in Parts A and C of the Annex to regulation 2019/880 from English into other languages.

2) a streamlined application and approval process in which customs import declarations are linked to the import licence/importer statement forms, realistic information requests and documentation requirements, so that the applications can be properly completed and swiftly and efficiently reviewed.

[1] See annex, page 1, CINOA's commentary regarding the Resale Right Directive 2001/84/EC regarding reciprocity principle and publication by the Commission of the names of third countries where an equivalent resale right applies.

This includes changes to allow all art market professionals to use Temporary Admission for auctions, restoration and exhibitions and to provide the option of using Importer Statements for collections.

3) improvements to the procedures by refining the existing Chapter 97 Customs Commodity Codes to reflect each of the Part B and C categories in regulation 2019/880 (including their minimum age thresholds as well as their maximum values) and creating a database of current and historic export rules for all third countries to ensure validity and economize time researching documentation, along with samples of permits, current and historical.

4) special provisions for the safeguarding and storage of transit cultural goods to avoid possible damage to the items.

5) procedures and processes if an application is rejected as well as an option to appeal.

6) verification of the compatibility with legal principles such as *nulla poena sine lege scripta* and other legislation: the EU Export Licence Regulation (EU) 116/2009, international and national restitution laws of member states, under Article 250 of Regulation (EU) No 952/213 and Article 576(3)(a) of Commission Regulation 2454/93 Temporary Admission.

The proposal needs to be modified in order to be successfully implemented and to effectively safeguard cultural goods for future generations. In the following pages we have highlighted some of the key issues and have attached an annex which provides line by line commentary on the draft implementing regulation. Please regard the annex as an integral part of this response to the “Have Your Say” consultation.

1. Accurate definitions of key words and terms are critical for implementing the regulation and for people who need to adhere to it.

A. The definition of cultural goods for the purpose of this regulation:

Article 2(1) of Regulation (EU) 2019/880 states:

“‘cultural goods’ means any item which is <u>of importance</u> for archaeology, prehistory, history, literature, art or science as listed in the Annex”

Despite requiring that cultural goods “of importance” must be distinguished from those that are not considered “of importance”, Regulation (EU) 2019/880 and the draft implementing regulation both fail to make this distinction, or even to suggest how it should be made. For example, Part A of the Annex of

regulation (EU) 2019/880 lists general categories of goods, irrespective of their importance, age or financial value. Unless the Article 2 (1) requirement to distinguish between items of importance and those not of importance is applied then, for example, the Part A category (g) objects of artistic interest would include an amateur painting created in the year of import by a three-year-old child from an non-EU country and category (l) objects would include a mass-produced 19th century wooden chair made in England, worth €50.

The Annex lists categories of goods but needs to demonstrate how only items that are “of importance” can be identified as being subject to the regulations.

These categories and items must be accurately translated into all EU official languages. Of concern is the word “antiquities” in Parts A and C, a term which refers to objects created in the ancient past, especially the period of classical civilizations prior to the Middle Ages, and which has been inaccurately translated into various languages. For example, the correct translation in German should be “Antiken” (not Antiquitäten) and in Dutch should be “Oudheden”.

B. **Definition of the terms “licit provenance” (Articles 8 and 12) and “provenance”** as also used in Explanatory Notes (1) and (2) in the Annex. The term also appears in regulation (EU) 2019/880. The meaning of “provenance” in the context of cultural goods is the identity of previous owners. This is not information required by regulation (EU) 2019/880, which is concerned with the legal export of goods from third countries, not ownership or title as such.

C. **Definition of the term “country of export”** in Explanatory Note (1) in the Annex. How does the meaning of this term differ from “country of interest”?

2. A streamlined application and approval process through a simple electronic form, feasible information requests and access to required documents

We understood that the initial intent was that the importer statement would be designed for cultural goods that did not require an import licence and therefore the administrative burden for this would be less demanding, but the proposed application forms and lists of supporting documents appear to be almost identical. For the declaration, the documents are to be in the importer’s possession but not submitted, but for the import licence they are submitted.

It is unclear how the application process will operate in practice. Is it foreseen that an application for an import licence or the making of an importer statement can be submitted prior to the item arriving at customs? This would be important as it would cut down on the potential length of time for the storage of the item by customs and reduce the number of occasions when goods would arrive at the EU border and be denied entry.

As the implementation rules are similar for import licences and importer statements, for convenience we have grouped together some issues and concerns common to both measures:

A. A simpler electronic process

a) How will the electronic form-filling process filter out those cultural goods to which the Regulation does not apply so that it is clear both for customs and for applicants? In particular,
   i. cultural goods created or discovered in the customs territory of the Union;
   ii. cultural goods that are not of "importance for archaeology, prehistory, history, literature, art or science" (Article 2 (1) of regulation (EU) 2019/880);
   iii. cultural goods that are of less than 200/250 years of age.

b) Has consideration been given to combining the importer statement into the import customs declaration system? Customs declarations can be made in advance of import and if the declaration system could identify through additional tailored customs commodity codes the items that would require an importer statement it would speed up and simplify the process.

c) When a consignment consists of several items, it is stipulated (Article 6 (2)) that the competent authority may determine whether a single import licence shall cover one or several cultural goods in that consignment. An importer, who will want to avoid delays, will need evaluation criteria to determine whether they must apply for a single or multiple licence prior to submission.
   i. If a multiple licence is issued, the electronic record will need to clearly identify individual items covered by the licence to enable a link to be made for possible future exports/imports.
   ii. We do not understand why the draft implementing regulation fails to make provision for importer statements for consignments containing several cultural goods.

B. Feasible information requests

a) Cultural goods may have changed hands multiple times after export from the country of creation. So, if the date of export is unknown, a signed declaration that the time of export from the source country is unknown should suffice; "under oath" is disproportionate. We recommend however that the declaration should still include confirmation of the lawful export from the last country where they were located for a period of more than five years (if known).

b) It should be acknowledged that the applicant is dependant and must rely on anecdotal information (without paperwork from the past, as there was often no legal obligation) given by the seller to complete the application.

C. Required documentation

a) The minimum number of photographs should be three, which is usually more than enough to identify an object for the Export Licence application system, instead of seven to eleven photographs as stipulated in the proposed ICG regulation.

b) Clarification should be provided regarding third-country documents that must “adequately” identify the cultural goods. What happens if an export licence does not identify the cultural goods adequately and there are no photographs?

3. Improvements to the procedures such as refining Custom Commodity Codes and setting up a database of export laws

A. Refined Customs Commodity Codes to reflect the types of items in the applications will streamline the process for all parties

Current Customs Commodity Codes used are 9701 to 9706, but not all items using these numbers fall under the Regulation (EU) 2019/800, therefore, subcategories of items under these codes would provide more precise information and facilitate the administration of the regulation.

B. Make accessible a historic database of export rules for each country which will facilitate identification of relevant documents and authentication of supporting documents both for customs and for applicants which will streamline the administration and the curtail the time and expense of researching the appropriate export laws and the validity of export documents, if issued, on a case-by-case basis

To ensure the *nulla poena sine lege scripta* principle is upheld, the ICG system should include a comprehensive database indicating:

i. the periods in history when there have been no laws against the export of cultural property;
ii. the periods when such laws applied, the categories of objects to which they applied and whether the laws provided a requirement for export licences/permits;
iii. in the case of countries whose modern borders differ from historic borders within their territory, a clear indication of the export rules which applied within the component regions of the modern state.

4. Special provisions for the safeguarding and storage of transit cultural goods

A. Protocols should be put in place to ensure that the marking of goods does not damage them, alter their value

It is important that any 'marking' does not damage the item.

B. By nature, cultural goods are fragile and need special attention

Items should only be handled by specialists. Any damage due to unpacking/repacking should be under the responsibility of the customs authorities.

C. Refuges or warehouse facilities with full acclimatisation have been foreseen for some cases in the regulation

Warehouse facilities with full acclimatisation fit for all items, even in transit, should be available in every member state.

5. Procedures and processes if an application is rejected

A. If an application is rejected due to incomplete information

The procedure for the applicant and goods should be clearly indicated.

B. If an application is rejected

A clear appeal procedure should be put into place and its outline details should be incorporated into the implementing regulation.

6) Verification of the compatibility to legal principles and other legislation

A. Review by Regulatory Scrutiny Board (RSB)

We believe that the Regulation EU) 2019/880, as well as the draft implementing regulation, should be evaluated by the Regulatory Scrutiny Board (RSB), taking into account its likely ability of achieving its primary objectives, the proportionality principle and the *nulla poena sine lege scripta* principle, as well as the compatibility with other legislation, as highlighted in our submission, before undertaking the development of the IGC electronic system.

B. EU Export Regulation (EU) 116/2009

The proposed implementation of the regulation is more complicated than the Export Licence Regulation which deals with the export of cultural goods, thus making it more difficult to import cultural goods than to export them. For a more balanced approach and to streamline administrative processes, the ICG

regulation should be simplified, and the information required should mirror, as much as possible, the application process for the Export Licence Regulation.

C. International and national restitution laws

Regulation 2019/880 sits uncomfortably with member states' laws on the restitution of third countries' cultural property. Only a limited number of member states of the EU have implemented the 1970 UNESCO Convention into national law, so in the event of an import licence being declined by member states, then there would be no legal basis for the return of these goods to their country of creation and doing so would violate the property rights of the importer. Preventing their import into the EU is inappropriate and disproportionate if they cannot be lawfully returned to their country of creation.

D. Temporary Admission (TA)

Under Article 250 of Regulation (EU) No 952/213 and Article 576(3)(a) of Commission Regulation 2454/93 works of art, etc may be imported under temporary admission for exhibition with a view to a sale. The requirements for importers to use these measures are already well-established and are governed by clearly defined and strict rules, which have been in place and used in the art market for many years.

i. The implementing regulation is restricting the application of temporary admission relief for exhibited items contrary to the wording of Article 3(4)(c) in Regulation (EU) 2019/880.
ii. It is illogical, disproportionate and arbitrary for the implementing regulation to deny an art market professional the right to use temporary admission measures for display an item in their premises, when Article 5 of the same regulation would allow them to display the very same item at an art fair.

CINOA ANNEX on EC ICG Draft Implementing Rules
CINOA Comments written in red 2021 04 20

EUROPEAN COMMISSION

Brussels, XXX
[…](2021) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) …/...

of XXX

laying down detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods

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laying down detailed rules for implementing certain provisions of Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods1, and in particular Articles 3(6), 4(12), 5(3) and 8(2) thereof,

Knowledge of third countries' laws – breach of the *nulla poena sine lege scripta* principle

Knowledge of the export laws of third countries, not just their current laws, but those in existence during all periods in history when cultural property was created, is intrinsic to the functioning of and compliance with Regulation (EU) 2019/880.

This is partly because for the categories of cultural property covered by Parts A, B and C of the Regulation's Annex the vast majority will already have been exported from their country of creation many years ago, at a time when export licences were not issued.

For most such cultural goods no accompanying export certificate confirming the legal export from their country of creation exists. To comply with the regulation legal export will have to be demonstrated by other means. Knowledge of the export laws of third countries is crucial as a means of judging the validity of export licence documents (rare as they may be), but also for using other historical evidence to demonstrate that if goods were in a certain location on a certain date then they must by deduction have been exported legally.

We cannot help but wonder that those who devised the regulation were so focused on the export of antiquities from countries in the Middle East, some of which have had export restrictions and permit arrangements for excavations for many years, that they lost sight of the many other categories of items referred to in the Annex, such as furniture (Part A), paintings (Part A and C) and books (Part A and C) for the majority of which many countries have only introduced export restrictions in recent years. These items will never have been issued with a piece of paper to allow their export, so it is fundamental to being able to demonstrate lawful export and compliance with the law that an importer should now have access to accurate and clear details of third country export laws for cultural goods.

Consequently Regulation (EU) 2019.880 is a regulation which directly links itself to the laws of hundreds of non-EU states, many of whose laws are themselves unclear and may not have been codified as we understand the concept of written law today. The regulation also applies to the actions of EU citizens acting within the territory of the Union, yet those citizens are not given an opportunity to consult a code or official journal to inform them whether their actions are compliant with the law. Citizens living and working in the European Union are required to have knowledge of measures which the Union has so far failed to make available to them.

Furthermore, EU citizens are being expected by the European Parliament and Council to adhere to a statute, some elements of which (third countries' export laws) are not available in the official languages of the Member States.

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A law passed so that a citizen cannot readily know whether they are in breach of it or not, is an arbitrary law. Regulation (EU) 2019/880 is therefore a regulation for which a key element is hidden. In short: "Obey these rules, but we will not tell you the rules".

We therefore expected to see within the implementing regulation details concerning access to the export laws of third countries, but were disappointed to see no references to this.

From a human rights perspective how can it be possible for a law-making body to pass a regulation that entirely depends on rules which the body itself has failed to codify and make available in written form? We expect the principle of *nulla poena sine lege scripta* to be followed when regulations are enacted by the Commission and this principle has clearly not been followed; indeed it has been explicitly defied, since Article 4(4) of Regulation (EU) 2019/880 requires holders of goods to provide "evidence of the absence of such laws". The principle is accepted in modern democracies as a basic requirement of the rule of law – that there should be no penalties without *written* law.

An example of another law with direct relevance to the art market is Directive 2001/84/EC. This requires an art dealer to pay a resale right income for the benefit of any author of an original work of art who is the national of an EU Member State. Like Regulation (EU) 2019/880, the directive is also dependent on the laws of third countries; Article 7(1) grants reciprocity between Member States and third countries by creating an obligation on an EU art dealer to pay a resale right to artists of a country whose laws provide a similar right for its own and EU citizens. However, unlike Regulation (EU) 2019/880, the directive does not require EU art dealers to have knowledge of the laws of all third countries, because it requires publication by the Commission of the names of third countries where an equivalent resale right applies. Hence Article 7(2) of the directive states:

> "On the basis of information provided by the Member States, the Commission shall publish as soon as possible an indicative list of those third countries which fulfil the condition set out in paragraph 1. This list shall be kept up to date."

As a result an art dealer has total clarity in following the measures correctly and the directive is consistent with the *nulla poena sine lege scripta* principle.

In addition to the legal problems inherent in Regulation (EU) 2019/880 outlined above, from a practical perspective it will not be possible for the competent authorities of Member States to pass judgement on import licence applications unless they can decide whether the information presented to them is an accurate reflection of the export laws of the relevant country. They can only do this if they themselves know the laws of that country.

For all the reasons provided above, the implementing regulation should be amended to correct its intrinsic flaw. Measures should be added requiring the creation by the Commission of a database written in all the official languages of the European Union and showing for all third country states in the world:

i. the periods in history when there have been no laws against the export of cultural property;
ii. the periods when such laws applied, the categories of objects to which they applied and whether the laws provided a requirement for export licences/permits;
iii. in the case of countries whose modern borders differ from historic borders within their territory, a clear indication of the export rules which applied within the component regions of the modern state.

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The implementing regulation should also be amended to provide that the basis for deciding whether the export laws of a third country were breached shall be the contents of the Commission's export law database. In the absence of any information concerning the cultural goods export laws of a third country in particular years or historical periods, there shall be a presumption that goods could be freely exported at those times.

Any changes to the information held in the database would need to be accompanied by the date on which the database information had been changed, as well as the implementation dates of the relevant laws. This would allow an importer to demonstrate the information on the database that they had relied on at the date of import.

We should point out that the online database currently maintained by UNESCO would be entirely inadequate for this purpose since there is no indication as to the date on which cultural property laws were updated to the site, only the date on which the relevant law came into force. Some of the laws do not make clear how they were enforced in relation to exports, nor show the nature of or examples of the permits required. Furthermore not all laws have been translated from the language of the relevant state and where they have been translated it is into English and not the other official languages of the Member States of the European Union.

Whereas:

(1) In order to properly implement Regulation (EU) 2019/880, it is necessary to lay down specific rules for the establishment of an import licensing system for certain categories of cultural goods listed in Part B of the Annex to that Regulation.

(2) It is also necessary to lay down rules regarding an importer statement system for the categories listed in Part C of the Annex to Regulation (EU) 2019/880.

(3) Furthermore, it is necessary to lay down rules regarding the exceptions to the requirements to obtain an import licence or to submit an importer statement under certain conditions.

(4) The safekeeping of cultural goods which are at imminent risk of destruction or loss in a third country should be carried out in refuges in the Union in order to guarantee their safety, maintenance in good condition and safe return when the situation so allows. In order to ensure that cultural goods entrusted for safekeeping will not be diverted in the Union and placed on the market, refuges should be supervised or operated by public entities and the cultural goods should remain under their direct supervision at all times.

(5) Cultural goods entrusted for safekeeping in a refuge in a Member State should be placed under suitable customs procedures, which would guarantee their storage for an indeterminate period of time, and arrangements should be made in case the risk situation in the third country is expected to persist beyond the foreseeable future. In order to allow the general public to benefit from the temporary presence of these cultural goods in the Union's territory, their exhibition in premises operated by the same entity that operates the relevant refuge should be permitted, subject to the prior consent of the third country and, where the goods have been placed under customs warehousing, to a prior authorisation by customs in accordance with Regulation (EU) No 952/2013 of

the European Parliament and of the Council. Moving the goods to exhibition premises should only be allowed if their safety and maintenance in good condition can be ensured.

(6) The exemption from having to obtain an import licence or submit an importer statement to customs in the case of temporary admission of cultural goods for the purpose of education, science, conservation, restoration, exhibition, digitisation, performing arts, research conducted by academic institutions or cooperation between museums or similar institutions should be arranged in such a way as to ensure that the cultural goods are to be used for those purposes only. Establishments and institutions of the public sector are considered trustworthy with regard to the use of the temporarily imported cultural goods; it should therefore only be required of them to register in the electronic system. Institutions or establishments governed by private law or both private and public law should also be allowed to benefit from the exemption, provided that their registration in the electronic system is subsequently confirmed by the competent authority. This exemption should also be implemented in a way that ensures that the same objects temporarily admitted will be the ones re-exported at the end of the procedure and that customs can readily identify the beneficiary establishments via the centralised electronic system.

The above recital appears to disregard the existing strict arrangements for the temporary admission (TA) of works of art, etc for exhibition with a view to a sale, which arrangements are already available for the display of works in both private premises and at art fairs. Please see our further comments at Article 3.

We find the reference to public sector establishments as being "trustworthy", and the insinuation that private sector establishments are not trustworthy, to be inappropriate. We are not aware that it is European Commission official policy to label business tax payers in this way and we request that the language be amended.

Many art and antique dealers and auction houses in the EU have used the temporary admissions arrangements for many years and since use of TA is only given to art market professionals who have a good record, or to those who provide a financial guarantee, they should be given the ability to use TA for goods displayed in their premises. As stated in our comments adjacent to Article 3 no reason has been provided as to why art dealers and auction houses should be denied the opportunity to display items for exhibition in their premises, when they are allowed to do so at art fairs.

(7) In order to ensure the traceability of the cultural goods temporarily admitted in exemption from the requirement of an import licence or an importer statement under Article 3(4), points (b) and (c), of Regulation (EU) 2019/880, it is appropriate to lay down rules regarding the description of those goods that should be uploaded to the electronic system referred to in Article 8 of that Regulation.

(8) For the correct application of Article 3(5) of Regulation (EU) 2019/880 and in order to ensure uniform implementation and avoid misuse of the exemption by permanent sales outlets such as auction houses, antique shops and galleries, commercial art fairs should fulfil certain conditions as regards their duration, purpose and accessibility to the general public, as well as the publicity given to them.

(9) In order to ensure the uniform implementation of the provisions of Regulation (EU) 2019/880 on import licences, rules governing the drawing up, submission and examination of applications and the issue and validity of the relevant licences using the centralised electronic system are necessary.

(10) In order to prevent the irregular use of an import licence that has been revoked by a competent authority, an alert should be triggered in the electronic system for the import of cultural goods referred to in Article 8 of Regulation (EU) 2019/880, drawing the attention of other Member States customs and competent authorities.

(11) The licit provenance of a cultural good which has been imported in the past in the Union under an import licence has already been examined by a Member State competent authority. In order to ensure consistency with that assessment and to facilitate trade, a new application for the re-importation of the same cultural good should be subject to simplified requirements.

"Licit provenance" has not been defined. Please see comments concerning this below recital 14.

Unlike some other European languages, in English the term "goods" (as in "cultural goods") is a plural noun in its own right and, other than in economics, as a noun it is normally only given in the plural form, so takes the plural form of verbs. "Cultural goods" is the term used throughout Directive (EU) 2019/880, so we recommend for both consistency and the correct use of English that it be used in this implementing regulation.

(12) In accordance with Regulation (EU) 2019/880, the 90-day period for a competent authority to decide on an import licence application starts from when that authority receives a complete application. In order to ensure equal treatment and the expedient processing of licence applications, where additional information to that submitted by the applicant with their electronic application is considered necessary to demonstrate legal export, the 90-days period should only start from when the applicant has submitted the requested additional information by uploading it to the electronic system. As the applicant has the burden of proof for demonstrating legal export, when the additional requested information has not been submitted to the competent authority within the set deadline, the application should be rejected as incomplete.

Is there an appeal procedure for such rejections? We do not see details about the setting up of such a procedure in the recitals or the body of the draft regulation. A rejection of an application could have serious implications for the owner of the object and for the welfare of the object.

There is nothing in this document indicating what happens to the object when the application is rejected as incomplete.

(13) In order to prevent the introduction into the Union of cultural goods illegally exported from a third country, certain documents or information certifying the legal export by the third country authorities, adequately identifying the cultural good and engaging the liability of the importer, should always be submitted with an application for an import licence or be in the possession of the declarant submitting an importer statement, in case customs authorities request their presentation.

How is “adequately” defined or judged? What happens if an export licence does not identify the cultural goods “adequately” (e.g. no photographs, as was and often is the case)? See also comment about Article. 8.3

(14) In order to allow applicants to prove legal provenance 1 in the case where the country in which the good was created or discovered did not have an export certification system at the time of export, operators should be allowed to submit in support of their application for an import licence or have in their possession, in case these documents are requested by customs, a combination of other forms of evidence 2. In that case, Member States should require the operator to furnish as many different types of evidence as possible 4, including the history and ownership of the object through which its authenticity 3 and ownership can be determined.

1. How is “provenance” defined in this regulation? Its customary meaning in the context of cultural goods is that it refers to the identity of previous owners. This is not information required by regulation (EU) 2019/880, which is concerned with the legal export of goods from third countries, not ownership or title. Furthermore, what is meant by “legal provenance”? The term appears in the articles of this draft regulation, but has also not been defined. Is the meaning of “legal provenance” distinct from “legal export” (another term that appears in but has not been defined by this regulation)?

2. The above recital refers to “forms of evidence”, but it is not clear what this evidence is in relation to? Presumably it refers to evidence of the export of the goods in conformity with laws of the relevant country.

3. We are not aware that regulation (EU) 2019/880 is concerned with authenticity of items of cultural property? Its purpose is not to judge whether items have been accurately dated and described, simply whether they left their country of creation lawfully. It is therefore strange for this recital to refer to authenticity. Surely this should be changed or deleted?

4. We would appreciate confirmation that in cases where export licence or permits are not available, so supplying it becomes impossible, the authorities will accept “as many different types of evidence as possible” to demonstrate the country of location at certain historical dates?

(15) In order to ensure that the importer statements, as referred to in Regulation (EU) 2019/880, are uniform, rules governing the drawing up of the signed declaration in the centralised electronic system and the content of the standardised description of the cultural good are necessary.

(16) Customs are to carry out controls, other than random checks, based primarily on risk analysis. In order to ensure that the object presented to customs is the one for which the import licence has been obtained or the importer statement was drawn up, customs should carry out controls by applying risk management criteria in accordance with Articles 46 to 49 of Regulation (EU) No 952/2013.

(17) Regulation (EU) 2019/880 provides for the establishment by the Commission of a centralised electronic system to manage the import of cultural goods from third countries into the customs territory of the Union. Detailed arrangements should be laid down as to the operation, use, access, contingency provisions and security of that system and of the information stored or exchanged via the system.

(18) In order to ensure an adequate level of security of electronic means of identification and electronic certification and in order to digitalise and

harmonise processes, import licences and importer statements should meet the standards for electronic signatures, electronic seals and electronic timestamps in their different levels of identity assurance set by Regulation (EU) No 910/2014 of the European Parliament and of the Council and Commission Implementing Decision (EU) 2015/15064.

(19) Access to the content of import licences, applications thereof, importer statements and any information or documents submitted in their support should only be reserved to the Member States authorities in charge of implementing Regulation (EU) 2019/880 and to the applicants and declarants themselves. However, in order to facilitate trade, such as in the case of transfer of ownership of an imported cultural good, the holders of import licences or initiators of importer statements should be allowed to give access to third parties to their own licences or statements.

(20) Member States may restrict the number of customs offices which can process cultural goods import formalities. In order for importers to know which are the appropriate customs offices to carry out import formalities, this information should be made available to them and regularly updated in the centralised electronic system.

In order to ensure the smooth running of trade it is imperative that the question of customs offices is discussed with the art trade, since a wide variety of ports are currently used to bring cultural goods in the Union. Should there be an intention of reducing the numbers of such ports significantly this could prove economically damaging.

(21) Regulation (EU) 2019/880 provides that its Articles 3(2) to (5), (7) and (8), Article 4(1) to (10), Article 5(1) and (2) and Article 8(1) shall apply from the date on which the electronic system referred to in its Article 8 becomes operational or at the latest from 28 June 2025. Therefore, the date from which this Regulation should apply should be deferred accordingly.

In case the electronic system referred to in Article 8 is not ready to be implemented in all Member States on 28 June 2025, we suggest that provision be made in regulation for this date to be changed.

Furthermore, to allow for the possibility that vulnerable and fragile cultural goods need to be held in storage for much longer times than normally applies for imported goods, warehousing facilities with full acclimatisation will need to be made available at ports of entry. These facilities would need to be available by 28 June 2025, but if they are not ready then there should be a postponement of the application of the regulation.

(22) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council5 and delivered an opinion on........

(23) The measures provided for in this Regulation are in accordance with the opinion of the Cultural Goods Committee,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

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Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) 'refuge' means a secure storage facility within the customs territory of the Union, which is designated by a Member State for the safekeeping of cultural goods that are of importance for archaeology, prehistory, history, literature, art or science and which are under serious and imminent threat of destruction or loss if they were to remain at their current location;

Items "of importance" is intrinsic to the Article 2(2) definition of "cultural goods" to which Regulation 2019/880 applies, and the concept has been repeated in Article 1 of the implementing regulation above. Consequently cultural goods "of importance" need to be distinguished from those that are not considered "of importance", yet regulation (EU) 2019/880 and the implementing regulation fail to make this distinction, or even to suggest how this distinction should be made.

For example Part A of the Annex of regulation (EU) 2019/880 lists general categories of goods, irrespective of their importance, age or financial value. Unless the Article 2(1) requirement to distinguish between items of importance and those not of importance is applied to category (g) items (objects of artistic interest), then the regulation would apply to an amateur painting created by a three year old child from an non-EU country or, in respect of category (l), to a 19th century pine chair made in England and worth €50. It is certainly not the case that every old item is "of importance …".

Some third countries have export laws that western democracies regard as unfair and draconian - laws totally restricting the export of all cultural objects, including those that are of no significance. The definition of "cultural goods" in Regulation (EU) 2019/880 means that a two stage test needs to be applied in determining the goods subject to the regulation:

(i) Is the item of importance for archaeology, prehistory, history, literature, art or science?

(ii) Did its export comply with the export laws of its country of interest?

So that Regulation (EU) 2019/880 can be properly followed by importers, the implementing regulation needs to include measures that guide an importer of Part A objects on how to apply the Article 2(1) definition to them.

(2) 'third country' means a country or territory outside the customs territory of the Union, as defined in Article 1(11) of Commission Delegated Regulation (EU) 2446/20157;

(3) 'country of interest' means the third country where the cultural good to be imported was created or discovered or the last country where the cultural good was located for a period of more than five years for purposes other than temporary use, transit, re-export or transhipment, in accordance with Articles 4(4) and 5(2) of Regulation (EU) 2019/880;

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The five year period refers to the Article 4(4)(a) and Article 5(2)(a) derogations in Regulation (EU) 2019/880. In those derogations the wording used to describe the country of creation is "cannot be reliably determined", yet in implementing regulation Annex I, box I.11 (b) uses a different wording: "is not known". This should be changed to reflect the wording in Regulation (EU) 2019/880, since these two expressions do not have the same meaning. Likewise the Regulation uses the phrase "taken out of the country", but Annex I, box I 11 (b) states "were exported from there". For clarity the phraseology should be consistent.

(4) 'ICG system' means the electronic system for the import of cultural goods referred to in Article 8 of Regulation (EU) 2019/880;

(5) 'TRACES' means the system referred to in Article 133(4) of Regulation (EU) 2017/625 of the European Parliament and of the Council8;

(6) 'electronic signature' means an electronic signature as defined in Article 3(10) of Regulation (EU) No 910/2014;

(7) 'advanced electronic seal' means an electronic seal complying with the technical specifications laid down in Commission Implementing Decision (EU) 2015/15069;

(8) 'qualified electronic seal' means a qualified electronic seal as defined in Article 3(27) of Regulation (EU) 910/2014;

(9) 'qualified electronic time stamp' means an electronic time stamp as defined in Article 3(34) of Regulation (EU) 910/2014;

(10) 'EORI number' means the Economic Operators Registration and Identification number, as defined in Article 1(18) of Commission Delegated Regulation (EU) 2015/2446.

Our understanding is that private people are not required by EU law to have an EORI number. It should therefore be made clear in the Annex II templates that provision of an EORI number only applies to commercial imports (Boxes I.18).

Further definitions required as follows:

'provenance'
'licit provenance'
'holder of the goods' (given in Regulation (EU) 2019/880, but not in the implementing regulation).

Additionally, Explanatory Note (1) refers to the term "country of export". Presumably either this should be changed to say "country of interest" or a definition be provided for "country of export".

CHAPTER II

DETAILED ARRANGEMENTS FOR AN EXEMPTION FROM DOCUMENTARY REQUIREMENTS

Article 2

Safekeeping

1. Member States that import cultural goods for the purpose of safekeeping shall create refuges for their storage. Those storage facilities shall be specifically equipped to receive cultural goods and ensure their safety and maintenance in good condition. Free zones as referred to in Article 243 of Regulation (EU) 952/2013 may not be designated as a refuge.

The above mentioned storage facilities with full acclimatisation, fit for vulnerable works of art should also be available for the storage, potentially for more than 120 days, of cultural goods, waiting for a licence, in every Member State when the system becomes operational. See our comments for recital 21.

2. Where a Member State creates a refuge, it shall designate a public authority to operate it or supervise its operation and shall upload the contact details of that authority to the ICG system. The Commission shall make this information available on the internet.

3. Member States may only designate State, regional or local authorities or bodies governed by public law as those are defined in Article 2(1) and (4) of Directive 2014/24/EU of the European Parliament and of the Council10, as public authorities to operate or supervise the operation of a refuge.

4. Cultural goods belonging to the categories listed in Parts B and C of the Annex to Regulation (EU) 2019/880, which are of importance for archaeology, prehistory, history, literature, art or science may be temporarily placed in a refuge within the customs territory of the Union to prevent their destruction or loss due to armed conflict, natural disaster or other emergency situations affecting the third country in question.

Since the cultural goods are "of importance" they must be placed in such storage facilities, specifically equipped to receive cultural goods and to ensure their safety and maintenance in good condition. Consequently "may be" should be replaced by "shall be."

5. The import of cultural goods for the purpose referred to in Article 3(4) point (b) of Regulation (EU) 2019/880 shall require the prior acceptance of an official request for safekeeping submitted by a public authority of the third country possessing or holding the cultural goods to the public authority in the Union which has been designated to operate or to supervise the operation of the refuge in which the cultural goods are to be placed.

6. In the absence of a specific arrangement between the parties, the costs of storage and maintenance of the cultural goods placed in a refuge shall be borne by the Member State hosting that refuge.

7. The following shall apply with regard to the customs procedure under which cultural goods can be placed while they are stored in a refuge:

(a) The entity operating the refuge shall declare the cultural goods for placement under the private customs warehousing procedure in accordance with Article 240 of Regulation (EU) No 952/2013, provided that that entity holds an authorisation for operating a private customs warehouse in the premises of that refuge.

(b) Alternatively, the entity operating the refuge may declare the cultural goods for release for free circulation with relief from import duty, in accordance with Articles 42 to 44 of Council Regulation (EC) 1186/200911.

(c) The entity operating the refuge may initially place the cultural goods under the temporary admission procedure. When this customs procedure is selected, arrangements shall be made for the goods to be subsequently placed under one of the procedures under point (a) or (b), in case the maximum allocated temporary admission period under Article 251 of Regulation (EU) No 952/2013 expires and its extension is not granted, while the safe return of the goods to the third country is not yet possible.

8. The cultural goods may be temporarily moved from the premises of the refuge in order to be exhibited to the public, provided that the following conditions are met:

(a) the third country from which the cultural goods have been imported has given its consent;

(b) the customs authorities have authorised the move in accordance with Article 240(3) of Regulation (EU) No 952/2013;

(c) the premises designated for the purpose of display offer the appropriate conditions to ensure the protection, conservation and maintenance of the goods.

Article 3

Temporary admission for education, science or research

1. The temporary admission of cultural goods pursuant to Article 3(4) point (c) of Regulation (EU) 2019/880 shall be permitted without an import licence or an importer statement for the following purposes:

(a) exclusive use of the cultural goods by scientific, teaching or vocational training public establishments in teaching, vocational training or scientific research and under their responsibility;

(b) temporary lending by museums and similar institutions in third countries, of cultural goods belonging to their permanent collections to a public museum or similar institution within the customs territory of the Union for the purpose of exhibiting those cultural goods to the public by the latter or using them in artistic performances;

(c) digitisation, namely the preservation of their images or sounds in a form suitable for transmission and computer processing, by an establishment suitably equipped for this purpose and under the responsibility and supervision of a public museum or similar institution;

(d) restoration or conservation by professional experts under the responsibility of a public museum or similar institution, provided that such treatment or handling does not go beyond what is necessary to repair the cultural goods, restore them to good condition or preserve them in good condition.

2. For the purposes of paragraph 1, the establishment or institution concerned shall offer all the guarantees considered necessary for the cultural good to be returned in the same condition to the third country and that the cultural good can be so described or marked that there will be no doubt, at the moment of temporary admission, that the good being imported is the same one that will be re-exported at the end of the procedure.

3. Without prejudice to paragraphs 1 and 2, Member States may grant private or semi-private establishments or institutions in their territory an exemption pursuant to Article 3(4) point (c) of Regulation (EU) 2019/880 for the purposes specified in paragraph 1 of this Article, provided that they offer the necessary guarantees that the cultural good will be returned in good condition to the third country at the end of the temporary admission procedure.

4. In order to benefit from an exemption under paragraph 1, public establishments and institutions and authorised private or semi-private establishments or institutions shall register in the ICG system. This information shall be made available to customs in the Union via the ICG system.

Article 3(4)(c) of Regulation (EU) 2019 (880) states that import licences and importer statements will not be required for:

> *"the temporary admission of cultural goods, within the meaning of Article 250 of Regulation (EU) No 952/2013, into the customs territory of the Union for the purpose of …exhibition…"*

Under Article 250 of Regulation (EU) No 952/213 and Article 576(3)(a) of Commission Regulation 2454/93 works of art, etc may be imported under temporary admission for exhibition with a view to a sale. The requirements for importers to use these measures are already well-established and only traders with a good reputation and trading history are granted the relief. Release of temporary admission goods into free circulation is also governed by clearly defined and strict rules, which have been in place and used in the art market for many years.

The above existing temporary admission relief (subject to all the necessary guarantees) is available for the exhibition of works of art at art fairs as well as in approved dealers' galleries.

Article 3(4)(c) of Regulation (EU) 2019 (880) makes no stipulation that the use of temporary admission should be restricted to the exhibition of works by museums alone (the word "museums" only appears in respect of cooperation between museums), yet Article 3(1)(b) and

(3) in the draft implementing regulation would restrict the relief to public, private or semi-private museums only.

Consequently the implementing regulation is applying temporary admission relief contrary to the wording in Regulation (EU) 2019 (880).

It is illogical, disproportionate and arbitrary for the implementing regulation to deny an art dealer or auction house the right to use temporary admission measures for display in their premises, when Article 5 of the same regulation would allow the same dealer to display an item at an art fair.

We are unaware of evidence of significant abuses in respect of the existing temporary admissions regime for the exhibition of works of art by art market professionals in galleries, auction houses, warehouses or at art fairs. The Commission President has clearly stated that measures should comply with the principles of proportionality and subsidiarity, requiring actions to be evidence-based.

Accordingly we ask that the implementing regulation be amended to permit the import under temporary admission of works by dealers or auction houses that are to be displayed in their premises.

Article 4

Traceability

The holders of cultural goods exempted from the documentary requirements laid down in Article 3(4) points (b) and (c) of Regulation (EU) 2019/880 shall provide a standardised general description of the goods in the ICG system before lodging the corresponding customs declaration.

The general description shall be completed following the data dictionary set out in Annex I in an official language of the Member State where the goods are to be imported.

The level of detail required for the data dictionary and templates is extraordinarily long and unnecessarily burdensome, not proportionate and risks making compliance conflict with the guiding principles of the President of the European Commission, specifically the instruction "that our policies and proposals deliver and make life easier for people and for businesses". No justification has been given as to why the information required is considerably more complex than the requirements of the export licencing regulation (EC) No 116/2009.

Article 5

Temporary admission of cultural goods offered for sale in commercial art fairs

1. In order for the exemption laid down in Article 3(5) of Regulation (EU) 2019/880 to apply, the commercial art fair at which the goods are to be presented shall fulfil all of the following conditions:

(a) it is a limited-time trade event, other than a public auction, where cultural goods are exhibited with a view to a possible sale;

(b) it is accessible to the general public, regardless of whether that public has an intention to purchase or not;

(c) it is previously advertised via electronic or conventional media of wide circulation, such as newspapers, periodicals or exhibition catalogues.

2. In order to benefit from the exemption laid down in Article 3(5) of Regulation (EU) 2019/880, a cultural good shall be so described or marked that there can be no doubt at the moment of temporary admission that the good being imported is the same one that will be re-exported or placed under another customs procedure referred to in Article 2(3) of Regulation (EU) 2019/880 at the end of the temporary admission procedure.

What are the protocols that will be put in place to ensure that the marking of goods does not damage them and alter their value?

We recommend that the wording above be altered to ensure that the decision whether to mark cultural goods and by whom it should be carried out needs to be made by a specialist with experience in the handling of cultural property.

3. For the purposes of the second sentence of Article 251(1) of Regulation (EU) 952/2013, the period during which cultural goods may remain under the temporary admission procedure shall be determined by the customs authorities taking into consideration the time necessary for the purposes of the exhibition and the issue of an import licence, in the event that the goods are to remain within the customs territory of the Union after the end of the commercial art fair.

4. In accordance with Article 4(1) of the Regulation, the application for an import licence shall be submitted to the competent authority of the Member State where the cultural good was imported for the first time and placed under temporary admission.

CHAPTER III

DETAILED ARRANGEMENTS FOR THE IMPORT LICENCE

Article 6

General principles

1. The validity of an import licence shall expire in any of the following cases:

(a) the cultural good is released for free circulation;

(b) the import licence has been used only to place the cultural good under one or more of the customs procedures mentioned in Article 2(3) point (b) of Regulation (EU) 2019/880 and the cultural good is subsequently re-exported from the customs territory of the Union.

We ask that it be stipulated in the implementing regulation that an importer shall have the right to be given a printed or printable copy of the licence so they can demonstrate lawful entry into the EU. Also, for the purpose of re-exporting such as a document might be needed for proof of legal import. Ideally, the export and import regulations should be linked.

2. A separate import licence shall be issued for each cultural good.

However, where a consignment consists of several cultural goods, the competent authority may determine whether a single import licence shall cover one or several cultural goods in that consignment.

The meaning of "the competent authority may determine whether an import licence shall cover one or several cultural goods" is unclear. First, if the intention is that this should happen on a case by case basis then, since it is the applicant who will complete the (electronic) form, by the time they have done so it will be too late and if they have completed it with information about too many items they would have to complete it again. If the intended meaning above is that each Member State may determine a policy for whether applicants can use a licence for one or for several items, then the wording needs to be amended and clarified. We suggest the following possible phrasing:

"However, where consignments consist of several cultural goods, the competent authority may determine, as a policy, whether single import licences shall or may cover one or several cultural goods in such consignments."

In such circumstances we recommend flexibility to ensure that an import licence can be readily married up with the details provided on the customs declaration.

3. Before issuing an import licence, the competent authority may require that the cultural goods to be imported are made available to them for a physical inspection at the customs office or other premises within their jurisdiction, where the goods are kept in temporary storage. At the discretion of the competent authority and if deemed necessary, the physical inspection may be carried out using a remote video connection.

By their nature, cultural goods more than 250 years of age are fragile and should only be handled by specialists from art shipping companies. Who will be responsible for damage by inexperienced unpacking/repacking of such costly fragile goods? Additional provision should be made in this Article for the protection of the goods.

4. Any costs related to an application for an import license shall be borne by the applicant.

There is no reference in Regulation (EU) 2019/880 to the charging of fees and consequently we think that there should be greater clarity of the term "any costs". We query whether such charges can be levied, bearing in mind that Regulation's silence on this point.

5. A competent authority may revoke an import licence it has issued, if the conditions under which it was granted are no longer met. The administrative decision revoking the import licence, together with a statement of reasons and information on the appeal procedure, shall be communicated to the holder of the import licence via the ICG system. The revocation of an import licence shall trigger an alert in the ICG system, informing the other Member States customs and competent authorities.

If import licences are to be revoked we believe that in the interests of transparency the implementing regulation should provide the circumstances under which the licences can be revoked, otherwise revocation could be carried out in an arbitrary way. We recommend at the very least that conditions for revoking should reflect the contents of Article 4(7) in Regulation (EU) 2019/880.

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We have seen no information concerning an appeals procedure contained in either Regulation (EU) 2009/880 or the draft secondary regulation. The procedure for appeals needs to be outlined in the implementing regulation and should be consulted on.

6. The use of import licences shall not affect obligations related to customs import formalities or related documents.

Article 7

Consistency of issued import licences

1. The holder of a cultural good for which an import licence has been issued prior to its export or re-export from the Union may refer to that licence in any new application for import.

2. The applicant shall demonstrate that the cultural good has been exported or re-exported from the customs territory of the Union, and that the cultural good for which an import licence is applied for is the same as the one previously licenced. The competent authority shall verify whether these conditions are met and shall issue a new import licence, based on the elements of the previous one, unless it has reasonable doubts about the legal export of the cultural good from the country of interest, based on new information.

The second "for" in the first sentence of paragraph 2 is not needed.

Article 8

List of supporting documents to prove licit provenance in an import licence application

1. The applicant shall provide evidence to the competent authority that the cultural good in question has been exported from the country of interest in accordance with its laws and regulations or shall provide evidence of the absence of such laws and regulations at the time the cultural good was taken out of its territory. In particular:

As explained at the start of the recitals, we believe that for this regulation to be workable and in conformity with the *nulla poena sine lege scripta* principle it should not be for the applicant to demonstrate the laws of a country of interest. Those laws should be clearly summarised in the official languages of the EU in a database compiled by the Commission.

(a) The import licence application shall include a signed declaration by which the applicant explicitly assumes responsibility for the veracity of all statements made in the application and states that they have exercised all due diligence to ensure that the cultural good they intend to import has been exported legally from the country of interest.

As previously noted, the Annex shows the signatory as being the "holder" (undefined), rather than the owner. "Holder" needs to be defined, as it is in Regulation (EU) 2019/880. Since the term "holder" can include the owner, then perhaps box I.18 should explain the meaning of the

term holder and it should be made clear that if the holder is the owner they should complete box I.18 and I.19 with the same information.

The applicant will often be depending on information given to them by a seller, and consequently has to rely on information that will sometimes be anecdotal because of the lack of retained paperwork from the past, for which previously there was no legal obligation of retention.

Statements will be based on information given by the seller for which it will be difficult to assume responsibility. One can ask as much information as possible, but veracity will not always be possible.

The declaration wording provided in the Annexes includes the phrase “under penalty of perjury”. Perjury can only be the result of a statement made under oath, either in court, or when the oath has been sworn in front of a witness. We believe it is not appropriate, practical or proportionate to expect the standard declaration itself to be signed under oath and accordingly the term “under penalty of perjury” should be removed from the import licence and importer statement declarations.

Furthermore, bearing in mind that the signatory will usually be making judgements about evidence obtained from third parties and will frequently not have been present at the time of export (which could be hundreds of years earlier) then it is more appropriate for the applicant to declare that the goods have not been exported in breach of the laws, rather than to state that they have been exported in conformity with the laws.

We therefore strongly recommend that the declaration also be reworded as follows:

> “I hereby declare that, to the best of my knowledge, all information submitted with my [application][importer statement] is correct, complete and truthful and, to the best of my knowledge, the cultural goods which I intend to import into the European Union have not been exported in breach of the laws and regulations of ………………. “

We suggest that the declaration form makes clear that the words that the name of the country of interest should be inserted at the end of the declaration.

Finally, paragraph (a) above refers to a declaration in which it is confirmed that “due diligence” has been exercised, yet the declaration wordings in Annex II make no reference to this.

(b) Where the laws and regulations of the country of interest subject the export of cultural goods from its territory to the obligation to obtain a prior authorisation, the applicant shall upload to the ICG system copies of the relevant export certificates or export licences issued by the competent public authority of the country of interest, certifying that the export of the cultural good in question was duly authorised by them.

Please see our comments concerning specimen export licences from third countries under Article 8(3).

(c) The application shall be accompanied by photographs in colour of the object against a neutral background, following the specifications set out in Annex II.

It is not clear in the templates in Annex II whether providing all 11 types of photograph is mandatory, but if it is mandatory then it is excessive and far exceeds the existing requirements for cultural goods export licences.

How can it possibly be mandatory to provide a “left” side and “right” side image of a three dimensional spherical object?

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We recommend that it is stated in the Annex that applicants should provide no fewer than three good quality photographs of the cultural goods, ideally from the following angles, including a sufficient number of photographic angles to fully reflect the nature of the object and ensure that it can be readily identified.

(d) Other types of documents to submit in support of an import licence application may be, but are not limited to the following:

(i) customs documentation providing evidence as to past movements of the cultural good;

(ii) sales invoices;

(iii) insurance documents;

(iv) transport documents;

(v) condition reports;

(vi) property titles, including notarised wills or handwritten testaments declared valid under the laws of the country were they were established;

We imagine that the second “were” should state “where”.

(vii) declarations under oath of the exporter, the seller or other third party, which were made in a third country and in accordance with its laws, testifying as to the date on which the cultural good has left the third country where it was created or discovered or other events supporting its licit provenance;

It is important to note that there are other ways of confirming the lawful export of cultural goods from a country besides demonstrating the date on which they left that country. Combining information about the export laws of the country with confirmation of the goods’ location at a particular time can also demonstrate beyond doubt their lawful removal. We imagine that this is what is intended by the last phrase of the above paragraph.

We are unclear as to why this declaration evidence for import licences and importer statements need to be made “under oath” - this is not a murder investigation, after all. Export licence declarations are not made under oath and this approach is disproportionate, particularly as the importer statements financial threshold (€18,000) is far less than the EU’s threshold for exports of cultural property (€50,000).

Furthermore, it is unclear why the declaration needs to be made “in a third country”. Bearing in mind the vast knowledge of cultural property members of the art market in Europe possess it will often be the case that the person best-placed to research an object is based in the European Union. It would more appropriate simply to indicate that declaration should be made in the country where the declarant resides.

Bearing in mind the above and our comments elsewhere concerning the term “provenance” and its association with ownership rather than location, we recommend a re-wording:

(vii) declarations of the exporter, the seller or other third party, which were made in their country of domicile and in accordance with its laws, confirming the date on which the cultural goods left the third country where they were created or discovered or other events or documents supporting their licit provenance or licit removal from that country;

(viii) viii expert appraisals;

(ix) publications of museums, exhibition catalogues; articles in related periodicals;

(x) auction catalogues, advertisements and other promotional sales material;

(xi) photographic or cinematographic evidence, which supports the legality of export of the cultural good from the country of interest or allows to determine when it was located there or when it exited its territory.

Provision of the above information will cause great problems for many applications. The nature of goods derived from antiquity is that that the majority of them have been located outside the country of their creation for many years, sometimes hundreds of years. They could have moved around the world and passed through many different jurisdictions and been owned by countless different collectors and antiquarians. The identity of a past owner who exported an item from its country of creation or a third country will often not be known.

It is also very important to point out that a country where an object was created only has a right of restitution where it can prove illegal export. For example Article 7(b)(ii) of the 1970 UNESCO Convention states that "The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return." If no proof exists of the unlawful export from a territory then the object cannot be returned to its country of creation.

Furthermore only a limited number of Member States of the EU have implemented the 1970 UNESCO Convention into national law, so in the event of an import licence being declined by Member States, in many cases there would be no legal basis for the return of these goods to their country of creation and doing so would violate the property rights of the importer. Preventing their import therefore represents an inappropriate and disproportionate response if the goods cannot be lawfully returned to their country of creation anyway.

Accordingly we strongly recommend that an applicant should be able to demonstrate that the fullest possible attempts have been made to find information demonstrating the lawful export of an object from a country of creation. The following document should be added to the list above:

(xii) declarations of the importer, exporter, seller or other third party, which were made in their country of domicile and in accordance with its laws, confirming that they have exercised all possible due diligence in ascertaining the date on which the cultural goods left the third country where they were created or discovered or in searching for evidence to demonstrate lawful export from that country, but have been unable to ascertain this information.

2. The documents and other records of information listed under paragraph 1 point (d) shall be assessed freely by the competent authority, taking into consideration the circumstances and the perceived risk of illicit trade in each case.

3. The competent authority may require the applicant to upload official translations of the documents referred to in paragraph 1 points (b) and (d) in an official language of the relevant Member State.

The translation of documents would prove very costly and time consuming, adding further delay. In respect of low value objects to which the import licence applies this could make the import uneconomic. We suggest that in order to assist with the identification of documents, such as export certificates or licences, prior to the entry into force of the relevant parts of the implementing regulation the Commission should create a database containing examples of such documents, both recent and past, including translations, for all third countries, indicating the years when these documents were issued. This database would be part of the database of third country export laws we refer to above recital (1).

Article 9

Procedural rules on the processing of applications for import licences

1. The competent authority may make multiple requests for additional information in accordance with Article 4(6) of Regulation (EU) 2019/880 within the 21-day time-limit laid down in that provision.

2. The applicant shall provide the additional information requested within 40 days, failing which, the application shall be rejected. Once the applicant has submitted the requested information, the competent authority shall examine it and make a decision within 90 days. If the competent authority has made multiple requests for information, the 90-day period shall start from the submission of the last piece of information by the applicant.

It should be made clear when the 40 day period begins.

3. Where an application for an import licence is submitted to a Member State other than the one in which the applicant is established, the ICG system shall notify the competent authority of the Member State where the applicant is established.

4. Where the competent authority that receives the notification is in possession of any information that it considers relevant for the processing of the application, it shall forward such information through the ICG system to the competent authority to which the import licence application was submitted.

5. In case the application is not submitted to the authority which is competent to issue the import licence pursuant to Article 4(1) of Regulation (EU) 2019/880, the authority that received the application shall forward it to the appropriate competent authority and inform the person who submitted the application without delay.

Article 10

Controls of import licences

1. When carrying out customs controls in accordance with Articles 46 to 49 of Regulation (EU) No 952/2013, the customs office to which the customs declaration for the import of the cultural goods is lodged shall ensure that the goods presented

correspond to those described in the import licence and that a reference is made to that licence in the customs declaration.

2. Where cultural goods are placed under the customs warehousing procedure referred to in Article 240 of Regulation (EU) 952/2013, the tariff classification number of the goods in TARIC shall be stated in the customs declaration.

3. Where cultural goods are placed under the free zone procedure, the controls referred to in paragraph 1 shall be carried out by the competent customs office to which the import licence is presented in accordance with Article 245(1) of Regulation (EU) No 952/2013. The holder of the goods shall indicate the tariff classification number of the goods in TARIC upon their presentation to customs.

CHAPTER IV

DETAILED ARRANGEMENTS FOR THE IMPORTER STATEMENT

Article 11

General principles

1. Importer statements shall be drawn up using the form provided for this purpose in the ICG system, in one of the official languages of the Member State where the cultural good is to be imported and submitted to customs.

2. With the exception of coins of category (e) of Part C of the Annex to Regulation (EU) 2019/880, a separate importer statement shall be drawn up for each cultural good to be imported. More than one coin of the same denomination, material composition and origin may be covered under the same importer statement, following the specifications set out in Annex I to this Regulation.

In relation to import licences proposed implementing Article 6(2) allows for the possibility that a consignment may comprise several items and allows Member States' competent authorities to decide a policy in relation to this. We cannot understand why this approach is not possible in respect of importer statements. Items of cultural property are often shipped in groups, particularly with associated or similar items.

3. An importer statement shall be drawn up and submitted for every subsequent re-importation of the same cultural good, unless an exemption laid down in points (a), (b) or (c) of Article 3(4) of Regulation (EU) 2019/880 applies.

Article 12

List of supporting documents to prove licit provenance that should be in the possession of the declarant

Please refer to our comments made in relation to Article 8.

1. The importer statement shall include a signed declaration by which the importer assumes responsibility and explicitly states that they have exercised all due diligence

to ensure that the cultural good which they intend to import has been exported legally from the country of interest.

2. The importer statement shall be accompanied by standardised information describing the cultural good in sufficient detail for it to be identified by customs, including good quality photographs in colour of the cultural goods against a neutral background, following the specifications set out in Annex II.

3. Where the laws and regulations of the country of interest subject the export of cultural goods from its territory to obtaining a prior authorisation, the importer shall be in possession of the relevant permit documents issued by the competent public authority of the country of interest, certifying that the export of the cultural good in question was duly authorised by it. Upon request, that documentation shall be presented to customs.

4. Other types of documents which the holder of the goods could have in their possession to support, if so requested, their import statement may be, but are not limited to, the following:

(a) customs documentation providing evidence as to past movements of the cultural good;

(b) sales invoices;

(c) insurance documents;

(d) transport documents;

(e) condition reports;

(f) property titles, including notarised wills or handwritten testaments declared valid under the laws of the country were they were established;

(g) declarations under oath of the exporter, the seller or other third party, which were made in a third country and in accordance with its laws, testifying as to the date on which the cultural good has left the third country where it was created or discovered or other events supporting its licit provenance;

(h) expert appraisals;

(i) publications of museums, exhibition catalogues; articles in related periodicals;

(j) auction catalogues, advertisements and other promotional sales material;

(k) photographic or cinematographic evidence, which supports the legality of export of the cultural good from the country of interest or allows to determine when it was located there or when it exited its territory.

2. The documents and other records of information listed under paragraph 4 shall be assessed freely, based on the circumstances and taking into consideration the perceived risk of illicit trade in each case.

We are unclear as to the meaning of "assessed freely". Assessed by whom? Assessed for what purpose? This paragraph and that below appear to have been "cut and pasted" from Article 8, which is concerned with import licences (their numbering is also incorrect). We fail to understand how this provision can be required in respect of importer statements, since there is no requirement for submission of the above documentation.

3. The customs authority may require from the holder of the goods to upload official translations of the documents referred to in paragraphs 3 and 4 in an official language of the relevant Member State.

As with the above paragraph this has been copied from Article 8. Since documents are not required to be uploaded, we fail to understand why translations of them would need to be uploaded also.

The word "from" appears to be unnecessary.

Article 13

Controls of importer statements

1. When carrying out customs controls in accordance with Articles 46 to 49 of Regulation (EU) No 952/2013, the customs office to which the customs declaration for the import of the cultural goods is lodged shall ensure that the goods declared correspond to those described in the importer statement and that a reference is made to that statement in the customs declaration.

2. Where cultural goods are placed under the customs warehousing procedure, the tariff classification number of the goods in TARIC shall be stated in the customs declaration.

3. Where the cultural goods are placed under the free zone procedure, the controls referred to in paragraph 1 shall be carried out by the customs office to which the importer statement is presented in accordance with Article 245(1) of Regulation (EU) No 952/2013. The holder of the goods shall indicate the tariff classification number of the goods in TARIC upon their presentation to customs.

CHAPTER V

ARRANGEMENTS AND DETAILED RULES FOR THE ELECTRONIC SYSTEM FOR THE IMPORT OF CULTURAL GOODS

Article 14

Deployment of the ICG

The Commission shall:

(a) develop the ICG system as an independent module of TRACES;

(b) ensure the functioning, maintenance, support and any necessary update or development of the ICG system;

(c) have access to all data, information and documents in the ICG system for the purpose of producing annual reports and for the development, functioning and maintenance of the system;

d) ensure the interconnection between the ICG system and national customs systems, via the the European Union Single Window Environment for Customs.

Article 15

Contact Points

1. Member States and the Commission shall designate contact points for the purpose of managing, steering the development of, identifying priorities for and monitoring the correct operation of the ICG system.

2. The Commission contact point shall maintain and keep up to date a list of all contact points and make it available to the other contact points.

Article 16

Use of the EORI number

Holders of cultural goods who apply for an import licence or submit an importer statement shall use an EORI number to identify themselves.

As noted in our Article 1 comment our understanding is that private people are not required by EU law to have an EORI number when importing. If we are correct it should presumably therefore be made clear in the Annex II templates that provision of an EORI number only applies to commercial imports (Boxes I.18). If the importer is a private person without an EORI number, how should they complete the application? Again, we should point out that the making of a declaration on an import licence application or importer statement is something that the owner of the goods may be willing to do, but the shipper may be unwilling to sign. If the declaration is made by the owner and the EORI number is provided in respect of the shipper or agent, the forms will need to be adjusted to take account of this possibility. Equally the holder may be willing to sign the declaration but the owner is a commercial entity and wishes to provide their EORI number.

Article 17

Electronic import licences

1. Electronic import licence applications shall be completed following the data dictionary in Annex I and shall be signed by the holder of the goods with their electronic signature.

The relationship between “import licences” and “electronic import licences” is not clear. The term “electronic import licences” does not appear in Regulation (EU) 2019/880, nor is it defined in the implementing regulation. Article 4(4) of Regulation (EU) 2019/880 indicates that applications for import licences shall be made “via the electronic system”. This appears to suggest that applications by other means (e.g. on paper forms) are not possible. We are therefore confused as to why the word “Electronic” has been used here.

It is not clear whether an importer will be presented with a paper version of an import licence or whether it will be solely in an electronic format.

It is also unclear why the declarations in Annex I and II can only be signed by the “holder of the goods” and not by the “owner of the cultural goods” if the holder is another party (such as a shipper). Is it not possible for the owner to sign the declaration? – the “holder” may not wish to commit themselves to this. If an import licence or importer statement are to be applied for in advance it is quite possible that at that stage the shipper or agent will not be involved since the application may be made by the owner.

2. Electronic import licences shall be signed by the authorising officer of the competent authority with their electronic signature, sealed with an advanced or qualified electronic seal of the issuing competent authority, and then sealed by the ICG system with an advanced or qualified electronic seal.

3. The following steps in the process of issuing an electronic import licence shall be marked with an electronic qualified time stamp:

(a) the submission of the application by the holder of the goods;

(b) any request by the competent authority for missing or additional information from the applicant in accordance with Article 4(6) of Regulation (EU) 2019/880;

(c) any submission of additional information or document by the applicant, following a request from the competent authority;

(d) any decision taken on the application by the competent authority;

(e) the expiry of a 90-day period following the reception of the complete application, without a decision by the competent authority.

It is unclear whether applications for import licences (and submission of importer statements) will be made independently of Member States’ electronic customs declaration systems. Such systems can be complex for a layman to operate. Many art dealers will need to submit their licence applications or make their importer statements well in advance of shipment, so the systems need to be able to take account of this. We would welcome the opportunity to discuss with officials the practical operation of the system that is envisioned.

We note that steps relating to the rejection of an import licence application do not feature in the implementing regulation and we request that details for this be added.

Furthermore, in the interest of a fair and due process, details of the mechanism for appeals against rejected applications should also be outlined in the implementing regulation.

Article 18

Electronic importer statements

CINOA ANNEX on EC ICG Draft Implementing Rules
CINOA Comments written in red 2021 04 20

As for "electronic" import licences, it is unclear why two different terms "importer statements" and "electronic importer statements" are used in the implementing regulation and whether they refer to different things, since the latter has not been defined.

1. The electronic importer statements shall be drawn up using the ICG system in at least one of the official languages of the Member State where the goods are placed for the first time under one of the customs procedures referred to in Article 2(3) of Regulation (EU) 2019/880. They shall be completed following the data dictionary in Annex I.

2. Electronic importer statements shall be signed by the holder of the goods with their electronic signature and shall be sealed by Traces with an advanced or qualified electronic seal.

Article 19

Access to import licences, importer statements and general descriptions in the ICG system

1. Each holder of the goods shall have access to their own import licences, importer statements and general descriptions referred to in Article 4, in the ICG system.

2. Customs and competent authorities shall have access to import licences on which a decision has been made, to importer statements and to general descriptions referred to in Article 4.

3. Without prejudice to the Commission's right of access pursuant to Article 14 point (c), authorities which have not been involved in the handling, production or transmission of data, information or documents in the ICG system, or persons who have not been involved in the relevant import operations, shall not have access to such data, information or documents.

4. By way of derogation from paragraph 3, holders of the goods may provide access to their import licences, importer statements or general descriptions referred to in Article 4 to a subsequent holder of the goods through the ICG system.

Article 20

Joint controllership

1. The Commission and the Member States shall be regarded as data controllers of the processing operations necessary for the establishment, operation and maintenance of the ICG system.

2. The Commission and the Member States shall enter into a joint controllership arrangement at the latest three years after the entry into force of this Regulation.

Article 21

Update of designated customs offices lists

Member States shall keep the ICG system updated with lists of the customs offices competent to handle the import of cultural goods, pursuant to Article 6 of Regulation (EU) 2019/880.

Article 22

Availability of electronic systems

1. The Commission and the Member States shall conclude operational agreements laying down the practical requirements for the availability and performance of the ICG system as well as for business continuity.

2. The ICG system shall be kept permanently available, except in the following cases: (a) in specific cases related to the use of the electronic system laid down in the agreements referred to in paragraph 1 or, at national level, in the absence of those agreements; (b) in the case of force majeure.

Article 23

Contingency arrangements

1. The ICG system contact points shall maintain an online public repository containing a writeable electronic template of all documents that may be issued in the ICG system.

2. Where the ICG system, or one of its functionalities is unavailable for more than eight hours, users may use the writeable electronic template referred to in paragraph 1.

3. Member States shall determine their national operational details for the submission of importer statements and processing of applications for import licences during any unavailability of the ICG system.

4. Once the ICG system or the unavailable functionality become available again, operators shall use the documents created in accordance with paragraph 2, to record the same information in the system.

Article 24

Security of the ICG system

1. When developing, maintaining and using the ICG system, the Member States and the Commission shall establish and maintain adequate security arrangements for its effective, reliable and secure operation. They shall also ensure that measures are in place for checking the source of data and for protecting data against the risk of unauthorised access, loss, alteration or destruction.

2. Each input, modification and deletion of data shall be recorded together with information giving the reason for and exact time of such processing and identifying the person who carried it out.

3. The Member States shall inform each other, the Commission and, where appropriate, the operator concerned of all actual or suspected breaches of security of the ICG system.

CHAPTER VI

FINAL PROVISIONS

Article 25

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. It shall apply from the date referred to in Article 16(2) point (b) of Regulation (EU) 2019/880. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President