Imports of cultural goods into the EU – rules

Submission to the European Commission's "Have your say" web page by The British Antique Dealers' Association.

21 April 2021

1. The British Antique Dealers' Association (BADA) is the trade body representing the leading fine art and antique dealers in in the United Kingdom. It was founded in 1918 and its members are not only located in the United Kingdom, but also in the European Union, North America and Asia.

2. We are submitting comments to the "Have your say" facility because our antique dealer members conduct business with citizens of European Union (EU) countries, as well as with businesses located in the EU, notably with European antique dealers and auction houses. Consequently any harm to international trade arising from the existing and proposed implementing regulations on the introduction and import of cultural goods will apply to businesses in the UK as well as to EU-based businesses and citizens.

3. BADA is a member of the Confédération Internationale des Négociants en Œuvres d'Art (CINOA), which has submitted a comprehensive response, which we fully support.

4. We particularly wish to draw attention to the following significant concerns with Regulation (EU) 2019/880 and with the proposed implementing regulation and its annex. If these concerns are not addressed international trade in legitimate, lawfully owned cultural property will freeze up, to the detriment of cultural exchange and the European art market.

Definition of cultural goods is inadequate

5. The definition of "cultural goods" in Article 2 of the regulation is that they should be items "of importance", but neither the regulation nor the draft implementing regulation makes this distinction, or even indicates how this distinction might be attempted. If this issue is not resolved the Article 3 prohibition would apply to the most insignificant of objects that fall under the headings in Part A of the Annex (for which there are no financial and very few age thresholds), including mass produced furniture from 1920 or an old book of "literary interest" – what book is not of literary interest and what is the meaning of "old"?

6. Take the example of a third country, which has a draconian export restriction that prohibits the export of many types of personal possessions, including ones that no

rational person would regard as being "of importance". A refugee from a totalitarian state would be in breach of the Regulation for bringing into the EU some "old books" that were exported from their home country in defiance of unreasonable export laws, unless there is some further mechanism for distinguishing items that are "of importance".

7. The implementing regulation must address the fundamental clash that occurs when a source country's category of restricted export items does not comply with the Regulation's requirement that the prohibition be only in respect of cultural items that are "of importance". It should do this by defining "of importance" and making clear who or how this judgement should be made.

8. Unless this problem is resolved:

   (i) the European Union will end up policing and controlling the laws of third countries, including totalitarian regimes - however imprecise, inappropriate, draconian or injust their export laws.

   (ii) importers will face considerable uncertainty in understanding how they should follow the Regulation.

9. The word "antiquities" in the Annex (objects created in the ancient past, especially those from the period of classical civilizations prior to the Middle Ages) has not been correctly translated from English into a number of other European languages. This needs to be corrected.

Comprehensive database of third country export laws must be in place before ICG system is operational

10. It is important to understand that moveable property has been sold, bartered, exported between nations for hundreds – in fact thousands – of years. This applies to the categories of objects listed in the Annex to Regulation (EU) 2019/880.

11. It is a simple fact that for the vast majority of items falling into the categories of cultural property in the Annex and imported into the EU there will be no accompanying "export licence" relating to their original source country. This is either because one was never required or because it has been lost in the period since it left its country of creation – possibly many decades or several hundred years ago.

12. Consequently, demonstrating lawful export of old items originally made in countries such as China, Norway, England or the United States and exported from there many years ago cannot be fulfilled by the provision of a piece of paper. Knowledge of the export laws of all third countries will thus be needed in order for an EU citizen to comply with the regulation.

13. The export laws of those countries are an integral part of the Regulation, since neither the importer nor the "competent authority" that will judge lawful import can do so without clear information about third countries' laws, which the EU has decided it will uphold and police, however imprecise, draconian or unreasonable.

14. The Commission has so far failed to provide EU citizens with an adequate means of either knowing or understanding the third country export laws that they must obey. Consequently the legal principle of *nulla poena sine lege scripta* has not been followed when the Regulation was drawn up.

15. For an importer to even have a fighting chance of being able to demonstrate lawful export it is imperative that the implementing directive requires the European Commission to set up a database of all the export laws of all countries in the world, covering all periods in history. From this database the export requirements or restrictions need to be clear on a year by year basis. Citizens should be able to consult the database in their own language and its contents should be regarded as the definitive answer at the date on which it has been consulted – consequently all changes to the information incorporated will need to be dated. An absence of information concerning the export laws for particular categories of item in a particular year should be interpreted as indicating that no restrictions were in place.

Evidence of lawful export requirements are unworkable and not proportionate

16. Unless the list of possible evidence documents is amended it will be impossible for many importers to fulfil the Regulation's criteria for suitable evidence demonstrating export from the country of creation or the country where the object was based for five years after leaving the country of creation before 1972. The combination of a lack of information about third countries' export laws and unachievable evidence requirements will be like sitting a blindfolded person in front of a book of rules and telling them they must obey the rules in the book they cannot read, whilst pointing out that they will in any case be unable to adhere to the rules.

17. Take the example of a high quality English landscape oil painting by a late 18th century artist. This may have been exported from England to the United States in the 1930s, but any record of the year this happened was lost long ago. The painting appears in a current day auction in New York as a result of a clearance from the home of an elderly widow, who has died without issue. There are no records indicating how long the painting was in her ownership, nor indeed when it was imported into the United States. A French citizen bids for it at auction and pays €250,000. When it arrives in France it will not be accompanied by an export licence (none was needed by the United States customs nor by the United Kingdom at the time of actual export from each respective country.) Had the painting been exported direct from the UK to France it would have required a cultural goods export licence, since its value would have exceeded the current export threshold of £180,000. However, it is simply not known when the painting left the UK, nor how long it was located in the United States. Consequently the importer of this legally acquired antique painting, exported in accordance with the relevant laws of the countries in which it was located, will be unable to demonstrate that it left the UK lawfully, because the date it left the UK is unknown and so it is unclear which export rules/thresholds should apply. Furthermore, it will not be possible to benefit from the Article 5(2) 5 years exemption for pre-1972 exports since it cannot be demonstrated (a) that it left the UK before 1972 and (b) how long it was in the United States.

18. It is therefore important that the list of documentary evidence proposed for implementing regulation Articles 8 and 12 should include a declaration by the importer,

or by a third party on their behalf, 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.

Temporary Admission must be granted for goods held in premises – not just at art fairs

19. Article 3(4)(c) clearly states that an exemption from the need for an import licence or importer statement will apply for cultural goods held under Temporary Admission (TA) for the purposes of exhibition. The Regulation does not state that this is for exhibition in museums alone. In fact the word museums only features in the context of cooperation between museums.

20. Despite this, the draft implementing regulation restricts the TA arrangements for exhibition to museums alone. Temporary Admission arrangements have been in place in the EU for many years for *Works of art, collectors' items and antiques imported for the purposes of exhibition with a view to possible sale* under Commission Regulation 2454/93 Article 576(3)(a). This relief has only been available to reputable businesses that either have a good track record of compliance or have provided financial guarantees to the authorities. Bearing in mind all the controls in place, Article 3(4)(c) should be properly implemented by reference to this existing TA measure.

Review of compatibility with aims of the regulation and with other EU measures concerning cultural property

21. It is clear to us that more investigation is required to ensure that Regulation (EU) 2019/880 and the implementing regulation meet their intended aims and do not clash with other laws operating in the EU in respect of cultural property. Examples are given below.

22. The principle aims of Regulation (EU) 2019/880 are given in the first three recitals and can be summarised as:

    - Fight against terrorism financing
    - Prevention of pillage of cultural goods, particularly in the context of armed conflict
    - Action against pillage of archaeological sites
    - Removing the incentive for the trade in illegally excavated cultural goods

23. The above aims are of course noble aims, which the art market supports, but regrettably the regulation and the implementing regulation are straying a long way from these aims, by applying the measures to a far larger number of objects and categories than is necessary. There is no evidence that the sale of American antiquarian books, Chinese paintings, English sculptures – all objects potentially requiring importer statements and back-up documentation – are remotely connected with terrorism finance and looting, yet countless numbers of such items will be caught by the measures.

24. The implementing regulation needs to introduce a mechanism for better-targeting the types of objects that relate to the aims of Regulation (EU) 2019/880. It also needs to

take account of the fact that evidence of the past movement of all cultural items is simply not available.

25. The measures that will help do this would include a refining of the categories of objects caught by the regulation and properly implementing the requirement that the cultural goods must be those that are of importance for archaeology, prehistory, history, literature, art or science.

26. Failure to carry out this exercise will lead to the accusation that the measure represents an abuse the Commission's own requirements that measures should be applied in a proportionate way.

27. The potential consequences of Regulation 2019/880 are not fully compatible with member states' own laws on the restitution of third countries' cultural property. A limited number of member states have implemented the 1970 UNESCO Convention, so if an import licence is declined by member states, then there would be no legal basis for the return of stopped goods to their country of creation and doing so would violate the property rights of the importer.

28. Consequently, for paintings and other objects which have no historic paperwork demonstrating when they were exported:

    (i) some EU member states would be unable to return those goods to their country of creation, as the member states have not implemented the UNESCO Convention; and

    (ii) in other cases the very lack of evidence of illegal export would prevent a claim for restitution by the country of creation.

    In these cases it is disproportionate and inappropriate to create a regulation that will apply in member states of the EU, but which creates unattainable requirements in respect of lawfully traded items.

29. In several respects the contrast of approach between the European Union's export regulation – Regulation (EU) 116/2009 – and Regulation (EU) 2019/880 is striking. The information requirements required in respect of the application from for imports of cultural property will be far more demanding than for the export of Europe's existing cultural property. We strongly recommend that the requirements in the annex to the implementing regulation be adjusted to reflect the export regulation form. Furthermore, attempts should be made to ensure full compatibility of the electronic system for imports to be connected to the licensing of exports.

20 April 2021