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**Proposal for a Regulation of the European Parliament and of the Council
on the import of cultural goods**

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1. INTRODUCTION

In the framework of the 2015 European Agenda on Security¹ and of the 2016 Action Plan to step up the fight against the financing of terrorism² the Commission announced that it would prepare a legislative proposal against illicit trade in cultural goods. The European Parliament and the Council welcomed the European Agenda on Security³ and the Action Plan and requested further intensification of work⁴.

In a letter addressed to Commissioners Navracsics and Moscovici and the Minister of Culture of the Grand Duchy of Luxembourg⁵, the Ministers of Culture of France, Germany and Italy urged the Commission to submit to the Council of the European Union and to the European Parliament a proposal for an EU Regulation with a view to prohibiting, with all due efficiency, the importation into the EU of cultural goods exported illegally from their home countries.

The Council, in its Conclusions⁶ of 12 February 2016, recalled the importance of urgently enhancing the fight against the illicit trade in cultural goods and called on the Commission to propose legislative measures on this matter as soon as possible.

At international level, UNESCO's World Heritage Committee adopted the Bonn Declaration of 29 June 2015 on world heritage, which calls upon States Parties to strengthen their national legislation for the protection of cultural heritage by introducing more effective measures to combat illicit trafficking and illegal trade of cultural property.

A World Customs Organisation (WCO) Resolution of June 2016 stresses that customs authorities have an instrumental role to play in preventing and intercepting illicit trafficking. The Resolution advocates the need to elevate illicit trafficking in cultural objects as an issue of global concern and to identify and close gaps in the current legislation.

The United Nations Security Council (UNSC) has issued several Resolutions⁷ supplementing earlier resolutions covering Iraq and Syria regarding concerns that ISIL, ANF and other groups associated with Al-Qaida are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage. The UNSC calls upon its Member States to adopt adequate and effective regulations on export and import, including certification of provenance, where appropriate, of cultural property, consistent with international standards.

With the Cairo Declaration of 14 May 2015, the governments of Egypt, Libya, Sudan, UAE, Saudi Arabia, Iraq, Oman, Jordan and Lebanon considered the possibilities to start negotiations with international partners such as the US and the EU on a "Regional Memorandum of Understanding" on the banning of dealing in looted antiquities.

Finally, with the Florence Declaration of March 2017, the G7 have called on States to identify and prohibit the trade in looted cultural property that has been trafficked across borders, to reinforce monitoring of free ports and free zones and to ensure closer cooperation between international law enforcement authorities.

¹ COM (2015) 185 final, 28 April 2015

² Commission Communication the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing [COM(2016) 50 final], 2 February 2016

³ European Parliament resolution of 9 July 2015 on the European Agenda on Security (2015/2697(RSP))

⁴ European Council Conclusions of 18 December 2015

⁵ holding the EU Presidency, 7 December 2015

⁶ <http://www.consilium.europa.eu/en/press/press-releases/2016/02/12-conclusions-terrorism-financing/>

⁷ 2199 (2015), 2253 (2015) and 2347 (2017). See Annexes 16 to 18.

The present impact assessment examines a range of regulatory and non-regulatory policy options in order to address weaknesses identified regarding the entry into the EU of cultural goods illicitly taken out of their home countries, paying special attention to situations where cultural goods are endangered e.g. by armed conflict and where illicit trafficking may support terrorism and organised crime.

2. EXISTING REGULATORY AND OPERATIONAL FRAMEWORK

Over the years, measures to combat trafficking of cultural goods have been taken at international level, EU-level and national level. These measures cover the movement of cultural property (export, import and transfer of ownership) with a view to protecting the interests of individual States as well as the interests of the international community.

At EU level the focus has been on protecting the cultural heritage of the Member States. The Union has common rules subjecting the export of EU cultural goods to prior authorisation⁸ and common rules on the return⁹ of cultural goods which are found within its territory. With regard to importation and transit, in addition to the general customs legislation (Union Customs Code) the Union also applies prohibitions for cultural goods arriving from Iraq and Syria.

2.1 International instruments and initiatives

There are three main relevant international Conventions.

The *Hague Convention of 1954 for the Protection of Cultural Property in the Event of an Armed Conflict* and its two Protocols focusing on the protection of cultural heritage during hostilities.

The *UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*¹⁰ in response to increased concerns about commercially motivated plunder in the 1960s. This is a comprehensive instrument providing for preventive measures such as inventories, export certificates, monitoring trade, penal and administrative sanctions, educational campaigns, etc., as well as for the restitution of stolen cultural property and for international co-operation on import and export controls, where **designated cultural patrimony** is in jeopardy from pillage.

The *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*¹¹ which, while being an international private law initiative, is an important source of law for combating illicit trade in cultural goods. It completes the UNESCO 1970 Convention by laying down more specific rules for the restitution of cultural objects between Contracting States and in particular dealing with the question of *bona fide* possession. It covers all cultural goods **independently of whether or not they are designated** by a signatory party.

⁸ Regulation (EC) No 116/2009 on the export of cultural goods. Latest implementation report: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0144&qid=1488291848328&from=EN>

⁹ Directive 2014/60/EU

¹⁰ The Convention entered into force on the 24th April 1972. It subsequently entered into force for each State three months after the date of deposit of that State's instrument, except in cases of notifications of succession, where the entry into force occurred on the date on which the State assumed responsibility for conducting its international relations. At the moment (February 2017) the Convention numbers 131 signatory States, 25 of which are EU Member States. Ireland, Malta and Lithuania have still not signed the Convention.

<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/>

¹¹ Signed in Rome in 24.06.1995 and currently numbering 37 signatory States, 16 of which are EU Member States.

<http://www.unidroit.org/instruments/cultural-property/1995-convention>

Neither the UNESCO 1970 Convention nor the 1995 UNIDROIT Convention make any reference to the possibility of accession of an international organisation such as the EU; only States may become a Party. Moreover, under the TEU and the TFEU, the European Union has no general power to enter into such international treaty relations.

2.2 National legislation in the EU Member States

All EU Member States regulate trade in cultural goods¹². Most national legislations relate to the cultural heritage of the specific Member State. Since national definitions vary and may include cultural goods which are not covered by the common EU provisions of Regulation (EC) No 116/2009 on the export of cultural goods, Member States have measures in place regarding the export and intra-Union movement of such goods.

Twenty five Member States are signatories of the UNESCO 1970 Convention. **The Convention does not have a direct effect on the legal order of signatory states but relies on national laws and regulations to implement it.** The large margin of appreciation involved leads to different degrees of protection and varying degrees of effectiveness.

According to UNESCO¹³, some EU Member States that are signatories had pre-existing national legislation on cultural heritage, which continues to apply in parallel with the provisions of the Convention.

Only sixteen Member States have ratified the UNIDROIT 1995 Convention on the return of cultural objects. This is mainly attributed to conflicts between the Convention and the legal order of certain Member States.

Member State specific legal provisions on the import of cultural goods are very rare. In Greece an import licence is required for certain cultural goods. In Spain and in Italy, provisions for import licences exist but their use by operators is voluntary: such licencing of imports is often requested by operators to facilitate their legal re-exportation.

In the last three years, often in response to the crisis in the Middle East, some Member States, in particular, Germany, France, Austria and the Netherlands have introduced legislation to combat illicit trafficking in cultural goods. Germany and France¹⁴ require an export certificate from the source country to allow the entry of cultural goods into their territory, whereas Austria and the Netherlands stipulate that the importation of cultural goods that have been illegally exported from the countries of origin is forbidden.

Austria and Germany also require that buyers of cultural goods should exercise due diligence to make sure that the cultural goods have licit provenance.

2.3 Third country legislation regarding the import of cultural goods

2.3.1 USA

Third countries that are members of the 1970 UNESCO Convention may submit a request to the US President for **US measures¹⁵ concerning archaeological or ethnological material imported into the US** from their country. The request is subject to proof that their patrimony is under threat from pillage; that they themselves have taken measures to protect

¹² Annex 8. From 'Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU', external study carried out for the Commission, 2017.

¹³ UNESCO legislation of signatory States: <http://www.unesco.org/culture/natlaws/>

¹⁴ Only in the case of exports directly from countries-signatories of the 1970 UNESCO Convention.

¹⁵ The 1983 Convention on Cultural Property Implementation Act [19 USC 2601 et seq.](#) or [Public Law 97-446](#) referred to as the CPIA, is the U.S. statute implementing the 1970 UNESCO Convention.

it; that US import restrictions would be of benefit; and that US import restrictions will not impede the exchange of cultural property for educational or scientific purposes.

After an agreement has been negotiated, the US publishes a list designating the categories of archaeological or ethnological objects that are subject to import restrictions. The objects listed may only be imported into the US after an export permit is issued by the source country, or any other documentation showing that the object left the source country prior to the imposition of restrictions.

Any designated archaeological or ethnological material which is imported into the US without the necessary export proof is subject to seizure and forfeiture, unless the importer proves that the object is in compliance with the law. A **declaration under oath by the importer** or the person for whose account the good is imported is required. In case of seizure or forfeiture, the object is returned to the State of origin.

In addition, stolen cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State party to the UNESCO Convention may not be imported into the US after the date the 1970 UNESCO Convention entered into force with respect to the State party, or the effective date of the Act (April 12, 1983), whichever date is later.

2.3.2 Switzerland

In implementation of the 1970 UNESCO Convention, Switzerland has adopted the Federal Act on the International Transfer of Cultural Property (CPTA) and the implementing ordinance (CPTO)¹⁶ that entered into effect on 1 June 2005. These govern the **import, transit, export and repatriation** of cultural property.

Operators must provide the following in the customs declaration: (i) the cultural property object type and (ii) a description as detailed as possible on the place of manufacture or, in case of archaeological or paleontological excavations, the place where the cultural property was found. Whoever imports or places cultural property in transit **must declare that the export of cultural property from a contracting State is not subject to a permit under the laws of that State**. Persons required to notify customs inform the customs office in writing on the storage of cultural property in a **free zone**. The notification must contain the required aforementioned documents and information.

Further measures taken in 2016 impose an **official audit for every archaeological object bound for importation in the Freeport**¹⁷. In case of dubious origin or absence of an internationally recognised paper trail, the item is barred from entering the facilities.

2.4 Ad hoc EU trade prohibitions: EU Regulations on Iraq and Syria

Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and Council Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria prohibit trade in cultural goods with these countries where there are reasonable grounds to suspect that the goods have been removed without the consent of their legitimate owner or have been removed in

¹⁶ They both entered into force on 1 June 2005.

¹⁷ <http://www.arts-franc.ch/copie-de-procedure-pfeg-fr>; <http://geneva-freeports.ch/files/5514/7444/3078/info-flash-contle-objets-archologique.jpg> both retrieved 25 October 2016.

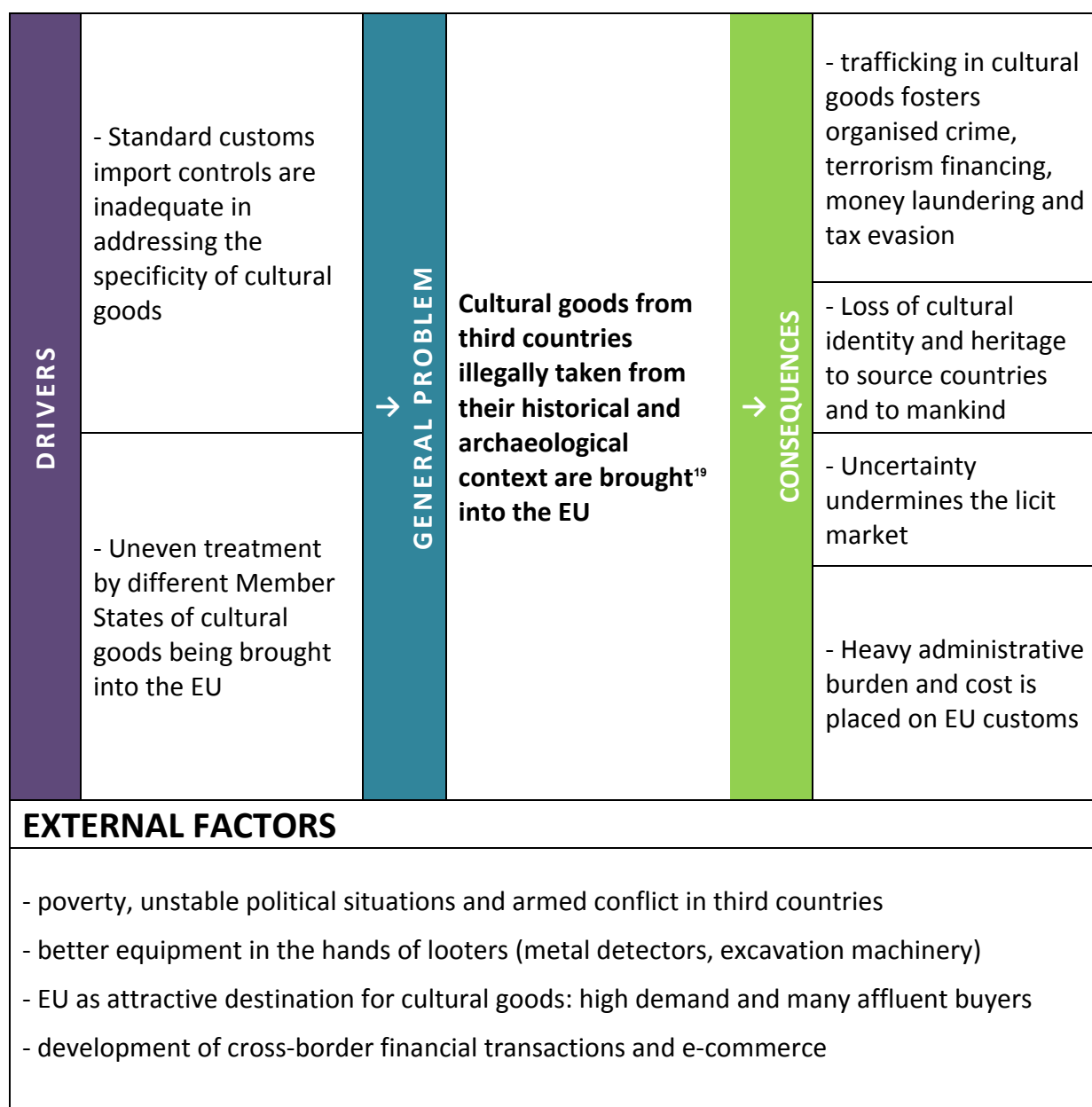
breach of national or international law¹⁸. The legislation does not include any further requirements regarding implementation.

These two instruments are the only example of restrictive measures adopted by the Union so far with regard to the importation of cultural goods.

3. THE PROBLEM

The **Problem Tree** below serves as a logical framework to illustrate current problems, their drivers and consequences.

Problem tree



¹⁸ Regulation (EC) No 1210/2003 (Iraq) and Regulation (EU) No 36/2012 (Syria).

¹⁹ This includes goods stored in free zones as well as those released for free circulation.

3.1 Problem definition

Before presenting the problem of illicit trade, it is appropriate to give an idea of the structure of the licit market.

3.1.1 The licit market and trade

The licit global art and antiques²⁰ market is estimated at \$63.8 billion of sales (2016)²¹. Dealers and private sales account for some 53% and auction houses account for some 47%. Post-war and contemporary art accounts for 46% and modern art accounts for 30% of the auction market. The remaining 24% is the market for antiques, ancient art and collectible articles of an older age.

The US market share is 43%, followed by Europe at 35% and China at 19%. The total value of the European market is around \$22 billion, of which, the UK accounts for two-thirds, or 24% of global trade. Among other European countries, Switzerland²² represents 6%, France 5% and Germany 3%, while Austria, Spain and the Netherlands represent each roughly 0.5%.

Online sales are a fast-growing section of the world market. Conservative estimates set the value of e-commerce to \$4.7 billion, on an upward trend, representing around 7% of the global art and antiques sales.

European art and antiques exports are estimated at \$14.59 billion and place Europe first among other continents. After the Americas, with \$11.5 billion, Europe comes second in terms of imports to and between European countries. More than half of these imports are going into the UK (\$6.3)²³.

In particular with regard to the **classical antiquities and ancient art market**, the European auction market, estimated at \$67 million, is relatively small compared to the Chinese (\$295 million) but larger than the U.S. market (\$52 million). Reportedly, 6 out of 10 lots sold at auction in Europe in the course of 2016 originated in the Far East.

Besides the above estimates stemming from the art market, estimates of EU external trade (i.e. excluding intra EU movements) may be based on EUROSTAT figures for Chapter 97²⁴, covering works of art, collectors pieces and antiques. On this basis, a rough estimate of the annual value of total EU imports declared to EU customs may be in the order of €3.7 billion a year.

Classical antiquities and ancient art objects are covered by tariff heading 9705 which for the same period showed a total of €1 billion worth of annual EU imports. However, this tariff heading includes a variety of other goods²⁵. Taking into account that the European auction market for such objects represents \$67 million, it may be safely assumed that the value of such EU imports is only a small fraction of the total imports declared under this heading.

²⁰ Antiques are generally considered objects over 100 years of age.

²¹ Source: TEFAF Art Market Report 2016. In the 2017 TEFAF Report however, this figure was cut down by a third, to \$45 billion. This report was conducted by a different author, Rachel Pownall, applying a new methodology. These figures have raised a controversy. See relevant article: <https://www.artsy.net/article/artsy-editorial-new-estimate-cuts-art-markets-value-third>

²² Switzerland is first when it comes to high-end jewellery trade, at \$330 million worth of *Haute Joaillerie* sales or 50% of the total European auction market.

²³ The UK has been historically a net exporter of art and antiques, a trend only briefly changed in 2011 due to the financial crisis, but re-established in 2013 when exports exceeded imports again.

²⁴ Average for 2014-17. There are considerable difficulties in obtaining reliable trade statistics for cultural goods. For example, cultural goods may also be declared under chapters other than 97. The inadequacy of the current classification nomenclature is an issue that has been flagged by the WCO but the changes to the tariff nomenclature will take many years to introduce.

²⁵ 'Collections and collectors' pieces; of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest'.

In terms of employment, the major volume of the trade is operated by micro businesses of the sector. Most prevalent are small or sole retailers with no employees; 75% of the art market trade in terms of number of enterprises is made up of sole traders. Next to those, there is a handful of big auction houses operating internationally, which can be considered medium or large enterprises in the sector.

3.1.2 What is trafficking or illicit trade in cultural goods?

In the present context, trafficking or illicit trade in cultural goods is to be understood as:

a) Trading in cultural goods exported from a third country in violation of its national laws and regulations. The laws of the source country determine the licit or illicit character of the good in question and of the relevant transaction.

b) The trading in Iraqi or Syrian cultural goods in violation of the prohibitions laid down by Regulations (EC) No 1210/2003 and (EU) No 36/2012. In this case, the illegality stems from decisions taken by the Council of the European Union in line with United Nations Security Council Resolutions.

3.1.3 External factors contributing to the development of the illicit market

There are technological, geopolitical and socio-cultural factors which contribute to intensify the problem²⁶. **These cannot be changed by this initiative** and must be taken as given.

An important factor on the supply side is the prevailing **poverty** in many regions of the developing world which are rich in cultural heritage sites. Money from illicit digging can supplement the income of impoverished locals in rural areas. They often only receive a fraction of the payment for the goods, compared to the middlemen who organise the trade and the dealers who make the final sale²⁷. Such activity may be combined with environmental crime, in particular trafficking in endangered wildlife and exotic timber. In both cases, a non-renewable resource is exploited for temporary gain until it is exhausted.

When poverty is combined with **political instability and armed conflict**, the plundering and destruction may even intensify, especially when motivated by ideological reasons, e.g. where a warring faction deliberately attempts to erase traces of past civilisations and religions (so-called 'cultural cleansing'). A typical example²⁸ is the case of post-Soviet occupation Afghanistan, where Taliban commanders organised systematic illegal excavations of archaeological sites to finance their war effort, but also blew up ancient artefacts because they were perceived as 'idols' (March 2001, the destruction of Bamiyan Buddhas).

Technological progress has provided modern-day looters with exceedingly powerful tools, compared to the digging implements of the past. Where classic tomb-robbers had only pick axes, rods and shovels at their disposal, modern looters have metal-detectors, bulldozers, power drills, scuba-diving equipment and explosives. They also have powerful vehicles and vessels which permit them access to remote unguarded land and maritime areas. Access to sites has become easier also by the falling cost of international travel and the erosion of borders.

The offer of stolen and illegally exported cultural goods exists because there is a market for these objects. **The demand** is concentrated mostly in Europe and North America, where

²⁶ Neil Brodie, *Illicit Antiquities. The Theft of Culture and the Extinction of Archaeology*.

²⁷ Studies suggest that 'subsistence diggers' only receive less than one per cent of the final sale price of an object.

²⁸ Also the conflicts in Cambodia and former Yugoslavia.

private and institutional collectors have the financial means to buy cultural objects, considering them desirable as good investment opportunities or signs of prestige, or appreciating them for their aesthetic properties. Purchasing and collecting archaeological objects is perceived even as a way of protecting them from deterioration and destruction and evocative of an educated taste. The idea is also often promoted that it is the sole responsibility of the source countries to police their cultural heritage.

Lastly, the development of **cross-border transactions** and e-commerce has provided criminals with greater opportunities to offer goods to buyers throughout the world and to receive payment undetected. In recent decades, e-commerce has brought offer and demand into much closer contact, allowing transactions to take place on online platforms in all discretion.

3.1.4 The magnitude of the illicit market and trafficking

There are hardly any data or instruments for measuring illicit commerce. Nevertheless, according to Interpol, the black market in works of art is becoming as lucrative as those for drugs, weapons and counterfeit goods.

The information dossier that UNESCO produced for the 40th anniversary of the 1970 Convention states that, together with the drugs and armaments trades, **the black market in antiquities and culture constitutes one of the most firmly rooted illicit trades in the world**²⁹.

The main destination markets are Europe and North America, while China is considered both source and market country in the global trade in cultural objects because of its growing affluence.

The value of the illegal antiquities traffic is also hard to assess³⁰ due to its invisible and seamless character³¹. It is estimated that only 30-40% of antique dealings take place through auction houses where the pieces are published in catalogues³²; the rest occurs through private transactions³³. According to some estimates, in 80-90% of sales of antiquities the goods have illicit origins³⁴.

According to studies, the total financial value of the illegal antiquities and art trade is larger than any other area of international crime except arms trafficking and narcotics³⁵ and has been estimated at \$3 to 6 billion yearly³⁶.

Links between the antiquities trade and drug, wildlife and arms trafficking³⁷, money laundering and tax evasion³⁸ and the financing of war machines and terror organisations

²⁹ UNESCO. The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future. 15 and 16 March 2011. <http://unesdoc.unesco.org/images/0019/001916/191606E.pdf>

³⁰ Alesia Koush 'Fight against the Illegal Antiquities' Traffic in the EU: Bridging the Legislative Gaps' Bruges, College of Europe 2011; Hardy 'Illicit trafficking, provenance research and due diligence: the state of the art'. Research study, 30 March 2016.

³¹ Duncan Chappell & Kenneth Polk, Unravelling the Cordata||: Just How Organized Is the International Traffic in Cultural Objects?', in Stefano Manacorda & Duncan Chappell (eds.), *Crime in the Art and Antiquities" World. Illegal Trafficking in Cultural Property*

³² Peter Watson, *Sotheby's: The Inside Story*, Random House, 1997, cited in Chauncey D. Steele

³³ Alesia Koush, *op. cit.*, p. 4.

³⁴ Peter Watson, *loc. cit.*

³⁵ Lisa J. Borodkin, The Economics of Antiquities looting and a Proposed Legal Alternative', *Columbia Law Review*, no. 2, 1995, p. 377-418.

³⁶ *Ibid.*, p. 377

³⁷ Neil Brodie, Jenny Doole & Peter Watson, *op. cit.*, p. 16.

³⁸ WCO Illicit Trade Report 2015, available at: <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/illicit-trade-report/itr-2015-en.pdf?db=web>

have been widely reported³⁹, which puts antiquities trafficking on the level of **serious transnational organised crime**.

Endangered heritage – categories of cultural goods at risk

Certain categories of cultural heritage are particularly vulnerable to dispersion and thereby to **disappearance and loss**; the loss is not only when an artefact is destroyed but also when it is wrongfully appropriated.

Certain cultural goods are by their nature directly exposed to increased risk of loss or dispersion and therefore need special protection. This is the case in particular with **archaeological heritage and religious artefacts**.

However, the notion of **endangered heritage** is not expressly identified in national legislations nor defined as such on the basis of increased exposure of those cultural goods to loss or dispersion to justify the adoption of a set of special rules for cultural goods at risk.

Statistical analyses of Sotheby's auctions in 2001, 2005, 2008 and 2010 demonstrate that Egyptian, Greek and Roman antiquities are worth more than other ancient societies' cultural objects. Sculpture is worth more than mosaics and jewellery, which in turn are worth more than ceramics⁴⁰. Each year, more than a million ancient coins are sold through one Internet auction site in the US alone⁴¹; they are 'fundamental and lucrative' for the trade⁴².

Crisis or conflict situations and wars increase the risk of trafficking in cultural goods that are by their nature particularly vulnerable to theft and looting. **Particularly at risk are goods from countries with numerous archaeological sites**, where the question of maintaining an inventory of cultural property has long been logistically problematic⁴³ and effectively policing the remote areas where the archaeological sites are located is near impossible.

The UNESCO Subsidiary Committee of the Meeting of States-Parties to the Convention, in its **review of national reports**⁴⁴, has underlined the increased risk of illegal archaeological excavations, in particular in the absence in certain States-Parties of legal supervision framework (permits, certificates, licences, etc.).

Storage of cultural goods in free zones

Another issue related to the problem of trafficking is the storage of looted **cultural goods in free zones**. Free zones are designated tax free areas where no customs duties are levied on imports or exports. The key role played by the European free zones in storing looted archaeological items⁴⁵ is exemplified by the 1995 Medici case. A long-running investigation led to the arrest and conviction of Giacomo Medici, who ran an extensive and highly lucrative international antiques smuggling ring for nearly 40 years, selling the looted artefacts through major auction houses. The Medici criminal group used a holding company located in the Geneva Freeport.

³⁹ Documentary Journeyman Pictures: Blood antiques' <https://www.journeyman.tv/film/4571/blood-antiques>

⁴⁰ Kiel and Tedesco, 2011: 10

⁴¹ According to numismatist Nathan Elkins' calculations, Elkins, 2012: 98

⁴² Elkins, 2012: 93

⁴³ Evaluation of UNESCO's Standard-setting Work of the Culture Sector; Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. FINAL REPORT. April 2014 <http://unesdoc.unesco.org/images/0022/002269/226931E.pdf>

⁴⁴ Review of national reports submitted by the UNESCO States Parties on the measures taken to implement the 1970 Convention. C70/15/3.SC/6, Paris, July 2015.

⁴⁵ "Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU", Study conducted for DG TAXUD, not published yet.

Free zones may serve as repositories for valuable art and antiques and conceal ownership of high-value objects. The ability of free zones to shroud financial wealth and encourage criminal behaviour casts shadow on the anonymity that prevails in the free zones⁴⁶. Supra-national institutions could alleviate some of the privacy, a measure that would be welcomed by many in the art industry.

The urgency created by terrorist activity and terrorism financing

Multi-billion antiquities revenues are used by Taliban, Al-Qaeda and Hezbollah, to say nothing of more common drug smugglers dealing also in antiquities⁴⁷. In Afghanistan, there are entire zones controlled by Taliban where antiquities are excavated and subsequently sold on the market at prices ranging up to €300,000 to finance their war activities.

From 1996 to 1998, for example, the Society for the Preservation of Afghanistan's Cultural Heritage reported, based on eyewitness accounts, that militant Islamist fighters were looting ancient Afghan sites, sometimes with bulldozers, to obtain marketable antiquities.

In 1999, Mohamed Atta, the al-Qaeda member who hijacked and flew an American Airlines plane into the North Tower of the World Trade Centre in New York, tried to sell Afghan antiquities to a German university professor in Göttingen. Atta, according to information released by the German intelligence agency, claimed that he was selling artefacts in order to purchase an airplane⁴⁸.

In its report titled *Financing of the Terrorist Organisation Islamic State (ISIL) in Iraq and the Levant*⁴⁹, the **Financial Action Task Force (FATF)** notes that although it might be impossible to show a direct link between the ISIL and the sale of a specific artefact, ISIL makes money in two ways from antiquities, through selling looted artefacts and taxing traffickers moving items through ISIL-held territory⁵⁰. The total amount that ISIL is earning is difficult to estimate, notes the report, particularly as the activity is taking place across Syria, in the midst of the conflict, not just in ISIL-held areas.

FATF also notes that ISIL's influence and presence has also expanded globally with recognised affiliates in North and West Africa (including Boko Haram), Pakistan and Afghanistan and the Arabian Peninsula.

In order to disrupt the financing through the buying and selling of tainted antiquities, FATF points to the need to adopt or implement policies that require clear, certified documentation that identifies the origin of the artefacts offered for sale by the auction houses and other legitimate businesses involved in the antiquities trade.

National Geographic reported that according to flash drives seized by Iraqi security forces, ISIL and other illicit groups operating in Syria could have earned as much as tens of millions of USD to date from antiquities stolen from Syria⁵¹. ISIL also occupies more than 4500 archaeological sites, some of them UNESCO World Heritage sites.

⁴⁶ According to TEFAF Art Market Report 2017.

⁴⁷ Neil Brodie, Jenny Doole & Peter Watson, *loc. cit.*

⁴⁸ Documentary Spotlight: Blood antiques', with the reference to "Kunst als Terrorfinanzierung?", *Der Spiegel*, 18 July 2005, retrieved 13 April 2011, <http://www.spiegel.de/spiegel/print/d-41106138.html>

⁴⁹ <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf>

⁵⁰ Frenkel, S. (2014)

⁵¹ Pringle, H. (2014)

The Permanent Representative of the Russian Federation to the United Nations, in a letter addressed to the Security Council⁵², reported a profit derived by the Islamists from the illicit trade in antiquities and archaeological treasures estimated at \$150-200 million annually.

According to the letter, within ISIL, the smuggling of artefacts is organised by the antiquities division, which is part of the so-called ministry for control of natural resources within the group's "government". Only individuals in possession of a written permit stamped by this "department" are authorised to carry out excavations and to remove and transport excavated items. Antiquities from Syria and Iraq are exported by the extremists mostly through neighbouring countries, where representatives of international criminal groups produce fake documents on the origin of the antiquities.

The antiquities are then offered to collectors from various countries, generally through **Internet auction sites and specialised online stores**. The criminals employ concealment measures, such as IP-address spoofing, which makes it difficult to identify and determine the actual location of the seller. ISIL has been exploiting the potential of social media more and more frequently so as to cut out the middleman and sell artefacts directly to buyers. Preference is given to cash transactions, while transactions conducted over the Internet involve the same financial institutions as are involved in transactions for the purchase of weapons and ammunition.

In its report titled '*Protection of Iraqi and Syrian antiquities*'⁵³ the **US Government Accountability Office (GAO)** states that, in addition to the destruction of cultural property, looters, including people affiliated with ISIS and other terrorist organisations, other parties to the conflict, as well as opportunistic individuals, have illegally excavated areas in Iraq and Syria, presumably in search of antiquities to sell. The proceeds of these sales could be linked to financing terrorism. Moreover, satellite imagery⁵⁴ shows several archaeological sites in Syria in 2012, before extensive looting, and after extensive looting in 2014, with visible looting pits.

Further according to the GAO report, a US Deputy Assistant Secretary of State reported that ISIS has encouraged the looting of archaeological sites as a means of both erasing the cultural heritage of Iraq and Syria and raising money. The State official noted that the US raid to capture ISIS leader Abu Sayyaf resulted in the finding of documents that demonstrated that ISIS had established an Antiquities Division with units dedicated to researching known archaeological sites, exploring new ones, and marketing antiquities. According to these documents, the Antiquities Division collects a 20 percent tax on the proceeds of antiquities looting and issues permits authorising certain individuals to excavate and supervise excavations of artefacts. Documents found during the raid also indicate ISIS made statements prohibiting others from excavating or giving permits not authorised by ISIS. Sales receipts indicated the terrorist group had earned more than \$265,000 in taxes on the sale of antiquities over a four-month period in late 2014 and early 2015.

These developments have further magnified the problem in recent years making it urgent to take action.

⁵² S/2016/298. Letter dated 31 March 2016 from the Permanent Representative of the Russian Federation to the United Nations Mr. V. Churkin, addressed to the President of the UN Security Council. See Annex 13

⁵³ GAO was asked to examine the protection of Iraqi and Syrian cultural property, including views of art market experts. The report describes **activities undertaken by U.S. agencies and the Smithsonian Institution** to protect Iraqi and Syrian cultural property since 2011, and art market experts' suggestions for improving U.S. government activities. GAO reviewed documents and interviewed U.S., international, and foreign officials. <http://www.gao.gov/assets/680/679075.pdf>

⁵⁴ http://unosat.web.cern.ch/unosat/unitar/downloads/chs/FINAL_Syria_WHS.pdf See Annex 15

3.2 Drivers

This section examines the drivers in the EU of the problem of cultural goods from third countries illegally taken from their historical and archaeological context and brought into the EU.

3.2.1 Standard customs controls are inadequate for addressing the specificity of cultural goods

Currently, cultural goods undergo only standard customs controls i.e. the customs declaration has to identify the type of goods based on tariff classification, the source country of the shipment and its value. Standard controls do not seem adequate where it comes to identifying the proper origin and provenance as well as the age or value of the goods.

For example, the **difficulty in establishing the provenance of cultural goods** that have never been registered in museum catalogues or are claimed to belong in private collections that have never been inventoried is considerable. While unique cultural goods may be easy to identify and describe, other cultural goods belonging for instance to civilisations that flourished over a wide geographical area (e.g. Babylonian, Egyptian, Greco-Roman, Arab, Byzantine, Ottoman) or serial cultural goods such as coins or jewellery that can be dismembered are not as easy to identify. The INTERPOL database for stolen art for instance, while considered one of the most important, does not include items for which there is no photograph. This would be the case of cultural goods illicitly excavated, where the State to which they belong is not even aware of the fact.

The difficulties that customs authorities face in detecting cultural goods that have been illicitly exported from their source country are exemplified in the implementation of the *ad hoc* EU measures banning trade in cultural goods with **Iraq and Syria**:

Article 3 of Council Regulation (EC) No 1210/2003 on specific restrictions on economic and financial relations with Iraq stipulates that any movement of Iraqi cultural property is prohibited unless the exportation of the cultural good in question can be proved to have happened prior to 6 August 1990.

According to Article 11c of Regulation (EU) No 36/2012, it is prohibited to import, export, transfer or provide brokering services related to the import, export or transfer of Syrian cultural property goods and other goods of archaeological, historical, cultural, rare scientific or religious importance. The prohibition applies where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law unless it is demonstrated that the goods were exported from Syria prior to 15 March 2011 or if the goods are being safely returned to their legitimate owners in Syria.

As artefacts are rarely dispatched directly from the source countries, in the case of illicit cultural goods from Iraq or Syria, where a different origin is declared by an importer, **the burden of proof that the goods are indeed from these countries and that they are the products of looting or illegal excavations is placed on EU customs.**

Based on the results of surveys⁵⁵, the adequacy of the EU *ad hoc* measures is questioned by a considerable number of Member States. **The possibility that these prohibitions are not currently enforced to their full extent cannot be discarded.**

The issue of customs having to prove Iraqi or Syrian provenance is believed to undermine the purpose of the *ad hoc* measures. For instance, importers of cultural goods may claim other origin e.g. Jordan or United Arab Emirates, which would then have to be proved inaccurate by the authorities of the Member States. This requirement on the shoulders of customs authorities is very difficult to meet. Usually, customs lack expertise in art history to identify suspicious objects and operational resources to trace provenance and determine age. Especially when it comes to cultural goods from illegal excavations, the finds cannot be traced back to any museum catalogue or database of stolen art, since they have never been registered. Similarly, when exported prior to a certain date, the goods are considered to have been moved legally. Again, the burden of proof regarding exportation after that date lies with the competent authorities of the Member States. Finally, once a good has been seized, the identification of the legitimate owner might pose difficulties, which is important for restitution.

While customs are well-placed at the EU external border to intervene at the stage of physical delivery of the goods, properly implementing these prohibitions in a context where imports of cultural goods are not subject to any specific or targeted controls is very difficult.

EU customs authorities have no means to determine conclusively facts and events that happened at a specific time in the third country in question, especially without the administrative assistance of the local authorities. Standard customs controls at import seem inadequate for addressing the specificity of cultural goods; such goods may therefore tend to enter the EU without sufficient scrutiny.

3.2.2 Uneven treatment by Member States of cultural goods imported in the EU

The above technical difficulties and lack of expertise are in themselves a source of divergent implementation of EU legislation by Member States. However, they are also compounded with a **variety of legal rules and requirements applied by Member States**.

While there is a clear EU prohibition of imports into the EU of goods originating in Iraq and Syria, imports from other countries are not subject to any EU restrictions. At the same time, a small number of Member States do apply restrictions on imports that have been illegally exported from their historical and archaeological environment in any third country.

These Member States also apply variable requirements regarding the proof of the legal movement of the goods, ranging from the presentation of export certificates from third countries or of an import licence issued by competent national authorities to a commitment by operators to due diligence regarding the origin and provenance of the goods.

The recent introduction by Member States of such measures has increased the diversity of rules and regulations within the EU. This partial and patchy legal framework relating to imports of cultural goods to the EU contributes to uncertainty about the licit or illicit nature of cultural goods being brought into the EU and suggests that illicit trade may be directed towards Member States where import restrictions are weaker or non-existent.

⁵⁵ In the framework of the study titled 'Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU', 2017, conducted by the Commission. Not published yet.

The effectiveness of national measures is undermined by the possibility for cultural goods to enter the internal market through any Member State which has no customs measure in place and then move freely and reach the market even of those Member States that have adopted strict measures. Such divergences of customs measures allow for 'port shopping' at external EU borders and undermine the consistency and protective character of the EU customs union in dealing with illicit trade.

3.3 Consequences

Failing to stop cultural goods from third countries illegally taken from their historical and archaeological context to be brought into the EU has several consequences.

3.3.1 Trafficking in cultural goods fosters organised crime, terrorism financing, money laundering and tax evasion

The law and order consequences both in the **source countries** and in the **countries of destination** are negative. Looting and trafficking cultural goods fosters common as well as organised crime in all the countries concerned. Starting from the theft of the objects, their trajectory until they reach the countries of destination (the EU in this case) is fraught with illegality. Theft⁵⁶, bribery and corruption, violation of domestic export legislation, smuggling, forgery, counterfeiting, fraud, etc. are perpetrated until the goods reach the buyers in Europe. As a result, in all of these cases, the objects arrive on the destination market with a high criminal record⁵⁷.

As indicated in the problem section, the illegal trade in antiquities and other cultural goods is associated with **transnational organised crime** often connected to drugs and arms trafficking and **terrorism financing**. Dealers and middlemen bringing the goods to their final destination operate in criminal networks implicated in other forms of illicit trade that are detrimental to public order and security. To the extent that goods imported to the EU and their value are not properly declared at import, tax evasion is also a consequence.

3.3.2 Loss of cultural identity and heritage to source countries and to mankind

Illicit trade in cultural goods is detrimental to mankind as it deprives all citizens from having access to and gaining knowledge about their common historical and cultural heritage.

In particular, from the point of view of educational and historical value that the objects represent, looting of cultural treasures causes irreparable damage, since it **destroys the archaeological and historical context** of the sites, and often the objects themselves. Trafficking of the cultural objects makes them end up in private hands, never to be seen by the public, nor studied by education and science professionals.

Foreign demand for illicit cultural goods provides **local impoverished populations** with a supplement to their meagre income (so-called 'subsistence digging'). The chain of supply starts with common thieves and tomb robbers in source countries, who often destroy the archaeological context and damage the objects themselves while excavating. For relatively

⁵⁶ The category of clandestinely excavated cultural goods sometimes overlaps with the category of stolen goods, when some countries have declared all unexcavated archaeological material to be the property of the State. Therefore their removal without State permission may amount to theft. O'Keefe 1994.

⁵⁷ Alesia Koush, 'The illegal antiquities' traffic as a form of transnational organized crime', Bruges, College of Europe, April 2011, p. 6.

small amounts of money⁵⁸, they sell the objects to professional dealers and middlemen, who transport the goods towards final destinations.

While gaining these small amounts of money may be seen as positive⁵⁹ by those local populations, in the longer term this activity is unsustainable. The number of cultural goods to be found is not unlimited. When all of them are found and sold, the local population loses permanently not only the link to their history and culture but also the opportunity to gain a steady income for the whole area by developing cultural tourism.

3.3.3 Uncertainty undermines the licit market

From the point of view of the **licit art and antiques market** in the EU, the current uncertainty regarding the licit provenance of imported cultural goods can be also detrimental to art dealers and private collectors. Unprovenanced or insufficiently provenanced goods quite often turn out to be fakes or they can be later identified as stolen and seized. As the TEFAF Art Market Report 2017 states: "the building blocks of the art market depend fundamentally on quality and trust; key to this are maintaining reputation and credibility, to ensure longevity, stability and resilience". Painstakingly developing a business reputation for decades can be seriously impacted by just one well-publicised major case of art theft or forgery.

Conversely, cultural goods with well-documented provenance can always fetch higher prices on the market.

As explained in Section 2.2, depending on the Member State of entry, scrutiny and controls on trade in cultural goods vary widely. This uneven treatment of cultural goods that enter the EU brings discrimination amongst traders and buyers. It also brings uncertainty as to the applicable law and to the licit or illicit nature of the trade concerned. Uncertainty is detrimental to the licit art market, to the benefit of informal and criminal networks.

3.3.4 Heavy administrative burden and cost is placed on EU customs

The lack of a comprehensive control system at import at the EU external border renders the tasks of **customs and cultural authorities** in the Member States more difficult to carry out and their efforts ineffective, since even strong legislation in certain Member States can be easily bypassed by unscrupulous operators choosing a different entry point. This is compounded by the requirement in the case of the implementation of the ad hoc prohibitions of goods originating in Iraq and Syria to prove the illicit nature of the import where customs may have doubts about the truthfulness of an importer's declaration. Such demonstration is in practice very difficult due to lack of expertise and customs resources, lack of provisions pertaining to the detention of the goods and lack of provisions relating to penalties for false declarations.

⁵⁸ As compared to the final market prices for the artefacts, the tomb robbers receive not more than 1% of the total value, cf. N. Brodie, J. Doole, P. Watson, *Stealing History: the illicit trade in cultural material*, commissioned by ICOM UK and Museums Association, Cambridge, The McDonald Institute for Archaeological Research, 2000, p. 13.

⁵⁹ Particularly where the local inhabitants do not identify themselves with the culture or religion that the artefacts represent.

4. WHY SHOULD THE EUROPEAN UNION ACT

In accordance with the Action Plan for strengthening the fight against terrorist financing, the Commission is to consider a wider response than at present, including a legislative initiative, to tackle illicit trade in cultural goods.

Section 3 above discusses the problem of cultural goods introduced into the EU, which have illegally been extracted and exported from their source country. The main drivers leading to this are: on the one hand, the inadequacy of standard customs controls at EU borders to deal with the specificity of trade in cultural goods even in the case of existing prohibitions currently applied by the EU on the import of cultural goods from Iraq and Syria; and, on the other hand, the existence of a patchwork of Member State legislations applying to the import of cultural goods to their territory.

While The Hague, UNESCO and UNIDROIT Conventions establish general principles relating to the trade in cultural goods and the protection of cultural heritage, there exists no international legislation that renders these principles operational. At the moment, with the exception of the prohibitions for Iraq and Syria that have been established at EU level all other action is organised at Member State level.

However, measures taken by Member States on their own initiative, as foreseen on the basis of Article 36 of the Treaty on the Functioning of the European Union (TFEU), i.e. with a view to protecting 'national treasures possessing artistic, historic or archaeological value', seem to be more suitable for the protection of their own national cultural heritage. National measures fall short when it comes to preventing the entry into the EU of cultural goods illegally exported from a third country. Such goods may enter the Union through any point, including where no control specific to such goods is foreseen. This uneven treatment by Member States of cultural goods imported into the Customs Union creates incentives for traders to bypass the strict national legislations applied by some Member States by choosing other entry points in Member States with less stringent legislations and customs controls when bringing cultural goods into the EU customs territory. It encourages criminals wishing to import in the EU cultural goods that have illicitly exited their countries of origin to do so by using the more vulnerable routes. It also discriminates between operators, as they are subjected to different compliance requirements depending on the Member State of entry.

The ineffectiveness of existing Member States legislation creates a **necessity for action at EU level** to ensure consistent treatment of imports of cultural goods all along the external EU borders. The EU has exclusive competence for commercial policy and for customs legislation⁶⁰ under Articles 3 and 207 TFEU. It is, therefore, appropriate that any required action to address the problems identified must be taken at EU level.

Article 207 TFEU empowers the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, to adopt the measures defining the framework for implementing the common commercial policy. Such is the case of Regulation (EC) No 116/2009 on the export of cultural goods which was adopted on the basis of Article 207 TFEU.

⁶⁰ In the case of customs cooperation under Article 33 TFEU, the Union shares the competence with the Member States.

Based on surveys carried out⁶¹ and discussions within the Expert Group on customs issues related to cultural goods⁶², Member States unanimously agree in principle on the need for EU action in this area.

5. POLICY OBJECTIVES

This report focusses on the issue of cultural goods illicitly exported from third countries being brought into the EU. It does not cover any EU action relating to the circulation of cultural goods within the EU and to the restitution of seized goods to their rightful owners nor any EU activities, such as capacity building and other cooperation organised with third countries with a view to helping them to protect their cultural heritage. [Some of these aspects are discussed in a separate overall Commission Communication on illicit trade in cultural goods.]

⁶¹ "Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU", Study conducted for DG TAXUD, not published yet.

⁶² Group composed by expert delegates from Member State administrations to assist the Commission in the preparation and implementation of relevant legislation.

The policy objectives relating to this initiative may be structured as follows:

Objectives tree

General objective				
Prevent the import and storage in the EU of cultural goods illicitly exported from a third country; thereby reducing trafficking in cultural goods, combatting terrorism financing and protecting cultural heritage, in particular in source countries affected by armed conflict				
Specific objectives				
(1) Establish a common definition of cultural goods in the context of importation	(2) Ensure that EU buyers and importers exercise diligence regarding the legality of cultural goods brought into the EU	(3) Determine standardised information regarding the identity of cultural goods brought into the EU (facilitation of customs controls)	(4) Provide for more effective deterrents to trafficking in cultural goods	(5) Promote active involvement of stakeholders in reducing trafficking

Notes:

1: A common definition is indispensable to create a common frame of reference for public authorities, businesses and buyers throughout the EU when it comes to the importation of cultural goods. The definition should be proportional to the protection needed without impeding legitimate trade.

2: Importers and buyers normally know the provenance of the goods they sell and buy. They are therefore in the best position to exercise diligence regarding the legality of the goods they bring in the EU. The burden of proof should not remain with customs authorities.

3: With standardised documentation used for the import of cultural goods into the EU, customs can perform controls more effectively and efficiently, therefore also facilitating trade.

4: The initiative should deter Importers and buyers from engaging in illicit trade of cultural goods.

5: Mobilising market operators and other stakeholders can make an important contribution to the prevention of import and storage in the EU of cultural goods illicitly exported from their source country.

6. POLICY OPTIONS

The policy options considered under this initiative are discussed in relation to the general policy objective of preventing the entry into the territory of the EU of cultural goods illicitly exported from a third country and in relation to the specific objectives also identified in Section 8.

This Section discusses several options:

- Firstly, the Baseline Scenario.
- Secondly, a grouping of soft-law options to improve capacities and foster stakeholder goodwill and self-discipline (**GROUPING A**), and
- thirdly, two groupings of regulatory options addressing two important elements: on the one hand, the appropriate definition of the scope of the cultural goods to be covered by the initiative (**GROUPING B**); and, on the other hand, the documentary requirements needed to certify the licit nature of the goods (**GROUPING C**).

6.1 OPTION 0 - Baseline Scenario

The Baseline Scenario assumes the continuation of two *ad hoc* measures prohibiting the import of certain cultural goods from Iraq and Syria (resp. Regulation (EC) No 1210/2003 and Regulation (EU) No 36/2012). These have been taken in the broader restrictive framework established by the EU in respect of Iraq and Syria and in line with the relevant UN Security Council resolutions (see point 2.4 above).

The Baseline Scenario also assumes the EU Member States would continue with their own national legislations, as the case may be, regarding the import of cultural goods to their territory (see point 2.2 above).

6.2 GROUPING A - Soft-law options to improve capacities and foster stakeholder goodwill and self-discipline

Active involvement of stakeholders can make an important contribution to achieving the general objective stated in section 5 above. Such involvement can be promoted by the recognition of codes of ethics or conduct and by raising awareness of stakeholders and the capacities of enforcement authorities.

These approaches are presented in the following options A1 and A2 which are non-exclusive of one another.

6.2.1 OPTION A1 - Endorsing codes of ethics or conduct established by art market associations or museums

Under this option the EU would endorse existing codes of ethics or conduct established by art market associations or museums, through e.g. a Commission communication or recommendation.

The two internationally most pro-eminent codes are the **UNESCO International Code of Ethics for Dealers in Cultural Property**⁶³ and the **ICOM Code of Ethics for Museums**⁶⁴.

⁶³ Adopted by the UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its Tenth Session, January 1999 and endorsed by the 30th General Conference of UNESCO, November 1999.

Codes of ethics typically cover four aspects of the movement of cultural goods: the acquisition and disposal of goods and collections; the provenance of items and collections; the professional conduct of members; and the sanctions laid down in the event of violation of the rules.

These key aspects already form the subject of specific rules in major international conventions. It should be noted, however, that one of the most notable functions served by these codes of ethics is that – at least for the groups of operators concerned – they may render certain rules covered by international conventions applicable.

The institutional character of the Union would not allow it to subscribe to these codes of ethics or conduct as an operator-member of the professional associations concerned. However, the Union could opt to promote those norms and give them greater visibility and status by formally endorsing them.

6.2.2 OPTION A2 - Raising awareness of potential buyers and of customs and other enforcement authorities

This option involves the organisation by the EU, alone or in co-operation with Member States, of awareness-raising campaigns using various media (printed or audio-visual) to reach **potential buyers** in Europe and dissuade them from acquiring cultural goods when their licit provenance is in doubt. Awareness-raising campaigns may inform and sensitise particular categories of buyers such as travellers and tourists about the need to respect source country legislation at export as well as EU requirements at import and promote the idea that it is not socially acceptable to buy dubious cultural goods from foreign countries.

This option also involves EU and Member States initiatives to strengthen the capacity of **customs and other enforcement authorities** in tackling the entry into the EU of cultural goods illicitly exported from third countries. This would involve appropriate training of customs officers as well as cultural authorities' officials to develop relevant expertise and cooperation between them at Member State, EU and international level as well as with market stakeholders. Such actions could be considered for financing under EU sectoral programmes (e.g. customs, cultural, security).

6.3 GROUPING B - Regulatory options regarding the definition of cultural goods

For reasons of legal certainty, any EU regulatory measures will need to have a clearly defined scope of application, i.e. an appropriate definition of the goods to be covered. In the light of existing legislations, the aspects relating to such definition are the typology of the goods to be covered, their age and, in certain cases, their value. The typology that will be selected will be introduced into the legislation and will be translated into the Integrated Tariff (TARIC).

Options B1 to B5 below are mutually exclusive.

6.3.1 OPTION B1 - Definition used in the UNESCO 1970 Convention

Article 1 of the UNESCO 1970 Convention (**Box 1**) defines a **wide range of cultural goods by type** based on their importance for archaeology, prehistory, history, literature, art or science. It provides for a **minimum age limit of 100 years only in two cases**, namely for

<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-international-code-of-ethics-for-dealers-in-cultural-property/>

⁶⁴ Approved in Seoul, 8 October 2004. <http://archives.icom.museum/ethics.html>

antiquities such as inscriptions, coins and engraved seals and for articles of furniture. **It does not provide for minimum value limits:**

Box 1

"Property which, on religious or secular grounds, is **specifically designated by each State** as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs ;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments."

6.3.2 OPTION B2 - Definition used in the UNIDROIT 1995 Convention

The UNIDROIT 1995 Convention defines cultural goods in exactly the same manner as the UNESCO 1970 Convention but for one important difference: it does not include the words "is specifically designated by each State". As a result, the definition has a wider scope than that of the UNESCO 1970 Convention because it also **includes cultural goods, such as products of clandestine excavations, which are not specifically designated by States** and where the State is not even aware of their existence, let alone their theft.

6.3.3 OPTION B3 - Definition used in Regulation (EC) No 116/2009 on the export of cultural goods

Regulation (EC) No 116/2009 on the export of cultural goods lists a broad range of cultural goods by type, i.e. category of objects, in its Annex I.A (**Box 2**). It has a similar scope to the previous definitions but is specific and precise to **reflect EU Member States' needs for the protection of their cultural heritage**. For most of the categories there are **minimum age limits**. In its Annex I.B, the Regulation further specifies **minimum value limits** for certain categories but not all (e.g. no minimum value limit is applied for archaeological objects):

Box 2

A.

1. Archaeological objects more than 100 years old which are the products of:
 - excavations and finds on land or under water
 - archaeological sites
 - archaeological collections
2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years
3. Pictures and paintings, other than those included in categories 4 or 5, executed entirely by hand in any medium and on any material ⁽¹⁾
4. Watercolours, gouaches and pastels executed entirely by hand on any material ⁽¹⁾
5. Mosaics in any material executed entirely by hand, other than those falling in categories 1 or 2, and drawings in any medium executed entirely by hand on any material ⁽¹⁾
6. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters ⁽¹⁾
7. Original sculptures or statuary and copies produced by the same process as the original ⁽¹⁾, other than those in category 1
8. Photographs, films and negatives thereof ⁽¹⁾
9. Incunabula and manuscripts, including maps and musical scores, singly or in collections ⁽¹⁾
10. Books more than 100 years old, singly or in collections
11. Printed maps more than 200 years old
12. Archives, and any elements thereof, of any kind or any medium which are more than 50 years old
- 13.(a) Collections ⁽²⁾ and specimens from zoological, botanical, mineralogical or anatomical collections;
 - (b) Collections ⁽²⁾ of historical, palaeontological, ethnographic or numismatic interest
14. Means of transport more than 75 years old
15. Any other antique items not included in categories A.1 to A.14
 - (a) between 50 and 100 years old
toys, games, glassware, articles of goldsmiths' or silversmiths' wares, furniture, optical, photographic or cinematographic apparatus, musical instruments, clocks and watches and parts thereof, articles of wood, pottery, tapestries, carpets, wallpaper, arms
 - (b) more than 100 years old

⁽¹⁾ Which are more than 50 years old and do not belong to their originators

⁽²⁾ As defined by the Court of Justice in its judgment in Case 252/84, as follows: 'Collectors' pieces within the meaning of heading No 97.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value'

B. Financial thresholds applicable to certain categories under A (in euro)

Value:

Whatever the value

- 1 (Archaeological objects)
- 2 (Dismembered monuments)
- 9 (Incunabula and manuscripts)
- 12 (Archives)

15 000

- 5 (Mosaics and drawings)
- 6 (Engravings)
- 8 (Photographs)
- 11 (Printed maps)

30 000

- 4 (Watercolours, gouaches and pastels)
50 000
- 7 (Statuary)
- 10 (Books)
- 13 (Collections)
- 14 (Means of transport)
- 15 (Any other object)
150 000
- 3 (Pictures)

6.3.4 OPTION B4 - Definition used in US legislation on the import of cultural goods (CPIA)

With regard to the type of the goods covered, the US legislation on import of cultural goods implementing the UNESCO 1970 Convention (**Box 3**) covers a **narrower range**, namely only objects of **archaeological and ethnological**⁶⁵ interest. It does not provide for minimum value limits, but sets out a **minimum age limit of 250 years**.

Box 3

- (2) The term "archaeological or ethnological material of the State Party" means -
- (A) any object of archaeological interest;
 - (B) any object of ethnological interest; or
 - (C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph -
- (i) no object may be considered to be an object of archaeological interest unless such object -
 - (I) is of cultural significance;
 - (II) is at least two hundred and fifty years old; and
 - (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater; and
 - (ii) no object may be considered to be an object of ethnological interest unless such object is -
 - (I) the product of a tribal or nonindustrial society, and
 - (II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

6.3.5 OPTION B5 – A wide typology of goods narrowed down by an age threshold

While options B.1, B.2 and B.3 define a wide typology of goods, option B4 reduces the material scope by using the narrow typology of archaeological and ethnological goods and by applying a 250 years minimum age threshold.

An intermediate option **combining a wide typology⁶⁶ with a restrictive minimum age threshold** is also worth considering. This intermediate option (B5) combines the typology of **UNIDROIT 1995** definition with a more restrictive age threshold. Under this option **the age threshold could initially be set at 250 years**, as is in the case of current US legislation. This threshold could be made adjustable by means of implementing act to take account of experience in implementation and of changing circumstances in the illicit trade of cultural goods.

⁶⁵ Defined as the product of a tribal or nonindustrial society and important for the cultural heritage of a people.

⁶⁶ However, it is worth noting that Switzerland whose legislation is also presented under point 2.3 above applies the UNESCO definition, i.e. option B1.

6.4 GROUPING C - Regulatory options regarding the documentation needed to certify the licit nature of the goods

Having defined the scope of the cultural goods to be covered, it is equally important to determine the procedure through which importers will be able to bring cultural goods into the EU including storage in free zones. Such procedures would need to define (a) the documentation required for customs to be satisfied that the goods have not been exported illegally from the source country, (b) any other requirements to deter trafficking and (c) the conditions for detention or confiscation of the goods.

Options C1 to C4 below are mutually exclusive.

6.4.1 OPTION C1 - Requirement on importers to present a copy of the export certificate issued in the source country

Under this option, a person who seeks to introduce cultural goods into the EU⁶⁷ would have to present the export certificate issued in the source country on the basis of that country's legislation. This certificate would accompany the standard import declaration.

An export authorisation, usually called 'export certificate' or 'export licence', is issued by the designated competent authorities of the country where the cultural good is lawfully and permanently located (i.e. not just transiting or being transhipped) before it can be legally exported to another country (in this case, dispatched to the territory of the EU). An export certificate is a standardised document which serves as proof of compliance with the laws and regulations of a country regarding its cultural heritage.

At international level, State Parties to the UNESCO 1970 Convention are requested⁶⁸ to (a) introduce appropriate certificates in which the exporting State would specify that the export of the cultural property in question is authorised and (b) prohibit the exportation of cultural property unless accompanied by such an export certificate. Among the respondents to a UNESCO survey⁶⁹ around 91% reported that their legislation contained export controls, while more than 30 countries confirmed that export certificates were mandatory for a cultural good to exit lawfully their territory.

Export legislations, however, differ considerably in scope and content, according to UNESCO. It has also become apparent that, while authorisation is usually required for the export of cultural property that is not banned from export, export certificates in line with the UNESCO-WCO Model Export Certificate or similar models are not always in use.

The **Model Export Certificate** form⁷⁰ was developed by UNESCO and the World Customs Organisation (WCO) in 2005. The most significant advantage of using standardised certificates is that customs officers, whatever their mother tongue, will find the same kind of information in the same place.

Under this option, third countries signatories of the UNESCO 1970 Convention which have established an export certification system, such as Cambodia, South Africa, Argentina,

⁶⁷ For release for free circulation but also for placing under a special customs procedure (e.g. free zone). It would be however inappropriate to include goods in transit in this context as this would considerably complicate customs action as well as international trade flows. Where such movements are suspected to be related to criminal or terrorist networks, customs action would still be possible in accordance with Member State legislation enacting Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31/3/2017, p. 6).

⁶⁸ Article 6, paragraphs (a) and (b)

⁶⁹ Survey organised by UNESCO addressed to all State Parties of the Convention and administered from November 2013-January 2014, with over half of State Parties responding (66 responses received, response rate of 53%).

⁷⁰ <http://unesdoc.unesco.org/images/0013/001396/139620E.pdf> (See also Annex 11)

Myanmar, Bosnia and Herzegovina, Niger, would request from the EU to allow the import of cultural goods from their country only when accompanied by a valid export certificate issued by the designated competent authorities of the third country in question. EU customs would therefore require from importers to present a copy of this certificate together with the import declaration.

It has to be noted that a document issued by foreign authorities would be prone to abuse if EU customs have no means to verify its authenticity and the accuracy of the information contained therein. For this reason it is a prerequisite for any certification system used in international trade to include an undertaking⁷¹ by the issuing country's authorities to provide administrative assistance to the authorities of the importing country. When EU customs need to perform controls and ask for verification in the context of customs risk management, they need to be able to request and obtain the assistance of the third country's competent authorities. For this reason, the request of the third country would have to be accompanied by an undertaking **to communicate specimens of the export certificate or licence used and the names and stamps of the issuing competent authorities, as well as to provide administrative cooperation to EU customs** whenever the latter would need to verify the authenticity and accuracy of the certificate.

Pending the results of the request for administrative cooperation the release of the goods would be suspended.

Where an export certificate is not foreseen by the source country, no documentation would be required from importers. This option would therefore have a limited geographical scope, corresponding to countries using an export certification system who would have moreover requested the EU to make imports of cultural goods from their country conditional upon presentation of a copy of the relevant export certificate.

6.4.2 OPTION C2 - Requirement to submit an importer's statement for all goods concerned

Under this option, a person who seeks to introduce cultural goods into the EU⁷² would have to sign a **standardised statement (affidavit)** stating that the cultural object in question has been exported from the third country in accordance with its laws and regulations. This would accompany the standard import declaration.

A standardised document describing the cultural good in enough detail for it to be identified by customs would be attached to the statement.

Standardised information requirements and forms are important because they (a) guarantee that the minimum necessary information is always submitted and (b) facilitate customs controls because officers can know which field of the form corresponds to what kind of information, even if the form has been completed in a foreign language. In this sense, the **Object ID**⁷³ standard is considered an appropriate accompanying document within the context of this option.

⁷¹ In the form of a Memorandum of Understanding or similar agreement between administrations.

⁷² For release for free circulation but also for placing under a special customs procedure (e.g. free zone) other than transit.

⁷³ **UNESCO Operational Guidelines**, Point 36, pg. 11 (See Annex 10):

Regarding movable cultural property in museums and religious or secular public monuments or similar institutions, including legally excavated archaeological sites and objects of ethnological interest, the usage of the **Object ID Standard** is recommended. The Object ID Standard facilitates rapid transmission of basic information on lost and stolen cultural objects. The Standard provides for eight key identifying elements which, together with a photograph, make the identification of an object and its tracking much simpler. States Parties which do not have extensive inventories and need to elaborate them quickly to make use of the international procedures now available for tracking cultural objects are now encouraged to use the Object ID Standard.

The Object ID is an **international standard for describing cultural objects**⁷⁴. It is the result of years of research in collaboration with the museum community, international police and customs agencies, the art trade, insurance industry, and valuers of art and antiques. The Object ID project was initiated by the J. Paul Getty Trust and the standard was launched in 1997. It is being promoted by major law enforcement agencies, including the FBI, Scotland Yard and Interpol, UNESCO, museums, cultural heritage organisations, art trade and art appraisal organisations, and insurance companies. It has also been endorsed by UNESCO as the international standard for **recording minimal data** on movable cultural property, which should be used to the fullest extent possible by all signatory States.

The Object ID is known and used by many Member States⁷⁵ for cataloguing objects in digital databases by their specialised police units, as a rapid means to communicate information and as inspiration for setting minimum information requirements for museums.

The Object ID standard requires at least one good quality photograph and detailed information on the type of cultural good; materials and techniques used; measurements; inscriptions and markings; distinguishing features; title (if known); subject; date or period; maker (if known). The standard finally recommends adding a short description of the object.

Under this option, EU customs receive the signed statement and the accompanying Object ID form, check if all formal documentary requirements are met, register the object (i.e. date it and assign it a serial number) and keep a copy of both documents.

Customs, if they have doubts⁷⁶ about the real provenance or the claims made in the statement and attached document by the importer, may suspend the release. During a set time period⁷⁷, the importer would have the possibility to provide documentary evidence supporting his claims.

Under this option, there may also be a possibility to use electronic copies which can be stored in a searchable database containing the statements and Object ID forms submitted by importers. This could improve the traceability of the objects and would allow, in the future, for customs and other law enforcement authorities to access the information stored and apply appropriate risk analysis at importation.

6.4.3 OPTION C3 - Requirement to obtain an import licence for all goods concerned

Under this option, a person who seeks to introduce cultural goods into the EU territory would have to obtain an import licence.

An import licence is an official document that would be issued by EU authorities designated for this purpose by the Member States⁷⁸, following a request by the person who seeks to import cultural goods in the EU. The import licence would authorise the entry of the cultural goods in question into the EU.

The importer-applicant would have to provide the EU competent authority with all the information and documents supporting his application for import authorisation and demonstrating the legality of export from the third country, e.g. export certificates issued by

⁷⁴ See Annex 12.

⁷⁵ Bulgaria; Poland; Finland; Czech Republic; Romania; UK; Belgium; Cyprus; Greece; the Netherlands; Estonia; Norway. Italy uses a compatible description in their *Carabinieri* website.

⁷⁶ E.g. based on principles of customs risk management or information received from specialised law enforcement units.

⁷⁷ In the US legislation it is 90 days.

⁷⁸ The same authorities (departments of Ministries of Culture in the Member States or similar) which currently examine and issue export licences for EU cultural goods in the framework of Regulation 116/2009.

the third country authorities, invoices, titles of ownership, transport or insurance documents, other proof supporting the licit provenance, etc.

In the absence of the import licence the declaration would not be validated by customs and the goods would remain blocked in a warehouse.

6.4.4 OPTION C4 - Requirement to obtain an import licence for archaeological finds and elements of monuments and to submit an importer's statement for other goods

Under this option, a distinction would be made between **archaeological finds and elements of artistic, historical or religious monuments** (i.e. heritage endangered by pillaging and theft) and **other cultural goods**.

As in the case of Option C3, a person who seeks to introduce into the EU archaeological goods and elements of monuments would have to obtain an import licence issued by the national competent authority designated for this purpose by the Member State of entry. Likewise, the importer-applicant would have to provide the said competent authority with all the information and documents supporting his application and demonstrating the legality of export from the third country.

For other cultural goods as in the case of Option C2, the person who seeks to introduce such goods into the EU would have to submit a **signed statement accompanied by an Object ID** stating that the cultural object in question has been exported from the third country in accordance with its laws and regulations. Similarly, this could be supported by the establishment of an electronic database.

7. IMPACT OF POLICY OPTIONS

In the following section, the impact of the identified policy options is examined and compared in terms of **effectiveness**, i.e. ability to achieve the set objectives; **efficiency** in terms of operational and compliance cost for stakeholders; **coherence** with existing policies and instruments and, where relevant, **proportionality**.

Due to the lack of detailed subheadings in the customs nomenclature for cultural goods, available statistical, and thus quantitative, data are limited and lack the desirable precision. Chapter 97 of the Harmonised System covering 'works of art, collectors' pieces and antiques' does not contain enough subdivisions to allow the collection of trade data for specific categories of cultural goods⁷⁹. As a result, the assessment that follows is mostly qualitative.

The analysis takes into consideration the points of view and positions expressed by stakeholders (citizens, enterprises and associations thereof, public institutions and authorities and civil society), in particular within the framework of an Open Public Consultation (OPC) conducted by the Commission⁸⁰. All the options under consideration are unrelated to and are not expected to have any environmental impact.

⁷⁹ As an example, archaeological goods are classified under the same heading 9705 with objects of zoological, botanical, mineralogical, anatomical, paleontological, historical, ethnographic or numismatic interest. Furthermore, the collection of import data is based on the value of the cultural goods, not per unit. For this reason, it is impossible to determine with certainty the number of imports the amount involves and how many times would EU customs be called to process formalities or competent authorities to examine import licence applications or operators would need to prepare documentation. An import value of 100 million could theoretically represent one single import of a very valuable painting or 100,000 imports of articles of an average value of 1000 euro.

⁸⁰ For a more detailed overview please refer to Annex 2 of the IA report.

In the comparative tables at the end of each grouping section, the options are graded from 0 to 3, depending on how well they perform in comparison to the baseline scenario. The baseline scenario is graded zero, 1 = fair; 2 = good; 3 = very good. The highest-ranking options are highlighted in green.

7.1 OPTION 0 - Baseline Scenario

Under this scenario the problem would remain and possibly be magnified as explained in SECTION 3.

The demand in Europe – one of the world's biggest markets – for cultural goods from third countries would continue to provide impoverished populations with a supplement to their income but this resource is not renewable or sustainable.

The uncertainty regarding the provenance of the goods would continue to plague the licit art and antiques market in the EU, which is dependent on good reputation and credibility.

Trafficking in illicit cultural goods would continue to foster the organised crime networks that bring the goods into the EU and would continue to represent a threat to the public order in all the countries concerned: the source countries, the transit countries and the destination countries in the EU.

Terrorists and other warring factions would continue to gain income from this illicit trade to finance their activities abroad and in the EU.

The uneven import provisions across the EU would mostly continue to hinder individual efforts by the Member States to regulate imports. Buyers of cultural goods in the EU would continue to be treated differently depending on which Member State they reside in. The persisting lack of provenance requirements would continue to benefit unscrupulous operators who manage to pass fake cultural goods as genuine.

From the point of view of applying the current legislation on imports by customs, the partial coverage – only imports from Iraq and Syria are regulated – would continue to be a hindering factor for the efforts of EU customs.

Finally, the Union would fail to prevent goods illegally exported from source countries entering the EU market, to the detriment of world cultural heritage.

Stakeholders position: The position of respondents to the Open Public Consultation (OPC) with regard to whether the EU should adopt customs rules to prevent and deter imports of illicit cultural goods differs notably, depending on the category of respondents:

While 63% of enterprises and 66% of interest representatives are not favourable to the EU taking any measures, 99% of NGOs and representatives of civil society and 90% of respondents from public authorities consider that the Union should adopt customs controls at the importation of cultural goods. This reflects concerns of economic operators about the compliance cost that the adoption of measures might represent for their business, while civil society and public authorities seem to prioritise the safeguarding of cultural heritage and the rule of law.

Social impact:

The baseline scenario will not limit risks to security, will not decrease crime or reduce terrorist financing from trafficking in cultural goods. It is more likely that these phenomena

will intensify. Nor will law enforcement capacity to address criminal activity (including tax evasion, money laundering and corruption) related to trade in cultural goods be strengthened. If measures are not taken to tackle the problem from the demand side, more and more artefacts will be irretrievably lost to their source countries and to archaeology, history, science and education, as they are removed from their cultural context.

Subsistence diggers in third countries – many of which are developing countries – may temporarily benefit, but since cultural goods are not a renewable resource, those local populations will lose in the long run the potential to develop the more economically sustainable income source that is cultural tourism. Terrorist and warring factions who are ideologically hostile to the remnants of past civilisations and cultures will succeed further in erasing the history and cultural identity of the affected local populations.

Economic impact:

In the absence of effective deterrents, unscrupulous operators, organised crime middlemen and looters and thieves in the source countries will continue to benefit and enrich themselves. The current economic benefits of this kind of trade cannot be considered relevant and warranted.

OPTIONS	Effectiveness	Efficiency	Coherence
Zero - Baseline scenario	0	0	0

7.2 GROUPING A - Soft-law options to improve capacities and foster stakeholder goodwill and self-discipline

Action within this grouping would particularly address Specific Objectives No 2 and 5, namely encouraging due diligence by traders and promoting active involvement of stakeholders.

7.2.1 OPTION A1 - Endorsing codes of ethics or conduct established by associations of the art market or museums

Effectiveness: An official endorsement by the EU of international codes of ethics or conduct, such as the ICOM Code of Ethics for Museums or the UNESCO International Code of Ethics for Dealers in Cultural Property, would promote them and give them greater visibility. The endorsement can be done through a non-binding act such as a Commission communication or recommendation.

Rules of conduct or codes of ethics for **business operators and professionals** in the market of cultural goods are non-binding and do not enjoy the enforceability that is characteristic of legal rules, but they can contribute to improve market conditions. In the majority of cases, they are **instruments of self-discipline** of those associated with or belonging to the professional category concerned.

The main weakness with international codes of ethics or conduct would lie in the sanctions laid down for violation of the rules: these sanctions are rarely applicable, which might even have an adverse effect on the level of effectiveness of the codes of conduct. In practice, not

only is suspension from the association or the loss of membership status rarely provided for, but there is also often no indication of the procedures by which violations are established⁸¹.

This is further complicated by the fact that it is difficult to provide for sanctions at international level, especially if the code is adopted by bodies unable to exercise any effective power over those to whom the rules are addressed, as is the case with ICOM.

Furthermore, such voluntary instruments are unlikely to modify the behaviour of unscrupulous operators and to effectively deter organised crime, to have an effect on persons who use cultural goods transactions to evade taxation or to launder money and even less so on terrorists looting cultural goods in third countries to finance their activities.

A set of non-binding rules cannot be subject to rigorous monitoring and it would be very difficult to ascertain compliance of operators.

Overall, this option could partially achieve the specific objective of promoting stakeholder involvement in reducing trafficking in cultural goods. However, it would have little deterrent effect and would fall very short of achieving the general objective set out in Section 5 (cf. Objectives tree).

Efficiency: Formal endorsement of international codes of ethics would not require any expenditure from public authorities. It would however require additional efforts by the relevant associations to monitor implementation, discipline the market actors and ensure transparency.

Coherence: From the point of view of coherence with existing policies and instruments, the promotion of codes of ethics or codes of conduct seems relevant, but mostly as an accompanying measure or follow-up to more robust instruments which directly address the problem of illicit cultural goods entering the EU.

Stakeholders position: In the OPC, at least half of the art market and museums representatives considered EU endorsement of codes of conduct an appropriate measure (ranking third, same as training for customs officers) and 62% of respondent NGOs and representatives of civil society also find it appropriate (again, ranking third, together with the training customs agents option). The other categories of respondents (citizens, public authorities, 'other') did not select this option among their top three favourites.

Social impact:

As explained above, the impact of more effective self-regulation would be positive in promoting accepted behaviour by the operators concerned, however, because of their voluntary nature the actual effect of such norms could be limited.

Economic impact:

This option would not be expected to have any particular trade and economic impact.

7.2.2 OPTION A2 - Raising awareness of potential buyers and of customs and other enforcement authorities

Effectiveness: Awareness-raising campaigns could contribute to informing potential buyers and educating the public with the objective of gradually influencing and changing consumer attitudes ('peer pressure').

⁸¹ Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Final Report October 2011.
http://www.do.etat.lu/voyages/Report_Trafficking_in_cultural_goods_EN.pdf

Actions to educate and inform potential buyers and influence public opinion have been undertaken with good results for trade in other goods which are either considered as endangered (e.g. wildlife conservation in the context of the Convention on International Trade in Endangered Species of Wild Fauna and Flora – CITES⁸²) or are suspected to be traded by rebel groups or their allies to fund conflict against legitimate governments and, in that way, contributing to geopolitical instability (e.g. 'conflict diamonds' – the Kimberley Process⁸³). Similar awareness raising actions directed at traders, travellers and customs authorities have been undertaken in respect of the protection of intellectual property rights and the cross-border movements of cash.

A certain number of collectors in the destination countries buy cultural goods from third countries for reasons of social prestige. If the opinion was nurtured, in the mind of the collector and in society at large, that it is not socially acceptable to indirectly contribute to the plunder of archaeological sites and the financing of organised crime and terrorists, perhaps the popularity and the demand for such items would lessen.

Similarly, raising awareness, expertise and capacity of customs and other enforcement authorities in the Member States could also make an important contribution to deter illicit trade and at the same time would facilitate legitimate international trade in cultural goods.

Overall, this option could partially achieve the specific objective of promoting stakeholder involvement in reducing trafficking in cultural goods. It would also strengthen deterrence by sensitising buyers and by improving capacities of customs and other enforcement authorities. However, it would fall well short of achieving the general objective set out in Section 5 (cf. Objectives tree).

Efficiency: Apart from the cost of launching and running such awareness campaigns and training actions, no other expense is foreseen as the measure would not create any obligations. The costs of awareness raising campaigns and capacity building actions would be moderate compared to their expected impact. As an example, an awareness-raising campaign that was organised in 2011 for cash controls ([informing travellers entering or leaving the EU with €10,000 or more of the need to declare it](#)) cost around €500,000 and reached an estimated number of 147 million people. It included adverts in in-flight magazines; alternative advertising in airports, a video clip on in-flight screens and on airport screens, online banners on Tripadvisor, embassy, travel agency and airport websites, posters and displays at customs desks, airports, railway stations and ports and distribution of leaflets in airports and embassies. The campaign was organised in cooperation with the Member States.

Coherence: This option would not dissuade suppliers of the illicit market, who would continue to bring illicit cultural goods into the Union as long as they consider it a profitable market. However it would sensitise buyers, except for those who purchase cultural goods for reasons other than social prestige. It may also be noted that training and capacity building

⁸² CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. CITES was drafted as a result of a resolution adopted in 1963 at a meeting of members of IUCN (The World Conservation Union). The text of the Convention was agreed at a meeting of representatives of 80 countries in Washington, D.C., on 3 March 1973, and on 1 July 1975 CITES entered in force. CITES has 183 members (182 countries and the EU).

⁸³ The Kimberley Process Certification Scheme (KPCS) is the process established in 2003 to prevent "conflict diamonds" from entering the mainstream rough diamond market by United Nations General Assembly Resolution 55/56 following recommendations in the Fowler Report. The Kimberley Process started when Southern African diamond-producing states met in Kimberley, South Africa, in May 2000, to discuss ways to stop the trade in 'conflict diamonds' and ensure that diamond purchases were not financing violence by rebel movements and their allies seeking to undermine legitimate governments.

for customs and other enforcement officers would be more relevant when linked to the enforcement of regulatory measures.

Stakeholders position: In the OPC, this option was favoured mainly by citizens, enterprises and representatives of professional associations. It was not selected among the top three choices by NGOS and the civil society, public authorities or 'other' respondents. This may be explained by the fact that the first three categories of respondents did not foresee any negative economic impact of such awareness campaigns on their business⁸⁴. As indicated above under option A1, organising training for customs and other law enforcement officers was considered highly relevant and supported by most categories of respondents.

Social impact:

This option would render the public better informed about the issue of trafficking in cultural goods and, hopefully, influence attitudes of certain buyers, making them more aware of indirect consequences of acquiring unprovenanced or insufficiently provenanced artefacts.

Economic impact:

This option would not be expected to have any particular trade and economic impact.

OPTIONS	Effectiveness	Efficiency	Coherence
A1 - Endorsing code of ethics or conduct	1	1	1
A2 – Raising awareness of potential buyers and of customs and other enforcement authorities	2	2	1

7.3. GROUPING B - Regulatory options regarding the appropriate definition of cultural goods

Under all of the options, the delimitation of the material scope of the measure is essential for achieving a level playing field in the EU with regard to importation. This would directly implement the specific objective "establish a common definition of cultural goods in the context of importation" and, in that manner, also contribute to the achievement of the general objective. The achievement of establishing a common definition (objective 1) must be assessed with regard to the protection needed, without impeding legitimate trade.

Social impact:

The social impact of each of the options within this grouping, in particular as regards criminality and terrorism financing, is commensurate to their respective effectiveness in addressing the general objective set out in Chapter 5 (cf. Objectives tree) as specifically assessed below under each of the options.

⁸⁴ To be noted: certain enterprises [also] responded to the OPC as 'individual citizens'.

7.3.1 OPTION B1 - Definitions used in the UNESCO 1970 Convention

Effectiveness: This option would partially achieve the specific objective of establishing a common definition of cultural goods which is proportional to the protection needed without impeding legitimate trade. It would contribute to achieving the general objective set in Section 5 (cf. Objectives tree).

This definition is the most widely known in the world (the UNESCO 1970 Convention currently numbers 131 signatory States, of which 25 are EU Member States). As indicated in Section 2.1, each State may apply its own particular focus for the protection of its cultural heritage.

A weakness in this definition is that it covers cultural property that is *specifically designated as such* by a State, therefore undesignated artefacts, e.g. from illicit excavations, may not be covered. Taking account of this aspect, this option would be only partially effective.

Efficiency: As this definition is the most widely known definition of cultural goods worldwide, its implementation by customs and cultural authorities in the EU should not be problematic. However, applying no age or value limits could result in subjecting a potentially unmanageable number of incoming cultural goods to customs control and, therefore, create high costs for operators and public administrations alike.

Coherence: Considering that the source countries are third countries, an international definition such as that in the UNESCO 1970 Convention would be a coherent and obvious choice.

Proportionality: Applying this definition without additional age or value limits could hamper international trade in goods.

Stakeholders position: Although the question was not directly put in the OPC, several respondents have recommended the choice of the UNESCO 1970 Convention definition.

Economic impact: This option refers to a very wide scope of application, which, if not otherwise limited, could have a negative impact on trade. The same would apply from the point of view of impact on administrations: depending on the option selected for documentary requirements, customs could be called to control a very large number of shipments and competent cultural authorities could be called to examine a great number of applications for import licences.

7.3.2 OPTION B2 - Definitions used in the UNIDROIT 1995 Convention

Effectiveness: This option would partially achieve the specific objective of establishing a common definition of cultural goods which is proportional to the protection needed without impeding legitimate trade. It would contribute to the achievement of the general objective set out in Section 5 (cf. Objectives tree).

The UNIDROIT 1995 Convention definition has the same advantages as the UNESCO 1970 Convention definition, **without the disadvantage of covering only the cultural heritage 'specifically designated as such' by the signatory States**, i.e. it can cover cultural goods from clandestine excavations or thefts of which the source country may be unaware. By covering the full range, this option would be highly effective.

Efficiency: Same as for option B1.

Coherence: same as for option B1.

Proportionality: While this option addresses an important gap compared to option B1, applying it without any age or value limit would have a similar effect as option B1.

Stakeholders position: The support for the definition in UNESCO 1970 expressed in the OPC may be considered as equally relevant for the UNIDROIT 1995 definition.

Economic impact: Similar to option B1.

7.3.3 OPTION B3 - Definitions used in Regulation (EC) No 116/2009 on the export of cultural goods

Effectiveness: This option would partially achieve the specific objective of establishing a common definition of cultural goods which is proportional to the protection needed without impeding legitimate trade. It would contribute to the achievement of the general objective set out in Section 5 (cf. Objectives tree).

As this definition is specifically designed for exports from the EU, its relevance on the import side may be questionable. This is because the specific criteria used for EU exports can be very different from those used by source countries in protecting their cultural heritage in accordance with the UNESCO 1970 Convention.

Efficiency: Competent authorities in the Member States are familiar with the types of objects in the listed categories and this is an advantage. However, the minimum age requirements (e.g. 50 years of age is required for works of art) would result in a high number of imported articles falling within the scope of this initiative. This would imply a high burden for customs, cultural authorities and importers in terms of human resources, expertise and compliance costs.

Coherence: Although a known frame of reference for authorities and traders in the EU, this definition stemming from EU legislation may differ from the legislation of source countries whose cultural heritage this initiative is expected to protect.

Proportionality: While the minimum age and value limits narrow down the material scope of the Regulation, this option may not a priori be adapted to the needs of source countries whose cultural heritage this initiative is expected to protect.

Stakeholders position: Overall, Member States and EU exporters consider the definition satisfactory on the export side. The minimum age limits of the Regulation are considered acceptable by EU stakeholders, while the minimum value limits have been identified as problematic (e.g. only paintings valued more than € 150,000 are within the scope of the Regulation⁸⁵) by certain Member States and operators⁸⁶.

In the OPC, respondents generally considered that age limits are relevant also on the import side. Market value was favoured by businesses as a criterion to exclude low value cultural goods from the scope of the initiative.

Economic impact: Similar to option B1 and B2.

7.3.4 OPTION B4 - Definition used in US legislation on the import of cultural goods (CPIA)

Effectiveness: This option would partially achieve the specific objective of establishing a common definition of cultural goods in the context of importation which is proportional to

⁸⁵ Especially problematic when an icon is considered a 'painting': only very few icons can attain that value.

⁸⁶ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods. COM(2015) 144 final
See Annex 9

the protection needed, without impeding legitimate trade. It would also contribute to the achievement of the general objective set out in Section 5 (cf. Objectives tree). Although it sets no minimum value limits, the CPIA provides for a minimum limit of 250 years of age and only covers material of archaeological and ethnological interest.

While such a narrow definition of cultural goods would protect the archaeological heritage of countries affected by armed conflict and terrorism, for example in the Middle East, it would not provide a deterrent to illicit trade in other cultural goods (rare manuscripts and incunabula, old books, documents of special interest, old maps, pieces of furniture, etc.). In this respect, this option would fall short of achieving the general objective set out in Section 5.

Efficiency: in view of the very narrow scope of the definition (both in terms of type of cultural goods and of minimum age), the burden on customs and cultural administrations and on EU operators would be limited relative to the protection this option would achieve in relation to countries whose archaeological heritage is endangered by armed conflict and terrorism.

Coherence: The restrictive definition of this option would not seem to be fully coherent with the general objective set out in section 5 (cf. Objectives tree).

Proportionality: For the same reason, this option would be proportional to the objective of addressing imports of cultural goods currently at very high risk. However, a potentially significant portion of illicit trade would be neglected.

Stakeholders position: Most respondents to the OPC favoured a focus on cultural goods endangered by armed conflicts and natural disasters.

Economic impact: The very narrow scope of this definition would also imply a low effect on the international trade in cultural goods. Equally, the very narrow typology of goods concerned would mean a limited operational burden for customs and competent authorities alike.

7.3.5 OPTION B5 – A wide typology of goods, narrowed down by an age threshold

Effectiveness: This option would achieve the specific objective of establishing a common definition of cultural goods in the context of importation, which is proportional to the protection needed, without impeding legitimate trade. It would also contribute to the achievement of the general objective set out in Section 5 (cf. Objectives tree). As indicated in Section 3.1.1, the total value of EU imports of cultural goods may be roughly estimated in the order of €3.7 billion annually. By combining the wide typology of cultural goods of the UNIDROIT 1995 Convention definition (same as in the UNESCO 1970 Convention definition but including goods not specifically designated by States) together with a rather high minimum age threshold the scope of cultural goods covered by this option would exclude an important volume of less sensitive goods that would otherwise fall within the scope of the definition. By allowing for flexibility in the determination of the minimum age threshold, this option would be also effective in taking account of changing profiles of trafficking in cultural goods.

In this way, this option would go a long way towards achieving the general objective set out in Section 5 (cf. Objectives tree).

Efficiency: By focussing on goods with a relatively high age limit, this option would *de facto* exclude entire categories of non-sensitive cultural goods for instance, all those which are

products of relatively recent technology or societal development (e.g. motor cars; photographic or cinematographic archives; postage or revenue stamps). This would substantially alleviate operational costs for administrations and compliance costs for operators on the art market.

Coherence: Setting a high but adaptable minimum age limit would be coherent with the aim of protecting endangered heritage from third countries, in particular cultural goods from ancient civilisations but also for more recent ones, and at the same time would take account of changing circumstances and profiles in trafficking.

Proportionality: As previously mentioned in Section 6, this option is positioned in between option B2, which has the widest scope of all definitions, and option B4, which has the narrowest. It strikes a proper balance, proportional to the objectives of this initiative.

Stakeholders position: While this specific combination was not presented to participants in the OPC, respondents considered the criterion of age particularly relevant.

Economic impact: Introducing an across the board age threshold in the definition should result in a corresponding limitation of the effect on trade. Changes to the age threshold could be easily introduced taking account of any adverse effects on legitimate trade as well as of changing circumstances in the profiles of illicit trade in cultural goods. Operational costs for customs and cultural authorities are also expected to be limited.

OPTIONS	Effectiveness	Efficiency	Coherence	Proportionality
Option B1 - Definitions used in the UNESCO 1970 Convention	2	1	2	1
Option B2 - Definitions used in the UNIDROIT 1995 Convention	3	1	2	1
Option B3 – Definitions used in Regulation (EC) No 116/2009	1	2	1	1
Option B4 - Definitions used in the US legislation	1	3	1	2
Option B5 – A wide typology narrowed-down by an age threshold	3	3	3	3

7.4. GROUPING C - Regulatory options regarding the documentation needed to certify the licit nature of the goods

Under all of the following options, the determination of the documentation needed to certify the licit nature of the goods would contribute to implementing the Specific Objectives No 2, 3 and 4 as defined in Section 5 (cf. Objectives tree).

The Commission addressed a questionnaire⁸⁷ to the Member States' customs and cultural authorities in an attempt to quantify the costs⁸⁸ of carrying out the various controls and issuing authorisations as per each option in Grouping C. While some Member States have sent estimates of the time needed to accomplish certain steps and formalities, the majority of Member States declared unable to provide any such estimates. The variety of capacities required regarding different types of cultural goods is one of the difficulties mentioned in providing estimates⁸⁹.

With regard to the costs for operators, an idea can be had from the implementation of a similar scheme, namely, the import/export certification of endangered fauna and flora under the CITES Convention⁹⁰. In this case, as an example, the UK applies a fee of £59 in the case of import permits or export permits, and a fee of £47 in the case of re-export certificates. An additional sum of £29 is due in cases of applications for multiple certificates (£29 for every 100 applications for permits or certificates). The permits and certificates are usually delivered within 15 days from submitting the relevant applications to UK authorities.

Social impact:

The social impact of each of the options within this grouping, in particular as regards criminality and terrorism financing, is commensurate to their respective effectiveness in addressing the general objective set out in Chapter 5 as specifically assessed below under each of the options.

7.4.1 OPTION C1 - Requirement to present, where applicable, a copy of the export certificate issued in the source country

Effectiveness: The requirement to present a valid export certificate issued by the competent authorities of the third country would help preserve its cultural heritage and also – because this option would be reserved for third countries-signatories of the 1970 UNESCO Convention – encourage the countries which have not yet done so to sign and ratify the Convention and establish export certification systems, as required by its Article 6. This would improve their capacity to deal with risks to their cultural heritage.

This option would reduce the number of illicit cultural goods entering the EU. However, it would cover only the cultural goods designated as such by the third countries that would submit a request to the EU to control export licences whenever a cultural good is exported to the EU. It would have no effect: on cultural items that have been stolen or never registered as national treasures and declared under a false origin; on cultural goods from third countries which are not signatories of the 1970 UNESCO Convention or which are signatories but have not yet established export certification systems; and on cultural goods from third countries which have not requested (yet) the assistance of EU customs at the stage of importation.

The presentation of an export certificate would create a *prima facie* presumption that the export of the cultural good has been in accordance with the third country's laws and regulations. In this way, it would support the work of EU customs, compared to the current

⁸⁷ See Annex 4.

⁸⁸ Following on the "Standard Cost Model" method. See Annex 5.

⁸⁹ e.g. ranging "from inspection of coins found in a traveller's luggage to a painting or other good for which special atmospheric conservation conditions have to be maintained or specific protocols for the opening of the packaging to be followed"

⁹⁰ As implemented in the EU by Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein and by Commission Regulation (EC) No 865/2006(d) laying down detailed rules concerning the implementation of that Council Regulation

situation where customs bear the burden of proof that the cultural good being imported may be illicitly exported from a source country.

Therefore, overall this option would only be partially effective in achieving the general objective and Specific Objectives No 2, 3 and 4 set out in Section 5 (Objectives tree).

Efficiency: While customs administrations routinely check certificates at import for a variety of other reasons and goods (such requirements, e.g. compliance with rules of origin, sanitary and phytosanitary rules, etc., are integrated in the automated customs tariff system⁹¹), the implementation of this option would require putting in place a system of bilateral administrative cooperation agreements between the EU and third countries. This would imply a considerable amount of time and effort at EU level to introduce and implement.

In principle, there would be no additional cost for businesses since, in any case, businesses need to comply with the source country's laws and regulations, including with the requirement for the exporter to obtain and provide an export certificate.

Coherence: This option is coherent with the UNESCO 1970 Convention and promotes accession of countries to it; it encourages them to establish control measures (in this case: export authorisation systems) and to use the standardised form of the Model Export Certificate.

Proportionality: This option would imply a relatively light burden for enterprises and authorities but would seem to be only partially fit for purpose relative to the objectives sought.

Stakeholder's position: This option was opposed by 38% of the enterprise category but favoured by 47% of interest representatives (art market and museum associations) and was clearly supported by public authorities, NGOs and civil society and private citizens.

Economic impact:

This option is not expected to have a significant impact on operators, as it does not imply new compliance costs. From the point of view of administrative costs, as more and more source countries would join the scheme, with varying categories of cultural goods for which they would wish the Union to control certificates at its external border, the cost in terms of human resources to manage the system would increase. This would be due both to the increase of cultural goods to be checked and also to the increasing complexity of the relevant legal provisions.

7.4.2 OPTION C2 - Requirement to submit an importer's statement for all goods falling within the scope

Effectiveness: This option would provide vital documentary evidence of the existence of the cultural good, of the person who imported it, and of the date and point of entry in the EU. This information could be used to better develop risk profiles and risk management of the relevant trade flows.

The signed statement would engage the liability of the importers for any untrue or inaccurate statements they make to the Member State authorities about the cultural good and its provenance, including statements contained in the accompanying standardised description document (Object ID standard).

⁹¹ TARIC system.

As a result, importers in the EU would become more diligent when they purchase cultural goods from third countries, more careful in choosing their suppliers, favouring suppliers who are able to provide the required information on provenance. Better traceability and transparency might also increase the market value of the goods. Better traceability could also make objects better known to researchers, academics and scientists.

However, this option would not fully achieve the general objective and specific objectives 2, 3 and 4 set out in Section 5 (Objectives tree) as it would not offer the high degree of scrutiny that is required in respect of particularly endangered cultural objects such as archaeological items.

Efficiency: The cost of this option for operators is considered minimal, as both documents – the signed statement as well as the Object ID form – would be in a standardised form and easy to download and complete. The information to be provided in the accompanying document is considered as the minimum that any diligent importer should know about objects they purchase from foreign countries. In practice, it would hardly require anymore efforts from market operators than the effective implementation of codes of ethics or conduct as described in option A1. The operational costs for customs authorities would not be significant. However this assessment does not include the costs of establishing and maintaining a searchable database containing the statements and Object ID forms submitted by importers. Such a step ahead could be decided at a later stage by implementing act following an ad hoc study.

Coherence: The coherence of this option in the context of efforts to prevent and combat trafficking in cultural goods is particularly evident, since it reinforces the monitoring and traceability of the whole range of cultural goods and their trade flows – an element identified as indispensable by UNESCO in safeguarding cultural heritage.

Proportionality: By relying on importer knowledge and standardised documentation to certify the legal provenance of the goods, this option would contribute significantly to the achievement of the objectives pursued. However, it would fall short of fully addressing the case of endangered goods.

Stakeholder's position: Enterprises (28%) and interest representatives (31%) slightly favoured this option, while NGOs and civil society representatives (75%) and public authorities (53%) considered it not appropriate. However, as self-certification is a relatively new idea in this domain, it is possible that not all the implications of this option were considered and understood by the respondents⁹².

Economic impact:

This option has no particular impact on diligent market operators, who routinely require the minimum amount of information necessary to fill in an Object ID form from their client, the exporter. From the point of view of administrative costs, Member States may have to organise simple trainings for their customs officers and competent cultural authorities to familiarise them with applying the provision.

7.4.3 OPTION C3 - Requirement to obtain an import licence for all cultural goods

Effectiveness: Under this policy option, the Union would have complete control over what cultural goods may enter its territory. In practice, the effectiveness of this measure would be

⁹² For example, the reply of the US Customs and Border Protection to the open public consultation contained a question as to the self-certification system, although in the US they apply a similar system where the importer's declaration is called an 'oath'.

conditioned on the quality and the amount of verifiable information submitted to customs and cultural authorities/experts by the applicant.

The effectiveness of this measure is also dependent on the existence of adequate resources to process import authorisation applications. Member States would need specialists who could provide expertise on a large spectrum of cultures, civilisations and objects from certain regions and would have difficulty to process such applications as they would arrive at great numbers. For operators it might mean long waiting periods during which they would be prevented from finding buyers and selling the objects.

Overall, this option would be effective in achieving the general objective and Specific Objectives No 2, 3 and 4 set out in Section 5 (Objectives tree), provided that all necessary resources became available to authorities.

Efficiency: The cost for EU importers is expected to be high as they will have to prepare and submit to the competent authority in the Member State of entry an application for each cultural good they seek to introduce into the EU territory. While the value of certain cultural goods would justify the expense, for others of low value it would make the importation impractical. For the competent authorities who would review the applications it would create a considerable burden because of the potentially large number of application cases and the variety of goods to review from a multitude of source countries. There is the risk of significant delays in processing the applications. Each Member State competent authority will have also to ensure coverage in terms of expertise of many third countries' cultural heritage.

Coherence: The option is coherent with the objectives set in the UNESCO 1970 Convention.

Proportionality: This option would be particularly burdensome, especially if a wide definition of the scope of cultural goods was also selected. It would be disproportional compared to the objectives set.

Stakeholder's position: Enterprise respondents to the OPC considered the option of an import authorisation as not appropriate (44%), predicting it will require significant additional human resources and that compliance costs will significantly increase. On the other hand, 62% of NGOs and civil society respondents and 68% of Member States' public authorities are in favour of import licencing.

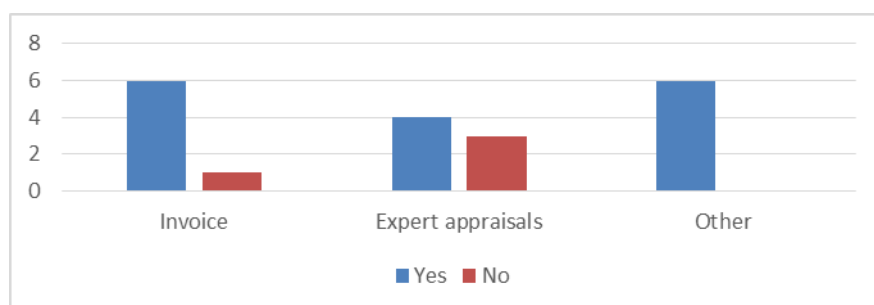
Economic impact:

The cost for operators seeking to import cultural goods is the highest among the examined options. While Member State authorities surveyed indicated a modest fee (20 to 40 EUR) for processing the application (some would do it even free of charge), the importer will still have to bear the cost of preparing an application substantiating the licit provenance of the cultural good. The cost of this may vary depending on the specific objects to be imported and the complexity of each dossier.

With regard to the provenance documents that applicants would be called to submit for an import licence, parallels can be drawn from the implementation of the similar EU system of export licences for EU cultural goods. From replies to a survey conducted in the framework of the study on 'fighting illicit trafficking in cultural goods: analysis of customs issues in the EU' it seems that in general, the cultural competent authorities would allow the applicant to supply any type of documentary evidence that may contribute to establishing licit

provenance. Referring to a standard situation, the Member States indicate the following documentation accompanies the application for a standard export license.

Figure 1 – Documentation accompanying application



Source: Specific survey to the EU Customs and Culture administrations (2016)

The authenticity of the invoice cannot always be verified, hence, supplementary evidence is required. Expert appraisals are more often than not supplied and could provide for important information on the provenance, value, and age of the cultural good. Most applicants also provide other evidence, such as documentation on provenance (e.g. an export/import certificate), photo documentation, declarations by stakeholders, proof of value, contract of loan, a catalogue entry, auction or sale details if the item is sold, proof of importation, shipping documentation, customs return. It can be deduced from this practical experience that documentary requirements are flexible.

From the point of view of costs for Member States administrations, there might be some additional expenses involved in ensuring the services of specialists with expertise in a large number of source countries' cultural heritage. The same authorities who are currently competent to issue EU export licences are expected to be in charge of import licences, so no significant organisational costs in establishing new departments are foreseen in that respect.

7.4.4 OPTION C4 - Requirement to obtain an import licence for archaeological finds and elements of monuments and to submit an importer's statement for other goods

Effectiveness: The option contributes to making importers exercise diligence when they purchase certain cultural goods from third countries, as they will have to demonstrate licit provenance in order to obtain an import licence for cultural goods at high-risk from pillage. For the less sensitive cultural goods, standardised information requirements will facilitate customs controls and validation of entry and improve traceability. Importer's statements still engage the responsibility of operators, who face penalties if the information they provide turns out to be false. As indicated in Section 3.1.1, the value of imports of archaeological objects for which import licencing will be required is only a fraction of the total imports declared under heading 9705, and therefore, represents a very small proportion of the total value of EU imports of cultural goods declared under Chapter 97.

This option would be effective in achieving the general objective, as well as Specific Objectives No 2, 3 and 4 set out in Section 5 (Objectives tree).

Efficiency: Due to its limited specialised scope, this option would still require specialised expertise from issuing authorities but to a much lower extent than subjecting all cultural goods to an import licence (option C3).

Coherence: This policy option is fully coherent with the identified need for a robust response to the increased risk for certain categories of cultural goods which, by their nature, are directly exposed to loss or dispersion, namely archaeological heritage. As it happens, these are also the very cultural goods that are targeted by terrorists and other warring factions for the purposes of financing their activities.

Proportionality: This option would be proportional to the objectives set since it organises import certification requirements in line with the relative risks and is readily adaptable to changing circumstances and trafficking profiles.

Stakeholder's position: While this was not an option presented as such to the participants to the OPC, NGOs and civil society respondents and Member States' public authorities declared to be in favour of import licencing (and not only for the limited part of archaeological finds). Art market enterprises are in principle against import licences, as they foresee significant compliance costs. The limitation of this obligation to only a small fraction of the market could be expected to make them less opposed to such a measure. At the same time the use of importer's statements seemed to be non-acceptable to businesses (see option C2).

Economic impact:

The balanced certification requirements would benefit the licit trade in imported cultural goods, as they would provide for evidence of licit provenance which would ultimately increase the trust of clients in the EU art and antiquities market. The costs linked to import licencing requirements may be considerable, but only for a very small part of the cultural goods market. The cost for customs would be limited for registering the affidavit and Object ID forms, while the cost for competent cultural authorities examining applications and issuing import licences would be significantly lower, compared to that of option C3.

OPTIONS	Effectiveness	Efficiency	Coherence	Proportionality
Option C1 – Presentation of a copy of the export certificate, where applicable in source country	1	1	2	1
Option C2 – Submission of an importer's statement for all goods falling within the scope	2	3	3	2
Option C3 – Obligation to obtain an import licence for all goods falling within the scope	3	0	3	0
Option C4 -	3	3	3	3

Obligation to obtain an import licence for archaeological finds and elements of monuments and to submit an importer's statement for other goods				
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8. COMPARISON OF OPTIONS

The merits of each policy option are assessed within each grouping and are compared on the basis of the following criteria: effectiveness with regard to the objectives set, efficiency in terms of administrative burden/costs for stakeholders, coherence with other related policies and policy instruments and, where appropriate, proportionality.

8.1 Baseline scenario

The performance of the baseline scenario (no change) is graded zero. See table in Section 7.1.

8.2 GROUPING A – Soft law options based on stakeholder goodwill and self-discipline

Option A2 ranks higher than option A1, as it is expected to perform better in terms of effectiveness and efficiency. See table in Section 7.2.

8.3 GROUPING B – Regulatory options regarding the appropriate definition of cultural goods

Option B5 ranks higher than options B1 to B4 as it is expected to cover as wide a typology of goods as options B1 to B3, but without impeding legitimate trade, thanks to its restrictive minimum age limit (same as in option B4). See table in Section 7.3.

8.4 GROUPING C – Regulatory options regarding the documentation needed to certify the licit nature of the goods

Option C4 ranks higher than options C1 to C3, as it ensures protection and modulates requirements for cultural goods by prioritising those which are most at risk. See table in Section 7.4.

8.5 Preferred options

The analysis of the impact of the policy options in Section 7 indicates that, in order to achieve the policy objectives set (see Section 5 – Objectives Tree), a combination of soft-law and regulatory measures presented in Section 6 would be necessary. The following combination is expected to be able to produce the best result in terms of effectiveness, cost/efficiency, coherence and proportionality:

8.5.1 OPTION A2 - Raising awareness of potential buyers and of customs and other enforcement authorities

Option A2 is superior to option A1 because it is more effective in promoting due diligence on behalf of businesses and individual buyers, such as tourists and travellers; as shown from previous experience, it is relatively inexpensive to implement; and it is more coherent with the policies and objectives pursued. This option would particularly achieve the Specific Objective No 5.

8.5.2 OPTION B5 - Wide typology of UNIDROIT 1995 definition narrowed-down by an age threshold

The UNIDROIT 1995 Convention definition achieves Specific Objective No 1 better than the definition used in Regulation (EC) No 116/2009 considering that the issue at present is trade with third countries which are more familiar with cultural goods definitions found in international Conventions. The UNIDROIT 1995 Convention definition is also better than the definition in UNESCO 1970 Convention because, while identical on categories of goods, UNIDROIT 1995 includes cultural goods that have not yet been found and therefore, have not yet been **designated by States as cultural property**. These happen to be the cultural goods at high-risk from pillage, i.e. endangered heritage.

However, the UNIDROIT 1995 definition is very wide and might create problems for day-to-day trade. As previously stated, Objective No 1 requires the establishment of a common definition, which would cover the largest possible typology of goods, without at the same time imposing excessive restrictions on legitimate trade. To overcome this drawback, inspiration could be drawn from US legislation (CPIA), which relies on a minimum age threshold of 250 years.

The merit of Option B5 is that it moderates the burden likely to result for businesses and administrations alike from the very wide scope of option B3 by introducing an additional criterion inspired by option B4, allowing to put the focus on those objects most at risk.

8.5.3 OPTION C4 - Requirement to obtain an import licence for archaeological finds and elements of monuments and to submit an importer's statement for other goods

The merit of Option C4 is that it moderates the burden that would result for businesses and Member States administrations alike from a requirement of import licences across the board (option C3) by resorting, for less sensitive goods, to the less burdensome requirement of an importer's statement (option C2).

This option would achieve Specific Objectives No 2, 3 and 4.

8.6 Conclusion

It follows that the preferred option is a combination of regulatory and non-regulatory measures.

On the regulatory side, with regard to the definition of the scope to be covered, option B5 is the preferred option. This would be combined with regulatory option C4, which is the preferred option as regards the documentation needed to certify the licit nature of the goods.

The implementation of the regulatory options B5 and C4 could be underpinned by implementing option A2, in order to increase the involvement of stakeholders through awareness raising and capacity building.

The combination of the three options could be expected to have a more powerful overall impact in relation to the five specific objectives as well as the general objective set out in Section 5, compared to the results shown above, where each option is considered in isolation (e.g. option A2).

9. MONITORING AND EVALUATION

9.1 Operational objectives

The following two operational objectives are set:

- A. Collection of factual data on incoming trade flows in archaeological objects and elements of monuments that have been dismembered, as well as for other cultural goods within the scope of the regulatory measure
- B. Assessing the performance of certification requirements and soft-law measures

9.2 Monitoring indicators

The Commission would monitor the performance of the legal instrument and its implementing provisions in close cooperation with the Member States. Monitoring in a continuous and systematic way would allow identifying whether the policy proposal is applied as expected and addressing implementation problems in a timely manner.

Collection of factual data by the Member States will provide the basis for the future evaluation of the Regulation and will be guided by the following monitoring indicators:

- statistical information to the Commission on importer's statements registered;
- controls carried out in cases where an importer's statement was made and there were doubts as to its accuracy;
- numbers of import licence applications submitted and numbers of those refused;
- relevant statistical information on cultural goods trade flows (e.g. countries from where cultural goods are mostly dispatched to the EU);
- numbers of cases where cultural goods have been detained for further controls, including expertise; and
- penalties established and imposed by the Member States.

The development in the future⁹³ of appropriate subdivisions in the customs nomenclature will permit to monitor more accurately trade flows and to collect more specific statistical data on the number and kind of cultural goods that are entering the Union's customs territory.

An evaluation report would be prepared by the Commission on the basis of information provided by the Member States and submitted to the European Parliament and the Council five years after the entry into force of the Regulation and every five years thereafter. The

⁹³ First at EU tariff nomenclature level by creating appropriate TARIC subdivisions for the purposes of applying EU customs measures and later on, at international level, by the WCO which has clearly stated their intention to amend Chapter 97 of the Harmonised System and create in it more subdivisions.

evaluation of the Regulation should assess the extent to which the objectives have been met. The evaluation results could be communicated to other European Institutions in the form of a report.

The performance of soft-law measures will be assessed by *ex post* evaluation of the awareness-raising campaigns and trainings (a standard component of EU-funded actions).

10. GLOSSARY

Al-Qaida	Al-Qaeda, Arabic al-Qa'idah ("the Base"), broad-based militant Islamist organization founded by Osama bin Laden in the late 1980s (source: Encyclopædia Britannica)
ANF	Al-Nusrah Front
CBP	US Customs and Border Protection
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CN	The Combined Nomenclature (CN) is a method for designating goods and merchandise which was established to meet, at one and the same time, the requirements both of the Common Customs Tariff and of the external trade statistics of the Community
CPIA	Convention on Cultural Property Implementation Act, representing the US implementation of the 1970 UNESCO convention
CPTA	Federal Act on the International Transfer of Cultural Property, representing the Swiss implementation of the 1970 UNESCO Convention
CPTO	Cultural Property Transfer Ordinance, Ordinance on the International Transfer of Cultural Property
Cultural goods	Throughout the text, 'cultural goods' is used interchangeably with other terms 'cultural property', 'cultural objects', 'antiquities', 'artefacts', 'national treasures', etc. according to the context. In all cases it concerns objects which are considered of importance for archaeology, prehistory, history, literature, art or science. The term 'cultural goods', however, is preferred for use in an eventual legislative act, as it is the one used in existing EU legislation (Regulation (EC) No 116/2009 on the export of cultural goods).
Due diligence	The requirement that every endeavour is made to establish the facts of a case before deciding a course of action, particularly in identifying the source and history of an item offered for acquisition or use before acquiring it.
EUROPOL	European Police Office

Export	Export is to be understood in this context as the exit of cultural goods from the territory of a third country, including cases in violation of the third country's laws.
FATF	Financial Action Task Force
GAO	United States Government Accountability Office
Hague Convention 1954	Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954
HMRC	Her Majesty's Revenue and Customs, UK Government
ICOM	International Council of Museums
ICPRCP	UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation
IEG	INTERPOL Expert Group on Stolen Cultural Property
Illicit trade	illicit trade is to be understood in this context as the illegal export of cultural goods, i.e. the export of cultural goods from a third country in violation of its national laws, with the intention to import those goods in the territory of the European Union.
Implementing Act	Instrument the European Commission may adopt on the basis of Article 291 TFEU in order to ensure the implementation of EU law
Import	Import is to be understood in this context as the entry of cultural goods into the territory of the EU, including cases of smuggling.
INTERPOL	International Criminal Police Organization
IP-address spoofing	Or IP spoofing is an impersonation of a user, device or client on the Internet. It's often used during a cyber-attack to disguise the source of attack traffic
ISIL	Islamic State of Iraq and the Levant (ISIL)
Kimberley Process (KP)	Joint governments, industry and civil society initiative to stem the flow of conflict diamonds – rough diamonds used by rebel movements to finance wars against legitimate governments
Object ID (Object ID Standard)	International standard for describing cultural objects
OPC	EU Open Public Stakeholder Consultation
Provenance	The full history and ownership of an item from the time of its discovery or creation to the present day, from which authenticity and ownership are determined.
Source country	Source country is to be understood in the present context as the third country where the cultural good was created or discovered and where it was lawfully located before export to the EU
TARIC	Integrated Tariff of the European Union

TEFAF	the European Fine Art Fair
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Third country	All countries which are not members of the European Union.
Traceability	The ability to establish the provenance of a cultural good.
UAE	United Arab Emirates
UCC	Union Customs Code
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNESCO Convention 1970	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
UNIDROIT Convention 1995	UNIDROIT convention on stolen or illegally exported cultural objects
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
WCO	World Customs Organization

11. WHO IS AFFECTED BY THE PROBLEM AND HOW

On the one hand, trafficking in cultural goods provides criminals, warring factions and terrorists with means to finance and continue their activities. It promotes crime – the goods arrive at their market destination with a heavy crime record - and thus it has, indirectly, a negative impact on society and public order in the source and transit countries, as well as in the countries of destination.

On the other hand, while the absence of any effective deterrents to the import of illicit cultural goods in the EU allows impoverished local populations in the source countries to supplement their meagre income with the small amounts of money paid to them by the traffickers and middlemen, the problem of illicit trade affects most directly and negatively the citizens of those source countries. The latter indeed lose part of their cultural identity and the potential to gain in future a more sustainable income by investing in the development of cultural tourism.

The absence of regulatory requirements and effective deterrents (penalties) makes the purchase of artefacts and antiquities easier for buyers in Europe, although the illicit character of the goods exposes such buyers to the risk of paying significant amounts of money for copies or fakes without having any legal recourse to obtain compensation. It also limits costs to traders, which explains their opposition to any new import measures, as expressed in the Open Public Consultation.

The loss of cultural heritage also deprives human society in general from its history. Illicit excavation and sale of the individual finds deprives archaeologists, scientists and historians

from the chance to study the objects and learn about the lives of ancient civilisations, an opportunity missed when the contextual link with the site is lost.