



Art and cultural property

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Welcome to the latest issue of our "Art law - recent developments" newsletter in which we discuss legal issues currently affecting the global art community.

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- The EU Regulation on the Introduction and Import of Cultural Goods
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- A recent judgment on the Proceeds of Crime Act and its potential implications on stolen works of art and restitution

The EU Regulation on the Introduction and Import of Cultural Goods: A deterrent to international money laundering and terrorist financing, or a serious impediment to lawful EU art market trade?

The European Union's Regulation 2019/880 on the introduction and import of cultural goods (the "Regulation") represents a significant shift in the legal landscape for the importation of cultural goods into the EU.

The Regulation's objective, to combat illicit trafficking in cultural goods and preserve cultural heritage, is certainly to be applauded. The measures by which it is to be implemented though have raised serious

concerns throughout the art world. Many feel that rather than target money laundering and the art trade as a conduit for global terrorist financing, what are seen as over stringent Regulations are in practice, much more likely to stifle lawful trade, with legitimate business bearing the brunt and cost of compliance. This could have a catastrophic impact on dealers, collectors and auction houses alike

throughout the EU, as well as perturb those wanting to do business within the EU.

Impetus behind the Regulation

The last decade has witnessed growing public controversy as regards the trade and ownership of ancient art, with the topics of restitution and repatriation reverberating far beyond the immediate art world. This has predominantly focused on the return of artefacts taken decades, if not centuries, ago from former European colonies now often residing in national collections and museums, or on Nazi looted art before and during the Second World War. More recently, the authorities' attention has turned to global conflict zones, which are believed to be the current targets of looting and illegal exportation undertaken for the benefit of terrorist groups, such as ISIS and Al-Qaeda.

It is this backdrop, in conjunction with the 5th Anti-Money Laundering Directive 2018, which introduced more stringent customer due diligence standards, that appears to be the impetus behind the Regulation. It marks a new and more rigorous approach which constitutes the first uniform rules to apply to imports into the EU. The objective sounds straightforward - to prevent items unlawfully taken from their countries of origin to enter and/or be traded within the EU; its implementation may be considerably more complex.

Key Provisions and Scope

The Regulation applies to cultural goods originating outside of the EU; those that originate from within the EU customs territory at the time of import are not covered. All items exported from the UK to the EU will therefore be caught by the legislation, with the exception of Northern Ireland which remains part of the customs union.

It essentially imposes a framework by which cultural goods (which includes archaeological finds, artworks, manuscripts, collectible items and rare books) are categorised in accordance with their perceived risk status. Depending on how the goods are categorised, it is incumbent on the importer to provide satisfactory evidence to the relevant authorities that the goods in question have been legally exported from their country of origin. Whether or not an item has been legally exported will be determined in accordance with the legislation of the country from which the item is exported, which may not always be clear or may not even have existed at the time of export and which may of course be entirely unfamiliar to the importer themselves. Previously the burden was on the country from which the goods originated to establish a breach; the evidential

burden is now on the importer to establish compliance. Sanctions for non-compliance will be determined in accordance with national laws.

The Regulation came into force in June 2019; however, a discretionary 2-year period was permitted by which to implement its various measures. The prohibition on the import of cultural goods illegally removed from the non-EU country (see Category A goods below) came into effect in December 2020. The deadline by which the rules in relation to Category B and C goods are to come into effect is 28 June 2025, which is now less than a year away.



'Categories' of cultural goods and corresponding requirements

Category A goods:

- Items that have been illegally exported from their country of origin in accordance with the laws of that country in force at the time of exportation. These are prohibited from entering the EU.

Category B goods:

- Items from archaeological excavations exceeding 250 years of age regardless of their value.
- Importers must obtain an import licence before entry into the EU, which application must include: (i) evidence in the form of export certificates or export licences that the goods have been exported from the country where they were created or discovered in accordance with the laws of that country at the relevant time; or (ii) evidence of the absence of such laws at that time.
- Within 21 days of receipt of the application the competent authority is to request any missing or additional information required from the applicant importer. Within 90 days of receipt of the complete application a decision must be made as to whether to grant or reject the licence. Licence applications could therefore take up to 3 months

from the date of receipt of the completed application.

Category C goods:

- Items such as paintings, sculptures, prints and coins older than 200 years with a minimum value of EUR 18,000.
- An import licence is not required, but instead the importer is required to provide prior to entry:
 - a) an 'importer statement' confirming that the cultural goods have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country at the time they were taken out of its territory; and
 - b) a standardised document describing the cultural goods in question in sufficient detail for them to be identified by the authorities and to perform risk analysis and targeted controls.
- Whilst the primary evidence (i.e., the export certificates or export licences) does not need to be submitted, for the importer to provide the required declaration they must still at least have access to these supporting documents evidencing the basis on which the declaration is made.

Exceptions to the rules?

In circumstances where: (i) it is not possible to determine the item's country of origin; or, (ii) where the item was removed from its country of origin prior to 24 April 1972 (being the effective date of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property), an applicant may instead provide evidence that the item was exported in accordance with the laws of the last country where it has last resided for a period of 5 years or more. This time period has been chosen to prevent exporters from effectively forum shopping for countries with less stringent export regulations and exporting goods to the EU from there.

The rules are also relaxed for the purposes of cultural goods exported into an EU state on a temporary basis, including for the purposes of education, commercial art fairs or exhibitions. In these circumstances it is not necessary to obtain an import licence, and an importer statement in accordance with the Category C goods requirements will suffice.

However, should the item be subsequently sold, for example at the art fair for which it was granted temporary access, whilst in the EU member state

and the purchaser wishes to retain the item in that country, an import licence will need to be applied for. This can feasibly be done after the sale has concluded but there is the obvious risk that the licence may not be approved. To avoid this risk, the licence would need to be applied for prior to conclusion of the sale, or the sale needs to be on a conditional basis, but either could put off the buyer altogether.

Impact on the Art and Antiquities Trade – the Look Ahead

It is expected that the Regulation will become fully effective by 28 June 2025. By this time a centralised electronic system capable of dealing with information exchange between member states and online licence applications must also be in place. Establishing such a database able to process import licences, importer statements and supporting evidence that can be accessed throughout member states is itself an astronomical task and quite a burden to bear.

In addition to this, each member state will need to have ready sufficient customs officials and staff with the requisite knowledge to be able to assess applications and consider the documentation and provenance of a huge range of cultural items. It is questionable the extent to which such a team of 'experts' will be sufficiently ready for deployment by June next year.

The new requirements are additionally seen as placing an undue burden on importers, who must now navigate a complex and potentially costly compliance landscape. Critics of the Regulation point out that the imposed blanket approach to all cultural goods fails to consider the nuances, complexity and diversity of the art and antiquities trade. The required documentation may be impossible to obtain either because it has long since been lost, or because it never existed in the first place. The search for and checking of documentation (in many cases by an inexperienced customs team) will undoubtedly lead to delays and could deter trade. This, coupled with the potential high costs of compliance, may also drive smaller dealers out of business, consolidating the market in the hands of a few large players. Alternatively, this could arguably result in the emergence of a parallel market altogether, where dealers seek to circumvent the EU's strict controls by trading in less regulated jurisdictions – in which case illicit trade is merely diverted.

Regardless of whether you support or lament the Regulation, with under 1 year to go until it is expected to be fully implemented, understanding the requirements and how to comply with these is now a

critical consideration. Dealers may want to consider amending their terms and conditions to make purchasers aware of the Regulation and even allocate the cost and risk of compliance to them where relevant. Auction houses undertaking online sales will also need to be very careful that their terms and conditions are sufficiently brought to bidders' attention and clear as regards the EU import requirements.

Whilst there may not be any current need to import an item to an EU state, as a dealer or collector that could change down the line depending on the item and counterparty in question. To ensure compliance as and when needed, it is imperative that evidentiary documentation, which may include export certificates, ownership history, and proof of legal acquisition, is retained throughout ownership of the item in question.

Some have advocated the Regulation as positive for the UK, in that London may be seen as home to a more flexible, less stringent art market to import cultural goods into. The louder contingent however is undoubtedly of the view that a more balanced approach is required that protects cultural heritage and the vibrancy of the international art market. It cannot also be overlooked that, while avoiding the import of an item into the EU and its sale elsewhere, may be a short-term solution, any buyer may be reluctant to pay a full price when they know that the EU will be a closed market for them when they come to sell the item themselves. This could lead to two tier pricing with EU compliant items having a higher value than non-compliant items.

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AI and authentication

There has been a huge boom in the use of Artificial Intelligence ("**AI**") and the art world is no exception. Tools and platforms utilising AI models and systems ("**AI Platforms**") are being used more and more commonly to assist businesses within the art sector, both to help streamline back-office processes and for novel uses within the industry, as highlighted by the recently publicised adoption of an AI authentication tool by the Germann Auction House in Switzerland. Taking a lead from this novel use of AI, we explore the benefits, considerations and risks of using AI Platforms to authenticate artworks in this article.



Why would we want to use AI to authenticate an artwork?

Whilst many would argue that the skill of an experienced expert cannot be replaced by AI, due to the years of experience, judgement and knowledge accumulated by the expert when studying and authenticating the works of a particular artist, the very nature of AI in fact lends itself to authentication. AI Platforms utilise algorithms that can be trained on large volumes of data and are well suited to detecting patterns or discrepancies at speed. In the context of authentication, AI Platforms can therefore be trained using the entirety of an artist's collection and then tasked with providing an objective assessment of whether a particular work is authentic or not based on its analysis of the artist's known authentic works. This may result in a quicker and cheaper authentication process than by using traditional means.

However, the use of AI Platforms also carries some significant challenges and risks that need to be carefully considered before you decide to use AI for the authentication of artworks.

What should we consider before using AI to authenticate a work?

Before using any AI Platform, it is important to have a basic understanding of how the platform works and how the underlying model was developed in order to understand its capabilities and limitations. This includes understanding what input the AI Platform requires to operate effectively and what output the platform is capable of producing.

AI Platforms used for art authentication commonly authenticate an artwork by comparing an image of the work to be authenticated with the known

authentic body of work of the relevant artist on which the AI has been trained. Access to a high-quality image of the work to be authenticated is, therefore, a prerequisite to using AI for these purposes. Where the AI Platform authenticates the work solely based on the image provided, it is crucial to consider that the platform will not take into account any surrounding documentation or evidence such as provenance records, certificates of authenticity, exhibition histories or scientific analyses in the manner that a human expert might.

Similarly, the algorithms underlying AI Platforms are generally probability-based and are notably not able to exercise judgment and discretion in the way a human can. AI Platforms therefore cannot fully account for any context, nuance, ambiguity or uncertainty relating to an artwork.

These points will be particularly important to consider when seeking to authenticate works that differ in style or technique from an artist's greater body of work – an AI Platform may well be less likely to view these as authentic in comparison to a human expert who can evaluate the broader contextual information relating to the artwork and exercise judgement accordingly.

Understanding the quality and quantity of the data sets on which the AI is trained is also crucial. The accuracy of an AI Platform when authenticating works will be largely dependent on training the model on a large body of known authentic works by the artist in question. AI Platforms are, therefore, likely to be less effective at authenticating works by artists with more limited bodies of work. Where an AI Platform lacks sufficient information to create a requested output – in this case authenticating a work – there is also a risk that the AI Platform could

"hallucinate" when producing results and create information to fill gaps.

Furthermore, where the AI is trained on data sets including works of questionable authenticity attributed to an artist, the AI Platform may produce misleading or inaccurate results, such as suggesting that works that have otherwise questionable authenticity are authentic.

Another important consideration when using an AI Platform for authentication is to understand what the output or report produced by the platform is actually telling you. The output may include a probability or a likelihood of the work being authentic, rather than a definitive answer or a guarantee as to authenticity. The output may also include caveats, disclaimers, qualifications, or explanations that need to be taken into account when determining the extent to which the AI Platform can be relied upon to authenticate and the level of human supervision required.

What options might we have if the AI authentication turns out to be incorrect?

If you do choose to use an AI Platform to authenticate a work and, subsequently, it turns out to have incorrectly identified this as authentic or not, what are your possible options and remedies?

If you have bought a work authenticated by an AI Platform that is later revealed not to be authentic or, alternatively, if the value of your work has been diminished as a result of an AI Platform deeming the work to not be authentic even after subsequent evidence suggests the work is authentic, you may wish to claim damages for the loss in value from the provider of the AI Platform in the first instance. However, providers of AI Platforms often attempt to exclude or limit their liability for the outputs of the AI in their terms and conditions. This is particularly the case for AI Platforms provided at low or no cost and for "off-the-shelf" rather than bespoke platforms. In any case, if the output produced by the AI Platform only provides you with a probability or percentage likelihood of the work being authentic, it may be hard to directly link this output with the loss suffered (given the AI Platform is not definitively asserting whether the work is authentic or not).

If you are unable to pursue a claim against the provider of the AI Platform, you may seek to claim against the gallery or auction house that sold you the work, if they used the AI Platform as part of their due diligence or authentication process. This approach may have more success, particularly where the gallery or auction house has verified or corroborated the results produced by the AI Platform. However, as with the provider of the AI

Platform, the gallery or auction house may well have sought to exclude or limit its liability for losses connected with the authentication process.

In these instances, you may be left with very little recourse or remedy should the AI Platform incorrectly authenticate your work.

In reality, many human experts may also seek to exclude or limit their liability in relation to their authentication opinions and reports. However, you may have more room to negotiate the terms entered into with a human expert, in particular to include or to carve out certain types of liability or losses from the limits or exclusions or to include provisions requiring the expert to maintain insurance, such as professional indemnity insurance, to cover certain losses.



What should we do to mitigate these risks?

Given the possible risks and limitations of using AI Platforms to authenticate artworks and the possible lack of recourse if the platform incorrectly authenticates a work, it is important that you avoid authenticating works solely using AI, without any human oversight. Whilst AI Platforms may be useful tools to help authenticate large numbers of lower value works quickly and at a reduced cost or to assist with authentication on higher value works, the AI's outputs should not be the final source of authority when determining authenticity.

AI Platforms for authentication should instead be used for what they are: a helpful tool to assist with and accelerate the authentication process to be led by a human expert. This principle applies to the use of AI in any context – whilst you may trust AI to produce an output, you should always verify the results it produces.

It is also worth noting the possibility of legislation being introduced to govern the use and provision of AI Platforms. In the European Union, we have already seen the introduction of the AI Act, which is to be phased in over the next two years and places a

number of obligations on providers and users of certain types of AI Platforms. Whilst the UK Government has taken a "pro-innovation" approach and has refrained from proposing significant AI-related legislation so far, it remains to be seen whether the current Government will continue with this approach or will instead seek to introduce legislation to govern the use and provision of AI Platforms in the coming years.

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Once criminal property, always criminal property?

A Court of Appeal case from 2024 may have significant consequences for the status of stolen works of art and cultural property, even following restitution.

In *R (on the application of World Uyghur Congress) and National Crime Agency* [2024] EWCA Civ 715, the Court of Appeal held that the "adequate consideration" defence in the Proceeds of Crime Act 2002 ("**POCA**") has no impact on the status of the property and does not "cleanse" criminal property. A full summary of the case and its implications can be found in our earlier article, [here](#).

The World Uyghur Congress – a very short summary

For present purposes, the key points relating to and arising from the judgment, expressed simply and not comprehensively, are as follows:

- POCA creates a designedly broad definition of "criminal property". Any property, in whatever form, and wherever situated, that constitutes (directly or indirectly, in whole or in part) a person's benefit from criminal conduct is criminal property, where a person knows of or suspects this to be the case.
- There is no "time limit" on the status of criminal property; it does not necessarily cease to be criminal property simply because of the passage of time or after a certain period. There is also no "statute of limitations" on money laundering offences in the UK.
- "Criminal conduct" can be criminal acts in the UK or overseas (so long as the relevant act would amount to an offence in the UK if it occurred here).
- There is a defence of "adequate consideration" in POCA; a person who received criminal property for adequate consideration (e.g. by paying market price or rate for it) does not commit an offence of acquiring, using or possessing criminal property.
- Prior to the case of *World Uyghur Congress*, the adequate consideration defence had been widely believed – including, as aired in that case, by the National Crime Agency ("NCA") – to operate to "cleanse" criminal property, changing its status, and rendering it no longer criminal property.
- In *World Uyghur Congress* the Court of Appeal made it clear that this interpretation is incorrect. The payment of adequate consideration does not change the status of the property. It remains criminal property in the hands of the payer of adequate consideration (e.g. a bona fide purchaser).

Unintended consequences – what does "cleanse" criminal (stolen) property?

One consequence of the judgment is that the payer of adequate consideration holding criminal property, while not committing an offence by possessing or using the property, might be at risk of committing a criminal offence of *transferring* criminal property, if s/he were to sell or otherwise transfer the property. The defence of adequate consideration is limited to receipt and possession of the property (s.329 POCA); any transfer might amount to a separate offence (s.327 POCA).

More extraordinarily, if the payment of adequate consideration does not "cleanse" or change the status of criminal property (e.g. a stolen work of art), a question arises as to what (if anything) *does* "cleanse" it.

Although there is suggestion in the judgment that there are circumstances in which property might cease to be "criminal property", the Court cited s.308 POCA in this regard, a provision which operates in the context of a separate legal regime (civil recovery under Part V POCA) to the money laundering offences created in Part VII POCA. Is it therefore the case that for the purposes of Part VII POCA a stolen work (criminal property) is always "criminal property", so long as a person knows or suspects that it represents a benefit from criminal conduct?

Such an interpretation would mean that a stolen work, restored to its rightful owners, would represent "criminal property" in the owner's hands, if the owner knows or suspects that it represents a benefit (i.e. the proceeds) of a crime (i.e. the theft).

Do works subject to restitution *remain* criminal property?

The implications of the judgment are potentially vast and significant, including in respect of works of art and cultural property. One unintended consequence of the judgment may impact the sale of works that have been the subject of formal restitution.

In cases where a work is restored to its owners (or the owner's heirs) or comes up for sale, where the seller's legal title is good under English law, consideration will need to be given to the impact of *World Uyghur Congress* and the notion that criminal property – the broad definition of which could encompass, for example, a work of art, stolen overseas, several decades ago – and precisely what acts in respect of that work (possession; transfer; sale) might amount, on a strict and technical reading of the law as it now stands, to a criminal offence.

Put more simply, given the *Uyghur* judgment dispenses with the notion that the payment of adequate consideration cleanses criminal property, when and how does cleansing occur, and absent clarity on this, how can the seller / buyer of a once-stolen work be confident that the sale does not amount to a transfer of "criminal property"?

The correct interpretation of the law is, in the view of the author, that stolen property ceases to be criminal property in the hands of a rightful owner, as what it "represents", in that case, is the rightful property of the owner and not (in the rightful owner's hands) the benefit of a crime. The notion of "benefit" ceases to be pertinent when the thief is dispossessed of the benefit of their crime.

However, absent strict legal clarity on this point, in many cases, a cautious approach will be adopted, and an application made for a "Defence Against Money Laundering" ("**DAML**", also called "Consent" or a "Consent SAR") to the NCA, to ensure the sale of a work of art, which at some point in its history had the status of "criminal property", does not amount to a technical offence of "transferring" criminal property. One would hope (and expect) that such an application would be promptly granted by the NCA.

The risk of prosecution of bona fide sellers and buyers is very low, but other legal considerations arise

It will be understandably counter intuitive, to say the very least, for the rightful owners of a stolen work of art to comprehend that it is they who are at risk of committing a criminal offence by dealing with a work that has been restored to them. Likewise, the purchaser of a work that was subject to restitution, and who has received legal advice that their title to the work is good, is unlikely to have considered the potential impact of the criminal law on their dealing with a work bought for market value and in good faith.

There will be no conceivable public interest in prosecuting the rightful owner or good-faith purchaser for money laundering in these circumstances and, with the public interest forming part of the Code for Crown Prosecutors test for initiating a prosecution in England, the risk of prosecution in a case of this nature therefore must only be considered very low. It follows that the question of law on cleansing is therefore very unlikely to come before the Courts in this context. However, other legal considerations may arise from the judgment.

Consideration will need to be given to disclosures and warranties in cases concerning once stolen works. Much more likely than prosecution is a case in which a repentant buyer seeks to undo a contract for sale on the basis that a broad warranty given about the absence of legal encumbrances was improperly given, considering the nature of criminal property in English law, following the *Uyghur* case. In combination with careful consideration of what is said about the work and its status in contractual and other legal documentation, including insurance documentation, there may be cases where an application for a DAML to the NCA, in relation to any act that goes beyond the narrow protection of the adequate consideration defence (e.g. a transfer or sale), will be considered a cautious but appropriate course of action.

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