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EU National Treasures and the Quest for a Definition

Abstract: As is well known, Article 36 of the Treaty on the Functioning of the European Union balances the role of the internal market with other interests. Among them, the protection of national treasures possessing artistic, historic, or archaeological value may justify prohibitions or restrictions on imports, exports, or goods in transit. These rules are the consequence of the recurring clash of interests between those who ask for a totally free art market and those who argue in favour of controls to avoid the dispersion of national patrimonies. The definition of the term “national treasures” is *de facto* open to determination by each Member State. Two fundamental points will be critically explored in this work: 1) the EU competence to verify the conformity of domestic rules identifying goods as belonging to their “national treasures” within the framework of Article 36 TFEU; and 2) the feasibility of using EU law for determining a threshold framework definition.

Keywords: national treasures, cultural property, European Union, Article 36 TFEU

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Introduction

The concept of “national treasures” is a sensitive topic. From a socio-political point of view, the issue is strictly related to the origin of modern States and the connection between archaeology and nationalism, as well as with contemporary claims of cultural identity and heritage (as demonstrated by the long-lasting dispute over the name “Macedonia” of the former Yugoslavian territory, considered by Greece as an appropriation of its culture and historical identity).

From a legal point of view, the concept constitutes a parameter for building some of the most relevant exceptions to the free flow of goods at both the international (see the General Agreement on Tariffs and Trade XX) and European (see Article 36 of the Treaty on the Functioning of the European Union, TFEU) levels. Hence, the definition of the notion influences the scope of application of the relevant provisions and, as a consequence, has an immediate impact on cross-border trade in cultural objects.

Notwithstanding the key role of the EU, until now the European institutions have never provided a framework definition nor has the Court of Justice of the European Union (CJEU) ever delivered a judgment on the topic. The result is that the identification of whether an object falls within the scope of Article 36 TFEU is left to be determined by each Member State. At the same time, the very competence of the European Union (EU) to define the notion has been questioned.¹

For this reason, it seems important to begin this analysis by verifying the existence of an EU competence to define the notion.

Setting the Stage: The EU Competence to Provide a Definition

The creation of the Single European Market (SEM) in 1993 has accentuated the necessity to protect Member States’ cultural heritage, having regard in particular to the risk of dispersion of national patrimonies as a result of the free circulation of goods within the internal market.

This objective has been pursued through an EU “legal web” composed essentially of Article 36 TFEU, Council Regulation (EEC) No. 3911/92,² and Council Directive 93/7/EEC.³

¹ M. Graziadei, B. Pasa, *Patrimoni culturali, tesori nazionali: il protezionismo degli Stati membri dell’UE nella circolazione dei beni culturali*, “Contratto e impresa/Europa” 2017, pp. 136-140.

² Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1.

³ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.

In particular,

- a) Article 36 TFEU grants EU countries the possibility to introduce prohibitions or restrictions on the circulation of cultural objects. The rule aimed to provide the required flexibility, balancing the role of the internal market with other interests considered worthy of special protection. These include the protection of “national treasures possessing artistic, historic, or archaeological value”.
- b) With the abolition of internal borders, Member States were unable to prevent the leaking out of their cultural heritage through other Member States. In this regard, Council Regulation (EEC) No. 3911/92 (repealed by Council Regulation (EC) No. 116/2009⁴) was aimed at ensuring uniform controls at the EU’s external borders.
- c) As far as the internal borders are concerned, Council Directive 93/7/EEC (repealed by Directive 2014/60/EU⁵) secured the return of those cultural objects unlawfully removed from the territory of an EU Member State.

At the core of this legal web stands Article 36 TFEU, guaranteeing Member States the power to limit the circulation of national treasures. In this framework, the definition of the notion of national treasures influences their identification and the scope of application of the relevant provisions.

The issue of the definition of the term “national treasure” also involves the limits of EU competence, since it requires an analysis of two different areas of competence: cultural policy (national) and the internal market (EU).

If we refer it to *cultural policy*, the main problem arises from the circumstance that Member States did not cede their sovereignty over cultural policy. As a consequence, “culture” not only does not fall within the exclusive competence of the EU, but neither is it a part of the competences shared between the Union and EU countries. Instead, it is indicated in Article 6 TFEU as an area which the EU may *support*, along with the protection and improvement of human health, tourism, and other areas (s.-c. supporting competence). Thus, in terms of culture the EU can only intervene to support, coordinate, or complement Member States’ actions.⁶ As a result of the lack of a specific EU competence with regard to culture, the meaning of “national treasures” within Article 36 TFEU could be considered to be left to the determination of each Member State.

⁴ 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.

⁵ 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), OJ L 159, 28.05.2014, p. 1.

⁶ For more on EU competences see, *ex plurimis*, L. Azoulay (ed.), *The Question of Competence in the European Union*, Oxford University Press, New York 2014.

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In addition, the Union's role in the cultural field is defined also by Article 167 TFEU. Even if it is true that this Article indicates the "conservation and safeguarding of cultural heritage of European significance" as one of the areas which forms the subject-matter of Union action, it expressly limits the intervention to encouraging the cooperation between Member States. Only if necessary should the Union itself intervene, but once again such intervention is limited to merely supporting and supplementing States' actions.

Furthermore, the Union plays a role in promoting Member States' cultures while respecting their national and regional diversity (Article 167 TFEU). In this regard, the multiplicity of national arrangements for defining national treasures could be read also as an encouragement for diversity in culture and, as a consequence, as a dimension that should be respected by the EU.⁷

It is worth noting that when Article 36 TFEU was originally drafted, the idea could have been to exclude from the scope of the internal market all the goods related to the above-mentioned interests, granting the States the freedom to regulate their circulation.⁸ From this perspective, it would have been a confirmation that cultural national treasures could be excluded from the common market. One could read the EU Commission's assertion that "it is not within the EU's competence to define national treasures" in this way.⁹

At the same time, on similar grounds it has been challenged that the CJEU has the authority to provide an independent interpretation of the concept within the ambit of its powers aimed at ensuring that EU law is properly applied.¹⁰ Notably, it has been recently affirmed¹¹ that the issue of the EU competence (in particular, Articles 6 and 167 TFEU and Article 3(3) of the Treaty on European Union)

⁷ This multiplicity of views is reflected also in the linguistic discrepancies in the various linguistic versions of Article 36 TFEU, which are discussed further in this article.

⁸ B. De Witte, *Les compétences exclusives des états membres existent-elles?*, in: R. Adam et al., *Liber Amicorum in onore di Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, G. Giappichelli Editore, Torino 2018, p. 306. If this could have been the original sense of the rule, there are no doubts but that the interpretation given to it by the CJEU in the years that followed have been far from such a view. On this point, see I. Grassi, *La circolazione dei beni culturali nella comunità europea*, in: L. Mezzetti (ed.), *I beni culturali. Esigenze unitarie di tutela e pluralità di ordinamenti*, Cedam, Padova 1995, pp. 5-6.

⁹ European Commission, *Commission Staff Working Document, Summary of the Impact Assessment Accompanying the Document "Proposal for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (recast)"*, SWD(2013) 188 final, 30.05.2013, p. 3. Similarly, see Directorate-General for Enterprise and Industry (European Commission), *Free Movement of Goods. Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, 2010, p. 27 <https://op.europa.eu/en/publication-detail/-/publication/9875cc75-4708-4cc0-a308-c6548ef721a5> [accessed: 20.10.2019].

¹⁰ See A. Arnull, *The European Union and its Court of Justice*, Oxford University Press, New York 2006; M. Derlén, J. Lindholm (eds.), *The Court of Justice of the European Union. Multidisciplinary Perspectives*, Bloomsbury, Oxford 2018.

¹¹ M. Graziadei, B. Pasa, *Patrimoni culturali...*, pp. 136-140.

appears as an obstacle to providing an independent and uniform interpretation of Article 36 TFEU. In this context, only Member States should have the right to decide which cultural goods may qualify for a derogation from the free movement of goods.

The situation is clearly different if we associate the definition of the term with the sphere of the *internal market*.

In fact, seen from this viewpoint, even if it is undeniable that “culture” is an area in which the EU has only a supporting competence, a framework definition would not necessarily lead to interfering with national competences. Actually, the issue would be only to determine the extent of the exception to the free circulation.

Therefore, it is possible to affirm that at the moment in which the EU qualified cultural objects as goods falling under the provisions relating to the common market, it reserved the competence to establish the extent to which some of them can be exempted from the free circulation.

This seems to be confirmed by another article of the Treaty having a direct impact on the relationship between the freedom of circulation and the protection of cultural property, i.e. Article 107 TFEU. This provision permits state aid to promote culture and heritage conservation only insofar as they do not affect trading conditions and competition in the Union to an extent that is contrary to the common interest. This would suggest that cultural policy in general, and the protection of cultural heritage in particular, cannot interfere with the functioning of the internal market.

In the end, the issue seems to go back to the controversial topic: Do cultural objects constitute normal items of merchandise, or not?

If in fact we define them as articles of artistic, historic, or archaeological value which cannot be compared to ordinary merchandise, then each transaction relating to them will fall outside the scope of the internal market rules. As such, the definition of what could be a national treasure has to belong primarily to Member States’ competence under Article 6 TFEU (area of “culture”).

However, if we consider them as goods they are necessarily subject to the principle of free trade. Consequently, the extent to which they can be derogated from the general principle via the application of Article 36 TFEU would have to be considered a shared competence under Article 4 TFEU (area of “internal market”).

In other words, one option seems to exclude the other.

As regards the nature of cultural objects, it is widely accepted that EU law considers them as merchandise. This point was clarified in the 1960s by the CJEU in the well-known case *Commission v. Italy*,¹² where the Court stated that the intrinsic

¹² Case 7/68, *Commission v. Italy*, ECR, 1968, 423. For more on the judgment, see, *ex plurimis*, T. von Plehwe, *European Union and the Free Movement of Cultural Goods*, “European Law Review” 1995, Vol. 20(5), p. 431; A. Roccella, *Aspetti giuridici del mercato dell’arte*, “Aedon” 2001, Vol. 1, § 3, <http://www.aedon.mulino.it/archivio/2001/1/roccella.htm> [accessed: 20.10.2019]; C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar, Cheltenham 2015, p. 137.

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sic characteristics of goods within the meaning of the Treaty is: 1) products that can be valued in money, so as 2) to form the subject of commercial transactions.¹³ The judgment adds that insofar as cultural articles have these qualities, they have to be qualified as merchandise, and thus be subject to the rules governing the internal market.

The same position can be deduced by the inclusion of cultural objects in the Common Customs Tariff.¹⁴

As a result, according to existing EU law doctrine it seems possible to affirm that the definition of national treasure under Article 36 TFEU would have to fall within the area of shared competences. Therefore, in accordance with the principle of pre-emption¹⁵ Member States may adopt legally binding acts in this area only if the EU has not exercised its competence or has explicitly ceased to do so. While it is true that the EU has never provided a definition of the term “national treasure”, this does not imply that it would lack the authority to do so.

It seems possible to find further confirmation of this position in a late 1980s communication of the then Commission of European Communities. In Paragraph 5 it states that:

The Commission, to which the Treaty has assigned the task of ensuring that Community law is applied, has to examine whether current national rules are compatible with Community law, and in particular Articles 30 to 36 of the EEC Treaty. Rather than proceeding on a case-by-case basis, the Commission considered it necessary to act more systematically here by publicizing its interpretation of the relevant Community provisions. It therefore intends to publish in a few months' time, after consulting the Member States on a draft text, a communication on the interpretation of Community law as it relates to the free movement of works of art within the Community. In that communication, the Commission intends – subject to the consultations mentioned – to interpret Article 36 of the EEC Treaty as follows. In line with decisions of the Court of Justice concerning other exceptions to the principle of the free movement of goods, *it is for each Member State to determine its own criteria for identifying cultural objects that can be regarded as “national treasures”; nevertheless, the concept of “national treasures possessing artistic, historic or archaeological value” cannot be defined unilaterally*

¹³ Case 7/68, cit., p. 429.

¹⁴ Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256, 7.09.1987, p. 1 (latest consolidated version: 7.01.2019); Council Regulation (EEC) No. 3911/92 and the subsequent Council Regulation (EC) No. 116/2009; Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1. With regards to case-law see, for example, Case 155/84, *Reinhard Onnasch v. Hauptzollamt Berlin-Packhof*, Judgment of the Court (Second Chamber) of 15 May 1985, ECR, 1985, 1449; Case 155/84, *Reinhard Onnasch v. Hauptzollamt Berlin-Packhof*, Opinion of Mr Advocate General Lenz delivered on 21 March 1985, ECR, 1985, 1449; Case 200/84, *Erika Daiber v. Hauptzollamt Reutlingen*, Joined opinion of Mr Advocate General Lenz delivered on 4 July 1985, ECR, 1985, 3363.

¹⁵ For more on this principle, see M. Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press, New York 2014.

by the Member States without verification by the Community Institutions. The Commission is proposing certain criteria that in a way constitute the framework within which Member States can apply their laws. Moreover, Article 36 of the EEC Treaty – which should be interpreted restrictively since it derogates from the fundamental rules of the free movement of goods – cannot be relied upon to justify laws, procedures or practices that lead to discrimination or restrictions which are disproportionate with respect to the aim in view.¹⁶

Unfortunately, the Commission never published its interpretation of national treasures. However, in expressing its intent, the Commission clearly declared that a framework definition would fall within its competences.

The lack of follow-up results seems to be connected to political reasons, determined by the fact that EU countries had refused to cooperate.¹⁷ Actually, over the years the EU has provided some definitions or lists related to cultural objects but – as will be discussed hereinafter – none of them creates a real threshold for defining the category of “national treasure” as set out in Article 36 TFEU.

The desire to proceed further has been manifested more recently, albeit timidly, in the *considerandum* n. 10 of Directive 2014/60/EU. In this respect, the provision declares that “[i]n order to foster mutual trust, a willingness to cooperate and mutual understanding between Member States, the scope of the term ‘national treasure’ should be determined, in the framework of Article 36 TFEU”.¹⁸

This opinion seems consistent with the provision of Article 114 TFEU on the approximation of laws, which gives a mandate to the European Parliament and the Council to adopt measures for the approximation of the provisions laid down by law, regulation, or administrative action in Member States which have as their object the establishment and functioning of the internal market. On this point, it is worth noting that Article 114 TFEU takes into account the special interests of Article 36 TFEU by introducing a special procedure that gives to the EU countries the possibility to maintain provisions deemed necessary for the protection of those interests. *En passant*, the Article includes a specific reference to the field of human health which – like cultural policy – is an area included both among the Article 36 TFEU exceptions and Article 6 TFEU areas of supportive competence. Once again, the Treaty seems to confirm that neither carrying out actions in an area

¹⁶ Commission of the European Communities, *Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992*, 22 November 1989, COM (89) 594 final (emphasis added).

¹⁷ Direction Générale des Études du Parlement Européen, *La libre circulation des biens culturels au sein de l'Union Européenne. Droit communautaire: nouvelles problématiques (Document de travail)*, 1995, p. 15, http://www.europarl.europa.eu/thinktank/fr/document.html?reference=DG-4-CULT_ET%281998%29167282 [accessed: 20.10.2019].

¹⁸ In this regard it is interesting also to note the second part of the *considerandum*, which subordinates the possibility to return cultural objects other than those classified or defined as national treasures to the observance of the “relevant provisions of the TFEU”.

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of supporting competences, nor the potential interference with the major needs of Article 36 TFEU undermines the EU's power to intervene in order to ensure the functioning of the internal market.

Furthermore, insofar as the CJEU's powers are concerned, we have to consider – as mentioned before – that it has jurisdiction over the interpretation of the Treaties.¹⁹

In particular, according to settled case-law the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation, in the light of the need for a uniform application of EU law as well as the principle of equality.²⁰ Looking at Article 36 TFEU there is little doubt that it empowers Member States to introduce otherwise prohibited restrictions on imports, exports, or goods in transit to protect their national treasures. Nonetheless, it seems possible to affirm that it does not grant them the right to freely decide what could be a national treasure within the meaning of the provision. Arguing the contrary would result in allowing States to restrict a fundamental freedom guaranteed by the Treaty, i.e. the free movements of goods; which would reverse the principle that the authority to decide what falls within the scope of the free market is vested in the Union.

However, it should be borne in mind that an independent and uniform interpretation is possible only as long as the required criteria (enabling the definition and scope of the notion) can be found in EU laws or general principles.²¹ To put it differently, it is not possible to give an independent interpretation if EU law does not provide sufficient elements to attribute a consistent meaning.

Insofar as national treasures are concerned, a cultural object can be identified among the national treasures of a specific EU country only by looking into that State's legal order. Still, in analysing the existing EU legal framework it seems possible to affirm that the EU has already provided some thresholds to identify what a "national treasure" could, or could not, be.

¹⁹ J. L. da Cruz Vilaça, *De l'interprétation uniforme du droit de l'Union à la «sanctuarisation» du renvoi préjudiciel. Étude d'une limite matérielle à la révision des traités*, in: R. Adam et al., *Liber Amicorum in onore di Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, G. Giappichelli Editore, Torino 2018; E. Russo, *L'interpretazione dei testi normativi comunitari*, Giuffrè, Milano 2008; N. Fennelly, *Legal Interpretation at the European Court of Justice*, "Fordham International Law Journal" 1997, Vol. 20(3), pp. 656-679; B. Pozzo, *L'interpretazione della Corte del Lussemburgo del testo multilingue: una rassegna giurisprudenziale*, in: B. Pozzo, M. Timoteo (eds.), *Europa e linguaggi giuridici*, Giuffrè, Milano 2008, pp. 383-431.

²⁰ Case C-34/10, *Oliver Brüstle v. Greenpeace e V.*, Judgment of the Court (Grand Chamber) of 18 October 2011, ECR, 2011, I-9821, para. 21; Case C-34/10, *Oliver Brüstle v. Greenpeace e V.*, Opinion of Mr Advocate General Bot delivered on 10 March 2011, ECR, 2011, I-9821, para. 58; Case C-373/00, *Adolf Truley GmbH v. Bestattung Wien GmbH*, ECR, 2003, I-1931, para. 35; Case C-287/98, *Grand Duchy of Luxembourg v. Berthe Linster, Aloyse Linster and Yvonne Linster*, ECR, 2001, I-6917, para. 43; Case C-357/98, *The Queen v. Secretary of State for the Home Department, ex parte Nana Yaa Konadu Yiadom*, ECR, 2000, I-9265, para. 26; Case 327/82, *Ekro BV Vee en Vleeshandel v. Produktschap voor Vee en Vlees*, ECR, 1984, 107, para. 11.

²¹ See E. Russo, op. cit., p. 280.

Using the above reasoning as a basis, below I try to verify the actual existence of thresholds for proposing a framework definition.

“National Treasures” and Other EU Instruments

In the quest for useful interpretative tools to understand the real extent of the term “national treasure”, it seems important to begin by investigating the use of the term within EU law, with special attention paid to other legal expressions referring to cultural property.

In this vein, I have chosen three of the main instruments (Directive 2014/60/EU, Council Regulation (EC) 116/2009, and Article 36 TFEU) and four languages (English, French, Italian, and Spanish). I have analysed the texts in order to see which terms were used and their frequency (see Table 1).

Table 1. Terminology related to cultural property within the main EU instruments; (n.) = repetitions, net of terminology included in the title of cited legal instruments

EU Instruments Language	Directive 2014/60/EU	Council Reg. (EC) 116/2009	Article 36 TFEU
English	Cultural objects (77) National treasures (19) Cultural heritage (1) Works of art (1)	Cultural goods (13) National treasures (3) Cultural objects (6)	National treasures possessing artistic, historic or archaeological value
French	Biens culturels (85) Trésors nationaux (19) Patrimoine culturelle (1) Œuvres d’art (1)	Biens culturels (19) Trésors nationaux (3)	Trésors nationaux ayant une valeur artistique, historique ou archéologique
Italian	Beni culturali (81) Patrimonio nazionale (18) Patrimonio culturale (2) Opere d’arte (1)	Beni culturali (20) Patrimonio nazionale (3)	Patrimonio artistico, storico o archeologico nazionale
Spanish	Bienes culturales (73) Objetos culturales (2) Patrimonio nacional (19) Obras de arte (1)	Bienes culturales (18) Patrimonio nacional (3)	Patrimonio artístico, histórico o arqueológico nacional

The starting point of this analysis is Directive 2014/60/EU, whose scope is to guarantee the application of Article 36 TFEU through ensuring the return of those cultural objects considered by an EU country as national treasures unlawfully removed from its territory.

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Analysing the text, the term “cultural object” appears to be chosen as keyword. However, the definition of a cultural object provided by Article 2(1) leads us back to Article 36 TFEU. The provision states as follows:

“cultural object” means an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the “national treasures possessing artistic, historic or archaeological value” under national legislation or administrative procedures within the meaning of Article 36 TFEU.

Thus the link between Directive 2014/60/EU and Article 36 TFEU emerges even more clearly. Nonetheless, it does not provide a self-determining definition.

It is worth noting that the former Council Directive 93/7/EEC provided an identical description, but also required the satisfaction of one of two alternative prerequisites: 1) belonging to one of the categories listed in the Annex;²² or 2) being part of the inventories of ecclesiastical institutions or public collections listed in the inventories of museums, archives, or libraries’ conservation collections.

It has been suggested that this Regulation be used in the identification of national treasures.²³ However, this possibility was already excluded by the Preamble of Directive 93/7/EEC itself.²⁴

Actually, based on this provision alone it would have been possible to infer only that the EU legislator did not consider either of the two conditions to be an ontological characteristic of national treasures. In fact, if that were the case it would not have added them to the basic definition.

The implication of the older provision was twofold: 1) There could exist national treasures that neither belong to the list nor form part of public collections as specified by Directive 93/7/EEC,²⁵ and 2) the categories of objects in the list may be classified as national treasures.

²² Among them, pictures and paintings executed entirely by hand, original sculptures or statuary, incunabula, and manuscripts.

²³ The Directorate-General for Enterprise and Industry, op. cit., p. 27, raises the issue of the assessment of a contextual nature. Directive 2014/60/EU has been used by some Member States to provide a definition of which cultural objects form part of their national treasure. This is the case of the Polish Act on Protection and Guardianship of Monuments. For more on this point, see W. W. Kowalski, *Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland*, “Santander Art and Culture Law Review” 2016, Vol. 2, p. 170; M. Graziadei, B. Pasa, *The Single European Market and Cultural Heritage: The Protection of National Treasures in Europe*, in: A. Jakubowski, K. Hausler, F. Fiorentini (eds.), *Cultural Heritage in the European Union. A Critical Inquiry into Law and Policy*, Brill Nijhoff, Leiden 2019, pp. 96-97; eidem, *Patrimoni culturali...*, p. 141.

²⁴ The “Annex to this Directive is consequently not intended to define objects which rank as ‘national treasures’ within the meaning of the said Article 36, but merely categories of object which may be classified as such and may accordingly be covered by the return procedure introduced by this Directive”.

²⁵ Such treasures used to be governed exclusively by the national legislation of the specific Member State. T. Kyriakou, *The Protection of National Treasures in the EU Single Market*, in: E. Psychogiopoulou (ed.), *Cultural Governance and the European Union. Protecting and Promoting Cultural Diversity in Europe*, Palgrave Macmillan, New York 2015, p. 70.

With the recasting of the definition by Directive 2014/60/EU, there is not anymore the compulsory belonging to collections or to one of the pre-established categories. Even these two minimal references have been removed.

Turning to Council Regulation (EC) 116/2009, the term “cultural goods” (*biens culturels/beni culturali/bienes culturales*) has been chosen to identify the scope of the Regulation. However, there is no explicit definition of the term. The EU legislator has opted instead to provide only an exhaustive list of items,²⁶ which does not offer formal clues for interpreting Article 36 TFEU. In fact, the legislator expressly states that the list cannot be used as a reference to define the concept of national treasure.²⁷ Consequently, the identification of a cultural good within the scope of the Regulation does not help in interpreting the term “national treasure”, notwithstanding the common aim of Article 36 TFEU and Council Regulation (EC) 116/2009 of maintaining the internal market.²⁸

To summarize, it seems possible to affirm that:

- 1) The term “national treasures” is rarely used in EU instruments, and when it is used it refers to hypotheses falling within the scope of Article 36 TFEU;
- 2) The rest of EU terminology related to cultural property is unable to provide further guidance on the issue.

Bearing in mind the terminology used within the main EU instruments, it seems appropriate to now move back to Article 36 TFEU to look for any possible interpretative indications.

National Treasures and Article 36 TFEU

The analysis of the main EU instruments relating to the circulation of cultural objects shows that all the references to the concept of national treasures derive from and revolve around Article 36 TFEU. Thus this Article seems capable of providing some guidance for interpreting the concept.

First of all, a comparison of the English, French, Italian, and Spanish versions of the Article (see Table 1) reveals that not all the texts include the same terminology.²⁹ This is certainly true, for instance, for Italian and Spanish. In fact, they

²⁶ See Annex I of the Regulation.

²⁷ *Considerandum* n. 7 states the following: “Annex I to this Regulation is aimed at making clear the categories of cultural goods which should be given particular protection in trade with third countries, but is not intended to prejudice the definition, by Member States, of national treasures within the meaning of Article 30 of the Treaty”.

²⁸ This *common aim* is pursued by, respectively, ensuring the balance with other interests (Article 36 TFEU) and by providing uniform controls on the export of cultural goods at the EU’s external borders (Council Regulation (EC) 116/2009).

²⁹ For an analysis of the notions that takes into account also the German version of the Treaty (*nationales Kulturgut*), see R. Peters, *The Protection of Cultural Property: Recent Developments in Germany in the Context of New EU Law and the 1970 UNESCO Convention*, “Santander Art and Culture Law Review” 2016, Vol. 2, pp. 89-90.

both use the word “patrimonio”, which appears to be slightly different from the idea of “treasure”.

Etymologically speaking, the word “treasure/trésor/tesoro” originated from the ancient Greek “θησαυρός” (*thesaurós*), which can be considered to come from the verb “to put” (Gr. *tithemi*) and the noun “gold” (Gr. *auros*). Accordingly, throughout the centuries the word “treasure” has always expressed the idea of something very valuable, to be preserved. On the other hand, “patrimony/patrimoine/patrimonio” comes from the Latin “pater” + “munus” and means “the duty of the father”, i.e. it refers to the revenue that the chief of the family (Lat. *pater familiae*) must ensure for the family maintenance.³⁰ As a result, the expression “patrimonio” identifies the entire assets of a natural or legal person, whereas the word “treasure” identifies only those things that are of special value included among the overall assets. As such, the idea of “treasure” implies a narrower concept.

The same word – “patrimonio” – has been used to translate the English term “heritage” (with reference to “cultural heritage”) in the World Heritage Convention as well as, recently, in Decision (EU) 2017/864 of the European Parliament and of the Council. The translation of the word “heritage” as “patrimonio” is justified by the fact that “patrimonio” is also generally used in the legal field to identify an “estate” (i.e. the entirety of inherited wealth). In this sense the terms “patrimoine culturel/patrimonio culturale/patrimonio cultural” have come to be used to express the idea of something that should be preserved to be transmitted from one generation to the next. Furthermore, the usage of this term is often related to two additional elements that fall outside the scope of this paper: 1) the co-existence of both tangible and intangible aspects; and 2) the attempt to avoid the much-discussed issue of the commodification of cultural property.

This leads us to a preliminary issue: whether “national treasure” is the real term to be defined. Not only there is a multiplicity of legal definitions at the national level, but – as we have just pointed out – the term to be defined itself is different at the European level. Choosing one term or the other produces direct effects on the extent of Member States’ power to identify a notion linked to the scope of Article 36 TFEU. The scope is broader if we favour the notion of “patrimonio”; and narrower if we opt for the notion of “treasure”.

In determining which of the two characterizations applies, the role and function of Article 36 TFEU must be taken into consideration. This Article sets forth an exception to the prohibition of quantitative restrictions between Member States, and thus it interferes with one of the fundamental principles

³⁰ For more on the etymological roots, see, *ex plurimis*, A. Momigliano, E. Albertario, L. Pace, *Tesoro*, in: *Enciclopedia italiana Treccani*, Treccani, Roma 1937; G. B. Bolza, *Tesoro*, in: idem (ed.), *Vocabolario genetico etimologico della lingua italiana*, Stamperia di Corte e di Stato, Wien 1838; O. Piangiani, *Patrimonio*, in: idem, *Vocabolario etimologico della lingua italiana*, Società editrice Dante Alighieri, Roma 1907; idem, *Tesoro*, in: idem, *Vocabolario etimologico della lingua italiana*, Società editrice Dante Alighieri, Roma 1907.

of the common market: the free movement of goods within the internal borders. As such, it must be strictly interpreted.³¹ Thus when choosing between two similar meanings, the narrower one should prevail. On these grounds – bearing in mind the above-mentioned differences between the two words – it is now possible to confirm that “national treasure” is the term to be understood with regards to Article 36 TFEU.³²

An additional provision in Article 36 offers another important criterion: the part in which it affirms that a prohibition or restriction on the grounds of protection of national treasures shall not “constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

As is well known, except for the famous case *Commission v. Italy*, the CJEU has never ruled on the application of this latter provision to the national treasures’ exception. However, it should be noted that Article 36 TFEU was not even applicable in *Commission v. Italy*, since the case dealt with the imposition of a tax on the exportation of works of art, and thus it cannot be invoked as a justification.³³

Notwithstanding the absence of specific case-law, the CJEU has developed a general interpretation thanks to cases regarding other interests included in the list. Applying the principles it has delineated, it seems possible to conclude that in order to be deemed compatible with the Treaty national measures should be consistent with the principle of proportionality, having regard to the interest protected. In particular, two requirements need to be met: 1) the national measures have to be justified as being necessary to attain the declared objective; and 2) the objective could not be achieved by measures which are less restrictive of intra-European trade.³⁴

³¹ *Ex plurimis*, Case 174/82, *Criminal proceedings against Sandoz BV*, ECR, 1983, 2445, para. 22 (on the same issue, Case 227/82, *Criminal proceedings against Leendert van Bennekom*, ECR, 1983, 3883); Case 72/83, *Campus Oil Limited and others v. Minister for Industry and Energy and others*, ECR, 1984, 2727, para. 32; Case 50/85, *Bernhard Schloh v. Auto contrôle technique SPRL*, ECR, 1986, 1855, para. 13; Case C-400/96, *Criminal proceedings against Jean Harpegnies*, ECR, 1998, I-5121, para. 29.

³² M. Frigo, *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges*, “Recueil des cours” 2015, Vol. 375, pp. 306-307.

³³ Even if the Italian Government argued that the tax was aimed at protecting national heritage by discouraging the export of the goods, the fact remains that such an action constitutes a measure equivalent to a customs duty. Hence, it fell within Chapter I on the customs union and not within Chapter III on the prohibition of quantitative restrictions between Member States. Article 36 TFEU constitutes an exception to the rules of Chapter III. As said by the Court “in view of the difference between the measures referred to in Article 16 and Article 36, it is not possible to apply the exception laid down in the latter provision to measures which fall outside the scope of the prohibitions referred to in the chapter relating to the elimination of quantitative restrictions between Member States” (Case 7/68, cit., p. 430).

³⁴ To that effect, see Case C-198/14, *Valev Visnapuu v. Kihlakunnansyyttäjä and Suomen valtio – Tullihallitus*, EU:C:2015:751; Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*, ECR, 2006, I-9171; Case C-170/04, *Klas Rosengren and Others v. Riksåklagaren*, ECR, 2007, I-4071; Case C-17/93, *Criminal proceedings against J.J.J. Van der Veldt*, ECR, 1994, I-3537; Case C-189/95, *Criminal proceedings against Harry Franzén*, ECR, 1997, I-5909.

As a result, it is possible to infer that a too broad definition of national treasures would hinder the internal market, resulting in a violation of the above-mentioned requirements.³⁵

Conclusions

The exception set out in Article 36 TFEU reflects the never-ending clash of interests between those who seek a totally free art market, and those who support controls in order to avoid the risk of dispersion of national patrimonies; namely the controversial division between *cultural internationalism* and *cultural nationalism*.³⁶

There is little doubt that the lack of a harmonized definition of natural treasures comes from the conflicting trends emerging in Member States. The main problem seems to be that a clear definition may devalue national rules, striking a nerve. It is never easy to accept a supranational body that interferes with national decisions, even when the authority has been delegated freely. Brexit is a clear example. When the specific power deals with cultural heritage, the difficulties are even greater, taking into consideration public opinion's influence and patriotic sentiment. With this respect, it is not a case that the area of culture falls within supporting competences, and not within exclusive or shared ones.

As might be expected, the absence of a framework definition has led to a divergent application of Article 36 TFEU at the national level.³⁷ An Italian case will serve here as an illustrative example.

An action was brought challenging the denial of an export permit for a Dali painting.³⁸ In rejecting the claim, the administrative court of first instance affirmed that a direct connection with the Italian cultural heritage is not an indispensable prerequisite when a foreign work of art is deemed necessary to foster the understanding of the represented culture. In this case, contributing to the cultural development of the society, the denial of an export permit complied with Article 9 of the Italian Constitution.³⁹ As far as the painting itself was concerned, the court justified

³⁵ F. Lafarge, *Beni culturali*, in: M. P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo*, Giuffrè, Milano 2007, Parte speciale, Vol. II, pp. 673-705.

³⁶ C. G. Jernigan, *Protecting National Treasures in a Single-Market*, "Boston College International and Comparative Law Review" 1994, Vol. 17(1), pp. 153-164; J. H. Merryman, *Two Ways of Thinking About Cultural Property*, "The American Journal of International Law" 1986, Vol. 80(4), pp. 831-853; idem, *Cultural Property Internationalism*, "International Journal of Cultural Property" 2005, Vol. 12(1), pp. 11-39; J. H. Merryman, A. E. Elsen, S. K. Ulrice, *Law, Ethics and the Visual Arts*, Kluwer Law International, Alphen aan den Rijn 2007; L. V. Prott, *The International Movement of Cultural Objects*, "International Journal of Cultural Property" 2005, Vol. 12(2), p. 225.

³⁷ B. T. Hoffman, *European Union Legislation Pertaining to Cultural Goods*, in: idem (ed.), *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, New York 2006, pp. 192-193.

³⁸ Tribunale amministrativo regionale (TAR) Lazio, 7 April 2017, No. 4395.

³⁹ In this regard, see also TAR Lazio, 17 September 2012, No. 7833 on a French painting of Robert Jacques Francois Lefèvre and TAR Lazio, 6 August 2014, No. 8811 on *Petite Panthère Marchant* by Rembrandt Bugatti.

the denial by taking into consideration the quality and value of the work – which was possibly inspired by an Italian art movement called “Valori Plastici” – and the absence of other Dalí works of the same period in Italian collections.

In the court’s opinion, such an interpretation is consistent with EU law. In fact, the court affirmed that Article 36 TFEU should not be interpreted restrictively, since culture is not within the EU’s direct competence. On the contrary, the EU’s role is only to support Member States and is limited exclusively to the protection of cultural heritage of European significance. Hence, it has no authority to interfere with national laws limiting the export of selected works of art. Furthermore, the Treaty’s goal is respected because the risk of arbitrary discrimination or a disguised restriction on trade is overcome by the consistency of the denial with Italian laws.

This example seems on one hand to reflect one of the major difficulties with creating a framework definition, while on the other it provides evidence of the necessity to have one. As shown by the *Dalí* case, the common adjective “national” is far from being interpreted uniformly. It could refer to the nationality of the creator, of the finder, to the place it represents, or where it was created or found.⁴⁰ Moreover, the connection could be with the cultural environment, like in those cases where a work of art has inspired a foreign artistic movement. Finally, a highly sensitive issue is related to the time the object has spent in the territory of the State (e.g. the Egyptian obelisks in Rome), as well as its value taking into consideration its “marginal utility”.⁴¹

As mentioned above, such discrepancies have led the EU itself to affirm the necessity to find a mutual understanding of the term.⁴²

⁴⁰ J. M. Cheng, *The Problem of National Treasure in International Law*, “Oregon Review of International Law” 2010, Vol. 12(1), pp. 156-160.

⁴¹ It is worth noting that, at least at international level, a rule addressing the issue of “nationality” does exist. Article 4 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, states that: “The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;
- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property”.

However, it appears difficult to imagine a usage of Article 4 of the Convention as a parameter for interpreting Article 36 TFEU at the national level. In fact, not only is the Article 4 definition provided merely for the purpose of the 1970 Convention, but not even all the European Member States are Parties to this Convention (this is the case, for instance, of Ireland).

⁴² Directive 2014/60/EU, *considerandum* n. 10.

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In conclusion – although no EU institution has ever established a framework definition, nevertheless it seems correct to affirm that an EU intervention in this regard would not undermine Member States' sovereignty. Quite the contrary – it would fall within EU competence (to the extent that cultural objects are identified as merchandise). However, even if the existence of an EU competence were agreed upon, it seems difficult to imagine that the Union will exercise its power in this sphere in the near future.

The solution could be a CJEU intervention, if ever it will be vested with the issue. The Court seems to have the authority and enough parameters to provide a framework definition. In fact, based on the collected elements, in order to have a “national treasure” within the scope of Article 36 TFEU it seems correct to affirm that:

- I. a. the object should possess an authentic cultural value from an artistic, historic, or archaeological point of view;
- b. the value is to be determined according to the relevant field of study (history of art, archaeology, etc.), without regard to its constituent materials or to its market price;
- c. the value should be at least special;
- II. the object should have a clear and undeniable link with the State.

Broader criteria which would be capable of including all cultural property would seem to be contrary to Article 36 TFEU since:

- they would imply a broad interpretation which is not admissible because the provision concedes the possibility to impose restrictions on internal trade by way of derogation of one of the fundamental principles of EU law and, as a result, it must be strictly interpreted;
- they would not really be necessary to protect national treasures, and thus inconsistent with the principle of proportionality as developed by the CJEU case-law;
- limiting the export without a tie with the State appears to be contrary to the idea of protection of a “national” treasure.

As stated by Pierre Pescatore, a former CJEU judge, the intent is not to preserve the totality of a national cultural patrimony, but to safeguard its “essential and fundamental elements”.⁴³

Such a framework definition would not undermine the protection of national heritage, but only avoid exploitative practices aimed at qualifying each and every cultural object as a national treasure in order to restrict the circulation of cultural goods and, thus, the circulation of culture and mutual understanding.

⁴³ P. Pescatore, *Le commerce de l'art et le Marché commun*, “Revue Trimestrielle de Droit Européen” 1985, p. 455. See A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, New York 2014, p. 84. J. H. Merryman, *Cultural Property, International Trade and Human Rights*, in: idem (ed.), *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, Wolters Kluwer, Alphen aan den Rijn 2009, p. 228.

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