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**Milica
Jović**

Generation

The UK's Performative Approach to Trafficking of Illicit Antiquities

Nr. 15



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Author: Milica Jović

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The UK's Performative Approach to Trafficking of Illicit Antiquities

Milica Jović*

This work analyzes the United Kingdom's domestic legal framework that addresses the international trafficking of artefacts and antiquities. The 'performative' nature of the state's framework is critically examined, and suggestions for reform – especially in the wake of Brexit – are provided.

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* Milica Jović, BLaw, is currently completing her Master's degree in International and Comparative Law at the University of Zürich. She will complete her studies in January 2026 and will begin the legal licensing process.

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Bribery Act 2010

Cultural Property (Armed Conflicts) Act 2017

Customs and Excise Management Act 1979

Dealing in Cultural Objects (Offences) Act 2003

Export of Objects of Cultural Interest (Control) Order 2003

Fraud Act 2007

Good Friday Agreement 1998

Iraq (United Nations) Sanctions Order 2003

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

Proceeds of Crime Act 2002

Syria (The Syria (United Nations Sanctions) (Cultural Property) (EU Exit) Regulations 2020

Theft Act 1968

Treasure Act 1996

International and EU Legislation

EU: Export of Cultural Goods from EU Regulation No 116/2009

EU-UK Withdrawal Agreement 2020

Fifth EU Anti-Money Laundering Directive

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

The Import of Cultural Goods within the EU, Regulation 2019/880

The Introduction and Import of Cultural Goods (Revocation) Regulation 2021
The Return of Cultural Objects within the EU, Directive 2014/60
UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export
and Transfer of Ownership of Cultural Property
UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects
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Case Law

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1 September

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1 Introduction

The United Kingdom (“the UK”) is home to one of the world’s central markets for the trade in cultural property.¹ However, the bustling legitimate market scene in London also provides the backdrop for the more sinister *illicit* trade in cultural goods. These are items of cultural significance that are taken illegally from source countries and enter the UK’s market to be sold onwards to a variety of interested parties. Although the international community has enacted several instruments in response to this dilemma, such as the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”), the illicit trade continues to persist to accommodate high demand. This paper centers on this illicit trade in the UK by first examining how the trade operates and then critically analyzing the domestic legal framework that has been enacted in response. Despite the UK ratifying the 1970 UNESCO Convention in 2002 and adopting specific criminal laws to target the illicit trade, these measures have largely been ineffective in stopping the trade. More recently, with the UK leaving the European Union (“the EU”) through ‘Brexit’ and revoking stricter EU laws, there have been concerns that the UK’s current legal framework will render the country a ‘hub’ for the illicit trade.²

This paper attempts to unravel the complexities of the UK’s legal framework by examining why legal measures have been unsuccessful in curbing the illicit trade. To undertake this analysis, the central question that is addressed is to what extent the laws that have been enacted or revoked in this field can be deemed forms of ‘performative regulation’? This concept, coined by Green and Mackenzie in relation to the UK’s Dealing in Cultural Objects (Offences) Act 2003 (“2003 Act”), argues that regulation is adopted only to politically ‘perform’ that an issue is being addressed, rather than to create law that is effective in substance.³ This performance is a result of the influence of powerful art market participants, such as antiquities dealers, that lobby the government to enact ineffective legislation that favors their business prospects. The weak legislative framework that results from the trade lobby’s influence, allows

¹ Janet Ulph and Ian Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (1st edn, Hart Publishing 2012) 1.

² Robert Peters, ‘Nationalism Versus Internationalism: New Perspectives Beyond State Sovereignty and Territoriality the Protection of Cultural Heritage’ in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press 2020) 386.

³ Simon Mackenzie and Penny Green, ‘Performative Regulation: A Case Study in How Powerful People Avoid Criminal Labels’ (2008) 48 *The British Journal of Criminology* 138, 139.

the trade to persist largely unregulated and thus enables the illicit market to thrive. This paper extends this concept by examining other regulations that have been created or revoked since 2003, in order to comprehend whether they have also followed in this pattern of political 'performance' that Green and Mackenzie have developed.

The research question is addressed through a qualitative methodological approach that includes a critical analysis of both primary and secondary sources. Academic articles and books are consulted for the majority of the paper, as there is extensive research that has been conducted in this context. For more recent developments that have not yet been addressed by scholars, newspaper articles and various non-governmental reports are consulted. A portion of the paper also examines primary sources, such as parliamentary debates and governmental memoranda, in order to analyze the performative nature of the UK's stance towards the illicit trade. In terms of the specific literature consulted, this paper relies heavily upon the work of academics that focus on the pivotal role of the UK in the illicit trade and the domestic legal regime that it has developed in response. With regard to the general contours of the illicit trade, much of the literature that centers on the UK has criminological underpinnings. For instance, Mackenzie focuses his criminological studies on how art market participants justify their involvement with the illicit trade.⁴ The domestic legal framework has also been examined thoroughly in the literature. Ulph and Smith have written extensively on the criminal and civil law measures that the UK has crafted over the decades.⁵ Others, such as Green and Mackenzie, have criticized the legal regime and have argued that regulations have intentionally been rendered ineffective due to the influence of the trade lobby.⁶ With regard to the recent impact of Brexit, academics have warned that the UK's decision to deregulate and revoke the EU's stricter laws has created a complex situation that is readily exploitable by traffickers.⁷

This paper aims to contribute to this wealth of literature by providing a detailed critique of the existing domestic legal framework and expanding it to the changes that have emerged post-Brexit. Although 'performative regulation' was clearly formulated by Green and Mackenzie in relation to this field, this concept has not been extended past the 2003 Act and has created a gap in the

⁴ Simon Mackenzie, 'Dig a Bit Deeper: Law, Regulation, and the Illicit Antiquities Market' (2005) 45 *The British Journal of Criminology* 249.

⁵ Ulph and Smith (n 1).

⁶ Mackenzie and Green (n 3) 151.

⁷ Sophie Vigneron and Valentine Granet, 'The Impact of Brexit on Heritage: Impeding Worker's Mobility and European Cooperation in the Fight against the Trafficking of Cultural Objects and Endangered Species' (2022) 26 *Art Antiquity and Law* 277, 292.

research. This paper's significance lies in attempting to address this gap. It is vital to understand whether the UK's laws since 2003 have followed a pattern of 'performative regulation', as this will clarify why the state's legal regime has continued to be ineffective in curbing the illicit trade. Moreover, any findings of 'performance' will enable reform recommendations to be more realistic and in tune with the current political climate.

This paper begins with a brief chapter that outlines the analytical framework of 'performative regulation'. This short chapter demonstrates that the framework was chosen in order to broaden the concept past the 2003 Act and accurately assess the effectiveness of the UK's current legal regime. Moreover, the methodology of examining 'performance' through parliamentary debates on legislation and other governmental sources is detailed. This is followed by the first substantive chapter that examines how the illicit trade in cultural property operates in the UK and the actors that facilitate it. This contextual chapter outlines the historical importance of the trade in the UK and demonstrates how the state continues to justify its possession of cultural property as 'capital for the nation'. Through several factors, such as trade routes, notable cases, and statistical figures, it is argued that the UK's market is best described as 'grey' – meaning that licit and illicit goods circulate freely – and that the country benefits economically from this grey market. Lastly, the influential actors involved in the illicit trade, or its regulation, are examined. Actors, such as antiquities dealers and auction houses, do formally have professional ethical guidelines, but these guidelines are not robust enough to effectively deter participation in the illicit trade. This has created an environment where actors largely operate on the basis of self-regulation, which only further fuels the grey market. Moreover, many of these actors form part of a powerful trade lobby that has been able to influence the crafting of its own regulation for decades.

The next chapter then dives into a critique of the UK's legal regime and introduces the concept of 'performative regulation' as it relates to key legal instruments. Through a critical analysis of the plethora of criminal measures that the UK has enacted, including the rise of powerful anti-money laundering regulations, it is argued that the overall regime remains fragmented and rarely enforced in practice. The second half of this chapter examines the two domestic legal instruments that specifically target the illicit trade, namely the Dealing in Cultural Objects (Offences) Act 2003 ("2003 Act") and the Cultural Property (Armed Conflicts) Act 2017 ("2017 Act"). Through an examination of parliamentary rhetoric and the presence of the trade lobby in the creation of these Acts, it is argued that these instruments are forms of 'performative regulation' that have been enacted by the government to merely simulate the appearance that

the illicit trade is being confronted. Lastly, the European Union framework that existed in the UK prior to Brexit is examined. Although the UK benefited from the EU's laws in this field, namely the 2009 Export Regulation, the 2014 Return of Cultural Objects Directive, and the 2019 Import Regulation, a 'performative' aspect of the EU laws is also contemplated. It can be argued that the EU framework, in particular the 2019 Import Regulation, was potentially influenced by the trade lobby and might not be as effective as initially claimed.

The final chapter builds on the analysis of 'performative regulation' by examining the specific post-Brexit changes that have occurred in the UK. First, the central challenges that Brexit has created are examined, which include: the revocation of EU laws; the complex trade situation in Northern Ireland where EU law continues to apply; the Windsor Framework; and freeport expansion. It is demonstrated that a deregulated and inconsistent approach has been adopted by the UK that has rendered the country a target for traffickers wishing to exploit weak regulatory regimes. The chapter then extends the concept of 'performative regulation' to the deregulated approach that has been adopted following Brexit. Through an analysis of the parliamentary debate on the revocation of the EU's 2019 Import Regulation, it is contended that the UK has continued to only 'perform' that its own legal framework is robust enough to combat the illicit trade. This political performance contradicts the reality of the complex post-Brexit regime and could be attributed to the trade lobby's continuing influence on the government. Lastly, given this finding of performative regulation in recent years, recommendations for reform are put forth. These recommendations are both general and Brexit-specific, including such notions as improving due diligence enforcement and introducing more thorough import controls that mirror those that exist in the EU. However, given the current political climate that favors deregulation and does not appear amenable to any serious reform suggestions, it is conceded that the urgent reform that is needed will likely not occur. Throughout this paper, it is argued that the UK's legal regime that confronts the illicit trade has been ineffective due to its performative nature. Since Green and Mackenzie's conclusions on the 2003 Act, the law – influenced by a powerful trade lobby – has only continued in a pattern of performance rather than substance. Although reform is urgently required, it remains unlikely that post-Brexit, the UK will change the deregulated regime that favors the economic prospects of both the State and trade lobby.

2 ‘Performative Regulation’ and Methodology

As this thesis centers around the analytical framework of ‘performative regulation’, it is vital to concisely set out the context of this framework and how this paper will interact with it. The choice of the framework was influenced by Green and Mackenzie’s influential article from 2008, *Performative Regulation: A Case Study in How Powerful People Avoid Criminal Labels*.⁸ Their case study analyzed how the Dealing in Cultural Objects (Offences) Act 2003 (“2003 Act”) was shaped in the legislative process by powerful art market participants to render it ‘toothless’, or ineffective, in practice.

Green and Mackenzie expand their understanding of ‘performative regulation’ through two central definitions. The first definition is that the act of political regulation centers on performance rather than substance.⁹ The second definition of performance is one that suggests that performance can also have the power to create objects through political discourse.¹⁰ This paper only adopts the first definition of performance in order to ensure that the analysis remains focused. In doing so, this paper will analyze the extent to which the UK’s legal regime that targets the illicit trade has been crafted to ‘appear’ to be addressing issues rather than being effective in substance. Green and Mackenzie argue that in the 2003 Act legislative process, politicians adopted ‘performative regulation’ as they were under the sway of a powerful trade lobby. What emerged through the political process was only the public performance of addressing the illicit trade rather than the enactment of an effective legal instrument.¹¹

Inspired by Green and Mackenzie’s analysis, this paper would like to extend the concept of ‘performative regulation’ to other laws that have emerged in the UK since 2003. This has not yet been directly addressed by academics in this field, creating a gap in the research. Despite this gap, ‘performative regulation’ has been referenced explicitly in an article that examines Scotland’s progressive criminal penalty system as ‘performance’ under the influence of political forces.¹² However, since the framework of performative regulation originated in the discourse of cultural property, it is paramount to continue the analysis in this field to understand whether there has been a pattern of ‘performance’

⁸ Mackenzie and Green (n 3).

⁹ *ibid* 150.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² Jamie Buchan and Fergus McNeill, ‘Progressive Penalty as Performance’ (2023) 62 *The Howard Journal of Crime and Justice* 325, 327.

that has emerged over the past decades. Any findings of this pattern will clarify why legal instruments since 2003 have continued to be ineffective in stopping the illicit trade.

Regarding the methodology of examining performance in the UK, a similar approach that was adopted in Green and Mackenzie's 2008 article will also be used in this paper. Transcripts from parliamentary debates and governmental notes that accompany legislation will be examined to understand how the UK politically justifies its laws. As the focus of this paper is political performance through regulation, it is vital to examine the political discourse that has accompanied the legal instruments that have been enacted and revoked in the past two decades. For instance, this paper will analyze the government's repetitive affirmations during the passage of multiple instruments that its own legal regime is strong and that any new laws should not substantially hinder the legitimate trade. These statements are understood as examples of the government's 'performance', as they are in stark contrast to the reality of the illicit trade and demonstrate that a powerful trade lobby has likely influenced the government to enact such intentionally weak legislation.

Ultimately, through an examination of these primary sources, this paper will argue that the majority of the laws in this context exist only as forms of 'performative regulation', and that the legal regime that has emerged since 2003 has continued to follow in this established pattern. The performative nature of the regime will also be evidenced by the ineffective nature of the laws in practice. These laws have hardly generated any prosecutions and have not substantially deterred participants from engaging in the illicit trade, contradicting what politicians have promised time and again to the public.

3 The Illicit Trade in the UK and its Central Actors

3.1 Introduction

This first contextual chapter serves to outline how the illicit trade of cultural goods operates in the UK and the key actors that facilitate it. First, a brief overview will be provided of the historical value that has been placed on cultural goods in the country. It will be shown that the UK has historically exhibited a strong appetite to collect cultural goods as ‘capital for the nation’ and that this narrative has fueled market demand. Trade routes and notable cases will also be analyzed to comprehend how the illicit trade operates in practice. It can be argued that the UK’s market is ‘grey’, like that of other destination states, in that both licit and illicit goods circulate in the same market. This grey market has been exploited by traffickers who funnel cultural property into the UK in order to satisfy high demand. This section will conclude with a statistical overview of the economic impact of the market domestically and globally. It will be shown that the trade in antiquities is economically and culturally important, incentivizing the UK’s government to maintain strong import levels. This chapter will then analyze the key actors involved in the operation or regulation of the grey market, as well as the regulatory standards that they adhere to. The central actors analyzed are: museums and public institutions; auction houses; scholars and conservators; law enforcement and customs agents; and antiquities dealers. It will be shown that although due diligence obligations and ethical codes exist, they are often vague and do not effectively deter participation in the grey market. This environment amounts to one of ‘self-regulation’ that is woefully inadequate in curbing the illicit trade. The power of the art market participants is also referenced, providing the background for the rest of the paper that demonstrates that these participants form part of a trade lobby that uses its influence to craft its own ‘performative’ legislation.

3.2 Historical Importance of the Antiquities Market

The fact that London is one of the global hubs for art and artefacts can be attested to by the volume of visitors annually to its free entrance museums.¹³ The British Museum alone, founded in the late eighteenth century as the world’s first national public museum, generates approximately six million visits per

¹³ John Kerr, *The Securitization and Policing of Art Theft: The Case of London* (1st edn, Routledge 2016) 8.

year.¹⁴ Although the museum's collection is one of the most diverse globally, this is often attributable to the conquests and looting of the former British colonial empire.¹⁵ Given this link to its colonial past, the UK has been subject to numerous international attempts to restitute cultural objects to their country of origin. Just two of these international restitution attempts include: the Elgin or Parthenon marbles from Greece¹⁶ and the Benin bronzes looted by the British military from Nigeria.¹⁷ The British Museum has been subject to intense criticism due to its refusal to restitute these cultural objects, citing that the museum's trustees are bound under a fiduciary duty to maintain the collection above all else.¹⁸

Although the subject of this paper is not international restitution, the historical context of the cultural goods trade in the UK is a vital background element. In order to understand why contemporary politicians continue to justify the UK's involvement with this trade, this attitude should be traced back in the history of the state. One of the reasons that the UK exhibits such high demand for cultural objects is rooted in the nation's colonial past.¹⁹ In the UK, the possession of cultural goods from across the globe has been justified as a form of political and cultural capital.²⁰ Although in recent years regional museums in the UK have restituted cultural objects to their countries of origin,²¹ some continue to justify the UK's continued possession of these 'spoils of the empire'. British politicians have argued that the possession of looted cultural goods could be justified by the fact that the UK is providing the international benefit of housing all of these global treasures in one place.²²

Given this narrative of cultural property as 'capital for the nation', the demand for the market in cultural objects remains high. This demand is driven by a variety of actors, such as collectors, auction houses, and antiquities dealers, that tend to operate in lightly regulated spaces. It is evident in this short context of the UK's history with cultural goods, that this is a trade that has been closely

¹⁴ Hannah R. Godwin, 'Legal Complications of Repatriation at the British Museum' (2020) 30 Wash Int'l LJ 144, 144.

¹⁵ Lauren Bursey, 'Colonial-Looted Cultural Objects in England' (2022) 8 Santander Art & Culture L Rev 341, 342.

¹⁶ Godwin (n 14) 144.

¹⁷ Folarin Shyllon, 'Benin Bronzes: Something Grave Happened and Imperial Rule of Law Is Sustaining It' (2019) 24 Art Antiquity & Law 274, 274.

¹⁸ Godwin (n 14) 147.

¹⁹ David C Lane and others, 'Time Crime: The Transnational Organization of Art and Antiquities Theft' (2008) 24 Journal of Contemporary Criminal Justice 243, 248.

²⁰ Godwin (n 14) 151.

²¹ Bursey (n 15) 343.

²² Shyllon (n 17) 282.

intertwined with the UK's national identity and colonial past for decades. As this trade provides cultural and economic capital for the country, it is important to evaluate if a *genuine* desire to regulate this market exists. This question will be addressed in the following chapters of this paper that examine the domestic legal regime that has been created in response to the illicit trade and, more importantly, to what extent these laws are merely 'performative'.

3.3 Trade Routes, Notable Cases, and Statistics

Given this brief context of the historical significance of the trade, this section begins by highlighting some routes and notable cases in the illicit trade. It should be stated from the outset that the UK's market is best described as 'grey'.²³ A grey market in this context implies that both licit and illicit goods circulate together and are difficult to differentiate from one another. This grey market, which is characterized as low risk for both criminals and honest purchasers, thrives in a climate where participants are rarely punished for their involvement with illegal cultural property. Moreover, given the absence of a clear differentiation between licit and illicit goods, it is relatively simple for traffickers to insert illegal cultural property into the market and advertise it as legal. As the illicit trade is malleable and routes depend on the type of object and the socio-economic situation in source and transit countries, it is difficult to find reliable facts on how exactly the illicit trade unfolds in the UK. What can be inferred about the country, however, is that its geographic location and long history with cultural objects renders the country a prime location for this trade. The UK is also home to the English Channel and the Irish Sea, routes that traffickers can exploit to transport cultural goods.²⁴

In recent years, there have been several high-profile international cases that have shed some light on how the illicit trade operates in the UK. One such case involved smuggler and restorer, Jonathan Tokeley-Parry, who smuggled antiquities from source countries and sold them to dealers and buyers in London and New York. Tokeley-Parry's detailed notes that were used to prosecute him in the UK highlight how cultural objects arrive into the country.²⁵ Tokeley-Parry would befriend local smugglers in Egypt and bribe officials to allow objects to leave the country in violation of export laws.²⁶ Moreover, he would

²³ Simon Mackenzie and Donna Yates, 'What is Grey about the "Grey Market" in Antiquities' in Jens Beckert and Matias Dewey (eds), *The Architecture of Illegal Markets: Towards an Economic Sociology of Illegality in the Economy* (Oxford University Press 2017) 80.

²⁴ Kerr (n 13) 74.

²⁵ Ulph and Smith (n 1) 95.

²⁶ *ibid* 94.

create false documentation for these objects and request the help of academics to declare that his items were not stolen.²⁷ He would then sell his items to dealers and private buyers in the UK and other destination markets. Although Tokeley-Parry was eventually apprehended and charged with handling stolen goods, his is just one case that exemplifies the illicit trade that continues to occur in the UK. Other examples of the trade that have been linked with the UK's market are cultural goods that derive from Iraq and Syria. Regarding goods from Iraq, they could have been moved through various countries in an effort to hide their origins and to launder the items until they were able to be sold 'legally' to buyers in the UK.²⁸ Similar patterns have also been cited as emerging from Syria, notably with terrorist groups having been linked with the sale of cultural objects.²⁹ However, it should be noted that the UK has implemented statutory instruments in response to United Nations Security Council Resolutions that address the illicit trade originating from Iraq and Syria. These specific instruments will be discussed further in the following chapter that analyzes the UK's domestic legal framework.

Regarding the statistics associated with the illicit trade in cultural property, it is also challenging to derive reliable numbers on stolen art or antiquities in the UK, given the secretive nature of the trade.³⁰ However, what can be analyzed is the impact of the art and antiquities market on the UK's economy, as well as its position in the global market. According to the British Art Market Federation, the UK's art market is a global hub that is larger than the EU market as a whole.³¹ Although the UK has been impacted by the Covid-19 pandemic and Brexit, the art market is slowly recovering.³² In terms of the economic impact of the market, it contributes approximately 1.6 billion GBP to the economy and is responsible for attracting tourism and investment to the country.³³ Most importantly for the purposes of this paper, the UK's significance in the global market is directly correlated to the flow of art and antiquities into and out of the country.³⁴ The British Art Market Federation argues that there is a strong correlation between the growth of the art market and the import of art

²⁷ *ibid* 95.

²⁸ Ulph and Smith (n 1) 11.

²⁹ Neil Brodie and Isber Sabrine, 'The Illegal Excavation and Trade of Syrian Cultural Objects' (2018) 43 *Journal of Field Archaeology* 73, 82.

³⁰ Kerr (n 13) 9.

³¹ British Art Market Federation, 'The British Art Market in 2023' (2023) <https://tbamf.org.uk/wp-content/uploads/2023/11/British-Art-Market-2023-Final-Low-Res-FINAL.pdf> (accessed 5 April 2025) 2.

³² *ibid*.

³³ *ibid*.

³⁴ *ibid* 16.

and antiquities.³⁵ This is evident in the UK, especially prior to Brexit, where the flow of imports into the nation resulted in the UK becoming one of the largest entrepôt markets in the world.³⁶ This type of market is characterized by goods imported, traded, or stored with the potential to be exported onwards. However, it should be noted that the success of the import market has faltered following Brexit in 2020. Levels of imports of art and antiquities had somewhat improved by 2022, but were only half of their domestic value as compared to 2015.³⁷

As this section has outlined, the UK's art and antiquities market is economically and culturally vital. This market, however, can be characterized as 'grey' and has rendered the UK an important destination country for illicit cultural goods. In recent years, as described by the British Art Market Federation, this formerly thriving market has been depressed by Brexit. As will be argued in this paper, it is likely that the UK's government is attempting to revive this market by creating a deregulated climate that encourages imports. Unfortunately, this deregulation further enables the grey market and has led to fears that the UK will become a 'hub' for the illicit trade.

3.4 Key Actors in the Market

Adding to the previous section that has examined the contours of the UK's grey market, this section will analyze key actors in the market and their regulatory standards. It is important to note that not all players are examined, but only those that are cited in the literature as influential in either perpetuating the illicit trade or attempting to regulate it. It will be shown that the regulatory framework for the majority of these actors can be characterized as a form of self-regulation that is not robust enough to deter participation in the illicit trade.

3.4.1 Museums and Public Institutions

The first actors to be examined are museums and public institutions. Given the public nature of these institutions, Green and Mackenzie have argued that they are more aligned with the concerns of the international community to

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid* 18.

preserve cultural property than with the art market.³⁸ In terms of their regulatory standards, museums are governed by a Code of Ethics from the International Council of Museums.³⁹ These ethics, which are also promulgated by the Museums Association in the UK, require staff to exercise due diligence when acquiring new pieces. They also reiterate that staff should notify the authorities of any suspicion of illegal activity and should avoid exhibiting non-provenanced items.⁴⁰ In the UK, the public presence of the museum seems to provide a stronger incentive for these institutions to abide carefully to ethical considerations. As the museum could be seen as an outward embodiment of the UK's relationship with cultural goods, it is vital for the museum to broadcast that the UK is upholding its international obligations.

However, in spite of their public stances against the illicit trade, museums and public institutions do still occasionally partake in the illicit trade. As argued by Ulph and Smith, Codes of Ethics do not provide in depth guidelines on how to conduct due diligence, resulting in a level of self-regulation that also permeates museums.⁴¹ Although governmental guidance in the UK does stress that public institutions should carefully check documentation in order to not engage in the illicit trade,⁴² they have still been involved with unscrupulous deals. One notable instance took place in 1994, when the British Library acquired ancient Kharosthi scripts from Afghanistan. This problematic acquisition was only publicly exposed in 2004, when it was argued that the acquisition led to a rise in demand for similar cultural property and resulted in a campaign of looting in the source country.⁴³ The British Library justified its involvement with these smuggled items by arguing that it aimed to safeguard them in the interest of scholarship.⁴⁴ Moreover, it asserted that it had dealt with a 'reputable' dealer and decided to fund this project through a private benefactor to avoid accepting government funding for this unprovenanced object.⁴⁵ As just this one example from the British Library demonstrates, museums and public institutions can both become consumers in the illicit trade and fuel demand

³⁸ Simon Mackenzie and Penny Green, 'Criminalizing the Market in Illicit Antiquities: An Evaluation of the Dealing in Cultural Objects (Offences) Act 2003 in England and Wales' in Simon Mackenzie and Penny Green (eds), *Criminology and Archeology: Studies in Looted Antiquities* (Hart Publishing 2009) 161.

³⁹ Ulph and Smith (n 1) 190.

⁴⁰ *ibid* 193.

⁴¹ *ibid*.

⁴² *ibid* 194.

⁴³ Neil Brodie, 'The Circumstances and consequences of the British Library's 1994 acquisition of some Kharosthi manuscript fragments' (2005) 17 *Culture without Context* 5, 5.

⁴⁴ Nils H. Korsvoll, 'The (Continued) Online Trade of Aramaic Magic Bowls from Iraq' (2020) 23 *Journal of Art Crime* 17, 48.

⁴⁵ Brodie (n 43) 5.

for specific cultural goods. Although these actors justify their participation as necessary for the scholarship, this justification does not excuse public institutions from shirking their responsibilities. Nonetheless, the involvement of museums and public institutions in the illicit trade should not be overstated, as they are perhaps the most regulated actors in the UK. Despite their regulation, however, it is interesting to note that the most public facing of the actors in the UK does still partake in the illicit trade.

3.4.2 Auction Houses

In addition to public institutions, auction houses are another pivotal actor, accounting for 42% of the UK's art market.⁴⁶ Similarly to museums, auction houses should abide by Codes of Ethics and due diligence obligations. Those higher standards that apply to museums, however, are not replicated for auction houses, as they do not hold the same public interest positions.⁴⁷ Nevertheless, standards of due diligence and ethical acquisitions are promulgated by the UK's Council for the Prevention of Art Theft.⁴⁸ This has also led to more provenance information cited in the catalogues of influential auction houses, such as Sotheby's and Christie's.⁴⁹ In spite of these calls for due diligence, auction houses remain shrouded in a culture of secrecy, or 'privacy', as they refer to it. Given their clientele of high net worth individuals, auction houses are bound by confidentiality and are traditionally not required to fully detail provenance of goods.⁵⁰ In the event that provenance is offered, auction houses can be vague, referencing a 'Swiss collector' or a private family collection as the object's source.⁵¹ Mackenzie and others highlight the case of Neil Kingsbury as an example of the failure of auction houses to carry out due diligence when acquiring cultural objects. Kingsbury was convicted of fraud for falsely representing to Christie's that he had inherited an Egyptian object from his uncle.⁵² With the help of authentication staff from the British Museum, it was revealed that this object had in fact been smuggled and that Christie's had failed in its duty to inquire further into Kingsbury's scheme. Although auction houses have been involved in the illicit trade, it should be noted that current anti-money laundering measures have put pressure on auction houses to comply

⁴⁶ British Art Market Federation (n 31) 2.

⁴⁷ Ulph and Smith (n 1) 194.

⁴⁸ *ibid* 195.

⁴⁹ Simon Mackenzie and others, *Trafficking Culture: New Directions in Researching the Global Market in Illicit Antiquities* (1st edn, Routledge 2020) 66.

⁵⁰ *ibid* 14.

⁵¹ *ibid* 68.

⁵² *ibid* 70.

more closely with due diligence and reporting obligations.⁵³ Ulph argues that the promulgation of these measures has encouraged auction houses to guard themselves from shadier business transactions.⁵⁴ This element of anti-money laundering measures and their impact on the illicit market will be analyzed in the next chapter.

3.4.3 Scholars and Conservators

In addition to museums and auction houses, scholars and conservators can also play a part in the illicit trade. Although one must not overlook the ‘activist’ scholars that urge for the UK to effectively combat the illicit trade,⁵⁵ other professionals can be exploited for their expertise. Traffickers can employ conservators to remove dirt from objects and to clean them from any information that might reveal their source.⁵⁶ This was seen in the case of *HM Revenue and Customs v Rias Issa Mohamad al-Qassas*.⁵⁷ This case involved a statue that had been smuggled from Libya and sent through a complex network of traffickers, eventually arriving to a conservator for valuation.⁵⁸ The conservator, through his actions of cleaning and appraising the item, unknowingly removed evidence of theft and aided in the illicit trade of this statue. Although the item was eventually discovered to be trafficked and the criminal network uncovered, this case demonstrates how conservators can contribute to the illicit trade when working in conjunction with traffickers.

With regard to due diligence and other ethical guidelines, the Institute of Conservation (“ICON”) does stipulate guidelines that professionals should follow when dealing with cultural objects. However, Brodie argues that the guidelines are not stringent enough and do not elaborate on due diligence requirements.⁵⁹ Brodie cites the conservator’s action in the above Libyan case as an example of the failure of professional ethical guidelines. The conservator in the *Mohamad al-Qassas* case was not found to be in violation of guidelines, as he successfully argued that he did not have any knowledge of the illegality of the

⁵³ Derek Fincham, ‘Arts, Antiquities, and Money Laundering’ (2023) 111 Kentucky Law Journal 310, 339.

⁵⁴ Janet Ulph, ‘The Impact of the Criminal Law and Money Laundering Measures upon the Illicit Trade in Art and Antiquities’ (2011) 16 Art Antiquity & Law 39, 49.

⁵⁵ Mackenzie and Green (n 3) 142.

⁵⁶ Ulph and Smith (n 1) 110.

⁵⁷ *HM Revenue and Customs v. Riad Issa Mohamad al-Qassas* [2015] Westminster Magistrates Court, 1 September.

⁵⁸ Neil Brodie, ‘The Role of Conservators in facilitating the theft and trafficking of cultural objects: the case of a seized Libyan statue’ (2017) 48 Libyan Studies 117, 118.

⁵⁹ *ibid* 121.

statue and had exercised enough due diligence on his part.⁶⁰ In addition to the work of conservators, academics can also be approached by traffickers to authenticate items. This academic research into items, as demonstrated in the British Library case from earlier in this section, can create market demand for items and increase looting in source countries.⁶¹ However, it has been argued that in recent years due to the threat of prosecution under certain measures, both conservators and academics have been wary of involving themselves in these dealings.⁶² Although many professionals refuse to be involved with items of dubious provenance, Brodie still argues that the involvement of a few can have a disproportionate effect of spurring on the illicit market.⁶³

3.4.4 Law Enforcement and Customs Agents

Before addressing the role that dealers play in the illicit trade, the role of law enforcement agents that are involved in the regulation of this crime should be considered. The UK has a dedicated Art and Antiquities Unit situated in London's Metropolitan Police that is composed of researchers and part time constables that specialize in art crime.⁶⁴ The Unit also manages the London Stolen Art Database and was initially successful in recovering stolen artwork. However, this Unit has substantially downsized in recent years and is underfunded. In 2017, the Unit took a hiatus from investigation.⁶⁵ Although it did return back to active duty, by 2022 it was composed of only five individuals.⁶⁶ The scaling back of police involvement and the years off duty are indicative of this criminal activity not being prioritized by law enforcement. Although society might understand policing as important in the regulation of this crime, law enforcement is limited through a lack of funding and a public antipathy to this crime that does not endanger many lives domestically.⁶⁷ In addition to the police, customs agents also play a role in curbing and regulating the trade. As the UK thrives as an import destination for the illicit trade, customs agents at ports or airports are often tasked with recognizing illicit cultural goods. However,

⁶⁰ ibid 120-121.

⁶¹ Ulph and Smith (n 1) 111.

⁶² Brodie (n 58) 118.

⁶³ ibid.

⁶⁴ Naomi Oosterman, 'Regional Overviews of the Policing of Art Crime in the European Union' in Saskia Hufnagel and Duncan Chappell (eds), *The Palgrave Handbook on Art Crime* (Palgrave Macmillan 2019) 226.

⁶⁵ ibid.

⁶⁶ Metropolitan Police, 'Officers in Art and Antiquities Unit from April 2019 to April 2022' (Met-Police.UK, 2022) <https://www.met.police.uk/foi-ai/metropolitan-police/d/april-2022/of-ficers-art-antique-unit-april2019-april2022/> (accessed 5 April 2025).

⁶⁷ Kerr (n 13) 86.

customs agents tend to be limited in their knowledge of cultural goods and cannot be solely relied upon to stop these goods from entering into the country.⁶⁸ Quite remarkably, the UK government has in recent years countered that police and customs agents are well equipped to handle the illicit trade. This overstatement will be critically analyzed in the final chapter that examines the impact of Brexit on the market.

3.4.5 Antiquities Dealers

The final actors that will be analyzed in this section are the antiquities dealers, who are arguably the most important players in the perpetuation of the illicit trade. Mackenzie argues that dealers are at the center of the illicit trade, as their activities provide a source of demand for cultural objects and continue to drive the market.⁶⁹ Their attitudes towards the trade are also illustrative of how the grey market continues to thrive in the UK. In their criminological studies of dealers, academics have highlighted how dealers justify their central roles. Mackenzie argues that there is a culture of self-protection and ignorance that permeates the attitudes of dealers.⁷⁰ Dealers also justify their actions as a means to save items that would otherwise be destroyed in their source country, much like the attitudes that have been analyzed in the involvement of the British Library in its 1994 acquisition.⁷¹ Mackenzie highlights that the dealers that he interviewed possess an entitlement to buy goods.⁷² This entitlement to buy cultural objects is reminiscent of the entitlement that has been demonstrated in the UK since colonial times and is merely a continuation of the narrative of cultural goods as 'capital for the nation'. Lastly, techniques of neutralization are employed by dealers. They argue that since the harmful effects of the trade are not felt in their destination countries, the actions that they take occur *after* the harm has been done and they should not be held liable.⁷³ These attempts at justifying their participation in the grey market demonstrate how dealers avoid the responsibility of the harm that this crime creates globally. When dealers are not adequately deterred from continuing

⁶⁸ Mackenzie (n 4) 252.

⁶⁹ Simon Mackenzie, 'Illicit Deals in Cultural Objects as Crimes of the Powerful' (2011) 56 *Crime Law & Social Change* 133, 133.

⁷⁰ Simon Mackenzie, 'The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market' in Stefano Manacorda and Duncan Chappell (eds), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property: Prevalence, Laws and Strategies for Prevention* (Springer 2011), 74.

⁷¹ Ulph and Smith (n 1) 20.

⁷² Mackenzie (n 4) 249.

⁷³ Mackenzie (n 69) 142.

their involvement with the illicit trade, the grey market that they drive only continues to grow.

Despite the overwhelming evidence that dealers drive the illicit trade in the UK, they are also not exempt from due diligence obligations and Codes of Ethics. In the UK, the Council for the Prevention of Art Theft drafted a Code of Due Diligence that dealers in antiquities should abide by.⁷⁴ However, due diligence obligations remain as vague for dealers as they are for auction houses and other actors explored earlier in this chapter. Although the Antiquities Dealers Association in the UK has a Code of Conduct that sets out due diligence requirements in some detail,⁷⁵ the literature has argued that dealers largely operate in a system of self-regulation. Green and Mackenzie argue that dealers are lightly regulated and can always claim that they have complied with due diligence obligations to the best of their ability.⁷⁶ The self-regulatory environment dealers operate in effectively means that regulation will depend on the amount that any individual dealer is willing to exercise.

Ultimately, this creates a fragmented regulatory environment where the individual dealer can craft their own regulation. It has been argued that the culture of secrecy and the economic incentive in participating in the grey market, destroys any notion of self-regulation being able to effectively curb the illicit trade.⁷⁷ This lack of an effective regulatory framework could be attributed to the white-collar power of the dealers. According to Mackenzie, dealers are not powerful in the traditional understanding of power – either by number or corporate structure – but rather by the political and cultural connections that they maintain through their clientele.⁷⁸ Given their connections, dealers have the tremendous power to lobby the government and lawmakers to ensure that their regulatory system remains ineffective, enabling them to carry out their activities in the grey market. This power of the dealers will be examined in more detail in the following chapter which analyzes how these actors were able to insert themselves into their own regulatory process.

3.5 Conclusion

As demonstrated in this chapter, the trade in cultural objects remains culturally and economically important in the UK. This chapter first analyzed the his-

⁷⁴ Ulph and Smith (n 1) 195.

⁷⁵ Antiquities Dealers Association, 'Code of Conduct' (ADA.co.uk, 2022) <https://theadaco.uk/code-of-conduct/> (accessed 5 April 2025).

⁷⁶ Mackenzie and Green (n 38) 163.

⁷⁷ Mackenzie et al (49) 34.

⁷⁸ Mackenzie (n 69) 138-140.

torical significance of the trade in cultural goods, arguing that the history of the trade is tied to the UK's colonial past and desire to accumulate goods as 'capital for the nation'. Through the section that highlighted trade routes and notable cases in the trade, it was then demonstrated that the UK's market is effectively 'grey', and its legitimate market is always tainted with the potential of the circulation of illicit goods. The first section of the chapter concluded with an overview of the economic importance of the trade, highlighting that the government has a vested interest in returning import levels to pre-Brexit levels. Lastly, the role of the central actors that facilitate or regulate the grey market was analyzed. It was argued that, in spite of ethical guidelines, these actors overwhelmingly operate in a self-regulatory environment that does not deter them from engaging in the illicit trade. Ultimately, this chapter provided the background for the importance of the trade domestically and how powerful trade participants facilitate crimes through their lightly regulated environments. The trade lobby's influence in the creation of 'performative regulation' is the subject of the following chapters of this paper.

4 The Domestic Legal Framework to Combat the Illicit Trade

4.1 Introduction

This chapter outlines the legal framework in the UK to combat the illicit trade in cultural property. Although this chapter addresses the domestic legal framework that continues to be in place to this day, it does not confront the specific changes that have occurred following Brexit, as this will be examined in the final section of this paper. This chapter begins the dive into the domestic legal regime by offering a detailed critique of the criminal law measures that exist in the country. It will be argued that in spite of some promising developments, such as the promulgation of anti-money laundering regulations, the overall legal regime is fragmented and has not been a robust enough deterrent to stop actors from participating in the illicit trade. Next, the two specific instruments that address the illicit trade – the Dealing in Cultural Objects (Offences) Act 2003 (“2003 Act”) and the Cultural Property (Armed Conflicts) Act 2017 (“2017 Act”) – are examined. Through an analysis of the creation of these instruments and the parliamentary rhetoric that accompanied them, it will be argued that they can be understood as forms of ‘performative regulation’. As the trade lobby was present in the crafting of these instruments, these Acts were intentionally crafted to be ineffective and to allow the grey market to continue to thrive in a lightly regulated environment. Lastly, the European Union laws that were in place prior to Brexit are examined. Through the 2009 Export Regulation, the 2014 Return of Cultural Objects Directive, and the 2019 Import Regulation, the EU has created a harmonized framework that the UK had previously benefited from. However, this chapter also concludes by contemplating whether the EU’s framework could be deemed ‘performative’, arguing that the EU’s regime should not be viewed as infallible. Ultimately, it will be contended that the UK’s legal framework is unable to effectively curb the illicit trade due to the powerful trade lobby’s influence in crafting its own weak regulation.

4.2 Criminal Law Measures: A Fragmented Framework

This chapter begins by examining the central criminal law measures that target the illicit trade. This section will not analyze all measures or explore the civil law, as this would be outside the scope of this paper. In terms of the UK’s specific criminal law offences in this field, the UK fiercely protects its own cultural heritage. The Treasure Act 1996 requires that people report to the au-

thorities all items that they find in the UK that appear to be 'treasure' for the purposes of the Act in order to avoid prosecution.⁷⁹ This Act is complemented by the Ancient Monuments and Archaeological Areas Act 1979, which preserves sites of archeological value in the country.⁸⁰ However, prosecutions under this Act are costly and offences limited to a small category of scheduled monuments.⁸¹ A central instrument that targets not only domestic cultural property is the Theft Act 1968. Given prosecutorial familiarity with this Act, this is the instrument that is used most frequently in this field.⁸² For the purposes of the illicit trade where the theft most likely occurred outside of the UK, the prosecution needs to prove that the theft took place abroad.⁸³ This could be straightforward if the criminal breaks patrimonial laws which vest cultural objects as property of the state, but might be more challenging to prove in other scenarios. In addition to the Theft Act, the Bribery Act 2010 and the Fraud Act 2007 can also be engaged. For instance, had the Bribery Act been in effect during the prosecution of Tokeley-Parry described in the previous chapter, he might have also been convicted under this Act.⁸⁴ Fraud could also be used to prosecute a seller for misrepresenting the country of origin or falsifying provenance documentation, a pattern that occurs frequently in the illicit trade.⁸⁵

Another set of laws in the UK relate to the export of cultural objects. The central domestic piece of legislation that governs exports is the Export of Objects of Cultural Interest (Control) Order 2003. Any object deemed of cultural interest requires an export license to be issued on behalf of the state by the Secretary of State for Culture, Media, and Sport.⁸⁶ These licenses are granted with deference to the Waverley Criteria, which were introduced to protect important domestic cultural objects from being exported outside of the country.⁸⁷ Ulph and Smith argue that this export system, and specifically the EU licensing system that was in place prior to Brexit, could be helpful in the reduction of the illicit trade. They argue that the system provides a record of cultural objects and mandates provenance checks prior to export, making it more likely

⁷⁹ Roger Bland, 'The United Kingdom as a Source Country: Some Problems in Regulating the Market in UK Antiquities and the Challenge of the Internet' in Simon Mackenzie and Penny Green (eds), *Criminology and Archeology: Studies in Looting Antiquities* (Hart Publishing 2009), 86.

⁸⁰ Ulph and Smith (n 1) 92.

⁸¹ *ibid* 92.

⁸² *ibid* 99.

⁸³ *ibid* 99.

⁸⁴ *ibid* 118.

⁸⁵ *ibid* 121.

⁸⁶ *ibid* 123.

⁸⁷ *ibid* 124.

to stop the trafficking of goods.⁸⁸ However, Kersel counters that the UK's export framework is better suited to the protection of its own cultural heritage than the curbing of the illicit trade.⁸⁹ As export licenses are freely granted, the UK routinely benefits from the cultural heritage of other countries being sold past its borders.⁹⁰ Another law that confronts both imports and exports in this field is the Customs and Excise Management Act 1979. This instrument provides powers and penalties to relevant authorities as it pertains to illicit imports and exports of cultural property. However, this Act can be difficult to prosecute under, given the secretive nature of the trade and the ability for traffickers to smuggle objects undetected across borders.

As referenced in the previous chapter, the UK has also enacted domestic law in line with the state's obligations under the United Nations Security Council Resolutions ("UNSCR"). These resolutions, notably UNSCR 1483, were enacted to deter the removal of cultural goods from conflict zones and to protect vulnerable cultural heritage. The UK enacted these resolutions through the Iraq (United Nations Sanctions) Order 2003, which made it an offence to possess or deal with cultural objects illegally removed from Iraq past a certain date.⁹¹ This was relevant for the UK as London was historically an important market for goods from the Middle East.⁹² As Brodie argues, the effect of this Iraq Order in 2003 was an almost complete depression of sales of these goods in auction houses.⁹³ As the Order espouses a strict burden of proof where the possessor needs to prove the legality of the object,⁹⁴ it is evident why public facing auction houses would refrain from participating in sales that can easily lead to prosecution. A similar piece of legislation has been created for the conflict in Syria, namely the current Syria (The Syria (United Nations Sanctions) (Cultural Property) (EU Exit) Regulations 2020.

Lastly, the rise of anti-money laundering ("AML") measures should also be analyzed. Money laundering is the process by which the origins of property acquired through illegal activities are concealed and made to appear as if they

⁸⁸ *ibid* 125.

⁸⁹ Morag Kersel, 'From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities' in Neil Brodie et al (eds), *Archaeology, Cultural Heritage, and the Antiquities Trade* (University Press of Florida 2006) 192.

⁹⁰ *ibid*.

⁹¹ Korsvoll (n 44) 21.

⁹² Neil Brodie, 'The Plunder of Iraq's archaeological heritage, 1991-2005, and the London antiquities trade' in Neil Brodie et al (eds), *Archeology, Cultural Heritage and the Antiquities Trade* (University Press of Florida 2006), 215.

⁹³ *ibid* 217.

⁹⁴ Korsvoll (n 44) 21.

derived from legitimate means.⁹⁵ Through the various steps in money laundering – placement, layering, and integration – the market in art and antiquities is especially vulnerable to criminals who seek to launder their illicit proceeds.⁹⁶ Once criminal proceeds are used to purchase cultural objects, the lack of safeguards in the grey market renders it challenging to uncover the origin of funds.⁹⁷ In order to combat this risk, the UK's AML regulations are a powerful tool. For instance, the Proceeds of Crime Act 2002 can be used to prosecute art market participants, such as dealers and auction houses, who are involved in money laundering through their normal commercial activities.⁹⁸ Ulph and Smith argue that the mens rea element is more readily established for this offence – with no dishonesty required – and that art market participants should take care to report money laundering suspicions in order to avoid prosecution.⁹⁹

In recent years, AML measures have expanded in both the European Union and the UK. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 stipulate that art market participants involved with transactions of monetary values over a certain threshold, should take better due diligence steps and conduct risk assessments.¹⁰⁰ Information on clients should also be collected and reported to prevent prosecution if money laundering has occurred. This has been further bolstered by the Fifth EU Anti-Money Laundering Directive ("5AMLD") which came into force in 2020 in the UK. An important shift from this 5AMLD is that dealers were for the first time included in the regulated sector. This effectively signals that dealers should also improve due diligence obligations to avoid prosecution.¹⁰¹

In terms of the impact of the AML measures on the illicit market, Ulph argues that these measures will become an increasingly potent tool to combat this crime.¹⁰² As the mens rea element can be easily established and art market participants are now part of a regulated sector for the purposes of AML, it could be argued that the deterrent effect is substantial. Dealers and auction houses

⁹⁵ Ulph and Smith (n 1) 101.

⁹⁶ Fincham (n 53) 313.

⁹⁷ *ibid* 315.

⁹⁸ Saskia Hufnagel and Colin King, 'Anti Money Laundering Regulations and the Art Market' (2020) 40 *Legal Studies* 131, 142.

⁹⁹ Ulph and Smith (n 1) 104.

¹⁰⁰ Department for Digital, Culture, Media and Sport, 'Explanatory Memorandum to the Introduction and the Import of Cultural Goods (revocation) regulation 2021' (2021) https://www.legislation.gov.uk/ukxi/2021/1087/pdfs/ukxiem_20211087_en.pdf (accessed 5 April 2025) 5.

¹⁰¹ Hufnagel and King (n 98) 144.

¹⁰² Ulph (n 54) 41.

are required to conduct more due diligence for higher value transactions and thus are perhaps less likely to engage with the illicit trade. The impact on the market is best attested to by the British Art Market Federation publishing an updated guideline for art market participants outlining what to expect from the newly expanded AML laws.¹⁰³ Many have applauded the UK's stringent system and argue that other market states should learn from the UK's approach.¹⁰⁴ However, Hufnagel and King counter that prosecutions are rare for money laundering and that AML measures might have unanticipated consequences on the field.¹⁰⁵ They argue that these measures might create harmful effects on the market and that they cannot be a 'panacea' for the regulation of the illicit trade.¹⁰⁶ Ultimately, it can only be concluded that the effects of this expanded AML regime are yet to be monitored and further researched in coming years. Perhaps they will live up to their promises and slowly reduce the involvement of key players in the trade, but that is yet to be confirmed.

As has been demonstrated in this section, the UK does have a variety of criminal law measures in place to combat the illicit trade. However, this system is fragmented and incohesive, rendering prosecutions rare in practice. Although the Theft Act and the rise of AML measures in the last years is promising, the UK's fragmented system has not yet achieved the country's publicly espoused goal of reducing the illicit trade. The next section will analyze the two central criminal law measures that specifically target the illicit trade, demonstrating that these instruments have also not been as powerful as initially claimed.

4.3 Central Criminal Law Measures that Target the Illicit Trade

This section examines two instruments from 2003 and 2017 that specifically address the illicit trade. In order to provide the context for these instruments, it should be noted that the UK, in line with other market states, has been reluctant to ratify the central international law instruments in the field. The UK only ratified the 1970 UNESCO Convention in 2002, following increased in-

¹⁰³ British Art Market Federation, 'Guidance on Anti-Money Laundering for UK Art Market Participants' (6 February 2023) <https://tbamf.org.uk/wp-content/uploads/2023/02/BAMF-AML-Guidelines-February-6th-2023.pdf> (accessed 5 April 2025).

¹⁰⁴ Lauren A. Turner, 'Regulating the "Unregulated": The European Union and the United Kingdom Have Put in Place Anti-Money Laundering Directives for the Art Market. Should the United States follow?' (2024) 56 Case W. Res. J 611, 619.

¹⁰⁵ Hufnagel and King (n 98) 145.

¹⁰⁶ *ibid* 133.

ternational pressure to do so.¹⁰⁷ Similarly, the Hague Convention for the Protection of Cultural Property 1954 was only formally ratified in 2017. However, the UK has not yet ratified the more vigorous 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, due to time limitation concerns and the negative impact that the market might face.¹⁰⁸ The following sections will examine the specific legal instruments that have been adopted as a result of the UK ratifying international conventions. The drafting of the 2003 and 2017 Acts will be analyzed, stressing the role that art market participants had in crafting their own regulation. It will be argued that these two legal instruments are forms of ‘performative regulation’ that have not substantially impacted the illicit market or met their overstated claims.

4.3.1 Dealing in Cultural Objects (Offences) Act 2003

The central piece of legislation that targets the illicit trade in cultural property is the Dealing in Culture Objects (Offences) Act 2003 (“2003 Act”). This Act establishes the offence of acquiring, disposing, importing or exporting unlawfully removed cultural objects.¹⁰⁹ To understand why this Act was impactful at least on paper, one should first examine its legislative history. Prior to the 2003 Act, there was a gap in the domestic legislation, whereby there was no general criminal offence that covered handling goods illegally exported from a source country.¹¹⁰ This lacuna in the law was addressed by the Minister of the Arts in 2000 through the creation of a Ministerial Advisory Panel on the Illicit Trade in Cultural Objects (“ITAP”).¹¹¹ ITAP was also spurred on by activist archaeologists that highlighted the role of the UK in the illicit trade and the need for the criminal law to fill this lacuna.¹¹² The Panel ultimately recommended that the UK accede to the 1970 UNESCO Convention and create a specific criminal offence that targets the illicit trade. These recommendations circulated Parliament as a Private Member’s Bill, marketed as an opportunity for the government to respond to the cultural destruction taking place during the war in Iraq.¹¹³

¹⁰⁷ Maja R. J. Dehouck, ‘Balancing Markets, Morals and Law: The Fight to Regulate Illicit Trafficking in Cultural Goods and the EU Regulation on the Import of Cultural Goods’ (2019) 24 *Art Antiquity & Law* 1, 26.

¹⁰⁸ Mackenzie and Green (n 3) 145.

¹⁰⁹ Department for Digital, Culture, Media and Sport (n 100) 4.

¹¹⁰ Ulph and Smith (n 1) 127.

¹¹¹ Mackenzie and Green (n 3) 142.

¹¹² *ibid.*

¹¹³ *ibid* 147.

Throughout the passage of the Bill in Parliament, several politicians active in the trade affirm that the Bill is necessary and that the illicit trade should be curtailed. However, they also reiterate that any legislation must not deter the legitimate market or render it more difficult to conduct business.¹¹⁴ Richard Allan, in support of the Bill, stresses that legitimate dealers should have “nothing to fear” from this legislation, as the impact on them would be minimal.¹¹⁵ Lord Brooke of Sutton Mandeville, a pro-market member of the House of Lords with ties to the British Art Market Federation, argues that the country’s art market is recognized globally for its expertise and has a reputation for abiding by the law.¹¹⁶ His speech blames the illicit market on a few ‘bad apples’ in the trade, suggesting that this Act would be an adequate response from the UK to deter these individuals. As seen through these speeches from Parliament, it is evident that the government prioritized the needs of the art market over the need to criminalize the illicit trade. Although it was argued initially that the creation of the 2003 Act sent a strong message to the world that the UK was committed to upholding international standards,¹¹⁷ this paper will refute this argument by demonstrating that this legislation was merely a form of ‘performative regulation’.

Green and Mackenzie in their article from 2008 coined the notion of ‘performative regulation’ with specific regard to the role of art market participants in the creation of the 2003 Act. They argue that the presence of the trade at all stages of the legislative process, resulted in white collar criminals designing legislation to protect their business interests.¹¹⁸ Although this paper does not suggest that all market participants are white collar criminals or dishonest in their trade, it cannot be denied that the trade purposefully injected itself in the regulatory process to craft an Act that would be ‘toothless’, or ineffective, in practice. The trade’s support of the legislation was strategic, as it preferred to play a role in crafting its own lenient regulation rather than having more aggressive rules thrust upon it.¹¹⁹ The market participants achieved their aims through a variety of methods. Through their power, as explored in the first chapter, dealers and auction houses were able to use their connections to serve as lobbyists and become members of the ITAP Panel.¹²⁰ It is argued that from the beginning of the discussions in ITAP, the debate was geared towards

¹¹⁴ *ibid.*

¹¹⁵ HC Deb 4 April 2003, vol 402, cols 1221-1222.

¹¹⁶ HL Deb 12 September 2003, vol 652, cols 546- 548.

¹¹⁷ David Gaimster, ‘Measures against the illicit trade in cultural objects: the emerging strategy in Britain’ (2004) 78 *Antiquity* 699, 701.

¹¹⁸ Mackenzie and Green (n 3) 141.

¹¹⁹ *ibid* 151.

¹²⁰ Mackenzie et al (n 49) 43.

market interests, as all decisions were framed around the question of what kind of regulation the trade itself would accept.¹²¹ Ultimately, the trade's powerful lobby resulted in the creation of a toothless piece of legislation.¹²² Performative regulation, as outlined earlier in this paper, is regulation that is not formulated to solve an issue, but rather to create the *appearance* that the problem is being addressed.¹²³ The performative nature of the 2003 Act is shown by the interaction of the trade lobby and the government. Green and Mackenzie argue that there was not any indication that the government, influenced by the trade lobby, had any serious desire to stop the trade.¹²⁴ In fact, the economic value of the grey market and the political influence of the dealers were all factors that legislators considered when drafting this Act.¹²⁵ Therefore, there is a strong argument to be made that the UK only 'performed' through this Act, to both domestic and international audiences, that it was adequately doing its part to curb the illicit trade.

The toothless and performative nature of the Act has been proven repeatedly in the past two decades since its enactment. Academics that have highlighted the fatal flaws in the Act stress the following three issues: the proof problem, the narrow scope of the Act in practice, and the reception of the Act by professionals. The central issue is the problem of proof, more specifically the difficulty in establishing all of the elements of the offence. The mens rea of 'knowing or believing' will not be established by mere suspicion on the part of an art market participant or their failure to carry out due diligence steps.¹²⁶ Green and Mackenzie argue that given the power of the dealers in drafting the Act, this mens rea element was intentionally watered down, as the trade lobby would not accept higher standards.¹²⁷ Issues of proof are also compounded by the small amount of paper records left in the secretive trade, making it difficult for the prosecution to establish the required evidence in cases.¹²⁸ The difficulty to establish proof of the offence is so severe that this Act remains at the bottom of the offences that the police and prosecutors use in this field.¹²⁹

Next, the scope of the Act is limited in terms of the objects that are encompassed in it. The 'tainted' element of the offence, as described in section two of the Act, does not include within its definition illegally exported cultural prop-

¹²¹ Mackenzie and Green (n 3) 143.

¹²² *ibid* 148.

¹²³ *ibid* 139.

¹²⁴ *ibid* 150.

¹²⁵ Mackenzie et al (n 49) 45.

¹²⁶ Mackenzie (n 4) 260.

¹²⁷ Mackenzie and Green (n 38) 162.

¹²⁸ Mackenzie (n 70) 73.

¹²⁹ Mackenzie and Green (n 38) 160.

erty.¹³⁰ Green and Mackenzie argue that this choice in crafting the wording as ‘tainted’ cultural objects limits a considerable amount of goods from the scope of the Act.¹³¹ Lastly, the reception of the Act by professionals has demonstrated that the trade is well aware of the Act’s shortcomings. Market participants are aware that the Act does not require them to increase due diligence or change their business habits. This was expressly confirmed by the Department of Culture, Media, and Sport in 2004 when it issued reassuring guidance to art market participants, stating that they do not need to change their normal habits.¹³² Although Green and Mackenzie argue that some dealers have changed their habits out of fear of prosecution, they ultimately conclude that the Act fails on its deterrent premise.¹³³ This conclusion has been proven right, as in the nearly two decades since its enactment, the Act has only generated one prosecution in 2016 in a domestic theft case.¹³⁴ The toothless nature of the Act has only reinforced the argument that the Act was merely adopted as a performative gesture by the government.

4.3.2 Cultural Property (Armed Conflicts) Act 2017

In addition to the 2003 Act, the Cultural Property (Armed Conflicts) Act 2017 (“2017 Act”) is the second piece of legislation that specifically addresses cultural property. The 2017 Act prohibits dealing in cultural property unlawfully exported from occupied territory. This Act was created in response to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.¹³⁵ As of 2017, following a failed draft bill in 2008, the UK has implemented the 1954 Hague Convention and its protocols.¹³⁶ Although it is a positive development that the UK finally ratified the Convention, Jachec-Neale argues that this legislation is a mere formality, as the UK’s armed forces have de facto observed these rules for decades.¹³⁷ Moreover, the scope of this Act is incredibly narrow and only involves those goods which were exported from an occupied territory. This Act does not address any of the shortcomings of the 2003 Act or improve the possibility of criminal prosecution for participants in the illicit trade.

¹³⁰ Mackenzie (n 70) 73.

¹³¹ Mackenzie and Green (n 38) 155.

¹³² Ulph and Smith (n 1) 132.

¹³³ Mackenzie and Green (n 38) 165.

¹³⁴ Bursey (n 15) 345.

¹³⁵ Agnieszka Jachec-Neale, ‘UK’s Cultural Property (Armed Conflicts) Act 2017 – Legislation 60 years in Making’ (2017) 3 *Sant Art and Culture LR* 215, 216.

¹³⁶ *ibid* 219.

¹³⁷ *ibid* 232.

Based on the UK's governmental guidance on the 2017 Act and transcripts from Parliamentary debates, one could also argue that this Act is another form of 'performative regulation'. In the government's guidance on the Act, the government stresses that reputable dealers who gain temporary possession of cultural goods and discover later that these items were unlawfully exported, will not be subject to prosecution.¹³⁸ Although this is a reasonable stance for the government to take as to not unjustly punish dealers, it is remarkable that the government once again clearly emphasized that dealers should not fear the law. It appears that the government is only intent on prosecuting those proverbial 'bad apples', instead of changing the grey market culture that enables white collar criminals to thrive. This 2017 Act, like the 2003 Act, assures dealers that they do not need to fear prosecution as long as they carry out their regular forms of regulation. However, as examined earlier in this paper, these checks amount to self-regulation and have resulted in a fragmented regulatory framework that has facilitated the growth of the illicit trade. In that sense, this Act does very little to encourage dealers to change their habits in order to curb the illicit trade.

Lastly, some of the statements in the House of Commons during the passing of the Act reaffirm the importance that the government places on protecting market interests. Edward Vaizey argues that given the 'noble' profession of dealing in arts and antiquities, any dealer will report suspicion of trafficking immediately to authorities.¹³⁹ He argues that honest dealers, which he claims are the majority, do not have anything to fear from the 2017 Act. Tracey Crouch also stresses that the art market, and particularly the British Art Market Federation, was involved in the drafting of the Bill and was instrumental in explaining the potential impact of the Act on this 'important economic sector'.¹⁴⁰ In these statements, the influence of the art market in the drafting of its own legislation is again evident. Although the influence of dealers is not as explicit in the 2017 Act as compared to the 2003 Act, the pattern of 'performative regulation' being instigated through a powerful trade lobby is visible here. Another aspect of performance evident in the House of Commons debate, is that many politicians stress that the current legal system is strong enough to combat the trade and that the UK is 'sending a strong message' by formally accepting the 1954 Hague Convention. Karen Bradley argues that this 2017 Act will only give

¹³⁸ Department for Digital, Culture, Media and Sport, 'Guidance on the Cultural Property (Armed Conflicts) Act 2017' (2017) https://assets.publishing.service.gov.uk/media/5a82aa79e5274a2e8ab58b75/Guidance_on_s17_dealing_offence_-_final.pdf (accessed 5 April 2025) 5.

¹³⁹ HC Deb 31 October 2016, vol 616, col 714.

¹⁴⁰ HC Deb 31 October 2016, vol 616, col 738-741.

the system ‘teeth’ and more deterrence power.¹⁴¹ Through these statements, it is evident that politicians are ‘performing’ that the UK’s legal framework is robust enough and that the country is successfully curbing the illicit trade. Politicians do not address the actual problems that exist in the grey market or offer any sustainable solutions, rendering their statements merely performative. This performance has only been further confirmed by the fact that no prosecution has as of yet arisen from this Act.

4.4 The European Union Framework

To conclude this chapter, the European Union framework that was in place prior to Brexit will be examined. This section will only set out what EU law aimed to achieve, whereas an in-depth outline of the UK post-Brexit will be analyzed in the next chapter. Particular focus will be given to the Import Regulation from 2019, as the UK’s market thrives on imports and the majority of the literature has centered on this Regulation. Moreover, the potentially performative nature of EU import laws will also be contemplated, in line with the previous critiques made of the UK’s regulatory framework.

The literature highlights three central regulations that are in place in the EU: the Export of Cultural Goods from EU Regulation No 116/2009; the Return of Cultural Objects within EU, Directive 2014/60; and the Import of Cultural Goods within the EU, Regulation 2019/880. To begin with, the 2009 Export Regulation creates common export guidelines for cultural objects that are in the EU. This system depends on cooperation and mutual recognition between member states. If a national export license is granted, an EU license will normally be granted in recognition of national laws.¹⁴² The exporting system acts as a check for the lawfulness of exported cultural goods on two levels. These goods are first checked by the national authorities of member states and then by customs at export.¹⁴³ Hausler and Mackenzie-Gray Scott argue that the export of cultural goods in Europe is an area that is strengthened by mutual cooperation and all member states applying more safeguards on exports.¹⁴⁴ The next Directive from 2014 is one that simplifies the process for the return of cultural objects in the EU. This was deemed necessary after the abolition of customs controls in the EU, as people could easily remove cultural objects

¹⁴¹ HC Deb 31 October 2016, vol 616, col 701.

¹⁴² Vigneron and Granet (n 7) 284.

¹⁴³ *ibid* 284.

¹⁴⁴ Kristin Hausler and Richard Mackenzie-Gray Scott, ‘Outside the Debate? The Potential Impact of Brexit for Cultural Heritage in the UK’ (2017) 22 *Art Antiquity & Law* 101, 116.

from one member state and enter another without border controls.¹⁴⁵ In brief, the 2014 Directive aligns itself with the 1995 UNIDROIT Convention in terms of the process for return and extension of time limitations of cultural objects.¹⁴⁶ In the UK, this directive briefly closed a lacuna in the law, as English courts do not generally enforce foreign export laws.¹⁴⁷

However, arguably the most important and researched area for the EU in this context, is the 2019 Import Regulation. The Regulation was initiated to address the lack of import controls at borders for illegally exported cultural objects coming into the EU.¹⁴⁸ Vigneron and Granet argue that this effectively led to an increase of port shopping in the EU, as traffickers purposely exploited states with weaker import controls.¹⁴⁹ For London's art market in particular, this meant that the country's generous laws on imports were exploited by traffickers who funneled goods into the large art market.¹⁵⁰ This new Regulation sets out a uniform import and licensing system as a response to this issue. This Regulation aims to prevent illicit trafficking by ensuring that those who trade in cultural property provide evidence of the legality of their items.¹⁵¹ Many have heralded this Import Regulation as vital for the fight against illicit trafficking, as this more rigorous system should deter criminals from importing illegal cultural goods into the EU. However, this Regulation has also been sharply criticized, most prominently by art market participants. These actors have argued that the requirements are too strict and will substantially limit the legitimate market and flow of imports into the EU.¹⁵² Szabados, however, argues that this concern is overstated, as there has not yet been significant fall-back in the market due to this new system.¹⁵³ Nonetheless, the long term effect of the 2019 Import Regulation should be monitored in the next years, with specific regard to whether it is able to balance the need to curb the illicit trade with the interests of the legitimate art market.

As many academics have praised the EU's 2019 Import Regulation as an important step for the international community, it is vital for this paper to contemplate whether this new system is effective in substance or merely a form of 'performative regulation' to appease the public. The performative nature of the

¹⁴⁵ Vigneron and Granet (n 7) 283.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid* 284.

¹⁴⁸ *ibid* 286.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid* 287.

¹⁵¹ Peters (n 2) 385.

¹⁵² Tamas Szabados, 'The EU Regulation on the Import of Cultural Goods: A Paradigm Shift in EU Cultural Property Legislation?' (2022) 18 Croatian YB Eur L & Pol'y 1, 3.

¹⁵³ *ibid* 11.

EU framework has in fact been indirectly addressed by some academics with regard to the 2019 Import Regulation. Although academics have not expressly referenced 'performative regulation' as coined by Green and Mackenzie, they have alluded to some of the issues regarding the effective implementation of the 2019 Regulation. De Jong argues that if the Regulation is not implemented well, it runs the risk of becoming a 'paper tiger', or an instrument that is impressive on paper but not effective in reality.¹⁵⁴ This paper tiger analogy is similar to the manner in which Green and Mackenzie characterized the performative nature of the UK's own laws. De Jong also argues that some practical issues have not been resolved through the Regulation, specifically citing the role of customs. Given that customs agents are generally not trained to identify or respond to the complexity of the illicit trade in cultural property, the Regulation might fall short of effectively protecting these goods.¹⁵⁵ Some of these pitfalls might already be known to traffickers who will attempt to circumvent the Regulation and continue to grow the illicit market.¹⁵⁶

Another factor that can lend itself to a performative aspect of the Import Regulation is that the trade lobby was also present in its creation. Dehouck argues that lobbyists were able to change the initial provisions of the Regulation, specifically introducing minimum age thresholds for the law to apply and excluding objects of lower value.¹⁵⁷ Dehouck argues that the Regulation replicates some of the issues that have been encountered in national and international frameworks to combat the illicit trade. One of the main issues she cites is that the concerns of the legitimate art market are always weighed against the need to criminalize the illicit trade. This often leads to instruments that are not as effective as they should be in changing the market and discouraging participation in the trade.¹⁵⁸ Therefore, although this is speculative at this early point, it could be argued that the 2019 Import Regulation is also performative to some extent. As in the UK, the interests of the trade lobby might have penetrated the EU's framework to render the regime only effective on paper. As reiterated previously, however, the effects of the Regulation should be monitored closely in order to confirm or refute some of the academic warnings of this law's effectiveness.

¹⁵⁴ Anna M. de Jong, 'The Cultural Goods Import Regime of Regulation (EU) 2019/880: Four Potential Pitfalls' (2021) 7 *Santander Art & Culture L Rev* 31, 33.

¹⁵⁵ *ibid* 37.

¹⁵⁶ *ibid* 47.

¹⁵⁷ Dehouck (n 107) 36.

¹⁵⁸ *ibid* 37.

4.5 Conclusion

This chapter has outlined the domestic legal regime that the UK has adopted to combat the illicit trade. By first examining the specific criminal measures that the UK has adopted, it was demonstrated that the UK has created a fragmented system that renders prosecutions rare and does not effectively deter participation in the illicit trade. Although some criminal measures are better suited at deterring participants from becoming involved with the trade, such as the expansion of AML laws, the UK's overall regime is unable to stop this trade. This chapter then examined the 2003 and 2017 Acts that are marketed as the UK's central instruments in this field. Despite the initial promises that these measures would be effective, it has been argued that they are merely forms of 'performative regulation'. Powerful art market participants that were involved in the creation of both of these instruments were able to craft legislation that was effective only on paper and would not substantially change the grey market. Lastly, the European Union measures that exist to combat the illicit trade were also examined. Although the EU has created a harmonized framework in the field, it has also been argued that perhaps some of the EU's measures are also performative. To expand on the conclusions of this section, the following chapter analyzes the post-Brexit changes to the UK's legal regime and the extent to which the current framework fits into the pattern of 'performative regulation'.

5 Post-Brexit Challenges and ‘Performative Regulation’

5.1 Introduction

This chapter explores the post-Brexit challenges that have arisen in the UK’s legal framework. ‘Brexit’, namely the UK voting to leave the European Union, was the result of a referendum in 2016.¹⁵⁹ The decision to officially leave the EU in 2020 created difficulties for the UK’s cultural property regime regarding which EU laws to retain or revoke. In order to explore these changes, this chapter begins by examining the key challenges that Brexit has created for the trade in cultural goods. These challenges include: the revocation of the central EU measures in the field; the unique trade situation that has arisen in Northern Ireland; the complexities of the Windsor Framework; and the growth of freeports. Through these challenges, it is argued that the UK has adopted a deregulated legal regime that has rendered the country increasingly attractive to traffickers. Next, this chapter analyzes whether this new approach could also be deemed as a form of ‘performative regulation’, and is merely a continuation of the pattern of performance that has developed in this field. This is undertaken by analyzing the Parliamentary debate during the revocation of the EU’s 2019 Import Regulation and unraveling how the government publicly justified its decision to deregulate. It is argued that this current framework could also be understood as performative, as the government is continuing to only ‘perform’ that its deregulated system is able to curtail the illicit trade. This is a form of performance, given that the government’s statements contradict the reality of the UK’s deregulated legal framework and increasing concerns that the country will become a hub for the illicit trade. Moreover, it will be demonstrated that the trade lobby was also present in the government’s decision to continue in this pattern of performance. Lastly, this chapter ends with an analysis of both general and specific post-Brexit reform suggestions that could be implemented in the country. Through a variety of measures, such as strengthening due diligence requirements or introducing stricter import controls, it will be demonstrated that reform is urgently required. However, these reform proposals are also balanced with the acknowledgement that the current political climate does not appear to be open to these suggestions, thus rendering it difficult to change the UK’s grey market substantially.

¹⁵⁹ Vigneron and Granet (n 7) 277.

5.2 Post-Brexit Challenges

While the UK was a member of the EU, it benefited from the harmonized system that the Union has crafted. However, as the UK no longer forms part of the Customs Union, it was decided by the UK to revoke the central laws in the EU's cultural property regime. As a result, the UK has adopted a deregulated approach that runs counter to the stricter regime in most of Europe. As a consequence of this new approach, academics have warned of a number of challenges that have now arisen. First, the revocation of Regulation 116/2009 for the Export of Cultural Goods has resulted in the final check for goods coming from the EU now occurring outside of the UK. This can potentially limit the amount of goods entering the UK from the EU, as higher export standards are imposed in the EU.¹⁶⁰ This might cause a fall in imports, having a negative impact on the UK's antiquities market. In terms of the revocation of the Return of Cultural Goods Directive 2014/60, a gap has emerged in the UK's domestic law that was previously bridged by the EU's Directive. There are no longer any instruments that specifically facilitate the return of cultural goods exported illicitly, given that the UK generally does not enforce export laws of other jurisdictions.¹⁶¹

The most discussed EU Regulation, however, has been the 2019 Import Regulation that the UK has revoked. This Regulation was revoked by the Introduction and Import of Cultural Goods (Revocation) Regulation 2021, which will be examined in some detail in the following section. This decision to revoke has been controversial, with academics arguing that yet another gap is visible in the UK's domestic law that this EU legislation had briefly bridged.¹⁶² Vigneron and Granet argue that the existing domestic legal framework is not strong enough and does not address the same issues as the Regulation.¹⁶³ This has created a weaker domestic framework post-Brexit, where the level of protection for imports that exists in the EU simply no longer exists in the UK. Baumgartner warned prior to the revocation that without a uniform approach, gaps will appear in the UK that will put the country at a disadvantage from the more comprehensive approach that the EU has taken.¹⁶⁴ Others, like Rogers, have argued that the UK has made an enormous misstep by rejecting the 2019 Regulation that is both 'urgent and necessary' for the continued fight against

¹⁶⁰ Vigneron and Granet (n 7) 285.

¹⁶¹ *ibid* 284.

¹⁶² *ibid*.

¹⁶³ *ibid* 289.

¹⁶⁴ Tony Baumgartner, 'Tackling Art Crime and Obtaining Restitution of Cultural Property Post-Brexit' (2017) 22 *Art Antiquity & Law* 125, 129.

the illicit trade.¹⁶⁵ More fears have manifested from academics suggesting that the UK will become a hub for the illicit trade due to its revocation of this EU law.¹⁶⁶ Although no data has yet emerged in terms of the impact of the revocation on the illicit trade, this is a serious concern that the government has not adequately addressed. Conversely, as demonstrated in the last chapter, one could argue that the EU's framework is also performative and will not effectively curb the illicit trade. The academics that have been maintaining that the UK can only fight the illicit trade by reintroducing the 2019 Import Regulation, are perhaps overly eager regarding the impact of this EU law.

Another issue that has emerged in the UK has been the trade situation created by the Northern Ireland Protocol annexed to the UK-EU Withdrawal Agreement. This Protocol was created in response to the obligations of the Good Friday Agreement 1998, which put an end to the ethno-nationalist conflict in Northern Ireland. One of the central stipulations of the Good Friday Agreement was that a hard border would be avoided in Ireland.¹⁶⁷ Given that Northern Ireland is part of the UK and the Republic of Ireland is a member state of the EU, it was ultimately decided that the new border between the UK and the EU would be located in the Irish Sea. As a result of this sea border, this effectively means that Northern Ireland is obliged to comply with the EU's customs and internal market rules as it relates to trade.¹⁶⁸ With regard to the laws that target illicit cultural goods, this has created a framework where the EU's laws remain intact in Northern Ireland, but not in the rest of the UK. As Vigneron and Granet contend, a complex situation has arisen where different statutes and controls apply throughout the UK.¹⁶⁹ In terms of the potential impact on the illicit trade, traffickers will likely target the fragmented nature of the UK's laws and will exploit any areas where the law is unclear, or customs does not enforce it properly. This Northern Ireland framework has created a number of loopholes that the government may not have sufficiently considered when choosing to revoke EU regulations in all of the UK, apart from Northern Ireland.

¹⁶⁵ Fionnuala Rogers, 'Following the UK's Repeal of the EU Import Regulation in Great Britain, will Northern Ireland become a gateway to Europe for illicit cultural property?' (October 2021) <https://thinktank.theantiquitiescoalition.org/wp-content/uploads/2021/10/AC-Policy-Brief-9.pdf> (accessed 6 April 2025) 3.

¹⁶⁶ Peters (n 2) 386.

¹⁶⁷ Vigneron and Granet (n 7) 292.

¹⁶⁸ Billy Melo Araujo, 'The Windsor Framework and its Impact for Northern Ireland and EU-UK Relations' in Federico Fabbrini (eds), *The Law and Politics of Brexit: Volume V: The Trade and Cooperation Agreement* (Oxford University Press 2024), 67.

¹⁶⁹ Vigneron and Granet (n 7) 292.

Moreover, this has been further complicated by the advent of the Windsor Framework in 2023. Due to political disagreements over the initial framework agreed to between the EU and the UK, the Windsor Framework has attempted to design a system that imposes less trade barriers in the UK. This new system has created 'red and green lanes' for all goods moving from Great Britain – England, Wales, and Scotland – into Northern Ireland. Under the red lane, for those goods that are headed for the EU, a full check of customs and declarations applies.¹⁷⁰ Conversely, under the green lane, for those goods that are only headed for the UK, fewer checks and customs apply. With regard to the potential impact on the illicit trade, there has not been any research yet that has specifically highlighted the complexities of the Windsor Framework. However, there are several challenges that can be inferred from the Framework as it currently stands. For one, the Framework can only function properly if the UK is strict on labelling goods and ensuring that all goods are being sent through proper channels.¹⁷¹ In terms of the threat of trafficking, it is probable that goods can enter one country in the UK – without the Import Regulation 2019 applying – and enter Northern Ireland through the green lane. From there, goods can travel further on to the EU, by circumventing red lane arrangements, or continue to travel on to their final destination. It can be argued that the red and green lane system can only be effective if customs agents are sufficiently trained in the field of cultural property, and all declarations and forms are meticulously completed. However, this might not be the case as it relates to the illicit trade in cultural property. Traffickers often forge documentation, and law enforcement has not been trained to identify the illicit trade. As these challenges have demonstrated, it is clear that the Windsor Framework has opened another path for the illicit trade that has been made possible as a result of the UK revoking the EU's more stringent cultural laws.

A final challenge created by Brexit has been the government's proposal to expand the freeport project in the UK. Through the expansion of freeports, which are secure storage facilities located around airports and docks, trafficked cultural goods are likely to enter the UK without much inspection.¹⁷² Freeports are relevant for the art market, as the secrecy and tax exemptions that they provide have often been entangled with the illicit trade. For instance, the Geneva Freeport in the 1990s was linked to a network of looted antiquities

¹⁷⁰ CRG Murray and Jonathan Evershed, 'The Afterthought: Wales and the Operationalisation of Brexit' (2024) 28 *Edinburgh Law Review* 86, 92.

¹⁷¹ Araujo (n 168) 78.

¹⁷² Ruya Worthy, 'The Impact of Free Ports on the Art Market' (2020) 25 *Art Antiquity & Law* 253, 257.

that benefited from the freeport's confidentiality and ability to house goods for as long as required.¹⁷³ Although many freeports have been exposed in recent years for scandals relating to the illicit trade, they remain an attractive economic proposition for governments. For the UK specifically, its freeport project was spearheaded by politicians post-Brexit, citing the creation of these freeports as an avenue to attract investment and boost employment in the country.¹⁷⁴ As of 2025, several freeports that the UK's government had promised post-Brexit have been opened and others are in development.¹⁷⁵

Worthy argues that the UK's freeport project would have some competitive edge over other parts of Europe, given its position outside of the EU and its important harbor status.¹⁷⁶ However, freeports have also been cited as a potential pathway to rendering the UK more attractive to traffickers. Given the UK's important position in the global art market, it is evident that a large part of these freeports will be used for secure art storage.¹⁷⁷ Although freeports are 'obliged entities' under 5AMLD in the UK and must take precautions to monitor money laundering, Worthy argues that strict anti-money laundering regulations need to be in place in order to disincentivize trafficking.¹⁷⁸ As this new wave of freeports have recently become functional, it is worth monitoring the situation to examine whether there have been some indications of the illicit trade profiting from freeports.

More generally, there is a strong link to be made between the government announcing the expansion of freeports, notorious for their role in the illicit trade, and its decision to deregulate its cultural property regime. Perhaps it could be argued that the UK is economically motivated to deregulate, in order to attract more investment through freeports and increase the amount of imports to London's art market. Although this remains a speculative link, it is evident that the current deregulation and freeport expansion have created a system that can be easily exploited by traffickers that wish to take advantage of the UK's fragmented laws. This might provide an economic boost for the nation as imports rise, but the cost may well be the continued destruction and sale of global cultural heritage.

¹⁷³ ibid 266.

¹⁷⁴ ibid 260.

¹⁷⁵ Tom Espiner, 'UK pledges thousands of new jobs in freeports plan' BBC (London, 25 October 2024) <https://www.bbc.com/news/articles/c0j8w73pdn8o> (accessed 6 April 2025).

¹⁷⁶ Worthy (n 172) 254.

¹⁷⁷ ibid 255.

¹⁷⁸ ibid 254.

5.3 Performative Regulation Post-Brexit

As demonstrated in the previous section, the UK post-Brexit has developed a deregulated framework that has led to concerns that the state will further attract the illicit trade. However, what has not been expanded on in the literature, is the concept of ‘performative regulation’ as it regards the UK’s political decision to abandon the EU’s stricter guidelines. This section seeks to extend Green and Mackenzie’s analytical framework to the UK’s recent approach, by analyzing how the UK has publicly justified its decision to deregulate in this field. This will be done through an examination of a parliamentary debate in the House of Lords on the Revocation of the EU’s 2019 Import Regulation. This House of Lords debate provides insight into how the UK’s government ‘performs’ that its own framework is strong, whilst confronted with the reality of a weakened and exploitable legal regime.

At the start of the debate, Lord Parkinson of Whitley Bay argues in support of the revocation by stating that the legislation is ‘redundant’, as the UK is no longer part of the EU and the regulation is specifically created for member states.¹⁷⁹ Lord Parkinson continues by citing the government’s central arguments for revoking the 2019 Import Regulation. He first argues that the EU’s framework is complex and would only deter imports into the UK for sale on the legitimate art market.¹⁸⁰ This prioritization of the art market is reminiscent of the debate on the 2003 and 2017 Acts, and it demonstrates that the UK’s government likely continues to be influenced by a powerful trade lobby. The second point that he makes is that the UK already has sufficient means to tackle the trade. Lord Parkinson illustrates this argument by listing the many regulations that exist and the various international instruments that the UK has ratified.¹⁸¹ However, in a think tank piece, Rogers counters the government’s argument by stating that the UK’s current framework is more complex and deregulated than ever before.¹⁸² This has also been demonstrated throughout this paper, as it has been argued that the UK’s regime in this field is fragmented and can be deemed largely performative. Another point raised by Lord Parkinson is that Northern Ireland will not be used as a gateway for illicit goods, as this would be too expensive and lengthy for traffickers.¹⁸³ He also adds that the UK’s customs and border agents will do ‘their utmost’ to prevent illicit goods from entering into the UK and onwards from Northern Ireland.¹⁸⁴ Rogers coun-

¹⁷⁹ HL Deb 30 June 2021, vol 813, col 210 GC.

¹⁸⁰ *ibid*, col 211 GC.

¹⁸¹ *ibid*.

¹⁸² Rogers (n 165) 5.

¹⁸³ HL Deb 30 June 2021, vol 813, col 220 GC.

¹⁸⁴ *ibid*, col 221 GC.

ters that this will likely not be the reality, given that customs agents are not equipped for the illicit trade and that Northern Ireland's many loopholes can be exploited by traffickers.¹⁸⁵ Her arguments have also been echoed in the previous section of this paper, in addition to the challenges that the new Windsor Framework poses to the entire system.

As demonstrated by the government's position throughout the debate, the UK is once again 'performing' that its own laws can effectively tackle the illicit trade. However, this is contrary to the reality of the situation, where the illicit trade has not been effectively curbed due to the performative regulation adopted in this field. It appears that the UK's approach post-Brexit has been to continue in its tradition of 'performance' that has been evident in all major legal measures in the past decades. What is more remarkable in this post-Brexit era is that the UK's government is 'performing' its decision to *deregulate* as an example of its ability to effectively address the illicit trade. This is the first time that the government has politically performed a decision to revoke an instrument in this context. Nevertheless, 'performative regulation' can still be applied as an analytical framework here, as the government is merely peddling the appearance that its own deregulated system is robust, rather than creating a framework that is effective in substance.

It should also be acknowledged that several participants in the House of Lords debate publicly criticized the government's performative stance. Lord German cites two particular issues that he sees in the current regime, namely that the UK's current framework is not strong enough to prevent imports of illicit cultural goods and that the decision to revoke will lead to a loss of international reputation.¹⁸⁶ Lord Clement-Jones adds to Lord German's critique by stating that he believes that the government's decision to revoke has been due to "listening to the wrong advice" and being in "the pockets of the art dealers."¹⁸⁷ This particular argument is reminiscent of what Green and Mackenzie have argued was the reason for the toothless nature of the 2003 Act. Although this is speculative, this argument could be extended to the UK government's decision to deregulate post-Brexit. Perhaps dealers and art market participants lobbied the government to create a favorable framework for the market that did not include the 'unnecessary complexities' of the EU's regime. The prioritization of the art market was made clear by Lord Parkinson's opening statement in the House of Lords, as well as the explanatory memorandum that was released with the revocation. In point 7.2 of the memorandum, the government emphasizes that although it supports the stated aims of the EU Regulation,

¹⁸⁵ Rogers (n 165) 6.

¹⁸⁶ HL Deb 30 June 2021, vol 813, col 214-216 GC.

¹⁸⁷ HL Deb 30 June 2021, vol 813, col 217 GC.

it “has always been skeptical that the Regulation would achieve its aims and is concerned with the potential detrimental effects on the legitimate trade in cultural goods.”¹⁸⁸ These statements from the government could indicate that there had been some presence of the trade lobby in the decision to revoke, as there had been throughout all other major UK laws in this context.

The government’s response to the above critiques during the House of Lords debate further solidifies its performative stance. Lord Parkinson reiterates that the government does not believe that its own system is legally deficient by citing as proof that the UK has a “strong record of finding and returning unlawfully removed cultural goods.”¹⁸⁹ He adds that this strong record is enough to not damage the UK’s international reputation, as the government is continuing to do its utmost to fight the illicit trade outside of the EU’s framework. Lord Parkinson also responds to Lord Clement-Jones regarding his suggestion that the government is influenced by art market participants. He stresses the renowned reputation of the art market as evidence that it does not act in an ‘underhand way’ and argues that Lord Clement-Jones was wrong to speculate on the merits of the highly esteemed market.¹⁹⁰

The government’s response to these concerns raised in Parliament is demonstrative of the UK’s continued performance in this area, rather than addressing the real issues that underlie the illicit trade. By ‘performing’ that the UK and its art market are leaders in the protection of cultural objects, the government is attempting to craft an illusion of competence in spite of its controversial decision to deregulate. However, this image that the government has attempted to create, is in sharp opposition to the fragmented and complex reality post-Brexit and the serious challenges that deregulation poses. As this chapter has alluded to, there are perhaps a number of reasons as to why the government has decided to deregulate in regard to cultural property. In addition to prioritizing the concerns of the legitimate art market, the UK’s expansion of freeports will benefit from a deregulated system that encourages imports and investments. This economic concern post-Brexit seems to trump any actual concern for the protection of illicit goods entering the UK’s large import market. In this current situation, the UK is attempting to salvage its international reputation by continuing in its pattern of ‘performance.’ These motives remain speculative, but given the manner in which the literature has described the adoption of previous regulations in the UK, it can be argued that the decision to deregulate fits into this narrative of performance.

¹⁸⁸ Department for Digital, Culture, Media and Sport (n 100) 3.

¹⁸⁹ HL Deb 30 June 2021, vol 813, col 220 GC.

¹⁹⁰ *ibid*, col 221 GC.

5.4 Recommendations for Reform

Given the challenges that now confront the UK in the wake of Brexit's deregulation, this final section will analyze the potential avenues for reform. What should be stated from the outset, however, is that several recommendations provided by academics are perhaps unrealistic in the current post-Brexit political climate. Moreover, given the performative nature of the regulations that already exist, there could also be the challenge that any new regulations that might arise in this field would only follow in this established pattern of performance. Nonetheless, it is worthwhile to contemplate how to address the unique challenges in the UK in order to create a framework that can potentially curb the illicit trade.

As this paper has devoted much space to the specific criminal law measures that exist to tackle the trade, namely the 2003 and 2017 Acts, this is perhaps the best topic to begin this analysis with. The literature itself, however, does tend to be silent on the issue of how to reform these criminal measures. This is somewhat surprising as there has been much criticism on the toothless nature of these laws, including in the recent 2019 Import Regulation debate when Lord Clement-Jones reaffirmed that the laws are routinely unenforced.¹⁹¹ Perhaps this lack of any suggestion to change the criminal measures can be attributed to academics' awareness of the lack of political will to substantially reform these laws. Nonetheless, it could be argued that the 2003 and 2017 Acts would be fortified if the *mens rea* requirement were to be changed to encompass professionals who failed to make due diligence checks. If the failure to make standard due diligence requirements were to be criminally prosecuted through both the 2003 and 2017 Acts, the deterrent effect of the criminal law would be improved. Gerstenblith suggests a similar solution by arguing that a reversal of the burden of proof as it regards cultural property would be useful.¹⁹² This has been successful with the Iraq Order 2003, as the market declined with regard to Iraqi objects and dealers were fearful of prosecution. Once again, however, the prospects of the Acts themselves changing remain dismal in the current post-Brexit, deregulatory climate. As Mackenzie contends, there needs to be a shift in the culture of the grey market and a thorough understanding of market attitudes from the people that seek to regulate it.¹⁹³ The chances for radical reform to occur would require for this topic to gain more relevance on the current political agenda.

¹⁹¹ HL Deb 30 June 2021, vol 813, col 216 GC.

¹⁹² Patty Gerstenblith, 'Controlling the International Market in Antiquities: reducing the harm, preserving the past' (2007) 8 Chicago Journal of International Law 169, 187.

¹⁹³ Mackenzie (n 70) 82.

In terms of other regulations that might need to be adopted, the literature has continuously stressed that self-regulation has been ineffective in stopping the illicit trade. The UK's insistence that the market is able to adequately regulate itself to curb the trade has been proven wrong by the continued growth of the illicit trade throughout the decades. The sales data has shown that it is not in the financial interest of the market to 'clean up', as illicit goods remain on that same market fetching high prices.¹⁹⁴ If self-regulation is not functioning effectively to curb the trade, perhaps more regulation rather than deregulation needs to be considered in the UK. Mackenzie argues that regulations have proven ineffective in market states as they are missing a 'middle' layer.¹⁹⁵ In the UK, the top layer of regulation encompasses the criminal law measures that are generally performative and rarely used. The bottom level consists of self-regulation, where dealers and other players can exercise their own regulation without fear of prosecution. As Mackenzie puts it, the middle layer of administrative sanctions for people that fail to exercise due diligence is necessary.¹⁹⁶ This is a feature that the UK could explore rather than creating other criminal law measures that are in practice toothless and rarely used. However, as has been previously reiterated, this remains unlikely post-Brexit and would likely not be accepted by the powerful trade lobby.

Lastly, the culture around due diligence needs to be reformed. Although this paper has demonstrated that due diligence obligations do exist for professionals, oftentimes failure to comply with these obligations does not result in any sanctions. If dealers were to be punished effectively, either through the criminal law or administrative sanctions, then there would be a greater incentive to follow these due diligence criteria. In this sense, due diligence requirements should be formulated more clearly in guidelines and practical examples and scenarios should be taught to all art market participants. The anti-money laundering measures in the UK, as explored in a previous chapter, are perhaps the most promising in ensuring that actors comply with due diligence out of fear of prosecution. However, the effects of anti-money laundering regulations should be monitored, as well as their actual deterrent effect on the illicit trade.

To conclude this reform section, the unique post-Brexit challenges should be addressed. Several academics that have written about the impact of the post-Brexit laws have stressed that the system should urgently be reformed. Vigneron and Granet list some of the following as possible recommendations: entering into bespoke agreements with the EU regarding cultural property; modelling import controls after the 2019 Import Regulation; extending the ap-

¹⁹⁴ Mackenzie et al (n 49)114.

¹⁹⁵ Mackenzie (n 69) 146.

¹⁹⁶ *ibid.*

plicability of the 2003 Act to all parts of the UK; ratifying the 1995 UNIDROIT Convention; and monitoring freeports. As for the first argument, the UK is in a similar situation to Switzerland in terms of being able to create agreements to align itself with the EU framework. Hausler reiterates that this could be a solution for some of the issues caused by the revocation of EU laws, especially the EU Directive on the Return of Cultural Goods.¹⁹⁷ The UK could consider signing agreements with either individual member states or with the EU in order to bridge some of the gaps that have emerged in its legal framework.

Another point raised by academics is that the UK should model its framework based on the 2019 Import Regulation. According to Vigneron and Granet, import restrictions that adhere to those that exist in the EU should be adopted by the UK.¹⁹⁸ This would be a realistic solution that the UK could adopt that would bring it in line with the rest of the EU and would alleviate some of the disparities that have arisen in Northern Ireland. Rogers also adds to this argument by suggesting that the UK should require more information on import and declarations on provenance that correspond with the EU's framework.¹⁹⁹ However, any academic suggestions of re-introducing some aspects of the 2019 Import Regulation would likely not be successful in Parliament. As the House of Lords revocation debate has shown, the UK government is adamant that the 2019 Import Regulation is unnecessary and that it already has the means to tackle illicit imports. Moreover, it has also been argued in this paper that the 2019 Import Regulation could be deemed performative and should not be understood as a cure-all for the UK's challenges.

Another recommendation made by Vigneron and Granet is that the 2003 Act be extended to Northern Ireland and Scotland where it does not currently apply.²⁰⁰ This recommendation would be realistic and would help to bridge a fragmented system, but it does not appear that this is currently a topic that is being contemplated by Parliament. Moreover, the toothless nature of this Act that has almost never been invoked would most likely not have much of a deterrent effect in those countries. Vigneron and Granet also suggest that the 1995 UNIDROIT Convention be ratified.²⁰¹ This would send a message to the world that the UK is serious about combating the illicit trade, but could also be deemed performative if no additional laws are created to effectively implement it domestically. As for freeports, Vigneron and Granet echo Worthy's argument that the UK needs to regulate and monitor freeports to ensure that

¹⁹⁷ Hausler and Mackenzie-Gray Scott (n 144) 110.

¹⁹⁸ Vigneron and Granet (n 7) 294.

¹⁹⁹ Rogers (n 165) 9.

²⁰⁰ Vigneron and Granet (n 7) 295.

²⁰¹ *ibid.*

they remain within their legal limits.²⁰² This aspect should certainly be considered by the government, and it is important to monitor how the UK decides to regulate freeports with regard to any potential threat for the illicit trade.

Another suggestion made by Rogers is that the UK should consider dedicated points of entry for cultural goods.²⁰³ This would ensure that law enforcement would be better equipped to handle the illicit trade and would perhaps deter some of these goods from entering the country. This could be a realistic option for the UK, but it once again does not appear to have been addressed in the country thus far. Moreover, perhaps the resources to enforce such an arrangement are simply lacking. Lastly, the UK could reconsider the red and green lane arrangement with regard to cultural goods. Perhaps all cultural goods should be sent via the red lane in order for more declaration and provenance information to be secured. This would decrease the risk of trafficking for these goods and would disincentivize traffickers from exploiting the fragmented system. Nevertheless, it is likely not possible under the Windsor Framework to change this provision or would require complex international negotiation to facilitate this change.

As these recommendations for reform have demonstrated, it is currently difficult to realistically envision that the UK will reform its cultural heritage regime. There appears to be a lack of political will post-Brexit to reform the framework, as the UK has arguably designed a deregulated framework with the intent to foster the country's economic growth. Moreover, any reform that is created would need to precariously balance the needs of the powerful trade lobby with the UK's international obligations to curb the illicit trade. This is a difficult balance to strike that will most likely not occur in the near future, unless a genuine political will emerges.

5.5 Conclusion

As this chapter has examined, the UK has been confronted with a number of challenges due to its decision to deregulate its legal regime post-Brexit. These challenges were examined in the first section of this chapter which argued that the current deregulated regime and the complexities of the Northern Ireland trade situation, have rendered the country easily exploitable to traffickers. Following a critical analysis of this new regime, the framework of 'performative regulation' was then extended to the UK's decision to revoke the EU's laws. Through an examination of parliamentary debate on the revocation of

²⁰² *ibid.*

²⁰³ Rogers (n 165) 8.

the EU's 2019 Import Regulation, it was argued that the UK has continued to 'perform' that its own regime can curb the illicit trade. This has been understood as merely a form of performance, as the UK's government has not adequately addressed the real issues that continue to underlie the illicit trade and has decided to overlook yet another opportunity to create an effective legal framework. It has also been argued that this decision to deregulate has again been influenced by a powerful trade lobby that has been present in all other major legal measures in this field. Lastly, this chapter concluded with both general and Brexit-specific reform recommendations that the UK should consider. Although some of these options could be realistically adopted by the state, it has also been demonstrated that the political will is lacking, and that it remains unlikely that the radical reform that is needed will occur any time soon.

6 Conclusion

Throughout this paper, the UK's legal framework that addresses the illicit trade in cultural property has been critically analyzed. The central question addressed was to examine to what extent the UK's legal regime could be deemed 'performative,' given that it has been largely ineffective in combating the illicit trade. It has been argued that the UK's regime could indeed be characterized as 'performative,' in that the law serves to merely simulate the appearance that the illicit trade is being addressed. These laws are forms of 'performative regulation' as they are ineffective in substance and have not deterred participation in this criminal market. It has been contended that the nature of this regime has been the result of the power of a market trade lobby that has exploited its connections with the government to craft its own weak regulatory standards. Although reform should be considered in the UK, especially following massive deregulation post-Brexit, the political climate does not currently appear to be amenable to the type of radical change required.

First, the paper broached this critique by providing an explanation of the analytical framework of 'performative regulation'. This framework was inspired by Green and Mackenzie's seminal article from 2008 that coined the concept.²⁰⁴ This paper interacted with the framework by extending it past the Dealing in Cultural Objects (Offences) Act 2003 analyzed by Green and Mackenzie, and examining how the laws that have followed have also demonstrated performative characteristics. This brief chapter outlined that this approach was chosen to clarify why the UK's laws have continued to be ineffective in curbing the illicit trade since 2003. The methodology of examining primary sources, such as parliamentary rhetoric, for indications of the government's performance was also outlined.

This was followed by a chapter that examined the manner in which the illicit trade operates in the UK and the actors that facilitate it. It has been demonstrated that the UK's historical relationship with cultural property has resulted in these goods being viewed as 'capital for the nation' and has increased domestic demand for them. Next, the chapter examined trade routes, notable cases, and statistical figures that relate to the trade. It was argued that the market in cultural property is best understood as 'grey,' meaning that both licit and illicit goods circulate amongst each other in this market. The grey nature of the market enables traffickers to exploit the UK's bustling legitimate market by placing illicit goods for sale under the guise of legal origins. It was also

²⁰⁴ Mackenzie and Green (n 3).

demonstrated that this same grey market generates great economic and cultural wealth for the UK, providing the government with an incentive to maintain high import levels. The actors, such as auction houses, antiquities dealers, and law enforcement, that participate in or regulate the illicit trade were also examined. Although market participants do adhere to ethical guidelines, it was shown that they tend to operate in a self-regulatory environment that does not effectively deter participation in the illicit trade. These market participants are also members of a trade lobby whose role in shaping their own regulation is analyzed throughout the rest of the paper.

This contextual chapter is then followed by the chapter that critiques the legal regime that is currently in place. First, the numerous criminal law measures that address the illicit trade were critiqued. Although some measures are more powerful than others, such as the promulgation of anti-money laundering regulations, it is demonstrated that the legal regime is fragmented and that the criminal law does not serve as a deterrent against participation in the illicit trade. The latter part of the chapter examined the specific instruments that the UK has created in response to the illicit trade, such as the Dealing in Cultural Objects (Offences) Act 2003 and the Cultural Property (Armed Conflicts) Act 2017. By analyzing primary sources, including parliamentary debates and governmental memoranda, it was argued that these instruments are forms of 'performative regulation'. The trade lobby was present in the creation and watering down of both of these legal instruments, resulting in toothless forms of legislation that have not deterred criminal behavior. Lastly, the European Union framework in place prior to Brexit was examined. Although the EU framework does provide a harmonized approach to the regulation of the illicit trade, this paper contended that the 2019 EU Import Regulation is also potentially performative and cannot be viewed as a cure-all.

The last chapter critically analyzed the challenges that Brexit has created for the UK's legal regime. The central difficulties created by Brexit include: the revocation of EU laws; the complexities that the Northern Ireland trade situation and the Windsor Framework have generated; and the expansion of freeports. It was demonstrated that the current deregulated and fragmented regime has left the country vulnerable to exploitation by traffickers and that its many loopholes will likely render it a 'hub' for the illicit trade. Following this critique, the concept of 'performative regulation' was expanded to the post-Brexit system. Through an analysis of the revocation of the 2019 Import Regulation in Parliament, it was argued that the UK has continued in its pattern of performance in this context. Politicians continue to be influenced by a powerful trade lobby that favors deregulation and does not wish to see the UK adopt an effective framework that substantially changes the grey market cul-

ture. Although the UK continues to affirm that its own legal system is robust enough to address the illicit trade, these statements are merely performative and do not reflect the complex post-Brexit reality. This chapter ends by providing both general and post-Brexit specific reform suggestions. Some of these recommendations include enforcing more robust due diligence obligations on professionals and strengthening the UK's import procedures with regard to cultural property. However, this chapter also acknowledges that many reform proposals are too idealistic and have not considered the lack of political will that currently exists. The UK's government has perhaps intentionally crafted a deregulated legal regime in order to stimulate economic growth in this area and continue to support the art and antiquities market. Although these are optimistic causes that might benefit the state both economically and culturally, this regime has also generated uncertainty and has only fueled the grey market that thrives off of weak regulation. Desperate reform is needed in the UK to effectively combat the illicit trade, but unfortunately the *genuine* political will to do so might only emerge in the distant future.

Next Generation

Milica Jović analyzes the United Kingdom's domestic legal framework that addresses the international trafficking of artefacts and antiquities. The 'performative' nature of the state's framework is critically examined, and suggestions for reform – especially in the wake of Brexit – are provided.

Milica Jović

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