COMMENTS ON the Draft Implementing Regulation laying down certain rules for implementing certain provisions of Regulation (EU) 2019_880 on the introduction and the import of cultural goods.

For any law to be effective, and to avoid unintended consequences, its terms and conditions need to be clearly defined. Certain essential terms under the proposals are not defined clearly enough. This could create serious difficulties for customs enforcement in the execution of their duty, while also inadvertently bringing huge volumes of inappropriate material within the scope of the law. The following comments explain how the risks arise, while also suggesting solutions to mitigate them.

Page 3 (13): Third Country documents must "adequately" identify the cultural good under consideration. **How is "adequately" defined?**

Page 3 (14): "…Member States should require the operator to furnish as many different types of evidence as possible, including the history and ownership of the object through which its authenticity and ownership can be determined." **If very little information is available, yet everything available is submitted, this would still mean that "as many different types of evidence as possible" have been supplied. Is this the intention? If not, what is?**

Page 4 (20): "Member States may restrict the number of customs offices which can process cultural goods import formalities." **This could lead to a breakdown in the system if not qualified by a minimum standard. Under existing terms, customs could choose to locate their offices far away from major trade routes and to limit them to such a degree that imports could not be made in a timely manner. Instead there should be a minimum standard, by which Customs must commit to establishing properly staffed clearing houses at all major ports so that clearance can take place within the dictates of the law in a timely fashion.**

Page 6 (Article 2.4): 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."
It is essential that a clear definition of qualifying cultural goods is set out within the law here. The wording shows that it is inspired by the definition under the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. This is sensible as it is a definition recognised by more countries worldwide than any other. However, it is not clear whether the new regulation adopts the UNESCO Convention definition in full. It should, and the new regulation should make that clear to avoid confusion. In doing so, it also needs to be clear about the definition of "importance for archaeology, prehistory, history, literature, art or science".
It is clear from Article 1 of the UNESCO definition that importance must be "specifically designated by each State" for the item in question to be designated as cultural property. It is clear from Article 5b of the Convention that the means of specifically designating such

items is "establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage". This immediately establishes clear parameters for what is of importance and so would qualify as cultural property under the new regulations.
A leading case from Germany's highest court (the Bundesfinanzhof" in Munich in 2012[1]) creates further clarity as it ruled on what constituted cultural property under these terms for the purposes of export licensing (Regulation (EC) 116/2009).
To have value for archaeology – and therefore have any chance of qualifying as being "of importance" to it – the German court ruled that an object had to be able to "*convey knowledge about past cultures, especially about their customs, the technical and artistic level of development, political and social structures, religion and the like more".* It further qualified this explanation by adding: "*Objects that at best illustrate already existing knowledge about past cultures and therefore have no value for archaeology, are not 'archaeological objects' or finds within the meaning of Annex I Regulation No. 116/2009."*
As an example, then, a common scarab or oil lamp that is largely indistinguishable from the tens of thousands of others already known would not qualify as cultural property under the UNESCO Convention definition.
The German court also ruled that such objects could not be added arbitrarily to the national inventory of protected property as set out under Article 5b of the UNESCO Convention: *"This corresponds also, that objects which are of no (cognitive) value for archaeology, cannot be placed under protection by a member state due to an archaeological interest."*
This is extremely helpful because it clarifies the intent of the UNESCO Convention and the guiding principles of existing EU legislation with respect to export licensing and the protection of cultural property. It is additionally helpful here because it creates parameters that are more likely to be effective in the protection of important cultural property, while also ensuring that the compulsory electronic system and customs enforcement will not be overwhelmed by applications relating to material that should not be included under the regulations. For all the above reasons, I suggest that the new law adopts the UNESCO Convention definition in full under the terms of precedence for EU law as set out by Germany's highest court. It would have the added benefit of consistency built on existing EU practice.

Page 7 (Article 4 Traceability): "The general description shall be completed following the data dictionary set out in Annex 1 in an official language of the Members State where the goods are to be imported." **The level of detail required is extraordinarily burdensome, not proportionate and risks making compliance conflict with the guiding principles of the President of the European Commission[2], specifically the instruction that "that our policies and proposals deliver and make life easier for people and for businesses".**

Page 8 (Article 5.2): "…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

[1] (BUNDESFINANZHOF judgment of 11.12.2012, VII R 33, 34/11; VII R 33/11; VII R 34/11)

[2] See https://ec.europa.eu/environment/cites/pdf/draft_revised_guidance_doc_ivory_trade.pdf

that will be re-exported…". **What protocols will be put in place to ensure that the marking of goods does not damage them, alter their value etc?**

Page 8 (Article 6.2): "However, where a consignment consists of several cultural goods, the competent authority may determine whether a single export licence shall cover one or several cultural goods in that consignment." **At what point will this decision be taken? How will an importer be able to tell whether they need a single licence or multiple licences prior to submission? How can they establish this without risking significant delay? How will the electronic record later clearly identify individual items covered by the licence where required for future exports/ imports?**

Page 9 (Article 8.1.c): Note the additional burden of numerous photos required for each item. **This would need to be kept under review to avoid the risk of compliance being overburdensome and causing unnecessary delay.**

Page 10 (Article 8.3): "The competent authority may require the applicant to upload translations of the documents referred to in paragraph 1 points (b) and (d) in an official language of the relevant Members State." **This could prove very costly and time consuming, adding further delay. Together this could make the import uneconomic.**

Page 10 (Article 9.1): "The competent authority may make multiple requests for additional information…". **Some sort of cap needs to be put on this to avoid the system being manipulated or abused.**

Page 10 (Article 9.2): "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." **This potentially invites abuse. It would allow incompetent or under-resourced authorities to play for time by asking for more information arbitrarily, thereby delaying clearance until they have the capacity to proceed. Some sort of cap needs to be put on the number of requests that can be made and the time in which they must be made.**

Page 10 (Article 9.4): "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 as submitted." **There needs to be a time limit on this to avoid systematic abuse.**

Annex Page 4 (I.15): "Customs value: for import licences and importer statements, indicate the value of the cultural good for customs purposes." **Should this be the insurance value, retail value or other value?**

In conclusion, I believe that a few simple adjustments and clarifications, as set out above, could have a very significant positive impact on the effectiveness of the new regulations for the reasons given.
Fine tuning the regulations in this way would also bring them far closer to the guiding principles of the President of the European Commission (see under footnote 2).

Finally, removing the barriers to effectiveness, as identified above, would also mitigate the risk of putting EU art market interests at a significant competitive disadvantage compared with international trade between the world's other leading markets, such as the US and UK, where such restrictions will not apply.

Thank you for your consideration.

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