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## THE EXPORT OF WORKS OF ART ACCORDING TO ITALIAN LAW

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### 1. *Introduction: works of art as “goods”?*

The principle of free movement of goods represents one of the four fundamental freedoms of the European market, implemented through the elimination of custom restrictions and similar measures.

As far as the trade of works of art is concerned, the first issue to examine is whether the notion of work of art can fall within the definition of “goods” under Italian law (in particular, art. 810 of the Italian Civil Code). For the purposes of this article, it is sufficient to recall that, despite Italy’s nature of civil law country, definitions of “works of art” are to be found in courts and tribunals decisions,<sup>1</sup> rather than legal texts (e.g. codes, statutes...) and that these decisions make clear how works of art imply a *quid pluris* compared to mere goods, as they contribute for instance to the cultural growth of people. This is highlighted by art. 1, par. 2 and art. 2, par. 4 of **the Italian Code of**

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<sup>1</sup> See for example the decision of the Tribunal of Milan, 25 March 2014, n.4116.

**Cultural Heritage and Landscape** (the Code), which under art. 2, par. 2 defines the broader notion of “cultural goods” as those immobile or mobile goods that present artistic, historic, archaeological, ethnoanthropological, archivist and biographical value.<sup>2</sup> In other words, the public interest of the good under protection is directly linked to the Italian history of art and culture.<sup>3</sup>

## 2. *The cultural interest declaration*

Under **art. 36 of the Treaty on the Functioning of the European Union (TFEU)**, export restrictions are justified in cases where the artistic, historical and archaeological national heritage requirements need special protection. The Code follows the EU pattern through the notion of “cultural interest”, legal basis for the adoption of such restrictive measures. In particular, art. 13 of the Code regulates the “cultural interest declaration”, which ensures the interest of the community in the protection of the good in question under art. 10, par. 3 of the Code.<sup>4</sup> These goods, despite being property of private owners, are considered “particularly important” and essential for the contribution and the development of Italian culture under art. 9 of the Italian Constitution, allowing the whole population to enhance personal and collective growth.<sup>5</sup>

It is also important to add that, as recognised by Italian judges, the procedure of this declaration under arts 10, 13 and 14 of the Code is characterised by huge discretion of the Administration, as it implies highly specialised expertise

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<sup>2</sup> The list is not exhaustive and art. 10 of the Code provides more details. See paragraph 2 for the *cultural interest declaration* pursuant to arts. 10 and 11 of the Code.

<sup>3</sup> See the decision of the Council of State, Section VI, 27 December 2023, n. 11204.

<sup>4</sup> Ibid.

<sup>5</sup> See the decision of the Regional Administrative Tribunal of the Region Lazio in Rome, Section II quater, 28 December 2023, n. 19889, which defines works of art as goods that, despite being private property on a formal-legal basis, must be considered belonging to the community as components of the State heritage under art. 9 of the Italian Constitution. The latter aims to contribute to the development of culture. In other words, the historic and artistic heritage is considered “national” as it represents the entire Italian population, that in this way enhance its own knowledge in order to pursue the full personal development as provided for by art. 3 of the Italian Constitution.

from various sectors (e.g. history, art and architecture) and the subsequent difficulty of judges as law operators to assess the matter from a technical point of view.<sup>6</sup> Therefore it is not possible to clearly define the notion of “particularly important interest”, as the action of the Administration can be based not on purely scientific evidence, but considerations of historic and philosophical nature, often linked to a specific territory, and that are continuously evolving.<sup>7</sup>

In Italy, the first forms of export restrictions date back to the **Law n. 364 of 1909** and find their origins in the set of rules of the Italian States before the country unification. Today, in the context of globalisation of art and culture, the traditional distinction between “source countries” of artistic works (including Italy) and “market countries” (e.g. England), with the first group closing its borders to avoid the depletion of its heritage in favour of the second group, appears outdated.

Despite the well-known Italian artistic tradition, it was pointed out that in Italy the current strict measures may hamper the trade of Italian works of art, causing damage to modern and contemporary Italian artists.<sup>8</sup> As suggested by some practitioners,<sup>9</sup> it is necessary to align the limit of euros 13.500,00 (introduced by the **Italian Competition Law 124/2017**) under which the State cannot impose restrictions or prohibitions to the export of artistic works (e.g. paintings), with the thresholds of value provided in France (euros 300.000,00), or England and Germany (euros 150.000,00). Indeed, imposing heavier restrictions constitutes not only a disincentive for investments in the art market and a case of “gold plating” practice criticised by the European institutions,<sup>10</sup> but also a waste of resources used for goods often without relevance for the Italian cultural heritage.

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<sup>6</sup> See Council of State, Section VII, Decision 31 December 2023, n. 11387.

<sup>7</sup> See the decision of the Regional Administrative Tribunal of the Region Lombardia in Milan, Section III, 15 November 2023, n. 2666.

<sup>8</sup> G. Calabi, *L'inverosimile masochismo degli italiani* in *Il Giornale dell'Arte* (March 2023).

<sup>9</sup> *Ibid.*

<sup>10</sup> See

[https://ec.europa.eu/futurium/en/system/files/ged/hlg\\_16\\_0008\\_00\\_conclusions\\_and\\_recommendations\\_on\\_goldplating\\_final.pdf](https://ec.europa.eu/futurium/en/system/files/ged/hlg_16_0008_00_conclusions_and_recommendations_on_goldplating_final.pdf).

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Moreover, to comply with property law, the State should compensate the loss of value represented by a such protection measure and ensure that the prohibition of export is balanced by the obligation to buy works of art under market prices (as it happens in France).

### *3. The updated role of the Export Office of the Italian Ministry of Culture*

**Article 70 of the Code** establishes that the Export Office may propose to the General Direction the enforced acquisition of goods by the terms of law provided for the release of a certificate of free movement and in case no measure has been previously imposed on that particular good. The Region and the interested subject must also be informed of the proposal. The time-limit for the release of the certificate is postponed of 60 days in that case. If this proposal is accepted, the General Direction must notify the acquisition including the price and the request of the certification of free movement within 90 days from the release of the certificate. Until the notification, the interested subject may keep the good in question with a waiver for the export. However, it is necessary to observe that the proposals of acquisition do not conclude often with a positive outcome, because of the lack of financial resources, the need of further scientific verifications or the absence of a project of museum valorisation.

The previous **Circular n. 13 of 2019** by the former Director General, Mr. Famiglietti, by virtue of the function of “enhanced protection” of the enforced acquisition, sets out that if the proposal does not have a positive outcome for different reasons than different technical verifications by the Ministry concerning the relevance of the cultural interest of the good proposed at the acquisition, the Export Office will not be able to confirm the relevance of the cultural interest of the good for which enforced acquisition has been proposed, prohibiting its export and initiating the procedure aimed to the declaration of interest.<sup>11</sup>

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<sup>11</sup> Circular n. 13 of 2019 is available at:  
<https://media.beniculturali.it/mibac/files/3182/Circolare%2013.2019.pdf>.

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However, **the Circular of the Ministry of Culture n. 1 of 3 January 2022**, on the relationship between declaration of cultural interest and enforced acquisition,<sup>12</sup> clarifies that such interpretation of the Circular of 2019 does not appear coherent with the principles set forth under **art. 68 of the Code**, which require that the rejection of the export and the relative burden of cultural interest are object of particularly strong reasoning to be based on the fulfilment of the good in question of (at least) two of the criteria under the **Ministerial Decree n. 537 of 2017** (artistic quality, rarity in quantitative and qualitative sense, relevance of the representation, belonging to a complex and/or context, particularly significant proof for the history of art collection, significative proof of relationships between different cultural areas also of production and/or foreign origin).<sup>13</sup> Yet Circular n. 1 establishes that the proposals of enforced acquisition are not subordinated to the presence of these criteria, as they should pursue the different goals of enrichment of public collections, also in relation to the adequacy of the price, and are therefore included in a path of valorisation.

Thereby, following some Italian case law in this field and the opinion issued by the legislative office of the Ministry, the Circular concludes that, in case the Ministry has decided not to exercise the power of enforced acquisition, the Export Office does not have grounds automatically for proceeding with the rejection of the certificate and to start the procedure for the declaration of cultural interest, but they must assess, case by case, the rejection of the export, with related burden of cultural interest, or issue the license in application of the criteria under the Ministerial Decree n. 537 of 2017.

Unfortunately, even if Circular n.1 is not explicit on this point, the same conclusion should be reached also in the case of the private owner that waives the export and keep the object pursuant to art. 70 of the Code. The distinction included in the Circular concerning the difference between the requirements of the declaration of cultural interest under art. 68 and the enforced acquisition

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<sup>12</sup> Circular n. 1 of 3 January 2022 is available at: [https://soprintendenzafirenze.cultura.gov.it/wp-content/uploads/2022/01/DG\\_ABAP\\_Circ\\_1\\_2022.pdf](https://soprintendenzafirenze.cultura.gov.it/wp-content/uploads/2022/01/DG_ABAP_Circ_1_2022.pdf).

<sup>13</sup> See the decision of the Regional Administrative Tribunal of the Region Lombardia in Milan, Section III, 10 November 2023, n. 2601.

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under art. 70 of the Code is a further manifestation of one of the peculiarities of the Italian system of control of export compared to other States, such as France and United Kingdom.<sup>14</sup>

#### 4. *Conclusions*

The Government's role is pervasive in relation to export of works of art according to Italian law. This is reflected by the huge discretionarily of the Administration for the cultural interest declaration and the powers of the Export Office of the Italian Ministry of Culture. Considering the role of the Export Office, it seems that the Italian State can exclude the exit of works of art from the country only if the acquisition of the same works occurred by the State. Moreover, taking into account the cultural interest declaration, challenges may emerge for the art market, as the verification of the "particularly important interest" can be based not on true historic facts, but on the assessment of the Administration. The judge and the private parties are prevented from substituting their view to that of the Administration and what they are allowed to is only verifying that the choices of the Administration were plausible in light of the relevant sciences and all the elements of the concrete case.<sup>15</sup>

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S. MORABITO, *The export of works of art according to Italian law*, 15 *BusinessJus* 85 (2024)

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<sup>14</sup> G. Calabi, *L'inverosimile masochismo degli italiani* in *Il Giornale dell'Arte* (March 2023).

<sup>15</sup> See the decision of the Council of State, Section VII, 3 November 2023, n. 9538.