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Import of cultural goods

Impact assessment (SWD(2017) 262, SWD(2017) 263 (summary)) of a Commission proposal for a regulation of the European Parliament and of the Council on the import of cultural goods (COM(2017) 375)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above [proposal](#), adopted on 13 July 2017 and now under discussion in Parliament and Council. The proposal aims to prevent the import and storage in the EU of cultural goods illicitly exported from a third country,¹ in order to reduce trafficking in cultural goods, combat terrorism financing and protect cultural heritage, especially archaeological objects in source countries affected by armed conflict (explanatory memorandum of the proposal, p. 3).

The market for antiques, ancient art and collectibles of older age constitutes 24 % of the global legal art and antiques market.² The European market share accounts for 35 % of this global market, with the UK in the lead with 24 % (due to its large auction houses), followed by Switzerland (6 %), France (5 %), Germany (3 %), and Austria, Spain and the Netherlands (each around 0.5% respectively). Based on Eurostat figures, the estimated annual value of imports of classical antiquities and ancient art declared to EU customs may be around €3.7 billion per year (IA, p. 10). The IA explains that the current Common Nomenclature tariff heading (9705) used for import of antiquities and ancient art objects is rather broad, including also a variety of other goods of interest to collectors, making it difficult to estimate the total EU imports of cultural goods (IA, p. 10).

Regarding the illicit trade of cultural goods, there are numerous underlying factors, which cannot be changed by this initiative, according to the IA (p. 11). These include, for example, poverty and military conflicts prevalent in many regions rich in cultural heritage sites, technological progress in various digging tools (such as metal-detectors, power drills, explosives), the market demand for such objects, mostly concentrated in Europe and North America, as well as cross-border transaction and e-commerce (IA, pp. 11-12). Estimates show that 80-90 % of global antiquities sales are of goods with illicit origin, and these sales are worth US\$3 to 6 billion annually (IA, p. 12). The illicit sales of cultural goods often stem from terrorist activities and serve as a means to finance terrorism (IA, p. 14). For example, the Islamist profit from illicit trade in antiquities and archaeological treasures is estimated at US\$150-200 million (IA, p. 15).

Problem definition

The main problem as described by the IA is **illicit trade in cultural goods from third countries brought into the EU**. The problem tree on page 9 of the IA explains that the drivers of the main problem are the fact that standard customs import controls are inadequate in addressing the specificity of cultural goods and that there is uneven treatment by different Member States of cultural goods being brought into the EU. The consequences are the

¹ See K. Binder, Import of cultural goods, EU legislation in progress, EPRS (forthcoming).

² 46 % of the market share is constituted of post-war and contemporary art, and 30 % modern art (IA, p. 10). Source: TEFAF Art Market Report 2016; TEFAF is the world's pre-eminent art and antiques fair, located in Maastricht.

following: trafficking in cultural goods fosters organised crime, terrorism financing, money laundering and tax evasion; loss of cultural identity and heritage in the source countries; uncertainty regarding the licit provenance of imported cultural goods as well as the applicable law (IA, p. 19), which undermines the licit market; and heavy administrative burden and cost placed on EU customs authorities (IA, p. 9).

It should be noted that the definition of cultural goods is a problem in itself and one that is to be addressed by the legislative proposal. The IA's specific objective No 1 (see below) is to establish a common definition of cultural goods in the context of importation (article 2 of the proposal). The IA discusses various definitions used globally among its options. Therefore, throughout the IA report it is difficult to understand exactly what items are meant by the term 'cultural goods'.

The problem description chapter gives a good background overview of the legal and illegal market of cultural goods. The IA specifies that it does not cover goods in transit, any EU action relating to the circulation of cultural goods within the EU and to the restitution of seized goods³ to their rightful owners, or any EU activities, such as capacity building and other cooperation with third countries to protect their cultural heritage (IA, p. 21). It does mention, however, that some of the abovementioned aspects are discussed in a Commission [communication](#) on illicit trade in cultural goods, but without providing a specific reference. There is a certain discrepancy here: protecting cultural heritage is mentioned as part of the anticipated result when implementing the general objective, yet the IA report states that it does not address the protection of cultural heritage. A more detailed context would have been useful for a better readability of the IA.

Objectives of the legislative proposal

The **general** objective of the Commission proposal is to '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 the source countries affected by armed conflict' (IA, p. 22). Within this, there are further **specific** objectives:

1. to establish a common definition of cultural goods in the context of importation;
2. to ensure that EU buyers and importers exercise diligence regarding the legality of cultural goods brought into the EU;
3. to determine standardised information regarding the identity of cultural goods brought into the EU (facilitation of customs controls);
4. to provide for more effective deterrents to trafficking in cultural goods;
5. to promote active involvement of stakeholders in reducing trafficking. (IA, p. 22).

The IA sets out the following two **operational** objectives for the preferred option, as required by the Commission's Better Regulation Guidelines:

1. 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;
2. assessing the performance of certification requirements and soft-law measures (IA, p. 49).

The objectives appear to correspond to most of the SMART criteria set out in [Tool #16](#) of the [Better Regulation Guidelines](#), although they are not time-bound.

Range of options considered

In addition to the status quo scenario, the IA presents three groups of options where Group A options A1 and A2 are meant to be viewed as non-exclusive of one another, and both Group B options B1 to B5 and Group C options C1 to C4 are meant to be viewed as mutually exclusive (IA, pp. 23-31).

³ See C. Salm, [Cross-border restitution claims of looted works of art and cultural goods](#), European Added Value Assessment, EPRS, November 2017.

The criteria for defining the goods that should be subject to a measure include: rarity, historical/educational value, age and whether a cultural good originates in a conflict zone (explanatory memorandum, p. 5). The typology of the goods to be covered will be introduced into the legislation and into the Integrated Tariff (TARIC).

Regarding the procedures through which importers will be able to bring cultural goods into the EU, the IA explains that the following criteria need to be defined: '(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' (IA, p. 28). However, criteria (b) and (c) do not in fact appear to be defined in the options.

Table 1: Options proposed and their description

Option	Description
Group A: Soft-law options to improve capacities and foster stakeholder goodwill and self-discipline	
Option A1 - Endorses codes of ethics or conduct established by art market associations or museums.	By means of, for example, a Commission communication or recommendation, existing international codes of ethics or conduct established by art market associations or museums would be endorsed (IA, pp. 23-24).
Option A2 - Raises awareness of potential buyers and of customs and other enforcement authorities	Sensitising particular categories of buyers (such as travellers and tourists) about the need to respect the source country legislation at export and EU requirements at import, and thus promoting the idea that buying dubious cultural goods from foreign countries is socially not acceptable. Capacity of customs and other enforcement authorities would be strengthened, also in order to improve cooperation of customs and cultural authorities on Member State, EU and international level, and with market stakeholders (IA, pp. 23-24).
Group B: Appropriate definition of the scope of the cultural goods to be covered by the initiative	
Option B1 - Definition used in the UNESCO 1970 Convention.	Wide range of cultural goods by type (specifically designated by each signatory state) based on their importance for archaeology, prehistory, history, literature, art or science, with a minimum age limit of 100 years only in two cases, namely for antiquities such as inscriptions, coins and engraved seals and for articles of furniture. It does not provide for minimum value limits (IA, p. 24).
Option B2 - Definition used in the UNIDROIT 1995 Convention.	Basically the same UNESCO definition as above, with a difference that the goods are not specifically designated by each state; accordingly the definition has a wider scope to include, for example, goods obtained from clandestine excavations when the state has no idea of their existence or indeed theft (IA, pp. 24-25).
Option B3 - Definition used in Regulation (EC) No 116/2009 on the export of cultural goods.	This definition is similar in its scope to the above two definitions, but is more specific regarding the EU Member States' needs for protection of their own cultural heritage. For example, the list of broad range of cultural goods by type includes also minimum age and value limits as appropriate (IA, pp. 25-26).
Option B4 - Definition used in US legislation on the import of cultural goods (CPIA).	The UNESCO 1970 Convention is implemented in the US by legislation, which narrows down the range of goods to cover only objects of archaeological and ethnological interest. No minimum value, but a minimum age limit of 250 years (IA, p. 27).
Option B5 - A wide typology of goods narrowed down by an age threshold.	This option offers to apply the typology of the UNIDROIT 1995 definition with a restrictive age threshold of 250 years. This threshold could be adjusted by means of an implementing act (IA, p. 27).

Group C: Documentary requirements to certify the licit nature of the goods	
Option C1 - Requirement for importers to present a copy of the export certificate issued in the source country.	UNESCO and the World Customs Organization (WCO) have developed a Model Export Certificate form (2005) to be used internationally; however, its application varies among different countries. The disadvantage of this option is that '[W]here 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.' (IA, p. 28).
Option C2 - Requirement to submit an importer's statement for all goods concerned.	The standard import declaration would be accompanied by a standardised statement (affidavit) and a standardised document describing the cultural goods in detail attached to it. For the purpose of this option Object ID – an existing international standard for describing cultural goods – has been selected. (IA, p. 28-29).
Option C3 - Requirement to obtain an import licence for all goods concerned.	The import licence would be issued by EU authorities designated by the Member States after a request of a person who seeks to import the cultural goods. The applicant would need to demonstrate the legality of export from the third country, and the goods would remain blocked in a warehouse until the import licence was obtained (IA, p. 30-31).
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.	This is a combination of options C2 and C3. For introduction into the EU of archaeological goods and elements of monuments, an import licence would have to be obtained, issued by the national competent authority designated for this purpose by the Member State of entry; for introduction of other cultural goods, a signed statement accompanied by an Object ID would be needed (IA, p. 31). An electronic database could be established for the storage and the exchange of information between the authorities of the Member States regarding importer statements and import licences (article 9 of the proposal).

The Commission's **preferred option**, as shown in bold in Table 1 above, is a combination of options A2, B5 and C4: **raising awareness** among buyers and customs authorities, including in the regulation a **wide typology of goods with an age limit** (250 years), and requiring an **import licence** specifically for archaeological finds and elements of monuments, and an importer's statement for other goods. The preferred options seem to be described in more detail than the others, even though descriptions are still limited. For example, the preferred option C4 is missing important details about the establishment of the database. These are included in article 9 of the proposal, where it is indicated that this database can be established by Commission implementing acts. Who will manage the database, and whether it will be managed by individual Member States or at the EU level, remains unclear.

E-commerce is mentioned among the background factors linked to the main problem that need to be taken as given, as these factors are supposedly not meant to be addressed by the proposal. This does not appear to be entirely in line with the general objectives, which also include combating of terrorist financing. The IA does not explain why there is no possibility of action from the EU side (for example, regarding e-commerce or indeed the high demand for cultural goods in the EU), nor whether these aspects are perhaps planned to be part of other, parallel, legislative initiatives.

Scope of the Impact Assessment

The impacts addressed by the IA include economic and social impacts, based on a qualitative assessment. The IA claims that the collection of trade data for specific categories of cultural goods appears to be difficult, because

the Harmonised System⁴ does not contain enough subdivisions. The IA examines and compares the impacts based on effectiveness, efficiency in terms of administrative burden and costs for stakeholders, coherence, and, where relevant, proportionality. No option is expected to have any environmental impacts.

Concerning **social impacts**, these are described as very limited for options A1 and A2. For options under group B and C, the IA claims that social impacts are reflected under the effectiveness of achieving the general objective (IA, p. 36 and 41). It is regrettable that no attempt is made to look into the social impacts in at least some level of detail, as indeed crime, terrorism and security are part of the social impacts to be analysed in an impact assessment, according to [Tool #19 Identification/Screening of impacts](#) (p. 130) of the [Better Regulation Guidelines](#).

The **economic impacts** are not further subdivided into more specific impacts (such as for SMEs). Regarding economic impacts on administrations under option B1, they are said to depend on the option chosen for the documentary requirements (from among options C1 and C4); however, no further details are given. Option B1 (definition used in UNESCO 1970 Convention) is claimed to have negative impact on trade due to its wide scope. Also regarding administrations, customs authorities might need to control a very large number of shipments, and cultural authorities, a great number of applications for import licences (IA, p. 37). It is mentioned that economic impacts of option B3 are similar to those of B1 and B2; however, the description of option B2 states that they are similar to those of B1 – no extra information is provided under option B2. Option B4 is described as having limited operational burden for customs and competent authorities due to the very narrow typology of goods concerned under the definition used in the United States. Under option B5, operational costs for administrations and compliance costs for market operators are claimed to be alleviated due to a focus on goods with high age limit, thus excluding categories of non-sensitive cultural goods (i.e. goods of more recent societal and technological development, such as motor cars, stamps, cinema and photo archives) (IA, pp. 39-40).

Option C1 is assessed as burdensome in terms of time and effort for Member States, as the requirement to present a copy of the export certificate in the source country would mean that bilateral administrative cooperation agreements would have to be concluded between the EU and the third countries. Meanwhile, businesses are not expected to have additional costs under this option, because they already need to comply with the laws of source countries, as well as with the provision of export certificates. Likewise, option C2 (submission of an importer's statement) is not expected to entail any particular costs for market operators. Member States might have some administrative costs in order to provide training for customs officers and cultural authorities to familiarise them with the new provision (IA, pp. 42-43). Option C3 is described as particularly burdensome for both Member State authorities and market operators, and disproportional to the set objectives (IA, p. 44). This begs the question as to why this option is retained at all. Costs under Option 4 are assessed as limited for customs authorities, and as considerable for a very small part of the cultural goods market (IA, p. 46). The IA lacks a further analysis into those costs and the scarce analysis of impacts does not help to substantiate the selection of the preferred options for the reader.

Subsidiarity / proportionality

Subsidiarity and proportionality are mentioned in the proposal's explanatory memorandum (pp. 4-5). It explains that under Articles 3 and 207 of the Treaty on the Functioning of the EU (TFEU), the EU has exclusive competence for commercial policy and for customs legislation, such as customs controls measures at import. Proportionality is included in the assessment of option groups B and C, and the preferred option is claimed to be the most balanced and proportional to the objectives of the proposal (IA, pp. 40 and 46).

⁴ The Harmonized Commodity Description and Coding System, generally referred to as 'Harmonized System' or simply 'HS', is a multipurpose international product nomenclature developed by the [World Customs Organization](#) (WCO).

Budgetary or public finance implications

A rather superficial qualitative analysis of possible burden and costs for Member State authorities, such as cultural and customs authorities, is provided under the efficiency part of each of the policy options, and also under the economic impacts for some options. A summary of the economic impacts, such as operational burden and compliance costs for public authorities, is given above. According to Annex 2 of the IA (p. 5), Member States were surveyed on potential or expected impacts of regulatory options on costs for administrations or other burdens; however, '[m]ost Member States were not able to provide any estimates, stating that the structure of their current system and procedures does not permit it'. Regrettably, the IA does not explain if such missing estimates may have influenced the quality of the analysis of impacts.

SME test / Competitiveness

Most businesses in the art market are SMEs – 75 % (with the exception of auction houses) (IA, Annex 2, p. 6). Costs for market operators are briefly qualitatively assessed in the IA (see above), but it is noticeable that the analysis of economic impacts on businesses is very limited and rather superficial. The IA does not appear to indicate any possible reasons for this, such as difficulty in obtaining sufficient data.

Simplification and other regulatory implications

Currently there are no common EU rules on the import of cultural goods (and thus this proposal is not linked to REFIT). Other similar measures in force include [Council Regulation \(EC\) No 116/2009](#) regarding export of cultural goods from the EU customs territory, [Directive 2014/60/EU](#) on the return of cultural objects taken unlawfully from another EU country,⁵ and two regulations prohibiting the import, export and dealing in Iraqi cultural property and of Syrian cultural goods.⁶ It is important to note that currently the burden of proof that cultural goods are looted or obtained in illegal excavations in Iraq or Syria, in cases where the importer claims a different source country, lies with EU customs (IA, p. 16). In the new proposal, it is the importer who needs to prove legal provenance of goods from third countries. A description of the relation of this proposal to other, similar proposals⁷ concerning trafficking of cultural goods as part of organised international crime and as a source for terrorist financing, including e-commerce, would have been very helpful in order to better understand how the main problem, or indeed its other aspects, might be addressed by other means or initiatives. Tool #12 of the Better Regulation Guidelines (p. 67) explains that the baseline scenario should include Commission proposals for future legislation. This does not appear to be the case here.

Relations with third countries

Regarding the local dimension in third countries, the IA briefly mentions that 'the number of cultural goods to be found is not unlimited. When all of them are found and sold, the local population permanently loses 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' (IA, p.19). Capacity building and other cooperation with third countries to protect their cultural heritage are not part of this IA report, however (IA, p. 21).

Under the preferred option, an import licence would have to be obtained, issued by the national competent authority of the Member State of entry (article 4 of the proposal). The legality of export from the third country would have to be proved by the importer (IA, p. 31). Cooperation with customs authorities of the third countries from where the goods originate is not discussed in the IA.

⁵ See A. Zygierewicz, [Illicit trade in cultural goods](#), implementation appraisal, EPRS, July 2017.

⁶ [Regulation \(EC\) No 1210/2003](#) prohibiting the import, export and dealing in Iraqi cultural property and [Regulation \(EU\) No 1332/2013](#) prohibiting the import, export and transfer of Syrian cultural goods.

⁷ Such as amendments to the [Fourth Money Laundering Directive](#), the [EU initiative](#) on restrictions on payments in cash, etc.

Quality of data, research and analysis

The IA is based on an [external study](#) 'Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU', which appears as its Annex 8.

The IA generally follows the logical steps for preparing an impact assessment, as described in Tool #19 of the Better Regulation Guidelines. Among the strengths of the IA, it has to be noted that the opinions expressed in the stakeholder consultation have been clearly included in the analysis of the scope of impacts. At the same time, it is regrettable that the analysis itself is rather limited and superficial, especially regarding the impacts on businesses, for example. The extent to which the options would achieve the objectives is assessed in very broad terms, but the steps of analysis of the impacts themselves lack detail, thus making it difficult at times to trust the analysis offered. Also, the measures for deterring trafficking or the conditions for the detention or confiscation of goods are not covered in the analysis of the different courses of action. The IA does explain that it was difficult to collect the information from the Member States and that another difficulty was the limited headings of the Combined Nomenclature, which do not describe cultural goods in enough detail. The assessment of the different types of impacts appears to be mixed up with the criteria set to compare the impacts themselves (such as effectiveness, efficiency, proportionality, etc.). This leaves a poor impression of the analysis.

Stakeholder consultation

A [public consultation](#) on the import of cultural goods was conducted from 23 October 2016 to 23 January 2017, with 293 contributions received. Stakeholders targeted by this consultation include individual citizens, businesses, (art market and activities related to the import of cultural goods), professional associations and interest representatives (art market and museum associations), (IA, p. 42), NGOs and civil society, and public authorities (IA, Annex 2, p. 5). The opinions expressed in the stakeholder consultation have been well included in the analysis of impacts.

Businesses seem to favour action being taken primarily by the exporting countries to protect their heritage – with help from the EU, whereas public authorities and civil society strongly favour EU legislation empowering customs authorities to prevent entry of illicit cultural goods in the EU (explanatory memorandum, p. 5). The preferred option C4 was apparently not put forward in the public consultation as a potential option (IA, p. 46).

Regarding documentation necessary to certify the licit nature of goods, 'art market enterprises are in principle against import licences, as they foresee significant compliance costs' (IA, p. 46). The preferred option requires the import licence for 'only a small fraction of the market' of cultural goods, i.e., archaeological finds and elements of monuments, which, according to the IA, would meet less opposition from businesses.

Monitoring and evaluation

Monitoring indicators are clearly identified in the IA (p. 49), and the Commission intends to monitor the performance of the legislative acts together with the Member States by collecting data from them. The monitoring indicators (article 14 of the proposal) appear to be in line with the operational objectives. The Commission would prepare an evaluation report three years after the date of application of the regulation, which is set at 1 January 2019 – the IA refers to five years after entry into force (IA, p. 49) – and subsequently every five years.

The IA explains that it was difficult to assess the impact of regulatory options on administrations costs or other burdens, because the Member States could not provide any figures as 'the structure of their current system and procedures does not permit it' (IA, Annex 2, p. 5). The monitoring criteria appear to address this issue.

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board (RSB) reviewed the IA twice. Following one negative opinion, it issued a [positive opinion](#) on 7 June 2017 on the basis of a re-submitted version of the IA report. The Board recommended that the IA be further improved as follows:

- a. further strengthen the analysis of impacts, especially use of the underlying evidence;
- b. develop a more systematic and robust comparison of options;
- c. describe the beneficiaries of the different options and provide an aggregate estimate of the total expected costs and benefits of the preferred option.

It appears from the final version of the IA that no attempt has been made to further improve the IA according to the RSB recommendations. This is contrary to the Better Regulation Toolbox (p. 72), which requires the IA to include an annex describing how the Board's recommendations 'have led to changes compared to the earlier draft. This should be presented in tabular format ...' Annex 1 of the IA explains only what changes have been introduced after the first, negative, opinion of the Board. As a result, the IA still lacks the necessary depth and robustness in its analysis of the different types of impacts, on the basis of quality evidence or estimations, and does not succeed in sufficiently substantiating the choice of the preferred option.

Coherence between the Commission's legislative proposal and IA

Overall, the IA and the proposal appear to correspond. As mentioned above, there is some discrepancy regarding the timing of the evaluation report — three years after the date of application of the regulation, which is set at 1 January 2019 in the proposal, whereas the IA refers to five years after the entry into force of the regulation (IA, p. 49). It should be added that neither the IA report, nor the proposal mention combating of terrorism financing or protection of cultural heritage, which are actually mentioned as part of the general objective of the initiative.

The proposal mentions in its articles 4, 5 and 9 that the Commission will set out the respective provisions in implementing acts. The IA does not mention in the description of options any details on which provisions could be set out by implementing acts. Some details in the IA on the impacts of the future implementing acts could have been useful for a better understanding, and also for the coherence with the provisions of the proposal.

Conclusions

Overall, the IA follows the standard methodology used for drafting impact assessments, as set out by the Better Regulation Guidelines. The opinions expressed in the stakeholder consultation have been clearly included in the analysis of impacts. However, the overall quality of the analysis suffers from a lack of sufficient and reliable background evidence used in the development of the options, as well as from a lack of robustness and depth in the analysis of the various types of impacts. The analysis of impacts is only qualitative, even though the RSB second opinion asks to 'provide an aggregate estimate of the total expected costs and benefits of the preferred option'. The selection of the preferred set of options is not clearly described and substantiated, even though certain criteria (such as effectiveness, efficiency, proportionality, etc.) are used. The combination of these shortcomings means that the analysis offered in the IA is not always entirely convincing.

This note, prepared by the Ex-Ante Impact Assessment Unit, analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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