



Kent Academic Repository

Vigneron, Sophie and Granet, Valentine (2022) *The impact of Brexit on heritage: impeding workers' mobility and European cooperation in the fight against the trafficking of cultural objects and endangered species*. *Art Antiquity and Law*, 26 . ISSN 1362-2331.

Downloaded from

<https://kar.kent.ac.uk/92895/> The University of Kent's Academic Repository KAR

The version of record is available from

<https://ial.uk.com/publications/art-antiquity-and-law/>

This document version

Author's Accepted Manuscript

DOI for this version

Licence for this version

UNSPECIFIED

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

The impact of Brexit on heritage: impeding workers' mobility and European cooperation in the fight against the trafficking of cultural objects and endangered species

Valentine Granet* and Dr Sophie Vigneron**

* LL.M, BSc (Hons) Agri. and Env., Agr.

** Reader, Kent Law School

ABSTRACT (100-200 words)

This article contributes to the understanding of the changes brought about by Brexit in the regulatory framework of the movement of cultural objects and people in the United Kingdom. It analyses the restrictions to the employment of EU workers and their impact on the need for highly skilled workers in the cultural and heritage sector. It then critically examines the revocation of the three EU instruments on the import, export and return of cultural objects (Directive 2014/60, Regulation 116/2009 and Regulation 2019/880) as well as the impact of the revocation of Regulation 865/2006 that dealt with the implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); an instrument often neglected but essential when discussing the circulation of cultural objects as many are made of, or contain parts of, endangered species. It also discusses the situation on the Island of Ireland since there is no border control between Northern Ireland and the Republic of Ireland but there are controls between Northern Ireland and the remaining three Nations (England, Wales and Scotland) of the UK. Brexit has led to regulatory gaps and loopholes that could be exploited by traffickers. Finally, the authors draw together their different findings to make recommendations that would improve the protection of cultural heritage in the UK post-Brexit which would enable it to fulfil its international obligations while maintaining its leadership in the art market.

Keywords

Brexit, EU law, trafficking, cultural property, CITES, 1970 Convention, heritage

After several years of negotiation following the Referendum of June 2016 and the triggering of Article 50 of the Lisbon Treaty on 29 March 2017, the United Kingdom (UK) left the European Union (EU) on 31 January 2020 (Exit Day). Consequently, all EU laws that had been incorporated into domestic law before 31 January 2020 had to be either consolidated or revoked. The process of selecting which laws should be consolidated, at least temporarily, and which should be revoked started before Exit Day, it continued during the Implementation Period that ran from 1 February to 31 December 2020, and will persist for some time. Indeed,

it is impossible to un-weave, at a stroke, all EU laws from the fabric of the national legal system.

Brexit has had, and will have, a medium- to long-term impact on the protection of heritage, most notably because of the end to EU funding for museums and heritage sites such as the European Regional Development Fund, but also because of its impact on laws and regulations which in turn impact the economy and trade in this sector. In 2016 it was calculated that the UK's creative sector contributed £84.1bn to the economy, making it "one of the UK's greatest success stories", and certainly a sector worth protecting.¹ Yet, limited attention has been paid to this situation as the cultural sector has been largely ignored in the wider Brexit debate, which has focused on trade deals, fishing rights, citizens' rights and migration.² For example, the Institute for Government's report entitled 'Implementing Brexit: Customs', which aims to examine policy areas which might experience significant disruption following Brexit, provided only one mention of the Arts Council in its role as "a specialist licensing agency for cultural goods" without further development.³

Since the end of the Implementation Period, there are now customs controls between the UK and the EU, including for cultural objects and works of art. It is difficult to measure the economic impact of these controls on the art trade for the moment as this is still a recent change. However, the UK is Europe's biggest art dealer in terms of market share,⁴ and is also of major importance on the world stage. In 2020, the UK was in second place behind the US with a 20 per cent share of the global art market, representing approximately \$9.9bn in value, a proportion that was even 22 per cent higher in 2019.⁵ This value materialises into thousands of cultural objects that are exported from the UK every year.⁶ Some of these objects are so important to the national cultural heritage that they fall within the control of export regulations.⁷ Others were exported from a Member State of the EU (MS) and needed a European certificate to be legally exported outside of the EU. For example, in 2019-2020, 8,537 objects totalling £8.07bn received an export licence because they had been in the UK for less than 50 years.⁸ It is difficult to differentiate those cultural objects that were legally imported into the UK from a Member State (and thus were automatically granted a European licence) from those that were imported from overseas, but Clare McAndrew estimates that the

¹ UK Government website, 'Creative industries worth almost £10 billion an hour to economy' <<https://www.gov.uk/government/news/creative-industries-worth-almost-10-billion-an-hour-to-economy>> accessed 14 Jan. 2022; See also <https://historicengland.org.uk/research/heritage-counts/heritage-and-economy/>

² Kristin Hausler and Richard Mackenzie-Gray Scott, 'Outside the Debate? the Potential Impact of Brexit for Cultural Heritage in the UK' (2017) XXII *Art Antiquity and Law* 101.

³ Joe Owen, Marcus Sheppard and Alex Stojanovic, *Implementing Brexit: Customs* (IFG ANALYSIS Institute for Government, 2017) <https://www.politico.eu/wp-content/uploads/2017/09/IfG_Brexit_customs.pdf> accessed 14 Nov. 2021, p. 33.

⁴ Clare McAndrew, *The Art Market 2021* (Art Basel and UBS Report, 2021). <https://d2u3kfw92fzu7.cloudfront.net/The-Art-Market_2021.pdf> accessed 28 Oct. 2021, p. 42.

⁵ Clare McAndrew, *The Art Market 2020* (Art Basel and UBS Report, 2020) <<https://www.ubs.com/global/en/our-firm/art/art-market-registration.html>> accessed 26 Feb. 2020, p. 29;32

⁶ *Export of Works of Art and Objects of Cultural Interest 2018/19 and 2019/20* (CCS1219710716, 2021) <<https://www.artscouncil.org.uk/publication/export-objects-cultural-interest-2018%E2%80%9319-and-2019%E2%80%9320>> accessed 24 Aug.2021.

⁷ See the DCMS guidance on the criteria to be taken into consideration when making a decision about whether or not grant an export licence: <www.artscouncil.org.uk/sites/default/files/download-file/Export_criteria_March_2015.pdf>.

⁸ *Ibid.*

trade between the EU and the UK before Brexit represented 20 per cent of the UK's total market share.⁹

This market share was influenced by economic factors such as the UK's low rate of Value Added Tax (VAT) on imports of art which, at 5 per cent, was one of the lowest in Europe, making the UK an attractive entry point for artwork to be sold elsewhere in Europe. Now, since there is no free movement of artwork between the UK and the rest of the EU, buyers and sellers cannot benefit from this low VAT rate, so the UK is no longer attractive compared to France for example which levies VAT on imports of art at 5.5 per cent. On the other hand, VAT will not apply to works which are returned to the UK within three years, and there had been a process of tax standardisation in the EU so the advantages for the UK had been diminishing anyway.¹⁰ Even if it is relatively short term, this loss of competitive advantage remains a negative economic consequence of Brexit for the UK, but Brexit's most significant impact is on the principles of co-operation and mutual assistance that existed between the UK and other Member States of the EU.

The aim of this paper is to contribute to the understanding of the changes brought about by Brexit in the regulatory framework of the movement of cultural objects and people. It aims to identify weaknesses and to suggest recommendations to fill the gaps created by the revocation of EU instruments and the suggestion to create freeports. The first part examines the impact of Brexit on heritage professionals. The second part focuses on the revocation of EU instruments on the circulation of cultural objects that ended the principles of co-operation and assistance in the protection of each State's cultural heritage. It assesses the impact of the revocation of the three EU instruments on the circulation and return of cultural objects (Directive 2014/60,¹¹ Regulation 116/2009¹² and Regulation 2019/880¹³), and of Regulation 865/2006¹⁴ that dealt with the implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which also applies to cultural objects made of, or containing parts of, endangered species. It examines the situation on the Island of Ireland since there is no border control between Northern Ireland and the Republic of Ireland. The final section draws together the different findings to make recommendations to improve the protection of cultural heritage post-Brexit which would enable the UK to fulfil its international obligations while maintaining its leadership in the art market.

EU Co-operation and the Free Movement of People

The consequences of Brexit on the heritage sector are not limited to the movement of artefacts across borders, they also have an impact on the movement of people across these borders. Before Brexit, EU citizens benefited from the right to free movement in the UK, which allows EU citizens to go live and work in any other country of the EU without a visa

⁹ McAndrew, above, note 5, 38.

¹⁰ Kate Brown, 'The UK Has Officially Exited the EU With a Trade Deal. So What Exactly Does It Mean for the Art Business?'

(*Artnet*, 5 Jan. 2021) <<https://news.artnet.com/market/implications-of-brexit-1934921>> accessed 14 Nov. 2021.

¹¹ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) 2014 (OJ L 159, 28 May 2014).

¹² Council Regulation (EC) No 116/2009 of 18 Dec. 2008 on the export of cultural goods (Codified version) (OJ L 39, 10 Feb. 2009)

¹³ Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (OJ L 151, 7 June 2019)

¹⁴ Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 166, 19 June 2006)

or work permit.¹⁵ It is estimated that 15 per cent of the workforce of some major museums are from the EU,¹⁶ and that on average the percentage of EU citizens working in the creative sector is between 10 and 20 per cent.¹⁷ In addition, 60 per cent of arts organisations reported that it was important for their work to have EU workers come to the UK.¹⁸ This loss of free movement is particularly problematic for artists who go on tour, such as musicians, as they now have to navigate different systems in each EU country - both for themselves and for their instruments - this makes touring very difficult and is leading 60 per cent of those surveyed to consider leaving the profession.¹⁹

Furthermore, a recent report from the House of Lords outlines detailed statistics on the percentage of EU citizens working in the creative and cultural sector and the impact of the end of free movement on the cultural sector.²⁰ This report details the three existing visas (Tier 5, Tier 1 and Tier 2) which currently allow third country cultural sector workers to enter the UK. Tier 5 visas (temporary worker - creative and sporting) are granted for a maximum of 12 months and require a UK sponsor, which in practice are used by touring musicians, or actors who have a short-term contract in the UK. Tier 1 visas are for exceptional individuals who are (or are expected to become) world leaders in their discipline and require an endorsement by designated 'Competent Body', a government selected cultural sector organisation. Tier 2 visas are for skilled workers who are needed for specific jobs and are capped at 20,700 per year. Employment contracts are subjected to strict salary thresholds and the potential employer must show that there is either a shortage of skilled workers or ensure that the job there are recruiting for is on the shortage occupation list. Many experts in the field, such as the City of London Corporation, claim that these visa requirements are not suited to the art and heritage sector and will contribute to the exclusion of many EU workers upon which cultural institutions had relied. They argue that visa quotas are 'unsuitable' for the cultural sector and "would lead to uncertainty [and] place additional administrative burdens on arts organisations."²¹ Tier 1 visas are by nature very restrictive, and greatly hinder the recruitment of early career professionals. Additionally, salary thresholds for Tier 2 visas are not adapted to the reality and specificities of the arts sector, as highly skilled does not equal high pay; this might further hinder EU nationals from coming to work in the UK as they may not qualify for a visa. Also, many people in the arts sector are self-employed, which means that pre-Brexit they would have entered the UK without a formal job offer and would have been allowed to stay as they were exercising their right to free movement within the EU, which is not possible anymore.²²

Many prominent museums and organisations have expressed concerns about the new constraints on EU citizens wanting to work in the UK. The Art Fund explained that these changes could "undermine the ability of UK museums to attract and retain skilled" EU

¹⁵ European Commission website, 'Free movement - EU nationals' <<https://ec.europa.eu/social/main.jsp?catId=457>>, accessed 14 Jan. 2022

¹⁶ For example, the Director of the British Museum.

¹⁷ House of Lords, 'Ending Free Movement: Implications for the Cultural Sector' Brexit movement of people in the cultural sector - European Union Committee <<https://publications.parliament.uk/pa/ld201719/ldselect/ldcucom/182/18206.htm>> accessed 5 July 2021

¹⁸ Kate Mattocks, 'Brexit Impacts on the Arts and Culture UK in a Changing Europe' UK in a Changing Europe, 06 Apr 2021 <<https://ukandeu.ac.uk/brexit-impacts-on-the-arts-and-culture/>> accessed 13 July /2021

¹⁹ *Ibid.*

²⁰ House of Lords, above, note 17.

²¹ *Ibid.*

²² *Ibid.*

citizens.²³ The Arts Council Wales/ Cyngor Celfyddydau Cymru /Wales Arts International was concerned that the limitation on free movement would lead to “a substantial loss of important skills”, while the Heritage Alliance argued that the demand for heritage skills would soon increase because of large heritage and infrastructure projects such as the new High Speed 2 railway, or the restorations of Buckingham Palace and the Palace of Westminster. The end of free movement and the new difficulties in hiring EU workers might lead to a shortage of highly skilled people in specific trades as existing training provisions are insufficient to cater to the increasing needs in heritage conservation.²⁴ For example, the *Compagnons du Devoir* is a French organisation which trains highly specialised heritage craftsmen and craftswomen who play a major role in renovating ancient buildings and monuments across Europe, and while the *Compagnons* seems to be attempting to build relationships with the UK, this might be severely affected by Brexit.

The movement of individuals across borders is also particularly important to foster exchanges of ideas and expertise, and to establish fruitful collaborations which are so important to the arts and cultural sectors.²⁵ In 2017, a study of the Arts Council England surveying arts and cultural organisation in England found that 67 per cent of respondents had engaged in international exchange or cooperation, for example through touring, joint production, or co-commissioning of production, and most of these international activities were in Europe.²⁶ Therefore, the European dimension of the art sector is very important,²⁷ and Brexit results in reduced freedom of movement for artists, scholars and professionals, notably in the British Institutes abroad, for example the British School at Athens or the British School in Rome.²⁸ Both the new difficulties in hiring EU nationals, and the limitations on collaborations between institutions threaten to increase the price of museum entries and of temporary exhibitions, making art less accessible and potentially adding a financial burden on museums and the cultural sector in the UK.

Additionally, the exclusion of the UK from the EU’s cultural and artistic scene will inevitably be reflected in the funding and resources available to these sectors. Brexit means the end to EU funding from major programmes such as Erasmus+, Europe for Citizens, or the European Structural & Investment Funds. The UK might still be able to participate in the Creative Europe programme, but with reduced prominence and support. With the exception of the Global Screen Fund to support film and television production, the UK Government has still not announced any plans for alternative sources of funding for the cultural sector.²⁹ As the EU was providing significant funding for the Arts sector and the UK is increasingly turning towards non-public investments to fund this sector, there is a real risk that there will be

²³ *Ibid.*

²⁴ Between 2013, the year of the Historic England survey, and 2020 the number of EU workers in the cultural sector increased by only 9 per cent: Historic England, *Heritage Counts 2020*, <https://historicengland.org.uk/content/heritage-counts/pub/2020/heritage-indicators-2020/> p. 25.

²⁵ Mattocks, above, note 18; Martin Bailey, 'House of Lords Warns Brexit may Starve UK Museums of Skilled Workers' *Art Newspaper* (26 July 2018). <<https://www.theartnewspaper.com/news/house-of-lords-warns-brexit-may-prevent-cultural-sector-workers-from-coming-to-uk?>> accessed 14 Nov. 2021.

²⁶ *Impact of Brexit on the arts and culture sector* (A report by ICM and SQW on behalf of Arts Council England 2017) <https://www.artscouncil.org.uk/sites/default/files/download-file/Arts%20Council_Brexit%20Research%202017_Report_FINAL.pdf> accessed 5 July 2021.

²⁷ Mattocks, above, note 18.

²⁸ Brown, above, note 10.

²⁹ Mattocks, above, note 18.

funding gaps for essential aspects of the arts and heritage sector, and, notably, insufficient funding for the effective protection of art from theft.³⁰

It is also relevant to note the intellectual and emotional significance of Brexit on those working in the arts and heritage sector in the UK, whether they be EU citizens or UK nationals. Indeed, many reported the initial shock and disbelief, followed by uncertainty and fear about the future, as well as disappointment.³¹ These less-tangible effects of Brexit are nonetheless significant as professionals' feeling are bound to affect their work and decisions. For example, Martin Roth, the German Director of the Victoria & Albert Museum in London resigned shortly after the Brexit result.³² Similarly, Deyan Sudjic, the Director of the Design Museum in London, wrote "I hope the Tate is not going to be the monument of a lost golden age for London",³³ expressing the fears of professionals and experts in the field which should not be ignored.

EU co-operation and the circulation of cultural objects

Brexit marks the end of a principle of co-operation between the Member States of the EU and requires the revocation of all EU instruments that implemented this co-operation, notably regarding the trafficking of cultural objects and the protection of endangered species.

The European Union (Withdrawal) Act 2018 authorised UK ministers to enact relevant measures by regulations to annul existing EU instruments. These regulations are made through the exercise of the power contained in section 8(1) of the Act in order to address deficiencies arising from the withdrawal of the UK from the EU; in particular those in relation to reciprocal agreements that are no longer appropriate (section 8(2)(c)). The co-operation for the export and return of illegally exported cultural objects falls within this category of reciprocal arrangements that entail a co-operation between Member States and thus had to be revoked. However, the adoption of the Northern Ireland Protocol complicates this further as this nation of the United Kingdom is still within the EU and aligned with Eire.

The Return of cultural objects within the EU: Directive 2014/60

Directive 2014/60/EU of 15 May 2014 on the return of certain cultural objects unlawfully removed from the territory of a Member State facilitates the return of cultural objects that have been illegally exported from a Member State of the EU. Since the establishment of the Single Market and the abolition of customs controls within the EU, people have been able to easily move cultural objects from one Member State to another without checks, which is a real threat to the protection of cultural objects against illicit export. Indeed, what is easier that wrapping up a painting, putting it in the back of a car, and driving for a few hours? Or to get on a yacht and cross the Mediterranean Sea from Spain to Corsica.³⁴ The first instrument was

³⁰ John Kerr, 'What Could 'Brexit' Mean for the UK's Policing of Art and Cultural Heritage Crime?' *British Society of Criminology Newspaper* (2016) <http://www.britisoccrim.org/wp-content/uploads/2016/04/Kerr_bscn_78.pdf> accessed 14 Nov. 2021.

³¹ Marion Löhdorf, 'Brexit and the Art World: From Hope to Despair and Back Again' in Christa Jansohn (ed) *Brexit Means Brexit? The Selected Proceedings of the Symposium*, Akademie der Wissenschaften und der Literatur Mainz 6–8 Dec. 2017 <www.adwmainz.de/fileadmin/user_upload/Brexit-Symposium_Online-Version.pdf#page=99> accessed 15 Nov. 2021, 100.

³² *Ibid.*, 100.

³³ *Ibid.*, 102.

³⁴ Gareth Harris, 'Caught Smuggling Picasso on his Yacht, Spanish Billionaire Collector Gets €52m Fine and 18 Months in Prison; Jaime Botin, of the Santander dynasty, did not have a Permit to Export the Painting' *Art Newspaper* (Jan. 2020) <<https://www.theartnewspaper.com/news/spanish-billionaire-fine-smuggling-picasso>> accessed 17 Nov. 2020.

Directive 93/7/EEC which was inspired by both the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention) and preliminary work by UNIDROIT on the international protection of cultural property that led to the adoption of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 Convention), that facilitates the return of illicitly exported cultural property. The Directive is based on two fundamental principles: autonomy and co-operation. First, Member States are autonomous in defining their national treasures by identifying objects that possess artistic, historic or archaeological value under their national legislation or administrative procedures (Articles 1 and 2 with the Annex). Second, Member States co-operate to protect each other's heritage, by facilitating the return of national treasures illicitly exported after 1 January 1993 (Article 14). An illicit export is defined as an export that occurred either in violation of national rules, or in violation of the 1992 Regulation (Article 2). Directive 93/7 was narrow in its scope and complex in its processes, and resulted in only a small number of returns in the twenty years of its implementation, leading to a major recodification in 2014.

Directive 2014/60 simplified processes for return and extended the different time limitations which are now better aligned with the 1995 Convention.³⁵ Firstly, the 2014 Directive removed the requirement that the object being claimed should be classified as a national treasure within the categories referred to in the Annex, notably removing criteria such as age or monetary value. Secondly, the time period for a Member State to check whether or not the object being claimed is a national treasure has been extended from two to six months (Article 5(3)). Also, the dual time limitation to initiate return proceedings by the Member State against the possessor of the object has been extended from one year to three years from the date when the Member State became aware of both the location of the object and the identity of the possessor, and the maximum limitation period for the commencement of proceedings following the removal of the object is now 30 years, and up to 75 years in some circumstances (Article 8). Fourthly, the Directive adopts the test of 'due care and attention' and places the burden of proving that this test has been satisfied on the possessor (Article 9). Finally, it improves co-operation by allowing Member States to use the Internet Market Information System which aims to facilitate information exchange between relevant authorities (Article 4). The Directive does not deal with ownership, as this is handled according to the law of the requesting State, after the return of the object (Article 10).

Following Brexit, this Directive naturally had to be revoked as it made provision for reciprocal arrangements between the United Kingdom and other EU Member States regarding the return of cultural property unlawfully removed from the territory of EU Member States. The Return of Cultural Objects (Revocation) (EU Exit) Regulations 2018 revokes the Return of Cultural Objects Regulations 1994 and the Return of Cultural Objects (Amendment) Regulations 2015, the two Regulations that implemented Directive 2014/60. They should have come into force on Exit Day which was 31 January 2020, but they were delayed until the end of the Implementation Period (31 December 2020).³⁶ There are, however, two potential exceptions which would allow for the application of the EU Directive after Brexit: if a Member State has made an application to the Secretary of State before Exit Day (Article 4) or a claim has been filed with the competent court before the regulation was repealed (Article 5).

³⁵ Sophie Vigneron, 'The Return of Illicitly Exported Cultural Objects: the Implementation of the 2014/60 Directive in France' (2016) 2(2) *Santander Art and Culture Law Review* 35

³⁶ The Return of Cultural Objects (Revocation) (EU Exit) (Amendment) Regulations 2020 SI 2020/975

This leaves a significant gap as there are no instruments that facilitate the return of illicitly exported cultural property as English courts do not enforce the violation of foreign export laws. In the case of *Kingdom of Spain v Christies*,³⁷ Spain asked the court to prevent the circulation of a forged export licence of a Goya painting entitled *La Marqueza de Santo Cruz*. The outcome was that Christies could proceed with the sale of the painting but without the forged export document. As a consequence, the seller agreed to return the painting to Spain for half the amount he had initially asked for. In the important cases of *Ortiz*³⁸ and *Iran v Barakat*³⁹, judges made a clear distinction between claims based on the assertion of an existing title of ownership over a stolen object and claims based on the violation of an export licence. The former are justiciable whereas the latter are not. The Directive bridged this gap which is now open again.

The Export of Cultural Goods from the EU: Regulation 116/2009

The EU Council (EC) Regulation No 116/2009 of 18 December 2008 on the export of cultural goods (Codified version) sets a common export control that emphasises the principle of co-operation between Member States by recognising the legitimacy of their control over their national treasures. The initial text, Regulation (EEC) No 3911/92, was also enacted in anticipation of the abolition of national borders following the creation of the Single Market on 1 January 1993. An EU certificate is issued by the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993, or by the Member State where the object is located following a lawful importation from another Member State or a third country. Evidence of lawful export is a valid export licence from the previous Member State or a third country. This control acts as a final verification of the lawfulness of the export of the cultural object to a third country, outside the EU, at two levels. Firstly, at the time of application to the relevant authorities (usually national ministries for culture),⁴⁰ and secondly, at the time of export control by customs.⁴¹ If a national export certificate has been granted, then a European licence is usually granted as well.

The revocation of Regulation 116/2009 has a significant impact on the protection of cultural objects and the principle of co-operation between Member States as illustrated by the case of *R (on the application of Simonis) v. Arts Council England*.⁴² Mrs Simonis owned an oil painting attributed to Giotto (1266-1337) entitled *Madonna con Bambino* with a value of approximately £10 million. She had bought it in Italy in 1990 for a small sum when it was sold as a nineteenth-century copy. It was later authenticated as a Giotto. She exported and reimported the painting several times out of and back into Italy, but never as an authentic Giotto and with a declared value of approximately £4,700. When the Italian authorities

³⁷ *Kingdom of Spain v Christie, Manson & Woods Ltd. and Another* [1986] 21/03/1986 (Ch. D.) (Spain v Christie's)

³⁸ *Attorney General of New Zealand v Ortiz* [1982] 3 570 (CA) (AG New Zealand v Ortiz (CA))

³⁹ *The Islamic Republic of Iran v Barakat Galleries* [2008] 3 WLR 486 2007 EWCA Civ 1374 21 December (CA) (Iran v Barakat (CA))

⁴⁰ Notices From Member States - List of authorities empowered to issue export licences for cultural goods, published in accordance with Article 3(2) of Council Regulation (EC) No 116/2009 (1) (2018/C 71/05) [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576231284944&uri=CELEX:52018XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576231284944&uri=CELEX:52018XC0224(01)) accessed 13/12/2019

⁴¹ Notices From Member States - List of customs offices empowered to handle formalities for the exportation of cultural goods, published in accordance with Article 5(2) of Council Regulation (EC) No 116/2009 (1) (2018/C 67/08) [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0222\(01\)&qid=1576231284944&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0222(01)&qid=1576231284944&from=EN) accessed 12/12/2019

⁴² *R (on the application of Simonis) v Arts Council England* [2020] EWCA Civ 374; [2020] All ER (D) 95 (Mar)

realised that the painting was authentic, they tried to annul the export licence that had been issued. Mrs Simonis brought the painting to the UK in 2007 without a valid Italian export licence, because the licence she held had expired in 2004 - after a lengthy judicial review, the Italian *Consiglio di Stato* confirmed that the painting had left Italy illegally. In 2017, Mrs Simonis applied for an EU export licence from the Arts Council England (ACE) under Regulation 116/2009 to allow her to export it to Switzerland. ACE refused on the ground that it was not a competent authority under the export Regulation because the painting had been unlawfully exported from Italy. If the painting had been lawfully exported, then it would have been the relevant authority.

The *Simonis* case was decided after Exit Day but at the time of the refusal by ACE, the EU Regulations were still in force. On the applicability of EU law, the judge stressed that they remained in force until 11pm on 31 December 2020 which marked the end of the Implementation Period and that the law on export was the same as the law that applied before Exit Day, 31 January 2020. There are exceptions to this rule, but none which are relevant in this case.⁴³ Mrs Simonis sought judicial review of the decision of the Arts Council arguing that the Arts Council had wrongly declared itself not to be competent. The Court of Appeal found that the export was illegal under Italian law because the previous export licences had expired, and that according to basic principles of statutory interpretation 'lawful and definitive dispatch' refers to the law of the State of physical export which in this case was Italy.⁴⁴ ACE had correctly applied the Regulations which ensure that every Member State determines whether or not export certificates have been issued by relevant national authorities, and rightly decided that it was not the competent authority.

The Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulations 2018 revoked Regulation 116/2009 and entered into force on 31 January 2020.⁴⁵ The revocation of this Regulation creates uncertainty for cultural objects that arrived in the UK with a valid export certificate from a Member States but which will now be outside the EU area without a valid EU export certificate that is required by Regulation 116/2009 since the end of the Implementation Period. Because of Brexit, the EU's border has changed, whereas the objects have not moved. The issue might arise when the owners want to move the objects back to the EU, as they will be in breach of the Regulation 116/2009 as they would be considered to have been exported illegally from the EU.

The revocation of Regulation 116/2009 means that the final check for the export of a cultural object outside the EU that previously took place in the UK will now take place in a Member State of the EU, before the cultural object arrives in the UK. This could limit the circulation of objects coming from the EU. Conversely, everything that is put up for sale in the UK market will be freely exported with the exception of a handful of objects (between ten and fifteen each year) that are found to be British national treasures in application of the Export Control Act 2002 and the Export of Objects of Cultural Interest (Control) Order 2003.

Since the end of the Implementation Period, this legal basis for co-operation between Member States no longer exists. However, ACE still requires evidence that the object was lawfully exported from a Member State on or after 1 January 1993.⁴⁶ Following the *Simonis*

⁴³ *Ibid.* [9-11]

⁴⁴ *Ibid.* [27] and [59]

⁴⁵ Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulations 2018 SI 2018/1186; they also revoke the Regulation (EU) No 1081/2012

⁴⁶ Department for Digital, Culture Media and Sport, *Export controls on objects of cultural interest statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export licence (presented to Parliament pursuant to Section 9(6) of the Export Control Act 2002)* (Dec. 2020)

case, there is no legal basis supporting the competence of ACE. If an application is refused on the ground that a Member State's relevant national authority has not issued an export licence, the legality of this decision is more than questionable since the revocation of Regulation 116/2009.

The import of cultural Goods within the EU: Regulation 2019/880

The EU has had a system of common export controls to protect its Member States' national treasures since 1993, but it had no import control at EU borders for national treasures illegally exported from third countries. This was in stark contrast with other goods from the health or food sectors, for example. This lack of control was problematic because after looted artefacts had entered the EU, they could move freely through 27 Member States as there is no border control within the EU.⁴⁷ This led to 'port shopping', where traffickers choose the Member State with the least control to import cultural objects and then move them to another Member State. For example, section L.111-8 of the French Cultural Code (*Code du Patrimoine*) makes it illegal to import a cultural object that has been exported in violation of the exporter country's rule whereas there is no such control in the UK. Therefore, when the UK was in the EU, it was easy to import an illegally exported object into London rather than Paris, sell it and then export it to another Member State such as Luxembourg or Poland. This situation had been a concern for the European Commission for many years.⁴⁸

Hence, Regulation (EU) 2019/880 of 17 April 2019 on the introduction and the import of cultural goods aims to avoid discrepancies within the EU by having uniform rules regarding the import of cultural objects from third countries.⁴⁹ It marks an important policy change as it was adopted to protect the cultural heritage of third countries, by acknowledging the trust placed in foreign export legislation and documentation since an illegally exported cultural object becomes an illegal import into the EU.⁵⁰ The Regulation distinguishes between an import licence and an importer statement. Article 4 requires an import licence for archaeological artefacts over 250 years of any value, for which there is a need to provide evidence of licit export. For objects that are not archaeological artefacts but are over 200 years and above €18,000, Article 5 requires the importer to declare that the goods were legally exported and to give a detailed description of them, i.e. an importer statement. A licit export covers three potential situations. If there is evidence that the object was exported from the country where it was created or discovered in accordance with the laws and regulations of that country. Or, if the importer can show that there were no laws regulating the export of such objects at the time they were taken out of the territory. Or finally, if the importer can show the object was legally exported from the last country where it had been located for more than five years and for purposes other than temporary use, transit, re-export, or transshipment,

https://www.artscouncil.org.uk/sites/default/files/download-file/Statutory%20Guidance%20on%20export%20licencing%20December%202020_0.pdf accessed 12 Nov. 2021, at [38-40]

⁴⁷ Robert Peters, 'Nationalism Versus Internationalism' in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Cultural Heritage Law and Policy, Oxford University Press 2020), 382

⁴⁸ European Commission, *Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the implementation of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (1 Jan. 2011 - 31 Dec. 2013)* (COM(2015)144 final, 2015) section 6.5

⁴⁹ Peters, above, note 47; Maja R. J. Dehouck, 'Balancing Markets, Morals and Law: The Fight to Regulate Illicit Trafficking in Cultural Goods and the EU Regulation on the Import of Cultural Goods' (2019) 24(1) *Art Antiquity & Law* 1.

⁵⁰ Peters, above, note 47, 386

in those cases where the country in which it was created or discovered cannot be reliably determined, or if the object was taken out of the country where it was created or discovered before 24 April 1972 (the date of the entry into force of the 1970 Convention). The revocation of Regulation 2019/880 was more complex than for the other two EU instruments discussed above. Regulation 2019/880 has a staggered applicability: it came into force on 28 June 2020, but some of its provisions were delayed to 28 December 2020 (including Article 3(1) that prohibits entry into the EU of cultural goods which were unlawfully removed from the country in which they were created or discovered), and its full applicability depends on an EU-wide IT system that should be in place by 28th June 2025. The Implementation Period ended on 31 December 2020, and all EU provisions not specifically revoked became retained EU law, which led some to conclude that Article 3(1) of Regulation 2019/880 had been incorporated into English law. This was a mistaken position as, even if the Regulation came into force before the end of the Implementation Period and therefore was incorporated, it relies on co-operation and mutual assistance with the EU as the entry of the cultural object into the UK would have qualified as entry into the EU. As the UK is now outside the EU, it is difficult to see how Article 3(1) could have been implemented on its own, and this obligation became irrelevant. However, to avoid confusion and address the concerns of the arts sector, the Introduction and the Import of Cultural Goods (Revocation) Regulations 2021 revokes Regulation 2019/880.⁵¹

This leaves a significant gap in the protection of cultural property against trafficking and is a missed opportunity to strengthen the implementation of Article 7 of the 1970 Convention. Indeed, the fundamental principle in English law is that English courts do not enforce foreign export laws. The Dealing in Cultural Objects (Offences) Act 2003 is unable to fill this gap because of its narrow scope of application. It applies to only a restricted category of ‘tainted’ cultural objects, and applies only in England and Wales, not in Scotland or Northern Ireland. The Cultural Property (Armed Conflict) Act 2017 (CPACA) is also very narrow in scope and protects only cultural objects unlawfully exported from countries that are ‘occupied’ according to Article 42 of the Regulations respecting the Laws and Customs of War on Land. This condition considerably restricts the scope of Part 4 of the 2017 Act. For example, Afghanistan, Mali, Yemen, Libya are not within the scope of the CPACA 2017 because they do not fulfil the narrow definition of occupied territory. Yet, they are in a situation of civil unrest that facilitates the trafficking of cultural objects.

[The Import and Export of Cultural goods made of Endangered Species](#)

The application of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has also been modified by Brexit. This Convention is intended to ensure that the trade in flora or fauna specimens does not endanger the survival of their respective species. It divides species it seeks to protect into three categories - which are detailed in Appendices I, II and III - with different levels of constraints applied to the international trade in the different protected species.⁵² This Convention is relevant to the arts and heritage sector as some cultural objects contain protected specimens, or parts of these specimens; such as objects of ethnographic interest or musical instruments, violins or pianos, which may contain rare woods or ivory. A key element of the implementation of the Convention is the use of CITES certificates and permits granted to the holder of the item and that act as evidence that the object was made before the specific species became protected by CITES.

Following Brexit, the UK Government’s official guidance is to “use CITES-designated points of entry and exit to move CITES specimens between Great Britain (England, Scotland and

⁵¹ SI 2021/1087, in force 24 Sept. 2021

⁵² Shlomit H. Heering, 'Ivory and Antiquities: A Tale of Two Trades' (2018) XXIII *Art Antiquity & Law* 138

Wales) and the EU”); while from Northern Ireland to Great Britain (or vice versa), the checks will take place in Northern Ireland as the point of entry or exit.⁵³ The guidance also requires that all CITES specimens, including those coming from the EU, have a certificate to travel to the UK.⁵⁴ This would seem to provide consistent and substantial protection to the species under CITES.

However, the amendment of the Trade in Endangered Species of Wild Fauna and Flora (Commission Regulation (EC) No 865/2006) Regulations 2020 (SI 2020/1668), adopted on 31 December 2020, effectively allows for CITES specimens to enter and exit the UK through points of entry which are not CITES-designated if two conditions are met. Firstly, that the person moving the specimen was not aware of the relevant regulations, and secondly, they had not used a customs office to do the relevant checks and formalities beforehand.⁵⁵ This is permissive and allows people to move potentially endangered specimens across borders without being informed about the laws and regulations intended to protect these species. The major risk is that there would not be the necessary expertise to ensure the appropriate application of the law at the non-designated ports of entry. This amendment is intended to be temporary, but the text does not specify when this special provision is due to end.⁵⁶ Also, there has not been any impact assessment of the consequences of this instrument, as it was considered to be of “no significant impact”⁵⁷ on the private, public or voluntary sector. This is debatable to say the least, as CITES was established specifically to safeguard natural resources and ensure international co-operation in the sustainable trade of flora and fauna. This decision seems to overlook the importance of protecting endangered species and the UK’s commitments through the ratification of CITES, which were supposed to be honoured notably by establishing and using CITES-designated points of entry and exit.

Additionally, there are several exemptions to the requirement for a CITES certificate to move CITES species into or out of Great Britain. These exemptions apply if the object is a personal or household effect, and in some cases if it is transiting through Great Britain while moving between a non-EU country and the EU.⁵⁸ These exemptions seem to further loosen the regulatory framework intended to respect the UK’s CITES commitments and risk letting endangered specimens fall through the cracks.

This lack of effective protection of CITES specimens which are part of cultural objects is highlighted by a striking exception: elephant ivory. Indeed, the trade, import and export of ivory products in the UK has been explicitly banned by the Ivory Act 2018, which has been described as “one of the world’s toughest bans on ivory sales”.⁵⁹ While this legislation has not yet entered into force, once in place it will establish regulations which are much more

⁵³ UK Government website, ‘Guidance Trading or moving CITES-listed specimens through UK ports and airports’ <<https://www.gov.uk/guidance/trading-cites-listed-specimens-through-uk-ports-and-airports>> accessed 1 Oct. 2021

⁵⁴ UK Government website, ‘Guidance Import or export endangered species: check if you need a CITES permit’ <<https://www.gov.uk/guidance/cites-imports-and-exports>> accessed 1 Oct. 2021

⁵⁵ Trade in Endangered Species of Wild Fauna and Flora (Commission Regulation (EC) No 865/2006) (Amendment) Regulations 2020 (SI 2020/1668)

⁵⁶ Thomson Reuters Practical Law “Regulations temporarily allow CITES specimens to be traded through non-designated points of entry: Brexit SI” <[https://uk.practicallaw.thomsonreuters.com/w-029-0570?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-029-0570?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 01/10/2021

⁵⁷ Trade in Endangered Species of Wild Fauna and Flora (Commission Regulation (EC) No 865/2006) (Amendment) Regulations 2020 (SI 2020/1668)

⁵⁸ UK Government website, “Guidance Import or export endangered species: check if you need a CITES permit” <www.gov.uk/guidance/cites-imports-and-exports> accessed 01/10/2021

⁵⁹ Department for Environment, Food & Rural Affairs, Thérèse Coffey MP, Lord Gardiner of Kimble, and Michael Gove MP, ‘Press release: World-leading UK Ivory Bill becomes law’ 20 Dec. 2018 <www.gov.uk/government/news/world-leading-uk-ivory-bill-becomes-law--2> accessed 18 Oct.2021

stringent than those which existed under EU law in the UK before Brexit, and which also go beyond what is required by CITES. The EU legal framework prohibited the commercialisation of and trade in ivory, among other protected specimens, but it did allow for several exceptions.⁶⁰ Notably, ivory which had been crafted or transformed into objects pre-1947, or antique ivory, was not included in the EU's ban - effectively allowing for the circulation and trading of numerous objects composed of ivory or containing ivory.⁶¹ The UK's Ivory Act, on the other hand, seeks to prohibit any and all trade, as well as imports or exports for trade in ivory, save for five very precise exceptions.⁶² These exceptions include some objects which have minimal amounts of ivory, "items of outstandingly high artistic, cultural or historical value" made prior to 1918, as well as dealings between recognised museums, which makes these exceptions particularly relevant in the context of cultural heritage.⁶³ However, while the exceptions exist, the objects belonging to these categories require appropriate documentation, either through registration, which allows for the verification of the legality of the exemption, or through the delivery of a certificate from the Secretary of State after due verifications.⁶⁴ CITES is also less strict than the UK's Ivory Act, as even the highest level of protection, which is given to species listed under Appendix I and includes some ivory, are banned from international trade only.⁶⁵ This leaves national commercial trade unregulated by CITES.⁶⁶

By making ivory dealings *prima facie* illegal, the Ivory Ban simplifies the rules, and sends a powerful message intended to protect elephants from poaching all over the world.⁶⁷ The enforcement of this Act will only be made more significant by the fact that it was challenged by way of judicial review in October 2019 by the Friends of Antique Cultural Treasures Ltd (FACT), a company comprised of professionals dealing in antique ivory.⁶⁸ FACT was unsuccessful at first instance and again on appeal, resulting in the affirmation of the legality of the Act which goes well beyond the restrictions imposed by the EU.⁶⁹

The political support for this Act, and the two subsequent court decisions unequivocally highlight the UK's awareness of the importance of protecting a threatened species, as well as the feasibility of establishing such legislation in the UK. While the protection of elephants can only be applauded, this Act serves as a reminder that other threatened species do not benefit from the same level of protection, and are in fact put at further risk since Brexit. One can wonder why ivory would benefit from such a privileged and exceptional protection, and it may seem that this is more attributable to the glamorous status of elephants, rather than to a real commitment to protecting biodiversity and threatened species, which notably include rare wood species which are much less in the limelight but are no less important from an environmental point of view. As the UK regains control of its borders, it would be a great opportunity to establish truly protective measures for all endangered species in order to match

⁶⁰ Charlotte Dunn, 'The Ivory Ban: A Proportionate Response: R (FACT Ltd) v. Secretary of State for Defra' (2020) XXV *Art Antiquity & Law* 159, 161

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Section 2 Ivory Act 2018

⁶⁴ Section 2(2) Ivory Act 2018; Dunn, above n 60, 161-162

⁶⁵ Heering, above n 52

⁶⁶ *Ibid.*

⁶⁷ Department for Environment, Food & Rural Affairs, The Rt Hon Thérèse Coffey MP, Lord Gardiner of Kimble, and The Rt Hon Michael Gove MP, "Press release: World-leading UK Ivory Bill becomes law" 20 Dec. 2018 <www.gov.uk/government/news/world-leading-uk-ivory-bill-becomes-law--2> accessed 18 Oct. 2021; Charlotte Dunn, above, n 60

⁶⁸ Dunn, above n 60

⁶⁹ *Ibid.*

the UK's commitments under CITES and to show a consistent and fair approach for all species needing protection.

Northern Ireland

The complexity of the situation in Northern Ireland has had consequences on the revocation of the three EU instruments related to the protection of cultural goods and the one related to CITES. The difficulty was to identify where customs controls should take place between the Republic of Ireland and the United Kingdom since they share a border within the island of Ireland. Should the border be on the island, thus separating communities in Northern Ireland and the Republic of Ireland that have lived in peace since the Good Friday Agreement of 1998? Or should the border be the Irish Sea, thus separating Northern Ireland from the rest of the United Kingdom?

The Protocol on Ireland/Northern Ireland adopted on 18 December 2020 opted for the second option.⁷⁰ Article 5(4) and Annex 2 of the Protocol identify which EU instruments should remain in force and these include Directive 2014/60 and Regulation 116/2009 as well as Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora. Although Regulation 2019/880 was revoked in September 2021, it was included in the Northern Ireland Protocol in December 2020,⁷¹ as the explanatory memorandum specifically restates.⁷²

The final situation is rather complex, and a map (at the end of this article) illustrates the different outcomes in eight situations. Great Britain includes England, Wales and Scotland. The United Kingdom includes Great Britain and Northern Ireland.

1. For an export *from the EU or Northern Ireland to Great Britain*: the exporter needs to produce an EU licence + a national export licence of the Member State from where the object was lawfully exported. This marks a significant change as the EU export checks take place between Northern Ireland and Great Britain
2. For an export *from the EU to Northern Ireland*: the exporter needs to produce a national export licence of the Member State from where the object was lawfully exported [same situation as before Brexit when the object was exported from the EU to the UK]
3. For an export *from Northern Ireland to the EU*: the exporter needs to produce a UK export licence [this is the same as before Brexit when the object was exported from the UK to the EU]
4. For an export *from Northern Ireland to a non-EU country*: the exporter needs to produce a UK and an EU export licence [same situation as before Brexit]
5. For an export *from Great Britain to the EU or a non-EU country*: the exporter needs to produce a UK export licence, the EU certificate is no longer required although there is a need to show in the application that it was lawfully exported from an EU Member State

⁷⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L 29/7 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12020W/TXT>> (accessed 1 Sept. 2021)

⁷¹ Decision of the Withdrawal Agreement Joint Committee on errors and omissions 17 Dec. 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949847/Decision_of_the_Withdrawal_Agreement_Joint_Committee_on_errors_and_omissions.pdf#:~:text=17%20December%202020%20DECISION%20NO%203%2F2020%20OF%20THE%20EUROPEAN%20UNION%20AND%20THE%20EUROPEAN%20ATOMIC%20ENERGY%20COMMUNITY accessed 28 Oct. 2021

⁷² Explanatory memorandum to the Introduction and the Import of Cultural Goods (Revocation) Regulations 2021 (2021 no. 1087) https://www.legislation.gov.uk/ukxi/2021/1087/pdfs/ukxiem_20211087_en.pdf accessed 28 Oct. 2021

6. For an import *from an EU or non-EU country to Great Britain*: Regulation 2019/880 does not apply and there is no import control except in the very narrow cases defined by the DCOOA 2003 + CPACA 2017
7. For an import *from a non-EU country to Northern Ireland*: the importer must comply with Regulation 2019/880 + CPACA 2017
8. For an import *from Great Britain (non-EU country) to Northern Ireland (EU)*: the importer must comply with Regulation 2019/880

The Northern Ireland Protocol produces discrepancies in the legal framework of the protection of cultural goods within the United Kingdom, as it creates differences in the geographical scope of rules, thus weakening their implementation. For example, cultural goods coming from a country outside the EU, through Belfast for example, should comply with Regulation 2019/880 because they can move freely to the Republic of Ireland and from there to any other EU Member State. In addition to export and import regulations, Directive 2014/60 is still in force in Northern Ireland but not in Great Britain. Different statutes and types of control are applied by Customs in Belfast and London, thus increasing the risk of trafficking.⁷³

Freeport

Since Brexit, the British Government has been exploring different ways to develop the UK's economy, including the development of free ports.⁷⁴ Freeports are tax-free zones intended to offset 'post-Brexit tariffs', and provide revenue to the country, as well as creating thousands of jobs.⁷⁵ The project of establishing freeports was confirmed by the Chancellor in 2020.⁷⁶ He defended this controversial system of freeports where works of art could be stored without incurring any sales or custom taxes. Indeed, freeports are not specifically set up to store artworks, but it is very likely that they will be used by art owners and collectors as they provide a relatively inexpensive storage solution for such objects.⁷⁷ In fact, the UK's position as the second largest market for art worldwide might be partially behind the government's interest in this establishing freeports, as the government might be aware of their attractiveness for the storage of art.

What is concerning is that freeports have a history of being used by traffickers in cultural property, as has been the case in the Geneva freeport,⁷⁸ in addition to facilitating financial

⁷³ Fionnuala Rogers, 'Following the UK's Repeal of the EU Import Regulation in Great Britain, will Northern Ireland become a Gateway to Europe for Illicit Cultural Property? Recommendations for the UK to Mitigate this Risk and Seize the Opportunity to Strike the Right Balance' (2021) <<https://thinktank.theantiquitiescoalition.org/wp-content/uploads/2021/10/AC-Policy-Brief-9.pdf>> accessed 4 Nov. 2021.

⁷⁴ Gareth Harris. "Freeport Debate Rages on after UK Government Commits to Establishing Ten Vast Storage Facilities; Labour MP Owen Smith calls the tax-free zones "self-storage for art thieves"" *Art Newspaper* (2 Aug. 2019) <www.theartnewspaper.com/news/debate-rages-on-over-freeports-after-uk-government-commits-to-establishing-ten-of-the-vast-storage-facilities-countrywide?> accessed 02/08/2019

⁷⁵ Ruya Worthy, 'The Impact of Free Ports on the Art Market' (2020) 25 *Art Antiquity & Law* 254 ; Harris above, note 74

⁷⁶ 'UK Budget: Freeports, Money for Patching up National Museums and New £250m Culture Fund Confirmed Chancellor Rishi Sunak Delivers First Post-Brexit Spending Pledges' *Art Newspaper* (11 March 2020)

⁷⁷ Worthy, above, note 75

⁷⁸ David W.J. Gill, 'Returning Archaeological Objects to Italy' (2018) 25(3) *International Journal of Cultural Property* 283.

crimes such as money laundering and tax evasion.⁷⁹ The role of freeports in maintaining the secrecy of the location and of the identity of the owners of artworks have been highlighted by the Panama paper leaks.⁸⁰ By using freeports, not only were the people involved able to dissimulate some of their assets, but they were also able to conceal artefacts which might otherwise have been the object of restitution claims.⁸¹ Additionally, artworks can be used to move large sums of money across borders undetected, and freeports have allowed untaxed trade and the anonymity of those involved, as highlighted in a report published in April 2019.⁸² Also, from a more moral and ethical point of view, some critics of freeports describe them as ‘art graveyards’⁸³ which intrinsically encourage the storing of art out of the public eye, instead of exposing it and allowing everyone to enjoy objects which are part of the historical and cultural heritage of humanity.⁸⁴

The establishment of freeports raises the question of whether the UK will become the hub of trafficking of cultural objects: an offshore haven from the EU customs territory. The threat raised by freeports, as well as the advantages they may bring to the UK, will essentially depend on the specific regulations put in place and their application.⁸⁵ For example, Worthy argues that the UK Government will need to adopt strict anti-money laundering regulations in order to establish freeports, but that these regulations will make UK freeports no more attractive than those in Luxembourg or Switzerland, and thus expose them to more competition than might be expected initially, which would reduce their profitability.⁸⁶

Recommendation

1. Mobility and employment of EU workers in the arts and cultural sector

Considering the importance of EU workers in the arts sector, the Government must facilitate their mobility and employment after Brexit. It would be particularly important to take into consideration the particular characteristics and constraints of the arts and heritage sector to design employment and immigration policies which allow for more flexibility and adaptability to the needs of museums, monuments and other institutions.

2. On the return of illegally exported cultural objects.

The UK could enter into a bilateral agreement with the EU rather than signing bilateral agreements with every EU Member State, or it could apply EU Directives in its courts (as is the case in Switzerland). The latter would be more likely to maintain better cohesion and efficiency.

3. ACE must continue to check that cultural objects are legally exported from EU Member States according to Regulation 116/2009.

⁷⁹ Worthy, above note 75

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Anny Shaw, 'European Parliament puts 'urgent' phasing out of freeports top of agenda; New report deplors the use of freeports to permanently store assets such as art' *Art Newspaper* (2 April 2019) <www.theartnewspaper.com/news/eu-puts-urgent-phasing-out-of-freeports-top-of-agenda?> accessed 08/04/2019.

⁸³ Worthy, above, note 75

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

Cultural objects legally exported from Member States to the UK before the end of the Implementation Period have become illegal exports from the EU. Because of Brexit, the EU's border has changed whereas objects have not moved, thus they are now outside the EU without a valid European export licence.

The UK Government must consolidate the legal basis for carrying out these checks.

4. The UK Government should introduce import controls modelled on the Regulation 2019/880 to better implement the 1970 Convention.

The 1970 Convention was ratified in 2002 following the publication of the report of the Ministerial Advisory Panel on Illicit Trade.⁸⁷ Ratification was subject to three reservations⁸⁸, including one to the effect that, for the sake of uniformity, in interpreting the term 'cultural property' in Article 1 of the 1970 Convention, the UK would apply the more precise definition contained in the Annex to Council Directive 1993/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. Following Brexit, the UK could take the opportunity to widen the definition of cultural property to reflect the definition found in Article 1 of the Convention. It is also necessary to withdraw reservation (b) according to which EU law applies between the UK and EU Member States.

There is an opportunity to create import restrictions based on Regulation 2019/880. Accordingly, an illegal export from a State which is party to the 1970 Convention would become an illegal import in the UK. This would grant additional powers and means for the UK to protect cultural objects from trafficking.

5. Extend the applicability of the Dealing in Cultural Objects (Offences) Act 2003 to Northern Ireland and Scotland.

The Dealing in Cultural Object (Offences) Act 2003⁸⁹ was adopted as a means of reinforcing the obligations contained in the 1970 Convention. However, it is not applicable in Northern Ireland and Scotland which leads to fragmentation and gaps in its application. The Act should apply to all nations of the UK.

6. The UK should ratify the 1995 UNIDROIT Convention.

So far, the UK has refused to ratify the UNIDROIT Convention. As for many countries opposed to the text, the main arguments relate to the length of the limitation periods for claiming the return of objects which have been unlawfully exported and for the restitution of stolen cultural objects and the fundamental changes in personal property law. However, the EU framework of co-operation no longer includes the UK, thus weakening its ability to protect cultural objects. Furthermore, the definition of due diligence had found its way into English law through the implementation of the 2014/60 EU Directive which has now been

⁸⁷ Report of the Ministerial Advisory Panel on Illicit Trade (chair Professor Norman Palmer) para. 61

⁸⁸ "(a) the United Kingdom interprets the term "cultural property" as confined to those objects listed in the Annex to Council Regulation (EEC) N° 3911/1992 of 9 December 1992, as amended, on the export of cultural goods and in the Annex to Council Directive 1993 / EEC of 15 March 1993, as amended, on the return of cultural objects unlawfully removed from the territory of a Member State;
(b) As between EC member states, the United Kingdom shall apply the relevant EC legislation to the extent that that legislation covers matters to which the Convention applies; and
(c) The United Kingdom interprets Article 7(b)(ii) to the effect that it may continue to apply its existing rules on limitation to claims made under this Article for the recovery and return of cultural objects"

⁸⁹ The Act creates a new offence of dishonestly importing, dealing in, or being in possession of, any cultural object knowing or believing that the object was stolen, or illegally excavated, or removed from any monument or wreck contrary to local law.

revoked following Brexit. These changes create a significant gap in protection of cultural objects that can only be filled by the ratification of the UNIDROIT Convention.

The ratification of the Convention would also send a strong message regarding the political stand of the UK on the protection of cultural heritage. It would also alleviate the fear that the UK might become the hub of trafficking of cultural objects outside the EU customs territory.⁹⁰

7. It is essential that freeports be closely monitored and strictly regulated.

The UK should review its plan to establish freeports and put in place strong monitoring and checks to avoid fostering illegal activity. In her article, Worthy suggests that the UK could establish a new system of freeports, which would provide temporary tax exemptions, storage for an unlimited amount of time and some level of confidentiality, while still requiring the necessary level of transparency and data collection to avoid illegal dealings.⁹¹ It has also been suggested that the owners of works of art stored in freeports could be incentivised to lend these objects to museums, institutions or exhibitions, thus allowing public access.⁹² It remains to be seen how the UK Government will handle freeports, but it is clear that well thought-out and strict regulations will be essential to ensure the morality and legality of freeports.

8. The UK should honour its commitments under CITES

The UK should require that all items made from CITES species come only through designated ports of entry, to ensure the most rigorous possible application of the regulations. It should also review some of the categories which grant exemptions to ensure that they are strictly necessary. Finally, the Government should ensure that the regulations and policies put in place do not arbitrarily favour some species over others, but systematically operate in the best interest of the protection of the environment and of biodiversity.

Conclusion

Brexit's impact is far ranging and will impact the arts and heritage sector in multiple ways, which go well beyond the circulation of objects (and people) and could not be included in this article. Much more could be said about the impact of Brexit on increased risks of money laundering, the impact on the livelihoods of artists who previously worked across EU borders, as well as on the end of the co-operation between police forces across different countries to tackle looting or illegal exportation. Mattocks also brings attention to an aspect of Brexit rarely discussed but nonetheless very relevant, which is "the lost opportunity to learn from and collaborate with other member states on issues relating to cultural policy."⁹³ Indeed, beyond the practical issue of employing skilled workers, obtaining funding, and practical cooperation, the separation of the UK from the EU is likely to hinder the exchange of ideas and information which would have contributed to the development of better policies in the art and cultural sector.

Brexit could also be an opportunity for the Government to act decisively in the fight against the trafficking of cultural objects, including objects made of endangered species. It is an opportunity to ratify the 1995 Convention, better implement the 1970 Convention and CITES

⁹⁰ Harris, above, note 74

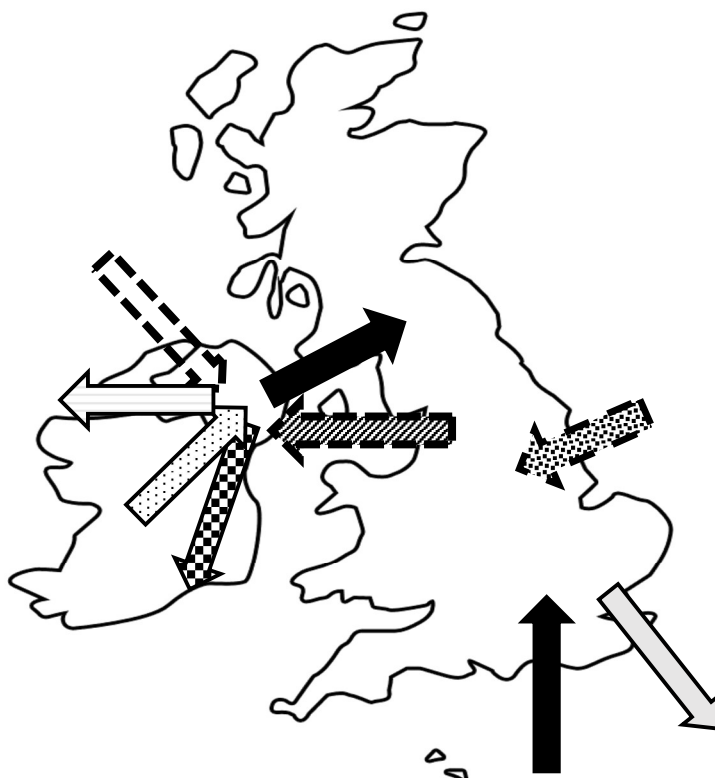
⁹¹ Worthy, above, note 75

⁹² *Ibid.*

⁹³ Mattocks, above, note 18

Convention, so as not to leave regulatory gaps and loopholes that will favour trafficking and contribute to the destruction of the cultural heritage of mankind.

MAP



-  1. Export from EU or NI to GB (England, Wales or Scotland) : EU licence + MS export licence
-  2. Export from EU to NI: MS export licence (no change)
-  3. Export from NI to the EU: UK export licence (no change)
-  4. Export from NI to non-EU country: UK and EU export licence
-  5. Export from GB to EU or non-EU country: UK export licence
-  6. Import from EU or non-EU country to GB: no import control but DCOOA 2004 + CPACA 2017
-  7. Import from non EU country to NI: Regulation 2019/880 +CPACA 2017
-  8. Import from GB (non EU country) to NI: Regulation 2019/880