

## A wave of regulations hits the Art Market

Which laws and legislative projects should art dealers and collectors keep in mind?

By Lucie Lambrecht<sup>1</sup> and Zacharias Mawick<sup>2</sup>

Since the widely discussed German Cultural Property Protection Act (KGSG) came into force, an increasing activity in the regulation of the protection of cultural property can be noticed also on the European level. The German KGSG is problematic from a constitutional point of view - several claims have been brought before the German Constitutional Court challenging the constitutionality of the Act, which is supposed to take a decision in the near future. Nevertheless, the European Union took KGSG as a model for issuing new rules on the trade of cultural goods with third countries.

### Import and Export Regulation

As a complement to the European export regulation (Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural good) which exists since 1992, EU-regulation 2019/880 on the introduction and the **import** of cultural goods, which will enter into force in its essential parts at the latest on 28 June 2025, imposes a strict import procedure for certain types of cultural property. For some objects an import licence will be required which the competent authorities of the member state will grant only if the importer can provide evidence of the legal exportation from the country of origin. It is therefore advisable to keep comprehensive records, even for longer periods of time.

Unfortunately, also in this area European lawmakers failed to achieve harmonisation with existing legislation in European member states. Especially differences among thresholds of value and age will require scrutiny of both European and national or regional legislation.

In Belgium, a similarly fragmented and therefore complicated legislation is already the reality. Each of the Flemish, French- and German-speaking communities have exercised their power to regulate and protect their own movable cultural heritage, besides the federal state which retains certain residual powers amongst others over the federal museum collections.

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## Nicosia Convention

On the international level, on 3 May 2017 member states of the European Council concluded the Convention on Offences relating to Cultural Property (commonly referred to as the Nicosia Convention), responding to abusive treatment of cultural property by terrorist organisations. This convention requires ratifying states to prohibit the destruction and illegal trafficking of cultural property and to make sure that such prohibitions are duly penalised. The lack of transparency of the term „cultural property“ constitutes a problem not only from a legal but also from a practical point of view. The Convention’s definition refers back to the UNESCO Convention of 1970 (UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property), which itself refers to the respective member states’ own definition of cultural property. However, all of the UNESCO, the EU and its member states continue to define cultural property in their own way. Since, on the one hand, the classification as „cultural property“ in accordance with the Nicosia Convention entails (also criminal) penalties in specific situations, while, on the other hand, there is no exact, common definition of cultural property, a potential conflict between the maxim of *nulla poena sine lege certa* and the application of the Convention is evident.

## Anti-money laundering legislation

The implementation of the 4th and 5th anti money-laundering directives is currently at full speed in most EU countries. Once legislation is put into place, art dealers will be required to screen and identify transacting parties under specific circumstances. As a consequence, personal data need to be collected and processed. Suspicious cases need to be reported to the competent authorities. The GDPR steps back in order to facilitate the functioning of the European anti money-laundering regime. However, it remains unclear whether this will entail a similar flood of cases being reported to the competent authorities to the financial sector where AML authorities of some member states are still unable to cope with the quantity of cases reported by financial institutions, where stricter regulation is already in place.

## Data protection

The European anti-money-laundering legislation is not the only law in potential conflict with data protection. In Germany regional legislations concerning the use of public archives and archival material protect personal data of persons that passed away less than ten years ago. De facto, consistent provenance of cultural property is hard to provide because of the historically intricate German archival structure, the lack of useful finding aids and notorious underfunding. Public archives usually contain

valuable information for provenance research, which art dealers have to pursue in order to comply with obligations of the German Cultural Property Protection Act, e.g. court records of indemnisations payed in the first post-war decades. However, it is often impossible to access these information not only in private archives by means of restrictive terms of use but also in public archives due to the abovementioned retention periods. As time goes by and the generation that witnessed the nazi regime personally slowly passes away, archival material in the context of the nazi-regime will get more accessible. This is not the case, however, concerning expropriations in the context of the German Democratic Republic, which will remain an issue for decades to come.

Archival documents concerning the looting of art under the nazi-regime are not only valuable sources for provenance research in Germany, but also in an international context. In most countries, the ability to provide archival documents proving confiscation by the nazis will be decisive for the results of restitution claims. The majority of this archival material slumbers away unseen in German archives. Things are not easier in other European countries, where additional archival documents are stored. In Belgium, for example, different archive laws and decrees exist at various federated entity levels, which complicate the matter even further.

### Ivory ban

New initiatives are also evident in the field of protection of endangered species, e.g. concerning the trade of ivory-made artefacts. On European level a stricter legislation is projected which plans to weaken exceptions still applicable at present. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) allows trading of ivory dating pre 1947, because the concentration of radioactive material caused by the detonation of the first nuclear bombs allows to scientifically detect a terminus post quem. In fact, the current legislation therefore suffices in order to prevent poaching, if it were just put into practice by severe customs controls.

After strict prohibition acts have been adopted in the UK and France, a similiar law has been passed by the Belgian Parliament. The law was supposed to enter into force on 1 October 2019 but it has not yet been published in the Belgian Official Journal, which is essential for its applicability. It therefore remains unclear if the outright prohibition of ivory-trade is enforceable as of this day. The rather absurd answer to this question is – not at all inappropriate for a country with strong surrealist tradition – yes and no. As a rule legislation projects that have not been published in the Belgian Official Journal are not in force, but once published they apply retrospectively if they so provide. It is unlikely, however, that the law will be published any time soon.