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Restrictions on the Export of Cultural Property in Italy through the Lens of Case Law

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This article examines the international circulation of cultural property through administrative discretion, European proportionality and judicial control. Anchored in the Italian Code of Cultural Heritage and Landscape, it analyses export licensing (the attestato di libera circolazione, ALC), the 2017 ministerial Guidelines, and the self-certification regime in Article 65(4-bis), situating these within EU and international instruments (Regulation (EC) No 116/2009; Directive 2014/60/EU; Regulation (EU) 2019/880). It evaluates how courts scrutinise 'technical-discretionary' assessments, the evidential thresholds for refusal, and the duty to give reasons. Particular attention is paid to autotutela (ex officio annulment), including temporal limits, legitimate expectations and cross-border effects when export authorisations are annulled. Drawing on recent case law, the article traces trends in the definition of 'cultural interest', the calibration of proportionality, and the interaction between national measures and the internal market. It argues for a more precise statutory framework for exceptional cases and greater procedural transparency to balance heritage protection with legal certainty for market participants.

1. Introduction

Cultural property – broadly, objects that may acquire cultural significance at particular moments – circulates through transnational channels shaped by values, politics and markets. Its international movement is neither a purely economic transaction nor a purely public function; it is a site where public and private interests interlock and, at times, conflict. In legal terms, this multidimensionality explains why the regulatory architecture for cultural property differs from the general regime for the circulation of goods. Cultural objects are at once carriers of an intangible value and objects whose cultural meaning is historically contingent and socially constructed. That value may fluctuate as communities reinterpret their collective identity. They are also public in character: the value they embody ought to remain publicly accessible within the polity.

From the perspective of contemporary administrative law, the international circulation of cultural objects is a classic field in which constitutional commitments, global markets and supranational legal orders meet. The public interest in safeguarding cultural heritage – constitutionalised in Italy and implemented legislatively – must be reconciled with economic freedoms domestically and with the free movement of goods and capital in the European Union. The art market is global, marked by rapid cross-border movement and increasingly financialised transactions. Within this context, Italian law frames export control not as a mere derogation from commerce but as a constitutional task: Legislative Decree

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No 42/2004 – the Code of Cultural Heritage and Landscape (the 'Code') operationalises the mandate to protect the national landscape and historical-artistic patrimony by translating "testimony of civilisation"[1] into normative criteria for administrative action. In express terms, the Code gives effect to Article 9 of the Constitution,[2] placing protection and enhancement of cultural heritage within a system governed by the Code's provisions and within the distribution of competences set out in the Constitution.

Against that normative backdrop, the export of cultural property is administered through a structured set of authorisations and controls. Export (i.e. removal from the Italian territory of the item) may require (i) an export licence in the form of a certificate of free circulation (*attestato di libera circolazione*, 'ALC') for movements within the EU[3] (Article 68 of the Code); (ii) an EU export licence where required by EU law; or (iii) for certain categories, self-certification by the owner. These mechanisms embed a technical and discretionary appraisal of whether a work manifests sufficient cultural interest to justify its retention within the national territory. Article 68 itself requires an application to the competent Export Office (within the appropriate Superintendency for Archaeology, Fine Arts and Landscape), disclosure of fair market value for each item, and a reasoned administrative decision to grant or refuse the ALC within the procedural framework the Code sets out. In performing that assessment, Export Offices must apply the General Guidelines adopted by Ministerial Decree No 537 of 6 December 2017 ('Ministerial Decree No 537/2017'),[4] which guide the appraisal – quality, rarity (quantitative and qualitative), representativeness, contextual belonging, significance for collecting history and evidential value of cultural relations across regions, including for foreign works.

As a result, export control presents as a qualified fact-finding exercise with marked scientific and technical components. The enquiry is whether the object is properly a "cultural asset" within Article 10 of the Code – i.e., a material thing (movable or immovable) whose material support conveys culturally significant content susceptible to public verification. Case law emphasises that both refusal of export and the imposition of cultural interest must be justified by complete, coherent, and suitably reasoned decisions, and that the guidelines reduce, rather than expand, administrative discretion by constraining technical discretion to demonstrable criteria and verifiable methods. The Council of State (*Consiglio di Stato*)[5] has repeatedly held that while declarations of cultural interest and ALC decisions involve broad technical discretion, judicial review will examine reasonableness, proportionality, logical coherence, adequacy of

1 Pursuant to Article 2(2) of the Code: "*Cultural property comprises immovable and movable things which, pursuant to Articles 10 and 11, exhibit artistic, historical, archaeological, ethno-anthropological, archival or bibliographic interest, as well as other things identified by or under the law as testimonies of civilisation*."

2 "*The Republic shall promote the development of culture and scientific and technical research. It shall safeguard the landscape and the historical and artistic heritage of the Nation. It shall protect the environment, biodiversity and eco-systems, also in the interest of future generations. State legislation shall regulate the modes and forms of protection of animals*".

3 An export licence to countries located outside the EU, which is issued on the legal same basis as a certificate of free circulation, is called licenza di esportazione definitiva or 'LED'. An LED is valid for twelve months while the ALC is valid for five years.

4 Ministerial Decree No. 537 of 6 Dec. 2017 – General guidelines for assessing the grant or refusal of the certificate of free circulation by the Export Offices for items of artistic, historical, archaeological and ethno-anthropological interest.

5 The Council of State is the court of last instance of the administrative jurisdiction.

the evaluation, and correctness of the chosen technical method – particularly where the property is privately owned.

Recent administrative case law illustrates these methodological demands. Where an Export Office or Soprintendenza has denied an ALC or imposed a listing without engaging concretely with the Guideline criteria (e.g., by offering merely tautological invocations of "rarity" or "exceptionality" without comparative analysis), the administrative courts have annulled the measures and required the authority to re-determine in accordance with law. Conversely, where the authority has articulated a complete, argued reconstruction of the elements underpinning the decision – linking, for example, quality and scarcity to the state of public collections, iconographic centrality, or collecting history courts have affirmed the lawfulness of the outcome. That approach aligns with the principle that technical discretion in heritage matters is wide but reviewable for coherent reasoning, adequate investigation and proportionality; it is not a licence for unreasoned fiat.

The broader public-law equilibrium at stake is also European. National rules and decisions must accommodate the internal market's guarantees while remaining consistent with the permissible derogations in Article 36 TFEU.[6] In litigation before the Council of State, parties have invoked proportionality to challenge the combination of domestic technical discretion, Ministerial Decree No. 537/2017 parameters, and the limits of judicial review. The Council of State has reiterated that, while Member States retain discretion to define the level of protection for cultural heritage, their restrictive measures must be appropriate and necessary to achieve legitimate objectives – a test that the courts apply by scrutinising the coherence and sufficiency of administrative reasoning rather than substituting aesthetic judgments. In parallel, the Code's export regime is understood to operate alongside EU instruments – Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Regulation (EC) No. 116/2009)[7] on extra-EU export licences and Directive 2014/60/EU[8] on the return of cultural objects unlawfully removed from the territory of a Member State – within the margin that Article 36 TFEU preserves for national measures protecting cultural treasures.

In short, the 'circulation' of cultural property is the practical space in which a constitutional commitment to heritage, a market reality of global trade in art, and the discipline of EU law must be held in principled balance. The Code's architecture – anchored to Article 9 of the Constitution, articulated through Article 68's ALC procedure, and channelled by Ministerial Decree No 537/2017's evaluative criteria – allocates broad but reviewable administrative discretion. The courts' contribution has been to insist upon method:

6 "*The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*." It should be noted, however, that in the Italian version reference to "national treasures" has been omitted. The Italian version refers only to "di protezione del patrimonio artistico, storico o archeologico nazionale".

7 OJ L 39, 10.2.2009, pp. 1-7.

8 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, 28.5.2014, pp. 1-10.

reasoned application of objective parameters, evidential rigour and proportionality in the service of a public interest that is constitutionally pre-eminent yet juridically constrained.

2. The EU and International Framework

In the aftermath of the Second World War, the international community's normative response to the risks attending the circulation of cultural objects developed along a dual axis: *ex ante* controls over cross-border movements, and *ex post* remedies designed to restore the *status quo ante* through restitution and return. Wartime trading, looting, theft and clandestine excavations fuelled a global market and obliged legal systems to craft a toolkit that is at once preventive (export and import licensing) and restorative (owner- and State-driven recovery actions). This bifurcated architecture frames contemporary Italian law as well as the relevant international and EU regimes.

Within the Italian legal order, the central domestic instrument remains the Code. Yet the Code operates in an open normative ecosystem that interfaces with the 1954 Hague Convention,[9] the 1970 UNESCO Convention[10] and the 1995 UNIDROIT Convention,[11] and – at Union level – with the export regime under Regulation (EC) No 116/2009 and the intra-EU restitution mechanism now codified by Directive 2014/60/EU. This can be considered to be a self-standing micro-system that is nonetheless porous and outward-looking, and one can observe how this evolution has refined core private-law categories (ownership, good-faith acquisition) by conditioning them through the primacy of the public interest in the integrity and completeness of the national heritage.

From an administrative-law perspective, the courts have progressively clarified the reach of judicial review over complex technical appraisals and value-laden discretionary choices made by the cultural administration. Review is not confined to external legality, but extends to the reliability of the decision-making operation its coherence, methodological correctness and adherence to predetermined criteria – while refraining from substituting the judge's aesthetic appraisal for that of the administration. In particular, where measures materially affect circulation (refusals of export licences, the opening of listing procedures, and entries in special registers), the case law requires a robust, evidence-based statement of reasons anchored to verifiable parameters and preceded by adequate fact-finding on the object and its historical-artistic context, eschewing formulaic assertions.

From an international angle, the 1970 UNESCO Convention first introduced the requirement of an export certificate as a condition for the lawfulness of international transfers, coupled with inter-State co-operation and the restitution of stolen or illegally exported property. It famously left unresolved certain pivotal issues – notably the position of the good-faith possessor and the calibration of compensation – lacunae addressed by the 1995 UNIDROIT Convention through a minimum set of directly enforceable rules built around two axes: (i) restitution of stolen cultural objects at the initiative of the owner (public or private), and (ii) return of illegally exported cultural objects at the initiative of the requesting State. The UNIDROIT model treats restitution as unconditional (even against a good-faith possessor),

9 Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954).

10 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 Nov. 1970).

11 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995).

while providing equitable indemnity subject to proof of due diligence at acquisition – typically assessed by indicators such as anomalous price, opaque provenance, absence of certificates and failure to check stolen-art registers. Limitation rules combine a three-year period from discovery (object's location and possessor's identity) with a 50-year long-stop, balancing legal certainty with effective recovery; in the return action, indemnity may be complemented – by agreement with the requesting State – by alternatives (retention with custodial obligations in the State of origin; transfer to reliable residents) that serve the public interest in repatriation, and the scheme coheres around the centrality of the *lex originis* and inter-State judicial and administrative co-operation.

In EU law, two structural pillars govern circulation. First, export of cultural goods to third countries is regulated by Regulation (EC) No. 116/2009, which establishes a system of licences by category (Annex I), age and value, relying on standardised forms and customs controls operated by the Member State from whose territory the object leaves the Union. Secondly, intra-EU return is addressed by Directive 2014/60/EU (which replaced Directive 93/7/EEC), consolidating protection into a single State-driven action for the return of cultural objects unlawfully removed from the territory of a Member State. The Directive harmonises limitation rules and places on the possessor the burden of demonstrating due diligence to qualify for equitable compensation. Practitioners will recognise a settled evidential template for 'diligent possession', as refined by administrative practice and case law.

A further, more recent, strand concerns import from third countries under Regulation (EU) 2019/880,[12] which establishes a graded regime comprising prohibitions for certain categories and, for others, either an import licence or an importer's statement, together with progressively more onerous documentary duties, harmonised taxonomies and interoperable information flows. Italian administrative practice has been aligning through operational guidance and customs co-ordination to standardise data formats and evidential expectations so as to safeguard traceability.

This multi-level structure interacts continuously with domestic export control under the Code. In particular, the Code's licensing and control provisions dovetail with the EU framework such that, for permanent extra-EU transfers, the ALC is complemented by the Union's export licence, while intra-EU movements remain subject to the Code's internal control mechanisms in accordance with Article 36 TFEU. In practice, Annex I to Regulation (EC) No. 116/2009 and the national parameters in Ministerial Decree No. 537/2017 together establish the evaluation criteria that must structure administrative reasoning. Courts have censured refusals grounded in generic invocations of "high artistic value" unmoored from those parameters, and have conversely upheld well-reasoned refusals demonstrating a coherent application of quality, rarity, iconographic representativeness, contextual belonging and collecting history to the facts established in the record.

Finally, the EU law matrix supplies the standards – proportionality, non-discrimination and loyal co-operation – by which domestic measures restricting circulation must be tested. Italian administrative case law reflects this stance: the duty to give reasons, the methodological discipline of technical discretion and the calibration of measures that

12 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods PE/82/2018/REV/1, OJ L 151, 7.6.2019, pp. 1-14.

impact markedly on circulation are assessed against predetermined and reviewable criteria, with the judge scrutinising the intrinsic coherence of the administrative decision while avoiding substitution of the same on the merits. The resulting synthesis is a functional alignment of domestic, conventional and EU instruments within an 'open' regime that operationalises Article 9 of the Constitution without renouncing the European internal market's commitments.

3. Origins and Development of the Legal Framework: From the *Ius Prohibendi* to the Code of Cultural Heritage

In order properly to understand the current structure of the legal framework, it is necessary, albeit in very summary fashion, to recall the main stages in its historical development.

Public protection of works of art and antiquities in Europe arose as an expression of the sovereign's *ius prohibendi*, understood as the power to prevent the alienation or export of objects regarded as representative of the prestige of a dynasty or a city. Between the seventeenth and eighteenth centuries this power took shape in various Italian preunification States, giving rise to an initial embryonic form of public protection of the artistic heritage, still far removed, however, from a fully developed normative system.

With Law No. 1089 of 1 June 1939 (the so-called 'Bottai Law'), the legislator of the then Kingdom of Italy made the first decisive qualitative leap: protection was no longer conceived as the contingent exercise of a sovereign prerogative, but as an administrative function governed by legal rules, exercised through the measure of 'notification' by which the artistic or historical interest of individual items was declared. In this context, the international circulation of cultural property was made subject to State control, exercised through the grant of authorisations and the power to prohibit export or to acquire compulsorily works destined for abroad.[13]

Law No. 487 of 1972 introduced a further element of modernisation by imposing an obligation to give reasons for decisions refusing authorisation. This was far from a merely formal step: it marked the gradual abandonment of a model of protection founded on mere authority and opened the way to a conception of the administrative function as an activity bound by objective criteria and subject to judicial review.

The Code gathers together and reorganises this tradition, offering a systematic framework that links the regime governing declarations of cultural interest, export control and the instruments of public acquisition (pre-emption, compulsory purchase), within a context deeply influenced by European Union law and by international conventions on restitution and the fight against illicit trafficking.[14]

Subsequent legislative developments – in particular Legislative Decree No. 62/2008 and Law No. 124/2017 – have adjusted the temporal thresholds (raised to 70 years), the value thresholds (EUR 13,500 for certain categories of works) and the simplified procedures (self-certification under Article 65(4-bis)), without however altering the basic structure. Central to that structure remains the idea that the power to prevent the export of works

13 Sandro Amorosino, *Diritto dei beni culturali* (Wolters Kluwer-CEDAM, Milan-Padua 2019), 16-17.

14 Anna Pirri Valentini, *Il controllo della circolazione internazionale delle opere d'arte* (Giuffrè, Milan 2023), 58-59.

does not constitute a residual vestige of absolute sovereignty, but the expression of an administrative function exercised in accordance with predetermined parameters, initially laid down in the Argan Circular of 1974[15] and, more recently, in the Guidelines set out in Ministerial Decree No. 537/2017.

The ultimate aim of the legislator of the Code, when drafting Article 65, was to eliminate the criterion of potential damage to the cultural heritage as the determinant for prohibiting export, thereby ensuring greater certainty and predictability in the concrete application of the rules. In this context, where the works in question are by a living author or, in any event, were produced no more than 50 years ago – 70 years under Law No. 124 of 2017 – the self-certification regime (with the introduction of Article 65(4-bis) of the Code), significantly enlarged by the 2017 reform, serves the clear need to safeguard the free circulation of works in this category, which are particularly attractive on the contemporary art market,[16] while also allowing a sufficient period of 'decanting (as with the ageing of wines)' so that one can see whether the work's cultural value has consolidated in the collective perception or has, instead, proved to be a passing fashion.

4. The Normative Framework and the 'Architecture' of Export Control

Within the Code, export control rests on Article 64-bis, which affirms the primacy of heritage protection over free movement. The provision stipulates that cultural property cannot be considered as ordinary 'goods' and that control over export and import is to be exercised in the national interest.

Within this framework, Articles 65-72 of the Code regulate in detail the titles and certificates required for removing cultural property from the national territory. Article 65 first identifies the categories which are subject to an absolute export ban, including cultural assets belonging to the State, the Regions and other territorial public entities, as well as those belonging to other public bodies or non-profit entities referred to in Article 10(1) and (2) of the Code.[17] For these categories the legislature presumes a public interest in their remaining in Italy, so that permanent export is, in principle, excluded, save in the case of temporary loans for exhibitions, study or for restoration purposes.[18]

15 Ministry of Public Education Circular, Protocol no. 2718, 13 May 1974.

16 Francesco Giovanni Albisinni, 'Dal potere autorizzatorio di tipo conformativo alle fattispecie normative abilitanti. Verso nuovi paradigmi in tema di amministrazione del patrimonio culturale' (2019) 1 *Aedon*.

17 Article 10 of the Code lays down the general definition:'"cultural property' comprises immovable and movable things belonging to the State, the Regions, local authorities, any other public body or institution and private legal persons without profit (including ecclesiastical legal persons recognised under civil law) which display artistic, historical, archaeological or ethno-anthropological interest. The definition thus combines a subjective criterion (title to the property) with an objective-evaluative one (the type of cultural interest). For these 'public or para-public' subjects, the cultural character is presumed by virtue of the interest and does not require a prior 'declaration' (subject, subsequently, to the verification procedure under art. 12). Article 10(2) directly classifies certain public collections as cultural property: the holdings of museums, picture galleries, galleries and other public exhibition venues; public archives and individual public documents; and the library collections of public libraries (with specific exclusions for certain collections performing particular library functions). This core is exempt from any constitutive declaration: cultural status follows *ex lege*.

18 See Regional Administrative Tribunal (Veneto), Second Section, order no. 436/2019, 16 Oct.

For privately owned items that may be of cultural significance but have not yet been so declared, the procedure for issuing an ALC under Article 68 applies instead.[19] Permanent export to non-EU countries further requires the grant of licences under Regulation (EC) No. 116/2009 and the relevant Union implementing measures, whilst for movements within the EU the provisions of the Code on internal control continue to apply, in conformity with Article 36 of the TFEU, which permits restrictions on the free movement of goods for the protection of national treasures possessing artistic, historic or archaeological value.

Alongside these two levels – absolute prohibition for goods already recognised as cultural property and a system of authorisation for those of potential interest – a third level has been added, introduced by Article 65(4-bis) and implemented by Ministerial Decree No. 246 of 9 May 2018 (Ministerial Decree No. 246/2018) which sets out the "*conditions, modalities and procedures for the international circulation of cultural property*". This is the declaratory regime, based on the owner's self-certification, which allows certain categories of property (in particular works by living authors or produced less than 70 years ago, or, alternatively, older works of a value below the relevant threshold) to be exported on the basis of a standardised form, unless the Export Office considers it necessary to carry out a substantive review and to initiate the procedure for a declaration of "exceptional" cultural interest.[20]

This stratified system reflects an attempt, not necessarily successful, to reconcile the need for intensive control over works of greater importance with the need to simplify the circulation of items of lesser impact, thereby reducing the burden on collectors and art-market operators. The introduction of self-certification appears to have contributed to a significant decline in the number of ALCs issued and a corresponding increase in the use of forms under Article 65(4-bis).

2019, Italia Nostra (a not for profit association) sought to annul and suspend the Director of the Gallerie dell'Accademia di Venezia's authorisation to loan Leonardo's *Vitruvian Man* to the Louvre and to impugn the Italy-France Memorandum of Understanding (24 Sept. 2019). The Regional Administrative Tribunal (Veneto) rejected interim relief. Substantively, at the interim stage the Administrative Tribunal determined that the challenge had insufficient prospects of success: the Minister's signature of the MoU was representational and did not bind the technical authorisation process (the MoU itself being subject to Italian and French law); the gallery's earlier internal list of works "generally excluded from loan" was not absolute; the loan fell within Art. 67(1)(d) of the Code (temporary export pursuant to cultural agreements in reciprocity); conservation institutes (Opificio delle Pietre Dure; ISCR) deemed transport/exhibition risks manageable under strict conditions (reduced exposure days; 25 lux); and choices on the valorisation of cultural goods lie within wide administrative discretion, reviewable only for manifest illogicality or serious investigative or reasoning defects—none of which appeared.

19 C. Ferrazzi, 'Commento all'art 68' in MA Sandulli (ed.), *Codice dei beni culturali e del paesaggio* (3rd edn, Giuffrè–Francis Lefebvre, Milan 2019) 675 *et seq*..

20 In practice, an application is lodged electronically via the SUE (Sportello Unico Esportazione) portal (art. 68(2) of the Code), with notice to the Ministry of Culture (MiC) within three days and a ten-day window for any instructive submissions (art. 68(2) of the Code). The administration then operates under a non-peremptory 40-day term to conclude the procedure (art. 68(3) of the Code), by either: (i) submitting to the MiC a proposal for compulsory purchase, which opens the sub-procedure under art. 70 of the Code; or (ii) issuing a reasoned refusal; or (iii) granting the certificate/licence (ALC). In the compulsory-purchase track, the MiC may, within 60 days of the declaration, acquire the work at the declared price or decline, after which the Region may act up to an overall 90-day cap; the private party may withdraw the application at any time before service of the purchase decision, which must be notified within 90 days of the declaration.

It should be noted that in terms of criminal liability, Article 174 of the Code makes it an offence to remove or export cultural property without an ALC (for EU destinations) or without the EU export licence under Regulation (EC) No. 116/2009 (for non-EU destinations), irrespective of whether authorisation could in fact have been granted; what is decisive is the absence of the authorising measure in relation to an item falling within the protected categories.

5. The Export Licence Procedure and the Guidelines under Ministerial Decree No 537/2017

The core of the system is the procedure for granting or refusing an export licence. It begins with the filing of a declaration with the competent Export Office, to which the applicant must attach, in addition to formal particulars, descriptive and photographic documentation of the work. The Office then examines the work, including, where appropriate, through the Central Advisory Commission, and adopts a final decision which may take the form of the grant of the licence, its refusal or, in certain cases, compulsory purchase at the declared price.

Today, the assessment of exportability is strongly conditioned by the 'General Guidelines on the criteria and methods for exercising the function of granting or refusing the export licence' adopted by Ministerial Decree No. 537/2017. These Guidelines, which are the outcome of a longstanding reflection that can be traced back to the Argan Circular of 1974, identify six parameters intended to guide technical-discretionary assessment: (i) the artistic quality of the work; (ii) rarity, in a qualitative and/or quantitative sense; (iii) the representational significance of the subject; (iv) the work's belonging to a historical, artistic, archaeological or monumental complex and/or context; (v) its particular significance as testimony to the history of collecting; and (vi) its evidential value – archaeological, artistic, historical or ethnographic – of significant relations between different cultural areas, including where the item is of foreign production or provenance. In this context 'rarity' is not purely numerical: it embraces the item's 'marginal utility' in light of what already exists within the national heritage, with attention to coverage in public collections (Regional Administrative Tribunal (Lazio), no. 9826/2018). Further, as to representational significance, artisanal seriality (with respect to Murano glass works – a *green pâte de verre* bird-on-branch attributed to Napoleone Martinuzzi (Venini and a lidded 'vetro Primavera' vase produced by Barovier around 1930) is not to be conflated with industrial production, and a work is not 'minor' if it faithfully embodies and represents a living craft tradition (Regional Administrative Tribunal (Veneto) no. 85/2023[21]). Moreover, case law indicates that the concurrent presence of at least two such parameters – amounting to an "association of more than one principle of relevance" – is sufficient to found a reasoned refusal of the certificate of free circulation (Regional Administrative Tribunal (Tuscany), no. 1015/2025).

Administrative courts have assigned a central role to these Guidelines, treating them

21 Regional Administrative Tribunal (Veneto), Second Section, judgment no. 85/2023, 19 Jan. 2023. The Tribunal rejected the premise that artisanal 'seriality' or souvenir-market destination excludes cultural value, noting that Murano's handmade production can yield unique, non-industrial variants; it endorsed a qualitative notion of rarity (including "marginal utility" to national holdings) and found the refusals sufficiently reasoned by multiple Guidelines parameters and bibliographic support.

not merely as soft law, but as an external benchmark for the lawfulness of technical assessments. On several occasions, administrative tribunals have annulled decisions refusing export licences where the reasoning was found to be inadequate, because it was based on bare assertions of "high artistic value" not clearly related to at least two of the parameters indicated in the Guidelines.[22] One may think, for example, of decisions of the Regional Administrative Tribunal (Lazio) which in 2025[23] stressed that refusals must be supported by a concrete factfinding process and detailed reasoning, especially in the case of works whose critical valuation is controversial and calls for cautious assessment.

Conversely, in cases where the administration has justified refusal by reference to the concurrence of several parameters – for example, quality and rarity, or iconographic representativeness and belonging to a specific collecting context – the courts have held the measure to be entirely lawful. This is illustrated by decisions concerning Old Master paintings in which the Export Office emphasised the scarcity of comparable works in Italian public collections, the centrality of the subjectmatter for religious and civic history and the provenance from collections of particular importance, in line with an evaluative approach fully consistent with the Guidelines.

The Guidelines have also had a significant impact on the scope of judicial review: they permit the administrative judge to conduct an intrinsic examination of the logical coherence of technical assessments without transforming the review of legality into a review on the merits. The judge does not substitute his or her own aesthetic judgment for that of the administration, but verifies that the latter has applied the appropriate parameters, that there are no glaring gaps in the factfinding process, and that the reasoning explains why the continued presence of the work on the national territory is considered necessary for the protection of the cultural heritage.

Administrative courts treat these Guidelines as an external benchmark for lawfulness. Where a refusal is justified only by bare assertions – e.g., formulaic invocations of 'rarity' or 'exceptionality' – without articulated reasoning showing why at least two parameters are met, courts have annulled. Thus, in Regional Administrative Tribunal (Lazio) n. 23890/2025 (concerning J.-L. Gérôme's *Mon portrait*, 1902),[24] the court quashed a refusal and related acts: the motivation, reliant on a single external report, was held tautological and technically unreliable, failing to demonstrate the cultural interest of a level sufficient to justify the restriction and any subsequent listing; the administration was ordered to re-determine with a reasoning aligned to the Guidelines.

Conversely, where the administration undertakes a documented, criterion-based analysis, the measure has been upheld. In Regional Administrative Tribunal (Lazio) n. 23891/2025

22 Within the 'Preamble' to the 'Guidelines' it is further specified that the reports supporting a refusal of export, together with the simultaneous initiation of the procedure for a declaration of cultural interest, must always be set out exhaustively, with specific reasoning and, where available, up-to-date bibliographic references, and by combining more than one relevance principle among those recast in the new Guidelines—particularly where the appraisal appears to rest predominantly on the artistic quality of the item, which on its own is not sufficient to justify a protective measure.

23 See for example, Regional Administrative Tribunal (Lazio), Second Section Quater, judgment no. 16129/2025, 10 Sept. 2025 and Regional Administrative Tribunal (Lazio) Second Section Quater, judgment no. 23891/2025, 29 Dec. 2025.

24 Regional Administrative Tribunal (Lazio) Second Section Quater, judgment no. 23890/2025, 29 Dec. 2025.

(Doccia/Manifattura Ginori, *Venere inginocchiata*),[25] the court accepted the authority's reasoning across quality, context and rarity, including comparative references (the only known porcelain exemplar of that iconography at the Victoria & Albert Museum, London, with firing defects; the subject work as a later, technically improved version), and stressed that judicial review is intrinsic but non-substitutive, testing logic, coherence, completeness and correct application of technical criteria under Article 68 and Ministerial Decree No. 537/2017. The same judgment rejected the argument that Article 68(3)'s 40-day term is peremptory, reiterating the prevailing case law that the term is ordinatory (so late decisions are not for that reason alone unlawful): the consequence is that a late, yet properly reasoned, decision is not invalid merely by reason of delay.

At appellate level, the decision of the Council of State no. 9419/2025 confirms both the EU-law setting and the domestic methodological demands. It rejects the claim that the criteria in Ministerial Decree No. 537/2017's are indeterminate: they are in fact *stringent*, and their cumulative application narrows discretion; at the same time, decisions must show proportionality-compliant reasons capable of judicial scrutiny under a legality-based (yet meaningful) intrinsic review. Where the motivational framework is thin, the Council cautions against an excessive judicial self-restraint that would risk non-justiciability of rights, and it sets aside such measures with remittal for re-exercise of power on a correct basis.

Finally, it is worth noting that: *"the evaluation of a work's cultural interest is marked by a wide technical–evaluative discretion, since it entails the application of specialist technical and scientific knowledge in disciplinary fields (history, art and architecture) characterised by broad margins of legitimate debate. The appraisal conducted by the authority responsible for protection – to be exercised in relation to the fundamental principle in Article 9 of the Constitution – is subject to judicial review solely as to the rationality, coherence and completeness of the evaluation, including the correctness of the technical criterion adopted and of the method of its application. That review must, however, respect the inherent relativity of scientific assessments, so that, in legality review, only an appraisal which falls outside the bounds of legitimate opinion may be censured; otherwise judicial scrutiny would become a substitution for the administration's own, by superimposing an alternative assessment that is itself open to debate. In other words, the assessment as to the existence of a particularly important cultural interest (artistic, historical, archaeological or ethno-anthropological) such as to justify the imposition of the corresponding listing is the exclusive prerogative of the authority charged with administering it and may be reviewed in court only where there are defects of such manifest incongruity or illogicality as to reveal the unreliability of the technical-discretionary evaluation carried out*" in Council of State, Sixth Section, judgment no. 5844/2015, 28 December 2015.[26]

6. Self-certification under Article 65(4bis) of Ministerial Decree No 246/2018 and the 'Lampertico' case

Article 65(4-bis), implemented by Ministerial Decree No 246/2018, introduced self-certification for lower-risk categories (works by living authors; works less than 70 years

25 Regional Administrative Tribunal (Lazio) Second Section Quater, judgment no. 23891/2025, 29 Dec. 2025.

26 See also Council of State, Fourth Section, judgment no. 508/2025, 23 Jan. 2025.

old; or older works below the value threshold). The Export Office conducts primarily formal checks but may view the work and initiate a declaration of 'exceptional' cultural interest where warranted.

The courts have only recently begun to engage with this mechanism. Central in this regard is the litigation known as the '*Lampertico* case',[27] decided on an interim basis by the order of the Council of State No 363 of 17 January 2025. After a miniature was exported under self-certification, the Export Office proposed compulsory purchase and, when export was renounced, opened a listing procedure under Article 7(3) of the 2018 Decree. The Regional Administrative Tribunal (Lazio)[28] annulled both the listing and Article 7(3), but at the interim stage the Council of State read the primary and secondary norms together to support a broad initiation power – subject to reasons and procedural guarantees – even where self-certification has been used

Regardless of the ultimate outcome of the proceedings – which is not yet settled – the *Lampertico* affair raises fundamental questions. Chief among these is whether self-certification should be regarded as a merely simplified form of declaration, subject to the same rules on administrative self-redress (*autotutela*)[29] as other administrative measures, or whether it gives rise to a particularly qualified legitimate expectation on the part of the private party, such as to require more stringent conditions for any subsequent activation of protective proceedings; what level of review the Export Office is required to undertake; and how self-certification interacts with the power of compulsory purchase and with the administration's duty to prevent the export of items of exceptional interest.

7. *Autotutela*, Legitimate Expectations and the Twelve-Month Time-Limit – A Difficult Balancing Exercise

One delicate issue concerns the administration's power of self-redress (*autotutela*) to annul export licences after they have been granted. Under Article 21-nonies of Law No. 241/1990,[30] the administration may annul its own acts *ex officio*, with retroactive effect, where the act is unlawful and there is a concrete, current public interest in its elimination. According to Professor Feliciano Benvenuti,[31] *autotutela* in administrative law – that is, the capacity of the public administration "to do justice for itself" – represents a legacy historically rooted in the transitional phase from the absolute State, in which legislative, administrative and judicial functions were all concentrated in the hands of the sovereign, to the modern State, in which the separation of powers has been progressively affirmed. In

27 Council of State, Sixth Section, order no. 363/2025, 17 Jan. 2025.

28 Regional Administrative Tribunal (Lazio), Second Section, judgment no. 19029/2023, 31 Oct. 2023.

29 As part of its power of 'self-redress' (*autotutela*), a public administrative body can annul or revoke decisions that have already been made, without the intervention of a judicial authority.

30 Pursuant to Article 21-nonies, an unlawful administrative measure within the meaning of Article 21-*octies* – that is, a measure adopted in breach of the law or vitiated by misuse of power or lack of competence – may be annulled *ex officio* "*where there are public-interest reasons for doing so, within a reasonable period of time and in any event not exceeding twelve months from the date on which the authorising measure or the measure granting economic benefits was adopted … and taking account of the interests of the addressees and of any counter-interested parties, by the body which adopted it, or by another body provided for by law*".

31 Feliciano Benvenuti, 'Autotutela (dir. amm.)' in *Enciclopedia del Diritto*, vol IV (Milano, Giuffrè 1959) 537–556.

the modern Italian legal system, *autotutela*, unlike judicial redress – which is by definition impartial – is always exercised by one of the parties; and while the latter does not modify the judge's legal position, the former is capable of achieving precisely this result.[32]

Following the 'Madia' reform and Law Decree No. 77/2021, annulment of authorisations must occur within twelve months, save where the favourable act was procured by the private party's false representation of fact. Courts in judicial review proceedings will test the existence of a concrete and current public interest, compliance with time limits and adequacy of reasons; where these conditions are met, no breach of legitimate expectation arises.

In this context, the Council of State's Plenary Assembly (No. 8/2017)[33] clarified that the 'reasonable time' runs from discovery of the defect; reasons are always required (albeit attenuated for self-evident public interests); and no legitimate expectation can arise where the private party's representation was untruthful. Older case law accepted annulment after a substantial amount of time had passed. A remarkable example of this is the Giotto attribution-shift case, where the Council of State[34] upheld an *autotutela* annulment concerning a wooden panel sold at a Sotheby's auction in Florence in 1990. The panel had been offered for sale and knocked down to the appellant under the following description: "*Madonna and Child, Giotto's imitator, about 1800, oil on panel, 116 x 69 cm*", with an estimated value of between 6,000,000 and 10,000,000 Italian Lira.[35] In 1993 the appellant obtained an ALC for the work, which was subsequently re-imported on a temporary basis and restored. Following restoration, it emerged that the work should be attributed to Giotto, with an inevitably positive impact on its economic value. No fewer than eleven years after the issue of the export licence, in 2004, the Ministry annulled the authorisation measure in *autotutela*, on the basis that it related to a work which, "although unchanged as regards its material support, had nonetheless, as a result of the restoration, become a different 'work' in terms of its artistic identity".[36]

Nowadays, administrative courts, called upon to interpret this provision in the field of cultural property, have been progressively forced to calibrate the balance between two opposing requirements. On the one hand, the protection of the cultural heritage entails that the administration must be able to remedy even serious errors in its factfinding, where it is later established that a work of exceptional significance has been authorised for export. On the other hand, the principle of legal certainty and the legitimate expectations of operators – often prominent international museums or collectors who have contracted on the basis of a duly issued licence – require that the power of *autotutela* not be exercisable indefinitely. To sum up: "*compliance of the annulment measure adopted in autotutela with the legal template in Article 21-nonies of Law No 241/1990—both as regards observance of the time-limits for exercising the power and the existence of a public interest – precludes any finding of a breach of legitimate expectation; the private party's mere factual expectation is of a different order and, as such, is not protected. In*

32 Paolo Lazzara, 'Administrative acts and decisions' in Fabrizio Fracchia (ed.), *Textbook of Public Law* (Napoli, 2014), p. 50.
33 Council of State (Plenary Assembly), judgment no. 8/2017, 17 Oct. 2017.
34 Council of State, Sixth Section, judgment no 136/2009, 14 Jan. 2009.
35 About Euro 3,000 and Euro 5,000.
36 Giuseppe Calabi and Cristina Riboni, 'Dopo il caso Bassano: annullamento in autotutela di attestati di libera circolazione di opere d'arte' (2024) 2 *Arte e Diritto* 463, p. 12.

this connection, it should be noted that, as to the time-limit for exercising the power of autotutela, the cited provision effects an ex lege balancing between the public interest in restoring legality and the private party's legitimate expectation."[37]

Three paradigmatic cases reveal the tension between these poles. The first concerns the dispute over the *San Pietro* by Vincenzo Foppa, originally presented as "Seventeenth-Century Painter, Saint Peter" and at first regarded as a heavily overpainted work that was difficult to interpret. Following restoration and its critical recognition as an autograph work by the Lombard master, the Ministry annulled in *autotutela* the ALC issued in 2019, refused a new licence and initiated the procedure for declaring cultural interest, ordering the painting's return to Italy.

The Regional Administrative Tribunal (Lazio), in its judgment No. 5630/2023,[38] held that the exercise of *autotutela* was lawful, emphasising the extraordinary importance of the work for the history of Italian art and the behaviour of the private party, which was deemed to have been less than fully co-operative, even at the stage of declaration and presentation of the work. The Council of State, in its judgment No. 2022/2025,[39] while confirming the need for protection, nonetheless annulled the listing order for breach of procedural guarantees, pointing out that the sequence refusal–listing must be supported by progressively reasoned decisions and that the applicant must be placed in a position to participate effectively in the procedure under Articles 68(6) and 14 of the Code.

The second case concerns the painting attributed to Jacopo Bassano, the subject of the Council of State's judgment No. 9962/2023.[40] In that case, the ALC had been granted by the Export Office in Pisa in 2018; the work was subsequently acquired by the J. Paul Getty Museum. Later, in light of new studies by art historians and a more careful assessment of the painting, the Ministry annulled the licence, refused to issue a new ALC and initiated the procedure for declaring cultural interest, requesting that the work be returned.

The Appellate Court recognised the lawfulness of the exercise of *autotutela*, holding that the twelve-month time limit may be exceeded only where the favourable measure was obtained on the basis of a false representation of the facts attributable to the private party, such as to mislead the administration as to essential preconditions. In the case at hand, the reticence and incompleteness of the information provided by the applicant, in particular as to the value and provenance of the work, were considered sufficient to constitute that 'false representation' which, under Article 21-*nonies*, permits intervention beyond the ordinary time limit.

The 'Vasari/*Allegoria della Pazienza*' dispute[41] sharpened the focus on legal certainty. An ALC granted in 2015 for a "female figure, Italian school, sixteenth century" was later reconsidered as a Vasari. The Council of State held that an omitted provenance (not a mandatory field at the time) and a generic subject description were not "false representations of fact", keeping the ordinary twelve-month limit intact while flagging

37 Regional Administrative Tribunal (Lombardy - Milan), Third Section, judgment no. 1169/2025, 31 Oct. 2025.
38 Regional Administrative Tribunal (Lazio), Second Section Quater, judgment no. 5630/2023, 14 March 2023.
39 Council of State, Sixth Section, non-final judgment no. 2022/2025, 11 March 2025.
40 Council of State, Sixth Section, judgment no. 9962/2023, 26 Oct. 2023.
41 Council of State, Sixth Section, non-final judgment no. 8296/2024, 26 Sept. 2024.

a constitutional question for uniquely important works whose significance emerges only after restoration. Hence the decision to refer a question of constitutional legitimacy concerning Article 21-*nonies*(1), in so far as it does not permit the timelimit to be exceeded, even in the absence of false representation of the facts, is valid in cases of exceptional cultural significance.

While this position attempts to address a legitimate concern, it is clear that a generalised relaxation of the twelve-month timelimit would generate further uncertainty in legal relations, particularly vis-à-vis foreign museums or cultural institutions that have purchased works in reliance on a duly issued ALC, since the very possibility of subsequent *autotutela* would itself become a material source of risk for the buyer. In this respect, the Constitutional Court[42] has rejected the argument that Article 21-nonies(1) of Law No. 241/1990 is unconstitutional in so far as it imposes a fixed twelve-month limit on *ex officio* annulment even where the underlying authorisation engages the protection of the national cultural heritage.

In the meantime, the Ministry of Culture has indicated that, should there be a risk of incorrectly qualifying certain cultural property for the purpose of export, such risk should be avoided: "*In order to avoid the irreversible departure from the national territory of works of art which, if properly presented to the export offices, would not have received a certificate of free circulation, those offices are requested – in the (in any event limited) cases where a lack or insufficiency of information, combined with the poor legibility of the work, does not allow an adequate assessment of cultural interest – to declare the application incapable of being processed*."[43] The resulting inaction would determine an additional compression of property rights.

Moreover, the export and sale abroad do not appear capable of precluding the State from requesting the return of a cultural object which left the territory on the basis of an authorisation measure that has subsequently been annulled as unlawful, and is therefore devoid of legal effect.

There are, however, those who argue that *ex officio* annulment should be excluded where the authorisation measure has already been implemented through export of the work abroad and its sale to third parties in good faith, by reason of the territorial scope of the law, which "*applies only to cultural property located within the territory of the State at the time when the act is adopted*", and of the good faith reliance of both the addressees of the measure and third parties.

This view has been rejected by the administrative courts themselves, which have held that such a position amounts to "*a misrepresentation of the principle of territoriality*", which, on the contrary, legitimises – indeed, obliges – the administration to secure the return to the national territory of cultural property, that is to say "of those objects which, on fuller consideration, ought to have been regarded as such from the outset". According to case law this is because: "*the measures challenged concern applications and decisions made in Italy, within the remit of the institutions competent to act; the challenge is partly inadmissible, because any difficulties of enforcement associated with the painting's place of location are irrelevant to the issue of lawfulness that is the subject-matter of these proceedings*." [44]

42 Constitutional Court, judgment no. 88/2025, 26 June 2025 (ECLI:IT:COST:2025:88).
43 DG-ABAP Circular of 24 May 2024, no. 21 (0018124-P).
44 Council of State, Sixth Section, judgment no. 9962/2023, 26 Oct. 2023.

While this position is difficult to accept from a conflict of law perspective, since an annulment of the unlawful authorisation would have repercussions on the right of ownership which in the meantime has been transferred to another legal person, under non-Italian law. Since annulment of an ALC in *autotutela* has retroactive effect, the licence is treated as though it had never been issued and, in accordance with this Italian administrative position, the cultural asset must be returned to Italy notwithstanding export and subsequent good-faith acquisition abroad. While the administrative invalidity of the Italian authorisation is not, of itself, determinative of either title under the *lex rei sitae* or the foreign procedures for compelling return, Italian case law proceeds on the premise that intra-EU circulation presupposes a lawful and definitive dispatch from the Member State of origin; accordingly, where the underlying Italian export authorisation is annulled, the object's continued presence abroad is treated as *contra ius* unless and until further measures are taken (including, where appropriate, restitution-oriented proceedings).

In other terms, according to case law, Article 2 of Regulation (EC) No. 116/2009, in governing the movement of cultural goods, "*requires as a condition precedent that the item has, in any event, been "lawfully and definitively dispatched from another Member State". Accordingly, EU law permits the circulation of cultural goods within the Union only on the basis that they have lawfully and definitively "left" the national territory of origin; otherwise, in the event of an unlawful departure, they must be returned to that State. By revoking the certificate of free circulation—or, as in the present case, the non-opposition to the opening of the procedure for a declaration of cultural interest—with retroactive effect, the administration reinstates a conformative limit on ownership, which renders the continued presence of the artwork abroad contra ius and therefore requires its return to Italy pending further measures*". [45]

All the consequences flowing from this follow, in terms of the State's power to exercise recovery actions in respect of the object, as provided for under international and European law. The restitution of the object does not entail a denial of the legal title of the foreign proprietor; rather, it imposes upon the latter an obligation to keep the object in Italy, thereby in practice depriving him of the enjoyment of the work.

It remains to be established what happens where a sale has been concluded between the owner, holder of the export licence, and a third-party purchaser. On this point, the administrative courts have not expressed a view, confining themselves to emphasising the transfer would not be effective as against the administrative authority, inasmuch as it is subordinate to the public interest in restoring the integrity of the cultural heritage.

The prevailing view is that a contract of sale entered into prior to annulment remains effective, in order to safeguard the principle of legal certainty in juridical transactions, and that the exporter is merely under a duty to notify the administration of the new owner and not to secure the return of the object. It is then for the administration to act, by means of the instruments laid down in private international law, in order to recover the unlawfully exported work from the new purchaser.

45 In Regional Administrative Tribunal (Lombardy - Milan), Third Section, judgment no. 2059/2023, 6 Sept. 2023. See also Regional Administrative Tribunal (Lazio), Section II-quater, judgment no. 11306/2022: "Put otherwise, annulment of the certificate renders the asset's continued presence abroad unlawful and, as such, entails an obligation of return under the law of the Republic, the applicability of which is preserved also by Article 16 of Directive 2014/60/EU on the *ad hoc* action for the recovery of unlawfully exported cultural goods".

This results in a distorted view of the notion of privately-owned cultural property, whereby the protection of legitimate contractual expectations gives way to overriding considerations of preserving the integrity of the national heritage.

8. Recent Case Law as a Laboratory

The decisions referred to above help to determine how the notion of cultural interest tends to unfold on several levels: artistic interest; historical interest; historical-relational interest; the interest in preserving the integrity of architectural or collecting contexts; and the interest in ensuring that artistic cultures of other countries ar represented in Italy.

The case of Salvador Dalí's diptych *Couple aux têtes pleines de nuages*, decided by the Council of State in judgment No. 8074/2023, [46] is of particular relevance. After the ALC had been granted by the Export Office in Rome, the work, owned by the Fondazione Isabella Scelsi, was sent to London for sale at auction. A few hours before the auction, the Directorate-General of the Ministry of Culture for archaeology, fine arts and landscape[47] annulled the licence in *autotutela*, initiated proceedings to verify cultural interest and subsequently declared the diptych to be of artistic, historical and historicalrelational interest that was particularly important and indeed exceptional for the integrity and completeness of the Nation's cultural heritage, ordering its return.

The Regional Administrative Tribunal (Lazio) annulled the measures, on the grounds that the authority (a) failed to provide adequate reasons and (b) was in breach of the principle of proportionality considering the legitimate expectations of Fondazione Isabella Scelsi and the auction house. The Council of State, by contrast, reversed that judgment, placing weight on a number of factors: the artistic quality of the diptych; the rarity of Dalí's surrealist works present in Italy; the biographical and cultural link with Giacinto Scelsi and with the Roman milieu of the postwar period; the function of the work as an iconic emblem of the Scelsi House Museum and, more generally, as a testimony to a network of relations between the visual arts, music, literature and the European and American avantgardes.

In this light, "cultural interest" can no longer be reduced to the pure aesthetic quality of the painting; it comes to include its "Italian story": the work's long presence in this country, its connections with surrealist culture and with Scelsi's *oeuvre*, its function within the mesh of places and relationships that constitute the memory of the twentieth century. The historical-relational dimension, codified in Article 10(3)(d-bis), assumes decisive importance in the listing decision.

The affair of Lucio Fontana's *Delfino*, mentioned above, in turn shows how the assessment of historical and artistic appurtenance between a work and an architectural context is no longer confined to traditional immovable heritage, but extends to complexes of modern and contemporary architecture. The Council of State stressed that the swimming pool, the sculptures and the surrounding spaces constitute a single design project, in which Fontana's work and the so-called "abstract sculpture" by the Società Ceramica di Laveno are inseparable from the overall conception of the place. This justified both the declaration of cultural interest in respect of the entire complex and the classification of the sculptures as appurtenances *iure publico*.

46 Council of State, Sixth Section, judgment no. 8074/2023, 30 Aug. 2023.
47 DG ABAP Direzione Generale Archeologia Belle Arti e Paesaggio.

The Bassano-Getty case, as we have seen, brings to the fore not only the issue of *autotutela* but also that of co-operation with foreign museums. In the aforementioned judgment No. 9962/2023,[48] the Council of State held that an order to secure the return of a work cannot in itself produce extraterritorial effects in a unilateral manner, but also recognised that such an order represents a measure required under domestic law, which serves as the foundation for all channels of co-operation and requests for restitution provided for under international conventions and European Union law.

In this sense, these decisions contribute to shaping a form of "open cultural territoriality": Italy may legitimately claim the return or retention on its territory of works which, by virtue of their history and significance, have become an integral part of the national heritage, even where they are by foreign artists, provided that such claims are pursued through instruments of co-operation rather than unilateral imposition.

9. Constitutional Challenges

In the course of 2024 and 2025, three different cases have raised the question of how the Italian constitutional settlement must reconcile Article 9's imperative to protect and promote cultural heritage with the guarantees of equality and rationality (Article 3), good administration and legal certainty (Article 97) and the constitutional freedoms of enterprise and property (Articles 41 and 42), all under the discipline of EU proportionality.

In the above mentioned *Lampertico* case,[49] the dispute between the owner and Export Office over the ordinary listing under Article 10(3)(a) by invoking Article 7(3) of Ministerial Decree No. 246/2018 for a small work for which the below-threshold self-declaration pursuant to Article 65(4-bis) of the Code was used to move a small work abroad, resulted in the Council of State staying the action and referring the matter to the Constitutional Court. The constitutional question arose from the strict reading of Article 65(4-bis), which created an irrational asymmetry: it compresses the administration's protective toolbox in the very setting where below-threshold filing is used, potentially frustrating the cultural-protection mandate (Article 9 of the Constitution) and impairing methodical, coherent administration (Article 97 of the Constitution), while treating similar cases in a different manner (Article 3 of the Constitution). In Constitutional Court, judgment no. 160/2025,[50] the Court held that Article 65(4-bis), second sentence, does not impose a substantive limit on the administration's power to declare cultural interest in the simplified export context. Properly construed, it is a procedural and competence rule, not a rule confining declaration proceedings to the sole case of Article 10(3)(d-bis). On that reading, the administration may still declare cultural interest in all the cases provided for by Article 10(3), even where the work has been intercepted through the simplified export route. The judgment is therefore important because it indicates that the 2017 reform did not partially liberalise under-threshold exports by silently removing the administration's ordinary declaration powers; instead, it preserved the coherence of the Code by ensuring that the ability to impose a cultural constraint depends on the substantive characteristics of the object, not on the procedural route through which the object comes to the administration's attention.

48 Council of State, Sixth Section, judgment no. 9962/2023, 26 Oct. 2023.
49 Council of State , Sixth Section, order no. 363/2025, 17 Jan. 2025.
50 Constitutional Court, judgment no. 160/2025, 31 Oct. 2025 (ECLI:IT:COST:2025:160).

In parallel, the *Trevisani/James Barry Fine Art* litigation[51] – arising from an Irish buyer's temporary introduction into Italy of a portrait attributed to Francesco Trevisani for diagnostics, followed by a public museum-prompted decree of acquisition at export under Article 70 – exposed additional constitutional uncertainties – first, whether using a fixed threshold of EUR 13,500 as a gatekeeper for control is compatible with Articles 3, 9 and 97 of the Constitution, given that market price is a volatile and often misleading proxy for cultural value; secondly, whether denying the Article 72 "transit"[52] shield to below-threshold imports imposes disproportionate burdens on enterprise and property (Articles 41 and 42), both questions cast in the EU template of suitability, necessity and fair balance. In Constitutional Court, judgment no. 51/2026,[53] the Court held that confining compulsory acquisition to works above the statutory value threshold is not unconstitutional. In its view, compulsory acquisition is an especially intrusive measure, closely akin to expropriation, and the legislature is therefore entitled to limit its scope, provided that the administration's other protective powers remain available, including the declaration of cultural interest and ordinary expropriation. By contrast, the Court found Article 72(1) unconstitutional in so far as it failed to permit, at the request of the temporary importer, the certification of entry of older works falling below the threshold. The denial of certification to under-threshold works was held to irrationally exclude them from the protective transit regime, thereby producing an unjustified disparity of treatment, distorting cross-border circulation, and imposing a disproportionate interference with ownership while unduly restricting economic initiative.

The aforementioned *Vasari/Allegoria della Pazienza*[54] affair then brings legal certainty and the limits of *autotutela* into sharp relief: an ALC granted in 2015 for a "female figure, Italian school, sixteenth century" – later reconsidered, following restoration and on the basis of a different analysis by critics, as Vasari's *Allegoria della Pazienza* – was annulled and refused anew; on appeal, the Council of State ruled that the omission of provenance (not a mandatory field on the official form at the time) and the generic subject description were not "false representations of fact", thereby keeping in place the ordinary twelve-month timelimit on *ex officio* annulment and curbing attempts to reopen beyond that limit, while itself raising the constitutional question whether a rigid temporal bar is sustainable where a work's cultural significance becomes apparent only *ex post* through conservation and study (a latent tension between Articles 9 and 97 of the Constitution, also viewed through the lens of Article 117 in its EU-law dimension). In Constitutional Court, judgment no. 88/2025,[55] the Court held, first, that the challenge brought under Article 117(1) of the Constitution, read with the Faro Convention, was inadmissible for want of

51 Regional Administrative Tribunal (Lazio), Second Section Quater, order no. 15869/2025, 28 Aug. 2025.

52 See Council of State, Sixth Section, judgment no. 95/2026, 5 Jan. 2025: "*for the purposes of issuing the certificate under the cited Article 72, the individual—who in any event must prove that the work originates from a foreign country—should be required to demonstrate the lawful presence of the item abroad (and thus the lawfulness of any prior export from Italy) only where the administration holds material, including circumstantial indications, capable of supporting the inference that the work previously left Italian territory unlawfully, or where—in the absence of such indicia—the private party's account offered to explain the lack of proof of lawful export is marred by logical inconsistencies*."

53 Constitutional Court, judgment no. 51/2026, 14 April 2026 (ECLI:IT:COST:2026:51).

54 Council of State, Sixth Section, non-final judgment no. 8296/2024, 26 Sept 2024.

55 Constitutional Court, judgment no. 88/2025, 26 June 2025 (ECLI:IT:COST:2025:88).

adequate reasoning; and, secondly, that the complaints based on Articles 3, 9 and 97 of the Constitution were unfounded. The Court's essential reasoning was that annulment in *autotutela* is a second-order power, distinct from the primary power exercised in the original administrative proceedings, and that the legal framework already provides enhanced protection for cultural interests at that first stage. Once the authorisation has been granted, the legislature may legitimately provide that, after the expiry of a fixed period, legal certainty, the stability of public-law relations, and the legitimate expectations of private parties are to prevail, save where the exception in Article 21-nonies(2-bis) applies. The Court further stressed that the fixed time limit serves the principle of good administration by encouraging greater care in first-instance decision-making and by avoiding prolonged uncertainty in sectors – such as the art market – where subsequent transactions depend materially upon the reliability of public authorisations.

Taken together, Constitutional Court judgments no. 160/2025, no. 88/2025 and no. 51/2026, 14 April 2026 significantly refine the constitutional balance governing the circulation of cultural property. They confirm, first, that Article 9 of the Constitution remains a central organising principle, but one that operates within a structured legal framework rather than as an open-ended warrant for administrative intervention. Thus, the simplified export route does not create a zone of immunity from protection: as judgment no. 160/2025 makes clear, Article 65(4-bis) is to be read as a procedural and competence rule, not as a substantive restriction on the administration's power to declare cultural interest, with the result that under-threshold works may still be subjected to declaration proceedings where their substantive characteristics justify it. Secondly, judgment no. 88/2025 confirms that the fixed twelve-month limit in Article 21-nonies for annulment in *autotutela* is constitutionally valid even in the cultural-heritage field: once an authorisation has been issued, legal certainty, the stability of public-law relations, and the legitimate expectations of private parties may, after the statutory period, prevail over the renewed assertion of the public interest, save only where the strict exception in Article 21-nonies(2-bis) applies. Thirdly, judgment no. 51/2026 rejects the argument that the EUR 13,500 threshold is unconstitutional as a limit on compulsory acquisition, holding that such a power is exceptionally intrusive and may therefore be confined by the legislature; but it simultaneously holds that the same threshold cannot be used to deny access to the Article 72 entry-certification regime, since that produces an unjustified disparity and disproportionate interference with property and economic initiative in the case of temporarily imported works. For exporters and purchasers, the combined effect is not to remove risk, but to make its contours clearer. Self-declaration is not a safe harbour, because it does not preclude subsequent declaration proceedings; low value does not by itself immunise a work from protection, although it does remain relevant to the availability of compulsory acquisition; and the law of *autotutela* is now more stable, because the Constitutional Court has declined to create a heritage-specific relaxation of the twelve-month cap. The practical consequence is a recalibrated, rather than diminished, field of legal uncertainty: parties may place greater reliance on the temporal finality of export authorisations once the statutory period has expired, but they must still treat provenance, attribution, restoration history and the possibility of under-threshold declaration as serious regulatory variables. Sensible risk management therefore continues to require longer transactional lead times, carefully drafted conditions precedent tied to the stability of administrative titles, express contractual allocation of recall or return risk, and robust documentation for temporary imports and diagnostic loans, particularly now

that access to entry certification can no longer be denied solely because the work falls below the statutory value threshold.

10. European Union law, Preliminary References and State Liability

The picture reconstructed thus far cannot be fully understood without recalling the role of European Union law. The interaction between domestic law and EU law has profoundly influenced both the procedural and substantive arrangements for the protection of cultural property.

As noted above, pursuant to Article 36 of the TFEU, it is for each Member State to determine what constitutes its national cultural heritage and, accordingly, to set the limits on the export and import of cultural goods. Imposing prohibitions or restrictions on such movements has tested the scope of the so-called "cultural exception". Under the EU Treaties, the general rule is the free movement of goods, with an exception for "the protection of national treasures possessing artistic, historic or archaeological value"; viewed from the Union perspective, Article 36 TFEU codifies limited exceptions, albeit not without some ambiguity, over the years. Such ambiguity has been exacerbated by the differing formulation of the Article across the various official language versions[56] giving rise to interpretative problems.[57]

As a matter of principle, the EU approach considers arbitrary restrictions on the movement of goods by national legislatures to be unlawful, generally even where cultural goods are concerned. National perspectives, by contrast, have long struggled – and continue to struggle – to square the mercantile logic of free movement with the more rigorous stewardship of cultural property, tending instead to favour an expansive reading of the Treaties' cultural exception.[58] Although Article 64-bis of the Code states that cultural heritage is not to be assimilated to ordinary goods, the Court of Justice has long held that the customs union "covers all trade in goods",[59] i.e. products which can be valued

56 See Council of State, Sixth Section, judgment no. 8074/2023, 30 Aug. 2023: "This latter provision is not, in fact, rendered uniformly across the different language versions of the Treaty. In the English and French versions it refers to "national treasures" and "trésors nationaux"; the Spanish version speaks of "patrimonio artístico, histórico o arqueológico nacional"; the Portuguese of "património nacional de valor artístico, histórico ou arqueológico"; and the German of "des nationalen Kulturguts von künstlerischem, geschichtlichem oder archäologischem". These divergences appear to reflect differing sensibilities on the subject – between States that are more preservationist and those more inclined towards circulation. They also raise a problem of uniform interpretation which, according to the case law of the Court of Justice, must be addressed by having regard to the objectives pursued by the body of rules to which the provision belongs."

57 On this point, see Piergiuseppe Otranto's comprehensive observations in 'Più aperto e più rischioso il mercato internazionale dei beni culturali italiani', (2018) *Rivista Italiana di Diritto Pubblico Comunitario* 708-09.

58 It should be noted that in judgment no. 1169/2025, 31 Oct. 2025 of the Regional Administrative Tribunal (Lombardy - Milan), Third Section, it was indicated that there is no such contrast: "*There appears to be no inconsistency between domestic law and Article 36 TFEU. That provision does, in fact, permit Member States to introduce export prohibitions designed to protect their artistic heritage*."

59 See *Case 7/68, Commission v. Italy (Art Treasures)* [1968] ECLI:EU:C:1968:51 where it was held that the "*European Community is based on a customs union 'which shall cover all trade*

in money and form the subject of commercial transactions; Member States' recourse to Article 36 TFEU must therefore be construed strictly (notwithstanding the unusual stance of Article 64-bis of the Code), protecting *national treasures* while avoiding arbitrary restrictions.

The Code's export regime operates alongside Regulation (EC) No. 116/2009 (extra-EU export), Directive 2014/60/EU (intra-EU return), and Regulation (EU) 2019/880 (import). National measures must fit within Article 36 TFEU and the principles of proportionality, non-discrimination and loyal co-operation; preliminary references under Article 267 TFEU remain a key dialogue tool.

In particular, Regulation (EU) 2019/880 has been fully operational – via the ICG platform – since 28 June 2025.[60] It establishes a graduated system: a prohibition on the introduction of categories removed in breach of the country-of-origin's rules; an import licence for 'at-risk' goods (notably archaeological material and dismembered monument parts over 250 years); and an importer's statement for other goods, each with specific documentary burdens on the economic operator. Targeted derogations (reintroduction, conflict-zone holding, and temporary admissions for restoration, research, loans and art fairs) apply, within a uniform digital workflow designed to strengthen traceability. The objective is to police the entry points of the European market, intercepting critical extra-EU flows and, where possible, reconstituting provenance chains; practical application will inevitably demand organisational effort from customs authorities, export/import offices and market operators, particularly regarding the quality of documentary proof and the timelines for case determination.

11. Concluding Remarks

Italian export control is a laboratory for balancing a constitutional commitment to heritage with market realities under EU discipline

The Code provides a fairly coherent framework for the routing of cultural property through Italy's export-control machinery. The outcome of such channelling can be conceptualised along four intersecting axes that determine whether the outcome is authorisation (ALC), self-certification or outright prohibition. First, ownership: public holdings (and privately-owned items already declared to be of cultural interest) tend towards an absolute export restriction, whereas privately owned, non-declared items may proceed to licence or simplified routes. Secondly, the gradation of cultural interest: from "simple" interest through "particularly important" to "exceptional", with the cumulative presence of higher-order criteria progressively narrowing the corridor for circulation. Thirdly, a temporal threshold distinguishes works by living authors and those whose date of creation crosses the 70-year mark, which functions as a trigger for different evidential burdens and procedural tracks. Fourthly, a single value threshold of EUR 13,500 operates as an objective filter for certain categories, while never applying to archaeological finds, the dismemberment of monuments, incunabula and manuscripts

in goods'. By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.".

60 See <https://taxation-customs.ec.europa.eu/news/protecting-cultural-heritage-eu-regulation-combat-illicit-trade-comes-effect-2025-06-30_en>.

or archives. The combination of these four axes channels cases – by ownership status, by intensity of cultural interest, by age, and by value – into either (i) self-certification for low-risk categories, (ii) ordinary authorisation subject to a reasoned cultural-interest appraisal, or (iii) categorical prohibitions where the legal system presumes that removal would be incompatible with the protection of the national cultural heritage. These variables, when interpreted through the lenses of Article 64-bis and the Guidelines within Ministerial Decree No. 537/2017, confirm the primacy of protection, but at the same time require a public authority to act on the basis of predetermined criteria that can be verified and reviewed in court. This results in a difficult balancing exercise, which may result in a cultural property being territorially constrained and subject to be fully preserved[61] and yet not enjoyed by the general public in Italy. This outcome is effectively summarised by a significant *obiter dictum*: "*A cultural asset, once declared as such, is subject not only to a constraint protecting its physical integrity, but is also territorially constrained, in that it is not transferable abroad. This is a political choice rather than a necessity and, indeed, in some respects it conflicts with the opposing need to ensure international co-operation in the sector, allowing countries lacking cultural goods to acquire at least a minimum of art objects for collection, so as to promote the cultural growth of the country and to satisfy the need for education and aesthetic enjoyment even among populations without an artistic production, while at the same time easing the (very high) costs of maintaining pieces of little interest for our country, which could thus concentrate resources to avoid the well-known impoverishment through neglect of our national cultural heritage. These are pressing contemporary issues, already addressed by this tribunal, which require the search for a point of equilibrium that has led to recent legislative amendments, producing greater openness towards the marketing abroad of cultural goods of no particular value, while preserving at home those works that undoubtedly form part of the national cultural heritage*."[62]

Case law reveals the emergence of several underlying trends. First, there is a gradual refinement of the concept of cultural interest, which is no longer confined to the aesthetic quality or economic value of the work, but encompasses rarity, iconographic representativeness, belonging to specific contexts and collections, the historicalrelational dimension and the role of the work in urban memory and in the social life of places. Secondly, judicial review by administrative courts has become more intense at the procedural and reasoning level, without encroaching upon the technical merits: refusals and listings supported by stereotyped reasoning or detached from ministerial parameters are censured, whereas measures based on careful factfinding and reasoning that reasonably apply the criteria set out within Ministerial Decree No. 537/2017 are upheld.

Thirdly, time has assumed a central role in the system. Following Constitutional Court, judgment no. 88/2025,[63] the twelve-month limit on *autotutela* must now be treated as constitutionally settled even in the cultural-property field: once an authorisation has been granted, legal certainty, the stability of public-law relations and the legitimate expectations of private parties may properly prevail after that period, save where the exception in Article 21-nonies(2-bis) applies. The real issue, therefore, is no longer

61 Article 20 of the Code provides that "cultural property may not be destroyed, allowed to deteriorate, damaged, or put to uses incompatible with their historical or artistic character, or otherwise liable to prejudice their conservation."

62 Regional Administrative Tribunal (Lazio), Section II-quater, 16 Oct. 2018, no. 10018.

63 Constitutional Court, judgment no. 88/2025, 26 June 2025 (ECLI:IT:COST:2025:88).

whether a heritage-specific constitutional derogation should be created, but whether the legal framework ensures that the most exacting cultural assessments are made correctly and promptly at first instance. The recent constitutional case law has also clarified the simplified export route. Constitutional Court, judgment no. 160/2025[64] confirms that under-threshold works proceeding by self-certification may still be declared of cultural interest under the other heads of Article 10(3), including works of particularly important artistic interest; self-certification is therefore not a safe harbour from the ordinary declaration powers of the administration. Finally, Constitutional Court, judgment no. 51/2026[65] confirms that the EUR 13,500 threshold may validly limit compulsory acquisition, but may not be used to deny temporarily imported under-threshold works access to the Article 72 entry-certification regime. The lesson is not that value thresholds are constitutionally objectionable as such, but that they must remain properly matched to the legal mechanism in question: they may filter especially intrusive powers, but not operate as arbitrary obstacles to transit protection.

Finally, the idea of open cultural territoriality is gaining ground: Italy does not renounce asserting, even in relation to works by foreign artists, the existence of a national interest in their retention or return when the history of the work, its decadeslong presence in the country and its role in cultural relations with other contexts make it an essential component of the heritage. Yet such claims are pursued within the framework of international cooperation and EU law, in compliance with the principles of loyal cooperation, proportionality and nondiscrimination.

Yet, much remains to be done.

Legislative refinement remains desirable, but on narrower grounds than might previously have appeared. After Constitutional Court, judgment no. 88/2025, the priority is not to create heritage-specific exceptions to the twelve-month limit in autotutela, but to confirm its operation with greater clarity and to improve the quality and timeliness of first-instance decision-making. Equally, following Constitutional Court, judgment no. 160/2025, the role of self-certification under Article 65(4-bis) should be stated more clearly in the Code and its implementing measures, so as to dispel any residual doubt that under-threshold works remain open to declaration proceedings under the full range of Article 10(3). Further, in light of Constitutional Court, judgment no. 51/2026, the legislation should be adjusted to ensure that temporarily imported under-threshold works have access to the Article 72 entry-certification regime, while leaving intact the legislature's choice to confine compulsory acquisition by reference to value. More generally, there remains a strong case for greater transparency and traceability in export decision-making, including through digital tools and more structured co-operation between Export Offices and foreign institutions. Beyond those institutional reforms, one may still argue that, where export is refused, a fairer balance might in some cases be achieved either through State acquisition or through measures ensuring meaningful public accessibility of the work in Italy. Any such reform, however, would need to be reconciled with finite acquisition budgets, conservation capacity and legitimate curatorial priorities..

In short, the international circulation of cultural property is a testing ground for the capacity of the Italian legal order to develop an administrative law of culture that is at

64 Constitutional Court, judgment no. 160/2025, 31 Oct. 2025 (ECLI:IT:COST:2025:160).
65 Constitutional Court, judgment no. 51/2026, 14 April 2026 (ECLI:IT:COST:2026:51).

once faithful to the command of Article 9 of the Constitution and capable of engaging, without either inferiority complexes or hegemonic ambitions, with the logic of the global market and of European Union law. The most recent case law shows that this path has already been partially mapped out. The task now is to pursue it further, building on the experience gained and consolidating, with the aim of achieving greater certainty and a more equitable balancing of public and private interests, those principles of method, proportionality and cooperation that emerge from the decisions examined.