

LEGAL COMMENTARIES

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UK Export Controls and National Treasures

Abstract: This article describes the UK's export control system for works of art and objects of cultural interest, with a focus on the protection of its national treasures. Beginning with an overview of the historical development of export controls in the UK, it goes on to outline the current legislative framework and the different types of export licences that are currently issued under both UK law and EU regulation. The process of assessing cultural objects as potential national treasures is set out, including descriptions of the Waverley criteria and the role of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest. The impact of the export controls is then examined, with reference to statistics for the year 2017-2018. Finally, there is a brief discussion on the potential impact of Brexit.

Keywords: national treasure, Waverley criteria, export control, Arts Council, objects of cultural interest

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The UK's export control system for cultural goods aims to protect the nation's cultural heritage whilst preventing illicit trade, looting, and trafficking in cultural objects. It strives to balance these aims with the personal rights of owners and the reputation of the UK within the international art market.

The Statutory Framework

Prior to the Second World War there were no restrictions on the export of art from the UK, although the need to do so had been recognized some decades earlier.¹ Due to Britain's declining economic fortunes at the beginning of the 20th century, many works of art were sold to private collectors abroad at prices higher than the UK's public collections could afford. In 1911 the Trustees of the National Gallery set up a Committee chaired by Earl Curzon to consider how important paintings might be retained in the UK. The Curzon Committee concluded that it was inadvisable to restrict the export of works of art or to place an export duty on them. It made some recommendations designed to assist public collections in purchasing them, including various policy initiatives and tax incentives, but the outbreak of the First World War prevented the adoption of any of these recommendations. After the war further representations were made, and in 1922 the "Paramount List" was drawn up by the UK government. This was a list of a few outstanding pictures which, if in danger of being sold abroad, would impel the Treasury to recommend that Parliament agree to their purchase for the nation for a reasonable sum. Two of the pictures on the Paramount List were subsequently acquired for the nation.²

It was not until the Second World War that restrictions on the export of works of art were put into place. The Import, Export and Customs Powers (Defence) Act 1939³ was enacted as emergency legislation to prevent the export of the nation's resources in wartime. Antiques and works of art were brought under this system in 1940. Originally intended to remain in force only for the duration of the emergency, it was not superseded until the beginning of the 21st century with the passing of the Export Control Act 2002⁴ and the Export of Objects of Cultural Interest (Control) Order 2003.⁵

¹ For a summary of the history of export control, see C. Maurice, R. Turnor, *The Export Licensing Rules in the United Kingdom and the Waverley Criteria*, "International Journal of Cultural Property" 1992, Vol. 1(2), pp. 273-296.

² These were the Wilton Diptych and Titian's *Vendramin Family*, both purchased in 1929.

³ UK Public General Acts 1939 c. 69.

⁴ UK Public General Acts 2002 c. 28.

⁵ UK Statutory Instruments 2003 No. 2759.

Cultural Objects Subject to the Controls

Under the 2003 Order, objects of cultural interest are prohibited from export except under the authority of a licence granted by the Secretary of State. Objects of cultural interest are defined as:

Any objects of cultural interest manufactured or produced more than 50 years before the date of exportation except:

- (a) postage stamps and other articles of philatelic interest;
- (b) birth, marriage or death certificates or other documents relating to the personal affairs of the exporter or the spouse of the exporter;
- (c) letters or other writings written by or to the exporter or the spouse of the exporter; and
- (d) goods exported by, and being the personal property of, the manufacturer or producer thereof, or the spouse, widow or widower of that person.⁶

Natural objects which have not been manufactured or produced, such as unworked zoological and palaeontological specimens, are not cultural objects for the purposes of the UK legislation.

Export Licensing Procedures

Export licences for cultural goods are issued on behalf of the Secretary of State for Digital, Culture, Media and Sport (DCMS) by the Export Licensing Unit at the Arts Council. The procedures for processing export licence applications are outlined in the published guidance *UK Export Licensing for Cultural Goods*.⁷ The criteria by which decisions on export licence applications are made are set out in the Statutory Guidance issued by the Secretary of State, as required by the Export Control Act 2002.⁸

At the time of writing the UK is a Member State of the European Union (EU) and, as such, operates a two-tier system of export control. It issues individual licences for either temporary or permanent export under both UK legislation (for objects being despatched to another EU Member State) and EU Regulation⁹

⁶ Ibidem, Schedule 1.

⁷ Arts Council England, *UK Export Licensing for Cultural Goods: Procedures and Guidance for Exporters of Works of Art and Other Cultural Goods*, 2019, <https://www.artscouncil.org.uk/export-controls/export-licensing> [accessed: 3.11.2019].

⁸ Department for Digital, Culture, Media & 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*, March 2015, <https://www.artscouncil.org.uk/export-controls/export-licensing> [accessed: 3.11.2019].

⁹ Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Codified version), OJ L 39, 10.02.2009, p. 1.

(for objects being exported to a third country). Open licences are also issued under both regimes.¹⁰ These are designed to reduce the administrative burden on exporters by removing the need for individual export licences in certain circumstances.

Open General Export Licence (OGEL)

The Open General Export Licence (Objects of Cultural Interest) is issued under UK law by the Secretary of State for use by any exporter and is revised from time to time.¹¹ It allows the permanent export of cultural goods below certain financial thresholds according to category. The “catch-all” threshold is £65,000, unless the object falls into one of the categories for which a different threshold is specified, such as paintings in oil or tempera (£180,000), textiles (£12,000), portraits of British Historical Persons¹² (£10,000), manuscripts (£zero), or archaeological material found in UK soil or UK territorial waters (£zero). The OGEL also covers some other types of goods, such as any article for which an EU licence has been issued, any article that has been imported into the UK from a country outside the EU and is not in free circulation within the EU, and any article that the Secretary of State has approved for return to the claimant following a recommendation to that effect by the Spoliation Advisory Panel.¹³ Goods covered by the OGEL do not need an individual licence for dispatch to another EU Member State. For export outside the EU, the OGEL does not remove the requirement for an EU licence, but insofar as it is below the OGEL threshold the object will not be scrutinized as a potential national treasure.

Open Individual Export Licence (OIEL)

Open Individual Export Licences are issued under UK law to specific exporters by the Secretary of State. An OIEL covers specific goods, such as manuscripts

¹⁰ Export of Objects of Cultural Interest (Control) Order 2003 and Commission Implementing Regulation (EU) No. 1081/2012 of 9 November 2012 for the purposes of Council Regulation (EC) No. 116/2009 on the export of cultural goods, OJ L 324, 22.11.2012, p. 1.

¹¹ Open General Export Licence (Objects of Cultural Interest) dated 12 March 2015 granted by the Secretary of State, <https://www.artscouncil.org.uk/export-controls/export-licensing> [accessed: 3.11.2019].

¹² A British Historical Person is defined as any person, living or dead, in respect of whom an entry appears in the Dictionary of National Biography (or any supplement thereto), “Who’s Who” or “Who Was Who”.

¹³ The Spoliation Advisory Panel resolves claims from people, or their heirs, who lost property during the Nazi era, and which is now held in UK national collections. For more information, see the website: <https://www.gov.uk/government/groups/spoliation-advisory-panel> [accessed: 03.11.2019].

exported by a dealer who regularly attends trade fairs, or objects from the collection of a public institution which regularly lends them out. There are four types of OIELs currently in operation:

- a) Museums and Galleries OIEL for the temporary export up to 3 years of objects owned by them or in their care;
- b) Objects of Cultural Interest OIEL for the export of goods which have been imported into the UK within the past 50 years;
- c) Manuscripts OIEL;
- d) Coins OIEL.

Objects covered by an OIEL do not need an individual licence for despatch to another EU Member State. For export outside the EU, the OIEL does not remove the requirement for an EU licence, but the object will not be scrutinized as a potential national treasure.

Specific Open Licence

Specific Open Licences are issued under Regulation (EU) No. 1081/2012.¹⁴ They allow the temporary export on multiple occasions (up to six months at a time) of specific categories of cultural goods for personal use and/or exhibition. The UK currently issues Specific Open Licences for two categories of cultural goods: musical instruments and motor vehicles.

All cultural goods that cannot be exported under the OGEL, an OIEL, or a Specific Open Licence require an individual export licence to leave the UK. Before being granted a licence, objects that have been in the UK for more than 50 years are assessed as potential national treasures. This “50-year policy” has been adopted by successive UK governments on the basis that an object which has been in the UK for less than 50 years has not been in the country long enough to acquire the status of a national treasure. This, however, is a matter of policy rather than a strict rule and the Secretary of State has the power to depart from this policy in a particular case if justified by the circumstances.

National Treasures and the Waverley Criteria

Following the Second World War, the UK government established a committee to consider a system of export control for works of art. It became known as the Waverley Committee, after its Chair Viscount Waverley, and it presented its report in 1952.¹⁵ The report proposed that a system of export control would be most

¹⁴ Article 10.

¹⁵ Committee on the Export of Works of Art, Etc., *The Export of Works of Art etc: Report of a Committee appointed by the Chancellor of the Exchequer*, HMSO, London 1952 (known as “The Waverley Report”).

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effective if it was applied to a limited number of items of national importance, determined by age, value, and the length of time the object had been in the UK. It determined that the assessment of national treasures should be based on three criteria, which became known as the “Waverley criteria”. The criteria are not mutually exclusive and no one criterion is any more important than the others.¹⁶

The Waverley criteria and their rubric are currently set out as follows:

An object will be designated as a “national treasure” if its departure from the UK would be considered a misfortune on one or more of the following three grounds:

History	Aesthetics	Scholarship
Is it closely connected with our history and national life?	Is it of outstanding aesthetic importance?	Is it of outstanding significance for the study of some particular branch of art, learning or history?
Waverley 1	Waverley 2	Waverley 3

Detailed guidance notes on each of the criteria are given as follows:

[I – History]

Is it closely connected with our history and national life?

This category can include objects which have been produced abroad, but which have acquired national importance by association with an important person, location or event. The first criterion was originally intended to catch such objects as the “Alfred jewel” or the manuscript of Gray’s *Elegy* but it is now interpreted in a somewhat wider context to include objects which are of major importance for local history, or which have been part of collections which are of great historical significance, or which are associated with significant historical events, people or places. Examples of “Waverley History” objects have included: the archive of manuscripts relating to the editing of Newton’s *Principia Mathematica*; a pair of paintings by Canaletto entitled *View of the Grand Walk, Vauxhall Gardens* and *the Rotunda of Ranelagh House*; a “jadeite” Neolithic axe-head; a collection of Thomas Hardy typescripts; Benjamin Britten’s complete draft score of *The Young Person’s Guide to the Orchestra*; and a copy of the warrant for the execution of Mary Queen of Scots.

[II – Aesthetics]

Is it of outstanding aesthetic importance?

The assessment of outstanding aesthetic importance involves a subjective judgment. It is not restricted to great works of painting or sculpture. It might, for instance, be concluded that an exquisite snuff box met this criterion as well as a painting

¹⁶ Department for Digital, Culture, Media & Sport, *Export of Objects of Cultural Interest 2008-09, 2009*.

by Poussin. In the case of works by great artists it may be claimed that anything from the hand of Rembrandt is outstanding. However, such arguments will not always be accepted, and the condition as well as the quality of the work in question and the extent of the damage or restoration to which it may have been subjected may also be taken into account. Examples of “Waverley Aesthetics” objects have included: the painting *Venus and Adonis* by Titian; a watercolour painting, *The Blue Rigi Sunrise*, by J M W Turner; the “jadeite” Neolithic axe-head also listed above; Domenichino’s *Saint John the Evangelist*; Van Dyck’s last self-portrait; and a Pietro Lorenzetti altarpiece.

[III – Scholarship]

Is it of outstanding significance for the study of some particular branch of art, learning or history?

The object might be considered of outstanding significance for scholarship either on its own account or on account of its connection with a person, place, event, archive, collection or assemblage. Such objects serve as benchmarks for assessing other items since they can throw new light on the study of their type. It is considered that “learning” in relation to culture should cover a wide number of disciplines e.g. art history, archaeology, ethnography, anthropology, palaeontology, science, engineering, architecture or literature, etc. However, this is an illustrative list and not necessarily a comprehensive one. Examples of “Waverley Scholarship” objects include: Benjamin Britten’s complete draft score of *The Young Person’s Guide to the Orchestra* also listed above; a 17th-century lead merchant’s ledger from the Peak District; a peridot and gold suite of jewellery given by the Prince of Wales to be worn at his daughter’s wedding; and a bilingual Middle English-Latin dictionary dating from 1483.¹⁷

The Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest

The Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA) is a non-statutory independent body, the main function of which is to advise the Secretary of State for Digital, Culture, Media and Sport whether a cultural object which is the subject of an application for an export licence is a national treasure. It was first appointed following the recommendations of the Waverley Report, and succeeded an earlier committee of the same name which had been established in 1949. That prior committee, comprising museum directors and officials, originally heard appeals against refusals of export licences and, from 1950, all cases where refusals were recommended.

The current Committee was established in 1952 and its terms of reference are:

- a) to advise on the principles which should govern the control of export of objects of cultural interest under the Export Control Act 2002 and on the operation of the export control system generally;

¹⁷ Department for Digital, Culture, Media & Sport, *Export Controls...*, para. 12.

- b) to advise the Secretary of State on all cases where refusal of an export licence for an object of cultural interest is suggested on grounds of national importance, and
- c) to advise in cases where a special Exchequer grant is needed towards the purchase of an object that would otherwise be exported.¹⁸

The RCEWA is made up of eight permanent members, including the Chair. They are drawn from across the UK and have expertise in one or more fields to ensure that a range of categories of cultural objects are represented, particularly with regards to manuscripts and archives. One member is traditionally connected with Scotland to represent that country's heritage interests, and at least one other with the art trade. They convene approximately once a month, apart from August, for a series of case hearings, each lasting for about one hour. At each hearing the regular members of the RCEWA are joined by up to three independent assessors with particular expertise in the area of the object under consideration. The hearings are held in private, with a quasi-judicial structure designed to give both the applicant (or his/her representative) and the expert adviser ample and equal opportunity to make their respective cases. They are then asked to leave the room while the RCEWA discusses the case and then takes a vote as to whether the object under consideration meets the Waverley criteria. The majority rules and, in the case of a tie, the Chairman has the deciding vote. Following the hearing, the RCEWA's recommendation on the Waverley criteria is submitted to the Secretary of State, who has the ultimate discretion to decide whether to grant an export licence.

In fulfilling its remit, the RCEWA takes advice on the operation of the export control system from The Advisory Council on the Export of Works of Art and Objects of Cultural Interest. This Council, established in 1952 on the recommendation of the Waverley Committee, is made up of members with an interest in the export of cultural objects, including expert advisers, representatives from the art trade, funding bodies, government departments, museums, galleries, libraries and archives, and other heritage organizations.

There is also a working party on Manuscripts, Documents and Archives which is a sub-committee of the RCEWA. Its terms of reference are to consider arrangements for the export control of manuscripts, documents, and archives, and the sources of funds available for their acquisition and to make recommendations resulting from this consideration.

The RCEWA publishes a report each year containing details of the cases considered during the past year, as well as general observations on the running of the export control system. Any changes to the procedures of the RCEWA

¹⁸ Department for Digital, Culture, Media & Sport, *Quinquennial Review of the Reviewing Committee on the Export of Works of Art*, 2003, para. 6.2.

are announced either in the RCEWA's annual report or at the annual meetings of the Advisory Council.

Assessing Potential National Treasures

The process of assessing an object as a potential national treasure is a three-stage one. Applications for export licences for potential national treasures, i.e. objects over the relevant age and value thresholds which have been in the UK for more than 50 years, are normally referred to expert advisers for assessment against the Waverley criteria. These advisers are usually the relevant curators in the UK national museums for each category of cultural object. For example, the expert adviser on manuscripts, documents, and archives is the Head of Western Heritage Collections at the British Library. If an expert adviser objects to the export, the application is referred to the RCEWA. The Committee considers the case at a hearing, which is attended by the applicant (or their representative(s)) and the expert adviser. If the RCEWA finds that the object meets one or more of the Waverley criteria, it makes a recommendation to the Secretary of State for Digital, Culture, Media and Sport that the decision on the export licence application should be deferred. It should be noted that the Committee is only an advisory body; the Secretary of State alone has the power to defer an export licence.

If the Secretary of State accepts the RCEWA's recommendation, the decision on the export licence application will be deferred for a period of time. This period is usually split into an initial period of between two and four months, followed by a possible further period of four to six months. This is not an absolute block on export; it is an opportunity to give buyers a chance to make an offer to purchase the object(s). If no offer is received, the licence will normally be issued at the end of the deferral period. The first deferral period begins with the public announcement of the Secretary of State's decision. Details of objects currently under export deferral are available on the Arts Council's website.¹⁹

The RCEWA also recommends the price which would be considered a "matching offer". This is usually the price achieved at a recent sale, including any buyer's premium or seller's commission. Where the RCEWA does not feel able to recommend a fair matching price based on the information available, for example when the value is an estimate, it may recommend to the Secretary of State that an independent valuation should be sought.

During the deferral period the expert adviser who objected to the export acts as a "champion" for the object. This involves bringing the Secretary of State's

¹⁹ See <https://www.artscouncil.org.uk/supporting-collections-and-cultural-property/reviewing-committee#section-3> [accessed: 20.11.2019].

decision on deferral to the attention of institutions that might be expected to be interested in purchasing the item under deferral. Normally the champion is asked to approach more than one institution, although in some cases where the object has a clear historical association with a particular institution, the champion can concentrate on that institution alone if appropriate. The champion is also tasked with drawing the attention of the institutions concerned to possible sources of funds.

Offers to Purchase

If a decision on an export licence application is deferred, the deferral period is usually split into an initial period of between two and four months, followed by a possible further period of between three and six months. These are the usual time periods, but the RCEWA can, and sometimes does, recommend longer or shorter periods depending on the value of the object, an approaching holiday season, and any other factors which might affect an institution's ability to raise the necessary funds. The purpose of the initial deferral period is to give UK buyers, whether public or private, a chance to come forward and make a serious expression of interest in purchasing the object. If no expression of interest is received, the export licence is usually granted at the end of that period. If there is a serious expression of interest, the deferral is extended into the second period to allow time for fundraising. This will usually involve applying for grants from funding bodies such as the National Lottery Heritage Fund, the National Heritage Memorial Fund, the Art Fund, and other smaller public and private funds. There may also be a public fundraising campaign.

Refusal to Grant an Export Licence

An owner is entirely free to reject an offer to purchase made during the deferral period. However, if the owner rejects a matching offer, the Secretary of State will normally take the existence of that offer into account in reaching a decision about whether to grant a licence. Where an offer to purchase from a public source (a museum, gallery, or other heritage body such as the National Trust) or one from a private source with public display committals in the UK for at least ten years (see below) is refused, the Secretary of State will normally refuse to grant an export licence. Any further application to export the same object within a subsequent ten-year period would normally be refused without a hearing.

The Secretary of State will also normally refuse to grant a licence where an owner indicates in advance that they are not prepared to accept any offer to purchase, should one be made. In addition, if an application is withdrawn after an offer to purchase has been made or in circumstances where it was reasonably

likely that an offer was imminent, the owner is likely to be considered as having refused an offer to purchase.

Offers to Purchase from a Private Source

Prior to 1990, when an offer to purchase from a private source was refused, the Secretary of State would not take the existence of that offer into account in deciding whether to grant a licence. In May 1990 The Rt. Hon. Nicholas Ridley MP, the then Secretary of State for Trade and Industry, announced that in considering whether to grant an export licence for heritage items he would take account of an offer to purchase from any source, whether public or private. Following further consultation in 1997 the policy was varied so that private offers could only be taken into account by the Secretary of State if they were accompanied by undertakings guaranteeing reasonable public access, satisfactory conservation and security arrangements, and retention of the object for a minimum period of five years. In 2011-2012 the required access period was extended from five years to ten. If an applicant refuses an offer to purchase from a private source which has been made under the “Ridley Rules”, the Secretary of State will normally refuse to grant a licence.

Withdrawal of Applications and Refusal of Matching Offers

Unlike some other countries, the UK does not operate a compulsory purchase or pre-emptory system. An exporter can withdraw their export licence application at any stage and is not legally obliged to complete the sale of the object to an institution even if he/she has agreed to do so and the institution has spent time and resources in raising funds based on that commitment.

The practices of withdrawing applications and refusing matching offers are problematic. They result in a waste of resources for the institution involved and have long been viewed as running counter to the spirit of the Waverley system. In the past there have been calls to introduce a process of “binding offers” whereby owners of cultural objects found to be national treasures, who have confirmed that they are prepared to sell to a museum or gallery or relevant private purchaser at an agreed fair market price, are legally bound to follow through on their commitment to do so, but no such process has yet been implemented.

The Department for Digital, Culture, Media and Sport has recently proposed changes to the export control system whereby an owner of an export-deferred object who has confirmed that they are prepared to sell to a museum or gallery or relevant private purchaser at an agreed fair market price would be required to sign a legally binding mechanism. If the proposals are implemented, an owner will no longer be able to withdraw his/her agreement to sell and the purchasing institution will be in

control of the acquisition process and will have complete and sole discretion whether to purchase within a specified time. The proposals also include optional mechanisms for setting the currency in which the matching price should be paid, the aim of which is to reduce the owner's risk. This should go some way toward comforting buyers who might otherwise find themselves out of pocket due to currency fluctuations during the deferral period. A public consultation on the proposals, *Strengthening the Process for Retaining National Treasures*, was launched on 15 December 2018 and ran until 24 February 2019; the feedback is currently being analysed.²⁰

Temporary Export Licences for National Treasures

Prior to 2015, it was possible for a cultural object which had been found by the RCEWA to be a national treasure to be outside the UK for a considerable period under repeated temporary export licences. An exporter who had withdrawn their licence application after the object had been found to be a national treasure, or had refused a matching offer to purchase it during the deferral period, could apply for a temporary licence for a period of up to three years, with no specific limit on the number of subsequent extensions. In 2015 new procedures were introduced whereby an object found by the RCEWA to be a national treasure can only be granted a temporary export licence if the purpose of export is public display. Furthermore, no extension is possible, so the object must be returned to the UK at the end of the period. This policy effectively closed the loophole by which potential national treasures could remain outside the UK for extended periods.

Impact of the Controls

In the past ten years the number of cases considered by the RCEWA has varied between 11 and 29 per year. These figures are slightly lower than the number of applications actually referred to the RCEWA on the grounds of national importance, because some applicants choose to withdraw their applications prior to the case hearing. Of those cases which do progress to the hearing stage, the number which are found to meet the Waverley criteria has ranged between 7 and 22 per year, a small fraction of the total number of objects for which export licence applications are received and referred to expert advisers for assessment.

During the period 1 May 2017 to 30 April 2018:

- 27,300 items were granted an export licence after referral to an expert adviser because the adviser did not consider them to be of national importance;

²⁰ Department for Digital, Culture, Media & Sport, *Strengthening the Process for Retaining National Treasures*, 15 December 2018, <https://www.gov.uk/government/consultations/strengthening-the-process-for-retaining-national-treasures> [accessed: 3.11.2019].

- 15 items were referred to the RCEWA after an expert adviser considered them to be of national importance;
- of these 15, two were found by the RCEWA not to meet any of the Waverley criteria;
- the other 13 were found to meet one or more of the Waverley criteria;
- the application for one of these was withdrawn following the hearing but before deferral;
- the other 12 were deferred to allow the opportunity for a UK buyer to come forward;
- five items worth £58.5 million were granted an export licence;
- seven items worth £3 million were retained in the UK.²¹

While it is encouraging that more than half of the deferred national treasures were retained in the UK, their value was only 5% of the total value of all 12 national treasures. As in previous years, lack of funding is the main reason why more national treasures are not retained. Public funds available for acquisitions have failed to keep up with soaring prices in the international art market.²² Nevertheless, over the past ten years a total of 62 export licence applications have resulted in national treasures being retained in the UK. These include not only works of fine and decorative art but also a Baird Phonovision disc and a George I Palladian baby house. The treasures were purchased by institutions around the UK, where they remain accessible for the benefit of the public.

Impact of Brexit on UK Export Licensing Controls

Following the UK's (presumed) exit from the EU, the Waverley system for assessing national treasures will continue to operate as previously. All objects which meet the relevant age and value thresholds for requiring a UK export licence to leave the UK will be referred to an expert adviser for assessment against the Waverley criteria as potential national treasures, unless they have been imported into the UK within the past 50 years.

The UK government has published a technical notice on exporting objects of cultural interest following Brexit.²³ If the UK exits the EU with "no deal", the Statutory Guidance and the Open General Export Licence will need to be amended.

²¹ For summaries of all 15 cases considered by the RCEWA during 2017-2018 see: Department for Digital, Culture, Media & Sport, *Export of Objects of Cultural Interest 2017-18*, April 2019.

²² For an analysis of the data on inflation, government funding for Waverley items, and art market prices between 1955 and 2004 see V.F. Wang, *Whose Responsibility? The Waverley System, Past and Present*, "International Journal of Cultural Property" 2008, Vol. 15(3), pp. 227-269.

²³ Department for Digital, Culture, Media & Sport, *Exporting Objects of Cultural Interest if There's No Brexit Deal*, 12 October 2018, <https://www.gov.uk/government/publications/exporting-objects-of-cultural-interest-if-theres-no-brexite-deal> [accessed: 3.11.2019].

Revised drafts of these documents have been prepared and are publicly available on the Arts Council's website for information; they will only come into effect in the event of a "no-deal" Brexit.²⁴

Whilst a Member State of the EU, the UK has protection afforded to its national treasures by EU Regulations. The export of any object that is considered a UK national treasure, but which is situated in another EU Member State, is prohibited under Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods. Further protection derives from Directive 2014/60/EU on the return of certain cultural objects unlawfully removed from the territory of a Member State,²⁵ which was implemented in the UK with the Return of Cultural Objects (Amendment) Regulations 2015.²⁶

Following our exit from the EU, the UK wishes to remain affiliated with the EU's regime for the return of unlawfully removed cultural goods and how we would work with the EU on cultural property protection in the future is subject to negotiations. Disincentivizing the illegal trade of cultural objects will be important in the future relationship.²⁷

Summary

The UK export control system strives to strike a balance between freedom and constraint, i.e. between the freedom of owners to deal with their private property and constraints on the export of the UK's national treasures.²⁸ The premise underlying the Waverley system is that owners should not be left financially worse off by the intervention of the State. It is generally considered to be balanced and fair, but to be fully effective it requires financial backing so that owners can be fairly compensated. This takes the form of a combination of public funds, private sources, tax concessions, and other policies to encourage philanthropy. However, keeping up with rising prices in the art market is a continuing challenge.

²⁴ Arts Council England, *EU Exit: Draft Amended Statutory Guidance*, 2019, and Arts Council England, *EU Exit: Draft Amended Open General Export Licence*, 2019, both at: <https://www.artscouncil.org.uk/export-controls/export-licensing> [accessed: 3.11.2019].

²⁵ Article 5 of 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, OJ L 159, 28.05.2014, p. 1.

²⁶ UK Statutory Instruments 2015 No. 1926, which amended the Return of Cultural Objects Regulations 1994, the law that had implemented EU Directive 93/7/EEC.

²⁷ For a discussion of the factors that the UK will need to consider as it negotiates its exit from the EU see K. Hausler, R. Mackenzie-Gray Scott, *Outside the Debate? The Potential Impact of Brexit for Cultural Heritage in the UK*, "Art, Antiquity and Law" 2017, Vol. 22(2).

²⁸ This balancing act also takes tourism and the art market into account, as discussed in P. Warrington, *Saving Art for the Nation: Export Controls in the United Kingdom*, "Art, Antiquity and Law" 2016, Vol. 21(2), pp. 117-131.

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LEGAL COMMENTARIES

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