

Study on preventing and fighting illicit trafficking in cultural goods in the European Union

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PROPOSALS AND RECOMMENDATIONS

The CECOJI (Study Center of the international juridical cooperation), belonging to the **French National Centre for Scientific Research**, a French public research body, has been entrusted by the **European Commission, DG Home Affairs**, to the survey aimed at taking stock of legal, regulatory and operational instruments in the different Member States, identifying legal and operational obstacles, and drawing options for possible further developments in the **Illicit trafficking of cultural goods**. The European Historic Houses Association was involved in order to represent the point of view of owners of private historic houses through the dissemination of a questionnaire to its members, dealing firstly with the difficulties that the private owners face up with illicit trafficking, and secondly, the solutions which can be developed to fight and prevent the risks of theft.

The study includes a series of recommendations and proposals for a **European Union programme of action in the prevention and combating of the trafficking of cultural goods**. The European Commission will probably build on those results to reinforce the fight against illicit trafficking in the years to come.

Gathered in this document you will find the recommendations that the European Historic Houses Association judged most useful and relevant for the owners of private historic houses possessing cultural goods and art objects.

To consult the survey on the trafficking of cultural goods in its entirety please check our website on <http://www.europeanhsitorichouses.eu>

SUMMARY

A. KEY PROVISIONS	4
B. INCREASING THE LEVEL OF VIGILANCE.....	5
C. IMPROVING TRACEABILITY	6
D. ENCOURAGING BETTER KNOWLEDGE OF THE CULTURAL HERITAGE IN EUROPE AND ENSURING BETTER DISSEMINATION OF INFORMATION ON THE HERITAGE OF THE STATES	6
E. IMPROVING THE CONDITIONS FOR THE RETURN OF CULTURAL GOODS AND THE STATES' HERITAGE	7
F. INCREASED PENALTIES FOR TRAFFICKING IN CULTURAL GOODS	8
G. PROMOTE COOPERATION BETWEEN AUTHORITIES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE	8
H. IDENTIFY THE HERITAGE AT RISK	8
I. RAISING PUBLIC AWARENESS OF THE RISKS INVOLVED IN TRAFFICKING IN CULTURAL GOODS	9

A. KEY PROVISIONS

Recommendation n°1

Creation of a cross-cutting coordination department at European level

Proper coordination at Member-State, EU and international level proved to be a major area of concern for all the stakeholders surveyed. The objective would consist in developing European expertise by creating a permanent cross-cutting department as well as fostering the emergence of a common culture and creating a genuine network by facilitating contact between the persons and services concerned and developing mutual trust.

The department would be divided into different sections:

- An advisory body to Member States that would use a coordinated approach to combating trafficking by working in partnership with national specialists
- A management and supervisory body for the European point of single contact. This body would also be responsible for managing and supervising the training of officials in cultural administration, museums curators and art dealers
- Could represent the EU in the competent international bodies
- Could act to provide alternative dispute resolution through conciliation, mediation or arbitration.
- Management of a European art market observatory

Recommendation N°2

Creation of European web portal

The objective of this European web portal would be to strengthen institutional cooperation and improve the level and quality of dissemination and sharing of the information needed by the different actors. Not only would this tool fulfil the objective of exchanging data at national and international levels, it would also ensure better coordination and exchange of good practices between the competent authorities and services concerned.

The platform would consist of a public portal, for individuals and actors in the art market and an institutional portal dedicated to the services and administrations concerned with the prevention of illicit trafficking.

B. INCREASING THE LEVEL OF VIGILANCE

Recommendation N°4

Codification by Member States of the due diligence obligation

This obligation (designed on the pattern of Article 4(4) of the UNIDROIT Convention) could be integrated into a directive dedicated to the trafficking in cultural goods.

- Provision of a “**provenance record**” accompanying the item and containing information on the security of transactions and of a due diligence handbook containing a list of checks to be carried out at the time of acquisition
- Drafting of a guide to interpreting the notion of good faith for courts

Recommendation N°5

Introduction at a European level of an obligation on online sales websites to provide information.

A number of the elementary measures to check the growth in illicit sales of cultural goods on the Internet could be taken up in the form of a Community rule, for example a requirement that all online sales websites publish a warning with a prescribed form of words.

Recommendation N°8

Institution of the status of Approved European Art Dealer

This matter is to be considered with organizations representing the art market. It might be a voluntary certification process in conjunction with the adoption of an ethics charter the contents of which could be determined in consultation with the professional bodies. This proposal is similar to the recommendations to the Commission by the OMC group on the mobility of collections, that: “A

special group should be set up [...] to work on framing a Code of Ethics concerning acquisitions, lending and/or sales of cultural goods by professionals of cultural institutions/collectors/owners/dealers/auction houses.

C. IMPROVING TRACEABILITY

RECOMMENDATIONS N°10

General obligation to keep a transaction register of cultural goods

The obligation to keep a register of goods in the charge of art market professionals (sellers, antique dealers and intermediaries such as voluntary salerooms) should be extended to all States in the Union. This register should have a uniform definition and prescribed content so as to ensure the traceability of the good, encouraging States to impose penalties in the event of failure to comply with this obligation.

RECOMMENDATION N°11

Creation of a logbook

This would be a common administrative document (similar to a European enforcement order, with a number of mandatory fields to be completed) certifying that an item may be moved freely within the European Union, leaving it entirely to the States to determine which types of goods should be subject to it. This document, designed on the lines of a passport, could ensure better security for transactions involving items for which such a document had been issued. From a technical standpoint, an electronic certificate capable of being put online on the European platform should be promoted.

D. ENCOURAGING BETTER KNOWLEDGE OF THE CULTURAL HERITAGE IN EUROPE AND ENSURING BETTER DISSEMINATION OF INFORMATION ON THE HERITAGE OF THE STATES

RECOMMENDATION N°14

Coordination of programmes for the digitization of the heritage of States

Information on the content of the State heritage is essential in terms of prevention. A campaign should be launched to digitize the inventories of the national treasures and cultural heritage of States, especially in those States that lack the tools (the DG for Information Society and Media runs programmes for the creation of digital content and services in areas of public interest, including culture, and should be involved). This aspect should obviously be handled in close coordination with existing projects or those under construction such as the MICHAEL project and the NUMERIC project, so that these programmes can incorporate the necessary data for the project of preventing and combating trafficking.

E. IMPROVING THE CONDITIONS FOR THE RETURN OF CULTURAL GOODS AND THE STATES' HERITAGE

RECOMMENDATION N°16

Introduction of a community standard to abolish the rule of extinctive prescription on claims against a possessor in bad faith, applicable only to cultural property. Recommendation to extend the time period required for acquisition in good faith.

This rule would only apply to cultural property. As it was determined that the various forms of prescription and the different systems in Europe may be prejudicial to the workings of the market, the need for the harmonization of rules on prescription seems essential to replace the very varied regimes currently applied in the Member States.

RECOMMENDATION N°19

Introduction of a rule of private international law making it possible to choose between the law of origin and the law of the situs in an action for recovery of a stolen item.

The traditional conflict of laws rule on acquisition of title to an item is that of the *lex rei sitae* (requiring application of the law of the place where the item is located at the time of its acquisition). In the case of stolen cultural goods the question arises whether the law of the place where the theft occurred (or the law of the provenance of the item, also known as the *lex originis*) should be taken into consideration.

Thus, the Belgian Code of Private International Law of 2004 gives the original owner the option of choosing either the law of the place where the stolen cultural goods was located at the time of its disappearance, or the place where it was located at the time of the claim for recovery (Article 92 of the Code of Private International Law)

F. INCREASED PENALTIES FOR TRAFFICKING IN CULTURAL GOODS

In the field of criminal law, progress must be made not only in European Union law but also in the legislation of Member States. This will be of various kinds:

RECOMMENDATION N° 21

Adoption at the European level of minimum rules for the definition of criminal offences of trafficking in cultural goods.

RECOMMENDATION N° 22

Adoption of criminal law measures by Member States.

G. PROMOTE COOPERATION BETWEEN AUTHORITIES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

Cooperation between national authorities responsible for combating trafficking in cultural goods must be stepped up. Instruments of cooperation already exist, and it is mainly a matter of improving them and fostering mutual trust between those involved.

H. IDENTIFY THE HERITAGE AT RISK

RECOMMENDATION N°28

Creation of an inventory of cultural and private goods

Article 5 of EC Directive 93/7 of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, provides: "Proceedings may be brought only where the document initiating them is

accompanied by: – a document describing the object covered by the request and stating that it is a cultural object”.

Based on, and by extension of, that provision, it is recommended that an inventory of cultural goods and private collections be set up, using the fields in the Object-ID standard, via an Internet platform. The description of the goods and its inscription on that platform would be the responsibility of the owner. There are two options for creating this inventory. A common standard based on Articles 36 and 114 TFEU might be established, since this is a traceability measure affecting functioning of the market. The other, less restrictive, option would be an incentive measure or Council recommendation regarding heritage protection, here based on Article 167 TFEU.

RECOMMENDATION N°30

Creation of an obligation on the seller to certify provenance

The key to trafficking in endangered heritage centres on the question of provenance of these items. While an obligation of due diligence generally applies to the purchaser, a rule should be introduced requiring the seller to certify provenance. This requirement might take the form of a certificate stating the origin of the item, and would be accompanied by penalties and restorative measures in the event of a false declaration or a fictitious history. For such a mechanism to be effective, all transactions involving cultural goods without such a certificate would have to be unlawful, with the absence of a certificate creating a presumption of irregularity in the trade in the item.

I. RAISING PUBLIC AWARENESS OF THE RISKS INVOLVED IN TRAFFICKING IN CULTURAL GOODS

RECOMMENDATION N°33

Initiation of a public information and awareness-raising campaign

The Union should initiate a campaign to raise awareness:

- of the importance of the cultural heritage of States;
- of the possible penalties associated with the illegal import of cultural goods coming from a European or third country. Such a campaign should be aimed at the general public (along the lines, for example, of the

communication campaigns in European airports concerning endangered species of animals and plants, in the form of posters, notices on airline tickets, etc.), and also at the actors in the market;

- awareness-raising and involvement of associations of owners of cultural goods;
- awareness-raising and involvement of the religious authorities in working groups and exchanges of information.