# The Intensity of EU Regulation with Regards to Cultural Goods

Marie-Sophie de Clippele and
Eadaoin Ni Chaoimh*

## Résumé – L'intensité des régulations européennes en matière de biens culturels

*Suite à la création du marché commun et à la suppression des frontières internes de l'Union européenne, la protection nationale par les États membres de leur patrimoine culturel risquait d'être compromise. Le Conseil a répondu à l'inquiétude des États membres en adoptant des règles européennes protectrices, telles que la Directive 93/7 sur le retour des biens culturels et le Règlement 116/2009 sur leur exportation. Partant du concept d'« intensité régulatoire », défini dans une première section, cet article vise à mesurer l'impact de ces mesures européennes sur l'autonomie régulatoire nationale et sur les acteurs privés du marché de l'art européen. Le résultat livre un portrait varié et complexe. Non seulement différents éléments d'une seule mesure législative peuvent déclencher différents degrés d'intensité, mais la notion d'intensité régulatoire met aussi en exergue l'écart entre l'intensité juridique d'une mesure et son effectivité en pratique. Par ailleurs, en examinant les effets de la législation sur deux destinataires poursuivant potentiellement des buts opposés, notre analyse met en lumière le juste équilibre opéré entre les intérêts privés et les intérêts des États membres. Ce juste équilibre se trouve au cœur du marché intérieur. Enfin, nous évaluons l'intensité régulatoire de la Proposition d'amendement de la Directive 93/7 dans la mesure où son adoption pourrait modifier la balance des intérêts. D'une part, en prorogeant la définition des trésors nationaux compris à l'article 36 du TFUE aux entités nationales et en renforçant les procédures de retour, la Proposition apparaît plus proche des demandes des États membres, au détriment du marché de l'art. D'autre part, la Proposition confirme en même temps que la portée des régulations réalisées sur la base de l'article 36 TFUE sera toujours soumise au respect de la libre circulation des biens. En améliorant l'effectivité de la Directive 93/7 tout en maintenant*

* Barreau de Bruxelles / Université Saint-Louis–Bruxelles.

*un juste équilibre entre les différents intérêts, la révision proposée s'inscrit dans la même direction.*


## Abstract

*The suppression of internal borders throughout the EU threatened to undermine national protection systems for cultural heritage. In response, the Council adopted protective EU rules, including Directive 93/7 on the return of cultural goods and Regulation 116/209 on their export. Using the concept of 'regulatory intensity', which is first defined, this paper explores the impact of these measures on national regulatory autonomy and on private parties operating in the EU art market. The result paints a varied and complex picture. Not only can different degrees of intensity co-exist within a single legislative act, but the notion of regulatory intensity also highlights the gaps that can arise between the legal intensity of a measure and its effectiveness in practice. Furthermore, by examining the effects of legislation on two addressees with potentially opposing aims, our analysis sheds light on the balance struck between private and Member State interests, a dynamic that goes to the core of the internal market. Finally, we assess the regulatory intensity of the Proposal to amend Directive 93/7 and the extent to which its adoption could alter this balance. On the one hand, by deferring to national definitions of national treasures under Article 36 TFEU and reinforcing the returns procedure, the Proposal may appear to respond more closely to Member State concerns, at the expense of the art market. Yet it also confirms that the scope to regulate under Article 36 TFEU will always be subject to the right to free movement of goods. As such, by improving the effectiveness of Directive 93/7 while maintaining an appropriate balance between different interests, the proposed revision seems to take a step in the right direction.*


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## Introduction

The drive to create the common market and suppress the internal borders of the European Union (hereinafter the EU) threatened to undermine Member States' national protection systems for cultural heritage and thereby public policies aiming at protecting cultural heritage.[1] Adoption of protective measures at EU level has therefore been necessary to prevent increasing illicit trafficking of cultural goods across borders. The latter challenge was and remains considerable, having the ignominious distinction of being among the biggest criminal trades, together with drugs and arms.[2] Despite the absence of data measuring the illegal trade in cultural goods,[3] the scale of the phenomenon is beyond doubt and has seen both the EU and international community[4] responding with what could only be described as a mosaic of solutions. At EU level, attempts to control the movement of cultural goods both within and outside its territory have resulted in Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (hereinafter the Directive) and Council Regulation (EC) No. 116/2009 on the export of cultural goods (hereinafter the Regulation). Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is also relevant as it governs the capacity of private owners of cultural goods to seek their recovery across borders.

The above mentioned Directive and Regulation form the basis for this Paper's analysis of regulatory intensity in the field of cultural goods. 'Regulatory intensity' is a potentially expansive notion that purports to measure the extent to which behaviour is or can be conditioned by regulation.[5] The specific definition of regulatory intensity adopted in this contribution is described in Section one below, together with the factors that can influence its varying degrees. Section two outlines the material scope of the Directive and Regulation before an attempt is made in Section three to apply theory to practice by assessing the regulatory intensity of this legislation. An overall analysis of our findings is presented in

1 F. Desmarais, 'An ordinary crime? Why illicit traffic in cultural goods is a threat to the world's cultural heritage' (2011) 1 *ICOM News*, 14-15.

2 <http://ec.europa.eu/homeaffairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf> accessed 19 September 2013.

3 INTERPOL notes on its website that 'the INTERPOL General Secretariat asks all member countries for statistics on theft of works of art, information on where the thefts took place, and the nature of the stolen objects. On average, we receive 60 replies a year (out of 188 member countries) some of which are incomplete or inform us that no statistics exist'.

4 The Hague Convention for the protection of cultural property in the event of armed conflict, 1954; UNESCO Convention on the means of preventing and prohibiting the illicit import, export and transfer of ownership of cultural property, 1970; UNIDROIT Convention on stolen or illegally exported cultural objects, 1995.

5 The concept of regulatory intensity is central to a collective research at the Institute for European Studies of Saint-Louis University, which is funded by the Communauté française of Belgium – Actions de Recherche Concertées (ARC). This interdisciplinary project examines the question: *Why Regulate? Regulation, Deregulation and the Legitimacy of the European Union: A Legal and Political Analysis*. It aims to provide insight into the regulatory practice of the EU by analysing: (1) the notion of regulatory intensity (2) the factors which justify, determine or shape the regulatory intensity of a specific EU policy and (3) the social legitimacy of that regulatory practice. For an analysis of the related concept of 'normative force' see C. Thiberge (ed.), *La force normative. Naissance d'un concept* (Paris: LGDJ, 2009).

Section four, with particular focus on how the recent Proposal to amend Directive 93/7 could impact on its regulatory intensity.[6]

The Proposal was accepted without any further amendment shortly before publication of this article, with the adoption on 15 May 2014 of Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State. Directive 2014/60/EU recasts the former Directive 93/7 but most of its provisions only come into effect on 19 December 2015.[7]

# 1. Regulatory Intensity: A question of degree

This paper takes the notion of regulatory intensity to mean the effect of formal EU law,[8] that is EU directives and regulations, first on Member States (1.1) and secondly on private persons such as art collectors and dealers (1.2) in the field of cultural goods.

## *1.1. The Intensity of Regulation as felt by the Member States*

### *1.1.1. The Scale of EU Intervention*

Regulatory intensity as felt by the Member States refers to the impact of EU rules on residual national regulatory competence. It is per se high in areas of exclusive EU competence, such as the common commercial policy, since only the EU can adopt binding measures unless Member States are specifically authorized to act. The degree of regulatory intensity is less clear for measures adopted in the context of shared competences where Member States retain capacity to legislate in the absence of EU action. In these areas, the challenge is to identify the existence and extent of this residual national competence, particularly following the enactment of EU legislation, and to decide what happens in the event of conflict.

6 Proposal for a Directive of the European Parliament and the Council on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2013) 311 final).

7 Articles 20 and 21 of Directive 2014/60/EU. Article 21 enumerates the amendments which will only apply as from 19 December 2015: 'Points (2) to (8) of Article 2, Articles 3 and 4, points (1), (2) and (4) to (6) of the first paragraph of Article 5, Article 6, the first and second paragraphs of Article 7, Article 8(2), Article 9, the third and fourth paragraphs of Article 10, and Articles 11 to 16 shall apply from 19 December 2015'.

8 While a limited definition of 'regulation' is taken in this paper, it is understood more broadly in the context of the collective research referred to above i.e. not only as 'command-and-control' regulation through formal law, but as 'the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly defined outcome or outcomes', see J. Black, 'Decentring regulation: understanding the role of regulation and selfregulation in a 'post-regulatory' world' (2001) 54 *Current Legal Problems* 103-147, at 142.





While the latter question is answered relatively easily under the well-known principle of EU supremacy,[9] the first leg regarding whether and when a conflict arises requires an assessment, generally by the Court of Justice of the European Union (hereinafter the Court), of the degree to which the EU rule(s) intervene in the national sphere.[10]

In sum, the level of EU intervention has an inverse relationship with the level of regulatory freedom it leaves to Member States and a direct relationship with its degree of regulatory intensity. In other words, the more complete the EU rule, the less regulatory autonomy Member States retain and the higher the degree of regulatory intensity. A useful illustration of these relationships is partially provided by the 'Scale of Intervention', which was drawn up by the European Convention Working Group on Complementary Competences in its 2002 Report.[11] At the top of its scale of legislative action with the highest degree of intensity is uniform regulation, which completely replaces particular aspects of the national legal orders with a new EU order.[12] This type of regulation generally concerns areas of EU exclusive competence, an example being the common customs tariff. Mutual recognition and interconnection of national legal systems sit at the bottom of the Scale and are associated with areas of EU complementary competences. And in between are the various harmonization models, which feel at home in areas of shared competence and play a central role in regulating the internal market. Together, they encompass the process by which the EU establishes common standards that domestic systems must meet without necessarily reaching the level of uniformity, as illustrated by a brief whistle-stop tour of each.

The model of harmonization[13] with the highest degree of regulatory intensity is complete or exhaustive harmonization, as it removes the scope for independent national action in that field. A measure can institute complete harmonization even if it leaves Member States with a margin of discretion once this margin is completely determined by the

9 See landmark Case C-6/64 *Costa v E.N.E.L.* [1964] ECR 585 and Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

10 The question of when a conflict arises between national and EU law in an area of non-exclusive EU competences is governed more generally by the principle of pre-emption. Although this term is not explicitly used in our Paper, it underlies much of the discussion regarding regulatory intensity. For a detailed discussion of this principle see R. Schütze, 'Supremacy without pre-emption?' (2006) 43 *Common Market Law Review* 1023-1048 and A. Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen' (2010) *The Jean Monnet Working Paper Series* 03/10, 11.

11 CONV 375/1/02 at 13.

12 J. Steiner and L. Woods, *EU Law*, 10th ed. (Oxford: Oxford University Press, 2009), 325.

13 Amedeo, above fn 10, for a discussion of the 'trigger' effect of harmonization models.

measure itself.[14] Minimum harmonization comes next and arises when the EU rule lays down a minimum standard on top of which Member States can set their own higher standards subject to the 'ceiling' set by the Treaty on the Functioning of the European Union (hereinafter TFEU).[15] This harmonization model allows Member States to retain some regulatory freedom and the degree of EU intervention it triggers is clearly lower than that of complete harmonization. However, while it might be criticized for facilitating too much diversity and undermining the object of harmonization, minimum harmonization can significantly reduce Member States' room for manoeuvre given that they can only adopt *stricter* standards.[16] The third model is partial harmonization, which enables EU and national law to coexist via a form of shared competence. Under this model, EU rules cover only part of a specific issue, leaving Member States free to fill in the gaps in areas not directly dealt with at EU level, or that have been expressly left to national law.[17] Unlike minimum harmonization, which enables Member States to replace the EU rule with a stricter national rule, partial harmonization allows them to regulate the element that has not been harmonized. The fourth and final model is optional harmonization, which also allows for the coexistence of EU and national law, with the former regulating cross-border transactions and the latter regulating purely internal situations. The producer can 'opt' to select which rules to follow, although Member States retain the real 'option' to subject internal situations to less demanding requirements than those in the harmonization measure.[18]

The competence retained by Member States under certain models of harmonization must be exercised in compliance with the TFEU. In the context of free movement of goods and as illustrated in Sections three and four, this includes the requirement that recourse to derogations under Article 36 TFEU must not unjustifiably restrict free movement.[19]

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14 See for example Case C-421/00 *Renate Sterbenz* [2003] ECR I-1065.

15 An image first coined by J. Weatherill, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market' in C. Barnard and J. Scott (eds.), *The Law of the Single European Market* (Oxford: Hart Publishing, 2002), 41-73.

16 Member State discretion to regulate can also be limited by the insertion of a 'market access clause' where stricter standards can only apply to national goods – see Arena, above, at 73. See more generally M. Dougan, 'Minimum Harmonisation and the Internal Market' (2000) 37 *Common Market Law Review* 855-885.

17 A. Garde, 'Partial Harmonisation and European Social Policy: A Case Study on the Acquired Rights Directive' (2003-2004) *Cambridge Yearbook of European Law* 173.

18 Arena, above, fn 10.

19 Article 36 TFEU states: 'The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (...) the protection of national treasures possessing artistic, historic or archaeological





### *1.1.2. Identifying the triggers of intensity*

These different types of legislative intervention could be collectively described as the 'triggers of intensity'.[20] However, as will be seen in Section three, establishing which trigger(s) is/are adopted by a particular measure is a complex task, particularly when harmonization model(s) are involved. Unlike the adoption of uniform standards, which is generally specified in the legislative act, the level of harmonization achieved often remains elusive. Indeed, the quest to establish the harmonization model(s) (if any) instituted by a particular measure motivates many requests for preliminary rulings that come before the Court and lies at the heart of our attempt to establish the intensity of regulation in the field of cultural goods. This task is complicated by the fact that different harmonization models can coexist within the same measure and moreover, can be difficult to distinguish from each other e.g. minimum and partial harmonization.[21] Unsurprisingly, the Court regularly provides a separate assessment of the harmonising model adopted by individual provisions.[22] A further layer of complexity can arise following amendments to EU acts, which can change the harmonization model and the degree of regulatory intensity by granting Member States more or less discretion.[23] Different levels of intensity can also exist within particular policy areas, including culture where under Article 6 TFEU the EU only holds supporting competence. Indeed Article 167(5) TFEU specifically precludes the adoption of harmonizing legislation in this field. Yet, as B. de Witte notes, 'this prohibition does not prevent the harmonisation of national laws that regulate cultural activities when such harmonisation is necessary for the smooth functioning of the internal market'.[24] Thus, as we will see below,

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value; (...) Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

20 Arena, above fn 10.

21 *Ibid.*

22 See for example Cases C-387/99 *Commission v Germany* [2004] ECR I-3751 and C-463/01 *Commission v Germany* [2004] ECR I-11705. This coexistence reflects the increasing complexity of EU measures that cover different objectives, and often with multiple legal bases. However, given the 'implicit' nature of many harmonization clauses, it can also cause problems for legal certainty, as noted by Arena, above fn 10.

23 The Court has also confirmed that the EU legislature is fully entitled to amend a legislative act that instituted complete harmonization. See for example C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras. 76-80.

24 See B. de Witte, 'A competence to protect: the pursuit of non-market aims through internal market legislation in The Judiciary' in P. Syrpis (ed.), *The Legislature and the EU Internal Market* (Cambridge: Cambridge University Press, 2012). De Witte highlights Directive 93/7/EEC as a 'surprising facet of the constitutional framework of internal market legislation' where 'non-market policy concerns can be pursued through

Article 114 TFEU on the approximation of laws was used as the legal basis to adopt Directive 93/7 (and amending Directive 2014/60) on the return of cultural goods.

### *1.2. Intensity of Regulation as felt by private persons*

The intensity of regulation on individuals measures the degree to which EU law intervenes not on regulatory autonomy, but on the private sphere. Intervention can arise for example if the EU rule creates, strengthens or limits the freedom of an economic operator or citizen to move, trade, work or employ. It can also follow the imposition of an obligation. The way in which this intervention is felt is subjective and depends on the character of the private person (i.e. a natural or legal person) and the circumstances he or she is in. It can also vary according to external factors such as the degree of harmonization, the content and the addressee(s) of the measure, the extent to which the measure creates directly effective rights for individuals and the application of primary law. Its scope is therefore broad and subject to many variables, and an analysis of its theoretical groundings and practical application is beyond scope of this article.[25] Instead, we use this notion to a more limited end, that being to assess the extent to which the abovementioned legislation and its proposed revision (could) limit the freedom of relevant private parties to engage in the trade of cultural goods.

## 2. Main EU legislative acts governing free movement of cultural goods

Regulatory intensity having been described, we now turn to the content of selected legislation in the field of cultural goods. As outlined earlier, negative integration in the internal market brought about the removal of trade barriers but posed a risk to Member States' cultural heritage. In response, the Council adopted protective EU rules, including Directive 93/7 and Regulation 116/2009.

### *2.1. Directive 93/7/EEC on the return of cultural objects*

Mirroring the philosophy and methodology of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995), the Directive establishes judicial proceedings to facilitate the return of the most important cultural goods unlawfully removed from one Member

internal market legislation even when those concerns cannot be addressed as such by the European Legislature'.

[25] See instead references above at fn 5 and 8.





State to another, otherwise known as the return procedure. Its reach is restricted to return claims inside the European Economic Area.[26]

#### *2.1.1. General scope*

The material scope of the Directive's return procedure is limited to 'items belonging to common categories of cultural object'.[27] These categories are defined in Article 1 as national treasures which are (a) listed in the Annex to the Directive; (b) part of public collections listed in the inventories of museums, archives or libraries' conservation collections; or (c) part of the inventories of ecclesiastical institutions. The Directive does 'not (intend) to define objects which rank as "national treasures" within the meaning of (...) Article 36, but merely categories of object which may be classified as such and may accordingly be covered by the return procedure introduced by this Directive'.[28] Its scope is therefore narrower than a mere synthesis of all national treasures.

The Directive aims to cover return proceedings only and does not preclude Member States from defining their own cultural heritage or providing higher protection in national legislation. Nor does it prevent extension of Member States' individual return obligations by enlarging the categories of cultural goods subject to the Directive or by accepting lower thresholds for classification.[29] Procedures governing the return of cultural goods between private owners also fall outside its scope.[30]

#### National treasures listed in the Annex

This first category comprises objects classified in Member States' legislation as national treasures possessing artistic, historic or archaeological value within the meaning of Article 36 TFEU and – this is a cumulative condition – which are cultural goods listed in the Annex of the Directive. As such, this category contains a national law element (national treasures) and an EU law element (the Annex). Cultural goods listed in the Annex are divided into subcategories according to financial and age thresholds.

The value or financial threshold starts at 'whatever the value'. This means that for certain objects the value is immaterial because it would

[26] EU Member States (except Croatia who is expected to join later) and Lichtenstein, Norway and Iceland.

[27] Preamble of the Directive, at Recital 3.

[28] *Ibid.*

[29] Article 14 of the Directive.

[30] Private owners can initiate recovery proceedings before the court where the cultural good is situated, following rules of international private law such as Regulation 1215/2012.

be too difficult to evaluate (as for objects of archaeological findings) or because the monetary value is low but the artistic or historical interest is very high (archive documents for instance). Other subcategories are separated by variable thresholds, the starting points of which range from EUR 15,000 to EUR 150,000 depending on the cultural good at issue.[31] The assessment of whether the conditions relating to financial value are fulfilled must be made when the return is requested and by reference to its value in the requested Member State. The age threshold completes the financial criterion and covers almost all categories, ranging from 50 to 200 years old as a starting point. Collections and specimens from scientific collections, or collections of historical, paleontological, ethnographic or numismatic interest fall outside the minimal age request but must also have a global value of at least EUR 50,000. Categories of visual arts are subject to a third criterion, which is that the object must not be in the hands of its originator. This protects the originator's right to sell his or her creation on the international market.

### Public collections and inventories of ecclesiastical institutions

The simple fact that a national treasure forms an integral part of the inventory of a public collection or ecclesiastical institution is sufficient for it to be categorized as a cultural object under the Directive and its value and/or age becomes irrelevant. As such, the judicial quality and/or characteristics of the holder appear to suffice in proving the value, giving these cultural goods a *de lege* national treasure status. The notion of public collection is widely defined in the Directive as:

> collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority.[32]

### *2.1.2. Return proceedings: The rules*

A Member State seeking the return of a cultural good via the return procedure must fulfil several conditions. First, the cultural good must have been unlawfully removed from a Member State in breach of its rules on the protection of national treasures, in breach of Regulation

31 The value must be equal or superior to: EUR 15,000 for mosaics, drawings, engravings, photographs, printed maps; EUR 30,000 for water colours, gouaches, pastels; EUR 50,000 for statuary, books, collections, means of transport, other antiquity item not mentioned in the Annex; EUR 150,000 for pictures.

32 Article 1.1 of the Directive.





No. 116/2009 on the export of cultural goods,[33] not returned at the end of a period of lawful temporary removal or in breach of another condition governing such temporary removal.[34] Secondly, the request must seek the material return of the cultural good only, since questions relating to property ownership are outside the scope of the Directive.[35] Finally, the request must be initiated by the Member State from whose territory the cultural object was unlawfully removed against the possessor or holder of the cultural object. The Member State in whose territory the cultural object is located must cooperate and promote consultation between the national authorities.[36] Return proceedings may not be brought more than one year after the requesting Member State becomes aware of the location of the cultural object and of the identity of its possessor or holder[37] and in any case within 30 years of the unlawful removal of the object.[38] Return proceedings only apply to cultural objects unlawfully removed after 1 January 1993. However, Member States can opt to dis-apply this rule of non-retroactivity by accepting return proceedings for cultural goods unlawfully removed before this date.[39] The Directive also provides that a *bona fide* possessor is entitled to fair compensation if due care and attention was exercised in acquiring the object, although national law governs the burden of proof in such cases.[40]

### *2.1.3. Return proceedings: The practice*

Since coming into force on 1 January 1993, only very few cases have been resolved under the Directive. This trend of limited effectiveness

33 Above at 2.2.

34 Article 1.2. of the Directive.

35 A recovery action by a dispossessed owner is separate from the Directive's return proceedings. Regulation 1215/2012 of the European Parliament and Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Article 7.4) operates in parallel with and without prejudice to the Directive and provides for civil recovery proceedings based on ownership at the courts of the place where the object is located other than the residence of the possessor.

36 Several cooperation duties are enumerated in Article 4 of the Directive, such as seeking the object, identifying the possessor and/or holder or taking measures for the preservation of the cultural object.

37 Article 7(1) of the Directive.

38 For public and ecclesiastical collections however, Member States may initiate a request up to 75 years after unlawful removal, which can be extended further where proceedings are not subject to a time limit (such as in France for some classified public cultural goods) or if a bilateral agreement exists between the Member States laying down a period exceeding 75 years, thereby leaving room for enhanced protection.

39 Article 14 of the Directive.

40 Article 9 of the Directive.

is confirmed by national reports submitted to the Commission every three years. For example, between 2004 and 2007 only eight judicial proceedings were initiated under the Directive's purview.[41] The reasons cited for this lack of success are its limited scope (in particular as regards the categories defined in its Annex) and the restrictions on initiating return proceedings, notably the limited time period of one year (below, 2.1.4). Member States have also referred to difficulties in identifying the competent court in other Member States and the financial costs in compensating the *bona fide* possessor.[42] Indeed, Member States with a rule of *bona fide* presumption, such as France and Belgium, clearly favour the possessor, unlike other countries such as the United Kingdom.

Overall, the Directive appears neither to sufficiently deter criminals who target cultural goods nor prevent trafficking in cultural objects of unknown provenance. The Commission together with the Member States therefore decided to explore its revision. In May 2013, following the conclusions of the working group on the return of cultural goods,[43] a public consultation with interested parties[44] and other initiatives,[45] the Commission published its Proposal to recast the Directive under Article 114 TFEU.[46]

#### 2.1.4. *The revised Directive*

The revised Directive aims to strengthen the ability of Member States to secure the return of unlawfully removed cultural objects classified as national treasures and to simplify the EU rules by *inter alia*:

41 Third report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, COM(2009) 408, 30 July 2009, 10-13.

42 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Fourth report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State – COM(2013) 310 final, 7.

43 Comprised of national experts representing the central authorities nominated under the Directive.

44 <http://ec.europa.eu/yourvoice/consultations/2012/index_en.htm for a summary of the replies> last accessed 15 July 2013.

45 See e.g. the study on illicit trafficking in the EU-CECOJI-CNRS-UMR 6224, France at <http://ec.europa.eu/homeaffairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf> or recommendations regarding the European Agenda for Culture and the Work Plan for Culture, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Fourth report on application of Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State – COM(2013) 310 final, 5-6.

46 Above fn 6.





A. extending its scope to cover all cultural objects classified as national treasures under Article 36 TFEU and deleting the Annex;
B. extending the time for authorities of the requesting Member State to check the nature of a removed cultural object from two to five months;
C. extending the time-limit for bringing return proceedings from one to three years after the requesting Member State becomes aware of the location of the cultural object and of the identity of its possessor/holder;
D. indicating common criteria for the concept of 'due care and attention' which will replace the diverse national rules that currently exist and confirm that the possessor bears the burden of proving he was *bona fide* when the cultural object was acquired.[47]

The potential consequences of some of these proposed amendments both on the Member States and on the legal art market are assessed in Section four below.

### 2.2. *Council Regulation No. 116/2009 on the export of cultural goods*[48]

In contrast to the Directive, Regulation 116/2009 governs the external dimension to the circulation of cultural goods for export outside the EU by ensuring uniform controls at the EU's external borders. These controls can relate to cultural goods of a Member State found on its territory or on the territory of another Member State.[49] Their central aim is to tackle 'cultural' forum shopping, whereby traffickers systematically use more liberal Member States for the illicit trade of cultural goods outside the EU.[50]

47 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Fourth report on application of Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State – COM(2013) 310 final, 6.

48 O.J.E.U. 10 Feb. 2009. This Regulation replaces Council Regulation No. 3911/92 of 9 Dec. 1992.

49 E. Cornu and B. Elster, 'Quelle protection pour l'objet d'art lors de sa vente ou de son exportation?' (2000) *Journal des tribunaux* 458.

50 G. Carducci, *La restitution internationale des biens culturels et des objets d'art volés ou illicitement exportés* (Paris: LGDJ, 1997) 100.

### 2.2.1. General Scope

The Regulation lays down a system of export licenses, delivered by competent authorities[51] and which are valid throughout the EU.[52] An export license must be requested and obtained before a cultural good listed in its Annex can be exported outside the EU. It may only be refused if the good is classified as a national treasure by the Member State in accordance with Article 36 TFEU. The Annex provides an exhaustive list of several categories of cultural goods, classified according to age (more than fifty years old) and financial value (from 'whatever the value' to EUR 150,000), similar to the Directive discussed above. However, a Member State can extend its notion of national treasure in line with Article 36 TFEU, to cover cultural goods not included in the Annex because, for example, they do not meet the requisite financial or age threshold. While an export license is not mandatory for these goods under the Regulation, the Member State in question could apply its wider national definition when exporting cultural goods to a third country directly from its own territory.

### 2.2.2. Application of the Regulation

The four evaluation reports on application of the Regulation published since its entry into force[53] illustrate its success, with the total number of standard export licences issued increasing from 16,117 in 2000 to 18,176 in 2010 and a peak of 21,557 standard licences being issued in 2007.[54] Moreover, refusal of export licences is rare (0.3% of all licences issued) and only 473 consignments were found to be in non-compliance with the Regulation between 2000-2010, a very low figure when compared to the total number of licenses issued.

## 3. The Intensity of Regulation in the field of Cultural Goods

Our brief outline of the Directive and Regulation reveals that each contains elements of EU and national law, with varied degrees of success in practice. This next Section assesses their intensity and effectiveness,

51 These are the authorities of the Member State on which territory the cultural good is located in a regular and definitive manner since 1 January 1993. See Notice from Member States, 2012/C72/08 for the list of authorities empowered to issue export licences for cultural goods, published in accordance with Article 3(2) of the Regulation.

52 Regulation Articles 1 and 2.

53 COM(2000) 325, 25 May 2000; COM 2005-675, 21 December 2005; COM 2009-408, 20 July 2009; COM(2011) 382 final, 27 June 2011.

54 This increase is not linked to enlargement given the limited licences issued in new Member States.





together with that of the recast Directive, and looks at the balance struck by the level of EU intervention in the field of cultural goods.

## 3.1 Directive 93/7/EEC on the return of cultural goods

### 3.1.1. Regulatory Intensity as regards the Member States

Directive 93/7/EEC was adopted pursuant to Article 100a ECT (now Article 114 TFEU) and concerns the internal market which is a matter of shared competence. National autonomy to regulate in this area and the regulatory intensity of the Directive will therefore depend on the model(s) of harmonization adopted. In the absence of judicial assessment of the matter, these must be gleaned from its provisions and objectives.

The Preamble states that the Directive is the 'first step in establishing cooperation between Member States' and does 'not intend to define objects which rank as national treasures within the meaning of Article 36'. Taken as a whole therefore, it in no way institutes complete harmonization. On the contrary, Recital 5 specifies that its aim is *mutual recognition* of relevant national laws, indicating a level of intensity that is at the bottom of the Scale of Intervention set out in Section 1.1. However, a closer examination of the Directive shows that it covers separate matters, albeit linked, each of which could trigger a different degree of intensity by granting more or less scope for independent national action. These matters are (a) categorizing cultural objects, (b) the procedure for returning unlawfully removed cultural objects and (c) the return obligations of Member States.[55] They are examined separately below.

### Categorizing cultural objects: low degree of regulatory intensity

While the Annex attempts to define items that fall within its scope by referring to characteristics such as age and value, additional elements to be decided by the Member States apply when defining a 'national treasure'.[56] As outlined above, three categories of cultural objects emerge from this 'mixed' approach: national treasures that (i) are listed in the Annex, (ii) form part of public collections and (iii) form part of the inventories of ecclesiastical institutions. The definition of the latter is not harmonized and its scope remains within the exclusive control of the Member States, subject to the limitations in Article 36 TFEU. The first two categories

55 The question of who owns the cultural object after it is returned, although relevant is not harmonized by the Directive and is governed exclusively by national law. Its 'intensity' is therefore not examined.

56 <http://ec.europa.eu/enterprise/policies/single-marketgoods/files/goods/docs/art34-36/new_guide_en.pdf>.

however, are less clear-cut. While Member States are competent to define their national treasures, both categories contain an additional element that is governed by EU law i.e. the Annex, which was drawn up by the EU legislature, and the term 'public collection' which has an EU definition, albeit broad.

These categories are not subject to minimum harmonization, given that Member States cannot, for example, impose stricter standards than what is contained in the Annex. Rather we see a coexistence of EU and national law, where one element of the term 'cultural objects' is subject to common EU rule, while the second, being the concept of national treasures, is not. This indicates a form of partial harmonization with a level of regulatory intensity that is lower than minimum or complete harmonization, given the discretion Member States retain to define one of the constituent elements of their cultural objects. However low regulatory intensity does not mean no regulatory intensity and the process of categorizing cultural objects for the purposes of this Directive does impact on national regulatory autonomy. First, the definition of national treasures remains subject to limitations contained in Article 36 TFEU and must not constitute an unjustified restriction to the free movement of goods, for example by being too broad. In addition, Member States are constrained by the Annex (and to a much lesser degree, the definition of public collections) in that they cannot demand activation of the return procedure for a national treasure not listed therein, unless the requested Member State opts unilaterally to extend its return obligations (see (c) below). Indeed, the European Commission cited the requirement that national treasures must also fall under a category referred to in the Annex as one reason for the Directive's poor effectiveness.[57] This confirms that the intensity of the EU-law element in categorizing cultural objects is higher than what might be presumed at first glance.

## Return procedure – high degree of regulatory intensity

Unlike the classification of cultural objects, harmonization appears to be complete as far as the return procedure is concerned. The Directive states at Article 2 that this procedure *shall* be used to secure the return of unlawfully removed cultural objects via action taken by nationally appointed central authorities, in accordance with specifically enumerated duties to ensure cooperation and promote consultation. Obligatory rules also apply regarding the implementation of this procedure. Specifically, it must be initiated within one year of the requesting Member State's awareness of its location, and Courts are obliged to order the return of

[57] COM(2013) 311 final at 2.





an unlawfully removed cultural object, subject to limited exceptions laid down in the Directive. They must also award a possessor who has exercised 'due care' with 'fair compensation', which the requesting Member State must pay. The Directive does not define these concepts and national law governs the burden of proof, which gives Member States some leeway. However national discretion in this regard does not alter the complete harmonization of the procedure,[58] even if it could limit its effectiveness in practice.

Our analysis points to a high degree of regulatory intensity as far as the procedure is concerned i.e. once a cultural object the return of which is sought falls within the scope of the Directive, Member States must have recourse to it and are bound by its provisions. An initial reading of the Directive's provisions would suggest that they could not for example institute parallel return procedures to retrieve such goods, for example under bilateral agreements.[59] Neither can they circumvent the one-year limitation on instituting procedures or impose additional requirements on the requesting State.

The enhanced uniformity that flows from measures with a high degree of intensity contributes towards correct implementation and is beneficial for legal certainty. On the other hand their inherent rigidity could, ironically, leave them more open to being bypassed, particularly in sensitive areas such as the return of national treasures, traditionally resolved bilaterally. Here, Member States might more readily resort to other methods such as diplomacy to iron out differences, especially if the EU rule is not at the right level of intensity. The Commission, in finding that the short timeframe for initiating return proceedings was a reason for the Directive's limited effectiveness, lends support to this conclusion.[60] So too does the fact that there are such few instances of recourse to its provisions, as testified by the national reports discussed in Section two above. A 2011 judgement by the Belgian Cour de Cassation provides a recent and interesting example of the Directive's limited impact in practice. At issue was a request to apply the return procedure to seek restitution of an object seized as part of a criminal investigation. The request was however dismissed without any analysis by the Court, which concluded, for reasons that are unclear, that it simply did not

[58] Case C-244/00 *Van Doren v Lifestyle Sports* [2003] ECR I-3051.

[59] A more extreme example could be retaliation by a Member State against a refusal to return by instituting a measure having an equivalent effect to a quantitative restriction or justify such action under Article 36 TFEU, as an alternative to instituting the procedure.

[60] Proposed Directive, above, at 2.

apply.[61] The 'high intensity' of the EU rule did not appear to guarantee its effectiveness.

### Return obligations of Member States – medium degree of regulatory intensity

Member States' individual return obligations are subject to minimum harmonization under Article 14 of the Directive and therefore a medium level of regulatory intensity, it being lower than complete but higher than partial harmonization.[62] While they must respect the basic rules set out in the Directive as regards the definition of cultural objects, Member States may extend their return obligations to categories not covered therein, for example where they do not meet the necessary financial or age thresholds. Member States may also cover objects removed before 1 January 1993, notwithstanding the general rule that the Directive shall only apply to cultural objects unlawfully removed on or after this date. They cannot however force other Member States to adopt such stricter return obligations. Neither can they refuse to apply the procedure to return a cultural object that falls within one of the categories in the Directive. As such, the freedom granted under Article 14 is relatively limited.

#### *3.1.2 Impact on Private Persons*

The Directive is primarily addressed to the Member States in that it aims to ensure the return of cultural objects via cooperation between national public authorities. However, given that its objective is to protect and therefore limit the free movement of cultural goods the degree of regulatory intensity felt by private persons, through constraints on their freedom to trade, is high. Typical scenarios include the selling by a professional dealer in Member State A of a national treasure to a buyer who brings it to Member State B without obtaining a national export licence, in breach of the former's export rules. A similar scenario can arise if the original owner of a national treasure brings it from Member State A to Member State B to reach more potential buyers and obtain a higher price, again without obtaining the necessary export licence. Member State A can subsequently issue a return request to Member State B under the Directive. This clearly impacts on the commercial freedom of both the buyer of the national treasure, who has little hope of regaining its material possession, and its seller, who may have difficulty attracting prospective buyers given the fear of repossession. Still, possessors of cultural objects are protected to a certain extent by the right to fair compensation if the good is returned.

[61] Cass., No. P.11.0927.F/1, 15 November 2011.

[62] Arena, above fn 10.





The Annex and its clear thresholds also provide legal certainty to the art market. Finally, private persons can seek redress elsewhere given that the return procedure is intended to take place between Member States without precluding rules on either ownership rights[63] or a parallel procedure for civil recovery of a dispossessed owner.[64] In such cases, individuals are only limited by national rules concerning cultural goods and property.

#### *3.1.3. The Regulatory Intensity of the Recast Directive*

Of the numerous amendments proposed in the recast Directive, two have particular potential to change the intensity of regulation in the field of cultural goods. These are the proposals to remove the Annex, which is currently an integral part of the definition of 'cultural good', and to impose a common EU definition on the concept of 'due care and attention', which will render the possessor of a cultural good whose return is being sought responsible for proving that he is bona fide.

### Categorization of cultural goods: Intensity on Member States is further lowered, with a high impact on private persons

The deletion of both the Annex and the definition of public collections will place the entire categorization process in national hands, leaving Member States relatively free to define their national treasures, within the limits set by Article 36 TFEU. The degree of intensity of the revised Directive for categorising cultural goods as it applies to Member States will therefore be lower than the current Directive, as it moves from partial to no harmonization. However private persons may experience an opposite effect via a higher level of intensity. No longer able to rely on the EU categories under the Annex, they could instead face the daunting task of having to establish, on their own, whether a particular object is a national treasure or not. This task would entail much more legal uncertainty for traders in the art market who could also be at greater risk of breaching national legislation that protects cultural goods. Moreover, the scale of cultural goods that could be subject to the Directive's return procedure is potentially much larger. However, while the term 'national treasures' is not subject to an EU definition, the Court retains the final say when it comes to interpreting primary law, including the application of Article 36 TFEU. As such, it can ultimately decide whether Member States have exceeded their discretion. The Court's role in this regard is discussed in Section four.

[63] See Article 12 of the Directive.

[64] See Regulation 1215/2012 (see also fn 33).

### A uniform regime for the burden of proof: increased intensity

The recast Directive, by proposing a uniform EU definition of the term 'due care and attention', will completely harmonize an important element that is currently in national hands. This change will increase the regulatory intensity on Member States who currently provide for a bona fide presumption in favour of the possessor. It will also increase the regulatory intensity on individuals who previously benefited from this presumption, as their behaviour will henceforth be regulated by the automatic imposition of the burden to prove they took due care and attention.[65]

## *3.2. Regulation 116/2009*

### *3.2.1. Regulatory intensity as felt by Member States*

Regulation 116/2009 was adopted pursuant to Article 133 of the EC Treaty (now Article 207 TFEU), which implements the EU's common commercial policy. It therefore falls under the EU's exclusive competence and Member States are excluded from acting unless specifically authorised otherwise. As such, the regulatory intensity of the Regulation insofar as it applies to the export of cultural goods (that are not national treasures) is automatically high. The Regulation does not however prejudice Member States power under Article 36 TFEU to define their 'national treasures'. It is presumably on this basis that a Member State can refuse to issue an export licence where the requested object is both a cultural good under the Annex *and* covered by national legislation protecting national treasures. Conversely, where the object is a national treasure that is not a cultural good, the Member State can only refuse the export licence if it is being exported directly from its territory. Once it enters the territory of another Member State, the national treasure is subject to the obligation to issue an export licence in accordance with the Regulation. EU rules of high intensity therefore coexist with national rules of low intensity when it comes to the export of national treasures.

65 The criteria in the proposal for interpreting the concept of due care and attention suggest that 'consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the nature of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects, and any other relevant information and documentation which he could reasonably have obtained and whether the possessor consulted accessible agencies or took any other step which a reasonable person would have taken in the circumstances', New article 9 of the Proposed Directive.





### *3.2.2. Regulatory intensity as felt by private persons*

Unlike the Directive, enacted in the context of the internal market where free movement is the rule, the Regulation concerns the export of goods to third countries, which is generally subject to restrictions such as the necessity to make an export declaration. By instituting a transparent regime that allows private persons to easily apply for and obtain a licence to export cultural goods, the Regulation lowers the regulatory intensity on private persons that would otherwise be high. However, despite the large number of licences issued (and limited refusals), the administrative procedure and paperwork has been criticized as limiting the development of a vibrant art market.

## *3.3. Tentative Conclusion*

Our analysis of the impact of relevant legislation on Member States shows a relatively high level of intensity regarding the return procedure and the issuing of export licences co-existing with a low intensity as far as the categorization of cultural objects is concerned. Notwithstanding the demands of subsidiarity, we have also seen that there is no obvious relationship between the intensity of a rule and its effectiveness in practice, at least as far as the Directive is concerned. Against this backdrop, the mixed approach of the recast Directive that proposes to simultaneously increase and decrease its regulatory intensity is unsurprising.

# 4. The revision of the Directive: Towards more effectiveness at all costs?

## *4.1. A mixed approach…*

By seeking to increase the intensity of the return procedure, for example by rendering the possessor automatically responsible for proving he exercised 'due care and attention' under the new EU definition, while at the same time loosening the EU grip on the definition of cultural objects, the Commission consolidates the trend set by the current Directive as regards its overall intensity. The reason for the removal of the Annex lies in the importance Member States attach to their 'national treasures'. This term although never defined, indicates the close relationship between the Member States and their cultural goods. Those with a rich cultural heritage, such as Italy and Greece, support a large definition of national treasures to protect this heritage, while other Member States, such as the United Kingdom and the Netherlands would prefer a flourishing cross-border art market. These different interests explain the absence of a definition, the scope of which falls, in any case, within a national competence.[66] Yet Member States also wish to tackle the problematic and trans-national phenomenon of illicit trafficking in art. They therefore appear to readily accept a higher intensity of EU rules as far as return procedures and obligations are concerned, acknowledging the necessity of increased uniformity at EU level.

### *4.2. … and a mixed reaction*

According to the Commission, its mixed approach is in line with the principle of subsidiarity, which, when applied during the process of revision, found that the simultaneous increasing and decreasing of regulatory intensity on Member States would enhance the overall effectiveness of the Directive.[67] As such, Member States are likely to view the proposals as improving their lot and if adopted, will probably refer to it more frequently in seeking the return of unlawfully removed cultural goods. The same reaction might not however be felt by players in the legal EU art market for whom the removal of the Annex and the imposition of the burden of proving they are '*bona fide* possessors' risk further constraining their freedom to trade.

While the Annex's financial and age thresholds are not very high, detailed nomenclature referring to it currently provides a valuable point of reference for traders in art across the EU. To avoid the negative effects its removal could have on the legal art market and particularly on legal certainty and transparency, Member States should guarantee access to documents identifying cultural objects as national treasures or at least specify categories of national treasures. The amount of administrative paperwork to be completed before leaving one Member State is liable to increase if the recast Directive is adopted but may bear no relation to the importance of a cultural good. This is certainly the case for more protective Member States such as Italy, Spain and Greece that consider almost all cultural goods as national treasures. Thought should also be given to how removal of the Annex would interact with and impact on the Regulation on the export of cultural goods, discussed above. As for the proposed EU rules regarding the burden of proof, the broad definition of national treasures given by some Member States (in Italy all cultural goods are subject to an export license) and the fact that the 'treasure' might not necessarily be recognized as such before leaving its territory, could make it difficult if not impossible to prove the exercise of due care and attention. In reality provenance is not always easy to certify for art objects.

[66] Proposed Directive, COM(2013) 311 final, above, at 7, where the Commission confirms that the EU is not competent for determining what is a national treasure.

[67] *Ibid.*, at 6-7.





It remains to be seen how these proposed rules are implemented in practice and their impact should not be overestimated. On the other hand, an awareness of the effects they could have on the art market is important to ensure a faire balance between public and private interests when establishing new rules.

### *4.3. The 'olive branch' of primary law*

A conclusion that the recast Directive responds primarily to Member States' concerns could be explained by examining the process of revision that preceded its publication. This process started with the creation in 2009 of a 'return of cultural goods' working group, composed of the Member States' central authorities. Its mandate was to identify the main problems posed by the implementation of the Directive and to propose solutions. In an unpublished 2011 Report, the group concluded that revision was necessary to make the Directive more effective and to improve administrative cooperation. The public consultation that followed however reached a very different conclusion.[68] 83% of the replies received were from the private sector and only 22% felt that there was a need to amend the Directive. A revision was nonetheless recommended. Some suspicious minds could surmise that this drive is based more on the unpublished Report of the working group and that the apparent 'imbalance' stems from this bias. However, one small but significant paragraph in the Explanatory Memorandum to the Proposal goes some way to redressing these concerns and as such, is worth quoting in full:

> (…) the possessor would be able to submit evidence in the return proceedings to argue that the requesting State infringed Article 36 of the Treaty when it classified the object as a national treasure. The court in question will then have to make a ruling, where necessary after sending a referral for a preliminary ruling to the Court of Justice of the European Union.[69]

On the one hand, this paragraph does nothing more than set out the law as it has always stood. However, by explicitly reminding possessors that the definition of 'national treasures' can be challenged, the Commission also reminds Member States of the internal market context within which the Directive is enacted, where Article 36 derogates from the fundamental freedom to move goods throughout the EU. By stating in its second sentence that 'Prohibitions and restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States', Article 36 itself articulates the balance to be

[68] A summary of the replies can be found on: <http://ec.europa.eu/yourvoice/consultations/2012/index_en.htm> accessed on 15 July 2013.

[69] COM(2013) 311 final, above, at 9.

struck between its 'low' intensity[70] and the 'high' intensity of right to free movement of goods in Article 34 TFEU.[71] This balancing act is a task that, as the Commission also recalls, falls to the Court, which has repeated in consistent jurisprudence that any limitation to free movement must be interpreted restrictively.[72] However, unlike the rich jurisprudence that applies this reasoning to interpret other derogations in Article 36 TFEU, national treasures have received scant judicial attention to date, mainly because no opportunity to pronounce on the scope of this term has arisen.[73] Perhaps the Commission feels it is time to bring an EU dimension to the search for balance between the public interest of cultural protection and the private interests of traders in the art market, although as Hannah Shield notes, this approach could seem surprising 'because it is politically charged'.[74] Then again, use of the judicial process to support an agenda of EU integration is an old strategy of the Commission that has served it well over the years. For, while it remains to be seen how far the Court will interfere in national discretion to classify cultural goods, it will never allow Article 36 TFEU to undermine the essence of the right to free movement of goods.

To conclude, the regulatory intensity of Directive 93/7 as it impacts on Member States will probably increase over time, particularly if the Proposal to reinforce the returns procedure is adopted. However, only the future can tell whether this higher regulatory intensity will improve its effectiveness in practice. By deferring to Member States' definitions of national treasures while underlining EU control via primary law, the revised Directive seems to take a step in the right direction.

70 The low intensity of Article 36 persists only if no legislation exhaustively harmonising the field has been adopted, since such measures pre-empt Member States ability to rely on Article 36 to justify restrictive national measures – See Case 5/77 *Carlo Tedeschi v Denkavit Commerciale* (1977). However, this principle does not and indeed cannot extend to the definition of national treasure: see above fn 66.

71 Article 34 TFEU states that 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States' and imposes considerable restrictions on national regulatory freedom.

72 This restrictive interpretation was applied to the term 'national treasures' in Case C-7/68 *Commission v Italy* [1968] ECR 617, para. 3, at 430.

73 The sole reference to 'national treasures' in the Court's jurisprudence to date is in Case C-7/68, above fn 72.

74 H. Shield, 'The recovery of unlawfully exported cultural property with the European Union – The European Commission has a plan', 12 September 2013, <http://www.artatlaw.com/latest-articles/the-recovery-of-unlawfully-exported-cultural-property> accessed 29 September 2013.



# Section IV

## Effects of EU Interventions in the Cultural Field from a Politologist Point of View

## Les effets des interventions européennes en matière culturelle d'un point de vue politologique