

Belgium

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A. Protection of cultural property

1. What are the key characteristics of your country's regulations on cultural heritage and national patrimony?

National patrimony laws in Belgium traditionally seek to protect the assets owned by the state, called the 'public domain', to the extent the state (which includes, within Belgium, regional and local authorities and their respective entities) owns these assets for the public interest, meaning that they are assigned to the use of all or to the exercise of a public service. Cultural goods belonging to the public domain – public museum collections, public libraries and archives – cannot be sold or transferred, nor be seized, nor can their ownership be acquired over time, unless they are disused.

Movable cultural property belonging to the private domain is in principle subject to the same regime of title and ownership as other private assets.

However, since 2002, specific protection legislation to protect certain important items of cultural property has been enacted on a regional level, mainly providing for classification or listing measures and export restrictions.

In this regard, an essential feature of the Belgian constitutional system is the federalisation of the Belgian State. Movable cultural heritage falls within the powers of the three Belgian communities (Flemish, French and German-speaking) while the powers to regulate immovable cultural heritage belong to the three Belgian regions (Flanders, Wallonia and Brussels). However, the Brussels region, given its specific status, was granted in 2014 its own powers for the protection of immovable as well as movable and intangible cultural property. This led to a specific regulation confined to cultural property 'of regional interest' situated in the Brussels region. The exact scope of this concept is not yet entirely clear, but it excludes federal museum collections – which continue to be governed by the Federal State – and all cultural property belonging to institutions whose activities are exclusively directed at the Flemish, French community, as the case may be.

Accordingly, four regulations seek to protect movable cultural heritage in Belgium:

- the Decree of the French Community of 11 July 2002 (FR);
- the Decree of the Flemish Community of 24 January 2003, as amended from time to time (FL);
- a Decree of the German-Speaking Community of 20 February 2017 (GER); and
- a decree ('*ordonnance*') of the Brussels Region of 25 April 2019 (BR).

The territorial reach of those regulations depends on the actual location of the good within the Belgian territory. Some exceptions can come into play if the good has just been transferred from one community or region to the other, in order to prevent abuses.

For the purpose of this questionnaire we limit ourselves to the Flemish (FL), the French-speaking (FR) community decrees and the Brussels regional decree (BR) as they cover the main part of the country.

2. Under your national law, which criteria must be met in order to classify an asset as cultural property?

FL: The protection extends to movable goods and collections that are rare and indispensable because of their exceptional archaeological, historical, cultural-historical, artistic or scientific importance for the Flemish community (then becoming a '*topstuk*'). A good is rare when few copies (similar or identical), exist inside the Flemish Community. A good is indispensable when it has a particular value for the collective memory, the function of link in the evolution of the art, the value of a standard in the evolution of art or a particular artistic value.

FR: There are two categories of cultural property, the wider being 'movable cultural goods' and the narrower 'treasures' (*trésors*). To classify as cultural good, the object has to meet thresholds of age and value that differ according to the type of good (paintings, books, photography, etc) similar to those set out in the Annex to the European Union Regulation 116/2009 on the export of cultural goods. Even if the decree is not clear in this regard, it seems that only cultural goods that have been listed (*classés*) are protected. This means that the French Community government must initiate a classification procedure that leads to the publication of the decision to classify a good as a *bien culturel* in the Belgian *Legal Gazette*. This publication mentions whether the cultural property is also to be considered as a 'treasure', which is invariably the case.

BR: 'Cultural property' is defined as a movable good or a collection which either: (i) belongs to one or more categories as referred to in Annex I.A. of the EU Regulation 116/2009 on the export of cultural goods; or (ii) is protected (listed) by the Brussels government in accordance with the listing regime provided by the decree. The criteria for listing are the same as under the Flemish Decree: the cultural good or collection must be rare and indispensable because of its exceptional archaeological, historical, cultural-historical, artistic or scientific importance for the Brussels region. All items of cultural property – listed and unlisted – of historical, archaeological, artistic, aesthetic, scientific, social, technical or folkloristic interest for the Brussels Region are included in its inventory of movable cultural property.

EU: The aforementioned sub-national regimes are subject to, and are supplemented by, the European regime that retains its own definition of 'cultural goods' for the purpose of exportation outside the EU. Like the regime of the French Community (which reproduces mainly the EU definition), cultural goods should meet thresholds of age and value that differs in function of the category of good.

3. What are the legal consequences arising from classifying a good as cultural property? Does the classification of a private asset as cultural property affect the right of ownership?

The consequences of classifying as cultural property are threefold. First, the good would be subject to restrictions on export, being understood that the rules on (temporary or definitive) export vary from community to community. Second, the right to sell and/or move the goods within the territory of Belgium will potentially be affected. In both the French-speaking community and the Brussels region, the government can exercise a pre-emption right on any sale of movable cultural goods, the former on all cultural property whether listed or not, the latter only in respect of listed property. Finally, the French, Brussels and Flemish decrees impose certain obligations on the owner, possessor or holder of a protected object with a view to preserving it.

4. Which authorities in your country define cultural property and who advises these authorities?

FL: The Flemish Community Government registers cultural property items it deems worthy of protection (*topstukken*) on the list of the movable cultural heritage of the Flemish Community, but a good or collection can qualify as *topstuk* even if not included in the list. This means that any owner should assess for himself if a particular good is likely to qualify as a *topstuk*. Guidelines are issued by the Flemish authority to assist owners in this regard.

Owners can also request the Flemish Government to issue a certificate confirming that an object or collection does not qualify as a *topstuk*. There is also an advisory body, the Council of Cultural Heritage (Topstukkenraad) designed to advise the Flemish authority and made up of specialists chosen by the ministry of culture.

FR: The French Community Government classifies cultural goods. To advise the government, there is a consultative commission for the movable cultural property (*commission consultative du patrimoine culturel mobilier*), made up of 17 members (art historians, university members, museum curators, legal experts, art restorers, trade representatives and politicians).

BR: The Brussels Government determines which items are included in the inventory and which items qualify for listing. It is assisted by the Commission for movable and intangible cultural property, an advisory body.

5. Has your country ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and, regarding the illegal export of cultural objects and artwork: what are the main characteristics of the national implementation?

Belgium ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 31 March 2009 and it entered into force on 1 July 2009. An implementing law has been in preparation for years, but no final instrument has been enacted. The draft legislation amongst other things provides for:

- the seizure of cultural goods that were, after 1 July 2009, illegally exported from another country party to the Convention or stolen from an institution of another party to the Convention (such as a museum) where the good was inventoried; and

- the right of the claiming country to request the restitution of the illegally exported or stolen object within a year of discovery of the location of the object and the identity of its possessor or holder and in any event no later than 30 years after the cultural object left the country of origin. The current holder of the object may receive a fair compensation in the event of restitution provided he or she held it in good faith, meaning that he or she should have exercised due diligence when acquiring the object. However, good faith is always presumed (the burden of proof resting on the claimant) and must only exist at the time of acquisition.

6. Has country ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and, regarding the illegal export of cultural objects and artwork: what are the main characteristics of the national implementation?

Belgium has not ratified the 1995 UNIDROIT Convention at the time of writing, and probably will not, according to the conclusions drafted in a joint study ordered by the different cultural authorities. These authorities believe the ratification at Belgian level is not necessary in the wider perspective of (prospective) European legislation and with due regard to the evolving position of the major trade countries. The priority is currently given to the implementation of the 1970 UNESCO Convention.

7. Has country ratified any other international conventions or bilateral agreements relating to the export of cultural objects?

Apart from The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols as well as the Convention on the Protection of the Underwater Cultural Heritage, Belgium is not party to any other international conventions or bilateral treaties relating to the export of cultural property.

Since 27 June 2019, the EU Import Regulation (Regulation (EU) 2019/880 on the introduction and the import of cultural goods) is in force in Belgium as in the whole European Union.

B. Restrictions on the export of cultural property and artwork

1. What are your country's export restrictions regarding cultural property and artwork?

1.1 Under which conditions is export permission granted?

FL: The export permission is granted if the Flemish Government considers that there are no archaeological, historical, cultural, artistic or scientific reasons to maintain the protected good within the Flemish Community.

FR: The permission is granted if the French Community Government considers its export will not cause serious harm to the cultural heritage of the French Community. The cultural goods classified as 'treasures' can only be temporarily exported (licence of one year). Since all listed cultural goods have been qualified as 'treasures' up to now, this means no listed cultural property can permanently leave the French-speaking Community.

BR: The Brussels Government will only grant permission to export a listed item on a temporary or definitive basis if:

1. the export does not threaten to entail a serious prejudice to the cultural property of the Region; or
2. the conditions imposed by the government, if any, are such that they can eliminate the risk mentioned in point 1 above (such conditions may include measures restricting the ownership right, such as conservation measures, exhibition methods, transport restrictions and conditions of access to the public).

1.2 Which authority grants such export permission and who advises this authority?

The export permission is formally granted by the executive branch of each entity, meaning the Flemish, the French and the Brussels Governments respectively, as identified in the answer to question A.4 above.

The practical handing of applications (and issuing permits and certificates) is delegated to the respective administrations:

- French Community Authority (Ministère de la Communauté française, Service General du Patrimoine culturel et des Arts plastiques): **www.patrimoineculturel.cfwb.be**;
- Flemish Community Authority (Vlaamse Overheid, Department of Culture, Youth, Sport and Media): **www.kunstenenerfgoed.be**;
- Brussels Region: Direction du Patrimoine culturel: **<http://patrimoine.brussels/decouvrir/inventaires-du-patrimoine-bruxellois/linventaire-du-patrimoine-culturel-mobilier>**.

1.3 What does the proceeding look like, who are the parties to the proceeding and what is the duration of the proceeding?

FL: An application must be filed with the Flemish administration. This is specifically a form or letter that contains the identification of the property and the reasons of the export. The administration must render its decision within two months of the application date. If the applicant does not receive a permission within two months, he or she must be deemed to be authorised to pursue the export. The whole procedure is confidential.

FR: No specific procedure is set for the French Community. In practice, applicants can use the application form for an EU export licence.

BR: no specific application procedure is provided as yet but the decree provides that authorisation is to be granted within two months of receipt of the complete application and that in the case of no answer, authorisation is deemed to be refused.

1.4 Are there any monetary thresholds (*de minimis*)?

Monetary thresholds rather play a role at the level of the definition of cultural property to qualify for protection or listing/classification.

FL: The guidelines issued by the Flemish administration refer to indicative thresholds – €500,000 for paintings and €100,000 for other cultural goods – in order to qualify as a *topstuk*. The guidelines specify that goods whose value is less than the values set out in the annex of the EU Regulation are less likely to be considered as *topstukken*.

FR: As mentioned, there are monetary thresholds to qualify as a cultural good that varies from types of objects (inspired by the EU Regulation). For example, archaeological objects qualify no matter their value, whereas, paintings must have a minimum value of €150,000.

BR: No thresholds are provided.

1.5 Does the circumstance of the artist still being alive or the time of creation of the artwork matter?

FL: The decree provides that if the owner is the author (maker) of the object, the export permission cannot be refused but the mere fact that the artist is still alive does not per se entail a permission to export.

FR: In general, goods being less than 50 years of age would not be considered as cultural goods. For certain types of goods, the object should still be older (such as 100 years for archaeological objects). No specific exemption applies to artworks of living artists.

BR: No.

2. Is the state obliged to buy out the artwork for which an export permission was denied?

FL: Yes. If an export permission is denied, the owner of the artwork can request the Flemish Community Government to make a purchase offer. Negotiations with the government must start within one month of this request, failing which the authorisation is deemed to be granted. The artwork must be acquired at the international market price. Failing an agreement between the owner and the government within one month of negotiation, the price is to be determined by an expert panel. If the owner refuses the offer at the price determined by the experts, he or she will not be entitled to apply for an export permission for three years after this refusal.

FR: No.

BR: No.

3. Are there any exceptions to these regulations (eg, temporary export for exhibitions, conservation or private reasons of the owner)?

FL: There are a few exceptions to the general rule. The authorisation cannot be refused if the artwork is less than five years in the Flemish Community, if it is still owned by its author or has been brought in the Flemish Community by its author, or if its owner has acquired it within five years of its entry in the Flemish Community. The Flemish regime does not distinguish between definitive and temporary export, except that in the event of temporary export, the export application should mention the conservation measures that will be taken abroad and the guarantees of the artwork's return.

FR: As mentioned, the French regime only authorises temporary exports of up to one year.

BR: No distinction is made between temporary and definitive export requests. In both cases the government may make its authorisation subject to certain conditions in respect of the object's conservation or to protect the particular interest which justified its listing. The temporary export licence will fix the period within which the good must return to the Brussel region.

C. Consequences in cases of violation of export restrictions; restitution and repatriation of illegally exported cultural property

1. What are the legal consequences in cases of breach of export restrictions?

FL: Whoever violates export restrictions is subject to a fine of €300 to €100k and a prison term of four months to five years. Those penalties can be doubled if the Flemish Community never recovers the good in the end. The court will decide between the minimum and maximum according to the circumstances of the case. The Flemish Government can also request the court to order the person responsible for the illicit export to bring the good back into the Flemish Community. In that case, the defendant has to pay a bail equal to the internal market value of the good. If the good returns, the bail is reimbursed (minus expense to repair damages). If not, the Flemish authority will retain the bail as damages.

FR: No explicit criminal sanctions are provided for in the French decree, which only specifies that illegally exported goods can be seized by the French Government. If there is a risk of recidivism, the government is entitled to confiscate the property.

More generally, if protected cultural property is illegally exported to another Member State of the EU (the 'EU Directive'), the Belgian State would be entitled to request its restitution before the court of the Member State of location, on the basis on the European Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State. Restitution of cultural property illegally exported outside the EU is also possible under international regimes, such as the UNESCO Convention of 1970.

2. Give a description of the regulations and practices in your country relating to the restitution and repatriation of illegally exported cultural property.

BR: Violation of the export-related obligations entails a prison term of eight days to one month and fines ranging from €100 to €500, which are doubled in certain aggravating circumstances. This can be combined with other enforcement measures including returning the object to Brussels, forced restoration, etc.

No general policy has been published to date regarding the restitution of goods illegally exported from Belgium.

However, in the context of the international agreements on the restitution of looted cultural assets during the Second World War, Belgium assigned a special team within the Ministerial Department of Economic Affairs to recover art and archives looted from Belgium. The mission of this team has since expired, even though not all items registered as such have yet been retraced or recovered. Where possible, Belgian enforcement authorities seek to rely on

the (voluntary) assistance of the diplomatic or enforcement agencies of the country of the present location.

Regarding cultural goods that have been illegally imported to Belgium, Belgian authorities will have the obligation to return under conditions set out in the Belgian implementation laws of the 1970 UNESCO Convention and the EU Directive.

3. Under which conditions does your country assist foreign countries seeking repatriation of cultural property/artwork?

Experiences show that Belgium will often cooperate with other states seeking repatriation through international and European letters rogatory under inter alia the European Convention on Mutual Assistance in Criminal Matters (adopted under the Council of Europe), the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, or bilateral treaties on mutual cooperation or extradition.

4. Does a buyer enjoy protection against restitution claims for violation of foreign export restrictions?

If the good has been illegally exported after 1993 from another EU Member State, the Belgian law transposing the EU Directive on restitution of cultural goods (law of 28 October 1996) provides that Belgian courts must order the restitution of the good.

In that case, the Member State requesting the good has to pay a fair compensation to the good faith buyer, provided that he or she had acted with due diligence at the time of the acquisition. In the case of export after 1 July 2009 from a non-EU state that ratified the 1970 UNESCO Convention, the implementing law to be enacted also provides for fair compensation (see question A.5 above). Outside the scope of European and international instruments and their implementations into Belgian law, the Belgian International Private Law Code grants the plaintiff in cultural restitution claims (which must be a state) the option between applying the *lex rei sitae* or the law of the country of origin of the disputed object. Where Belgian law is applicable to the restitution claim, the protection of the bona fide purchaser as laid down in the answer to question C.5 will apply.

5. Which regulations exist for the protection of the purchaser against title claims?

Pursuant to Belgian law of title, quiet and good faith, possession of a chattel confers immediate ownership title unless the original owner involuntarily lost possession of his asset, in which case the original owner has three years to reclaim his asset. This rule is only applicable in cases of true possession (actual power on the good, with the conviction to possess on his or her behalf) and good faith, meaning that the buyer did not know or should not have known when he or she acquired the good that he or she was acquiring from a person without ownership title. Good faith is legally presumed. Nevertheless, whilst traditional case law and practice seems to favour a protective application of the law towards bona fide purchasers, more recently civil courts do not hesitate to rule in favour of the claimant if the current possessor is clearly in bad faith or fails to prove his or her good faith.

In any case, a purchaser can acquire ownership title by having quiet possession of a good during 30 years, provided his possession is continuous, undisturbed, public and unambiguous.

In both cases, the possessor will have become the indisputable owner.

6. Does a lender from abroad enjoy protection against seizure of items on loan to local exhibitors if the good fails to have a proper export licence?

Cultural property owned by foreign states or public entities should be distinguished from private cultural property. The Belgian Judicial Code provides that cultural property owned by foreign authorities is immune from execution (specifically, civil [conservatory or executory] attachment) when present in Belgium for the purpose of a public and temporary exhibition, provided such property is not used for economic or commercial activity of a private nature. Beneficiaries include state entities, provided they exercise some degree of sovereignty, and international governmental organisations. On the contrary, private cultural property lent to a Belgium-based exhibitor is likely to be the subject of attachment on the Belgian territory to support a title or restitution claim.

7. What regulations exist concerning the import of cultural property that may have been exported illegally from its country of origin or that is the subject of claims?

We refer to the EU Import Regulation mentioned in question A.7 above.

No other specific regulation exists regarding the import of cultural property illegally exported from other countries, except for the regulations mentioned in question C.4 above.

D. Due diligence obligations

1. What general due diligence is required from the seller/buyer of artwork if the artwork is intended to be exported?

There are no specific legal requirements regarding an artwork intended to be exported, except:

- that the seller or buyer should check whether any of the national or regional protection regulations apply (confer under the various protection decrees, there are certain notification requirements in the event of export or sale); and
- for the due diligence test under the EU Directive 2014/60 and UNESCO 1970 in order to qualify for a fair compensation.

2. Are there any anti-money laundering regulations applicable in the art trade and at art auctions?

Under current money-laundering legislation, auction houses, art dealers and art service providers may not accept cash for the payment of artworks in excess of €3,000. Any infringement must be reported in principle to the Financial Intelligence Processing Unit, but without implementing regulation this requirement cannot be enforced.

The art profession is under present legislation not subject to the anti-money laundering obligations to report suspicious transactions, unlike, for example, real estate agents and diamond traders. This will change once the Fifth EU Anti-Money Laundering Directive is implemented in Belgium.