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From:	General Secretariat of the Council
To:	Cultural Affairs Committee
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods - Comments from the Netherlands delegation

Delegations will find attached comments from the Netherlands delegation regarding the above subject following the meeting of the Cultural Affairs Committee on 14 September 2017.

Comments and questions after first reading of the proposal 2017/375 on the import of cultural goods, contribution of The Netherlands

Dear colleagues of the Presidency,

Thank you for providing the opportunity to send written comments and questions regarding the proposal of Regulation 2017/375. These are the expert opinions on the proposal (in line with the concept government position), since there is no official position at this stage yet, as the proposal is under discussion in our Parliament.

General position on the international protection of cultural goods

The Netherlands fully supports the need for effective action against money-laundering and terrorism financing, and endorses the EU Action Plan to combat terrorism financing, of which this proposal is part .

Additionally, The Netherlands is committed to promote good cooperation in the enforcement chain and to carry out all the (international) legislation and treaties on the im- and export of cultural goods. The long and fruitful cooperation between the Cultural Heritage Inspectorate and Dutch Customs can be seen as a best practice for other countries in Europe. The dialogue with business associations on art has been intensified the last few years with the common goal for a “clean” art trade.

The Netherlands is also dedicated to international cooperation between the EU, Unesco and the UN. Important aspects in this cooperation are training, research and exchange of information. For instance in the light of the UN recommendation to direct means to combat illegal trade of cultural goods and through this to combat terrorism financing.

Position on the proposal 2017/0158

An EU-wide approach to protect cultural goods on import, can help in the fight against terrorism financing. The question is however whether the current proposal will prove effective in this fight.

The Netherlands has four major questions regarding this proposal:

- Is the current proposal the right measure for the problem?
- Is the proposal in line with operational needs of the competent authorities?
- What will the additional administrative burden be on the competent authorities and business of art trade and citizens of the EU?
- If legislation is deemed to be the right measure, which definition should be used and is an should an age threshold desirable?

The proposal seems to be over inclusive. The scope and effect of the proposal goes further than fighting terrorism financing. It mainly focuses on measures towards the legal trade, having an effect on the international art trade for which already an international legislative framework exists. The proposal only contains measures to act upon legal trade flows at the declaration to release for free circulation. The proposal seems to be under inclusive as well. It does not contain any measures to prevent the illegal entering of cultural goods to the Customs Union, nor its trade after the release for free circulation. The measures in the proposal do not focus on protected cultural heritage, nor the monetary value of the cultural goods. In the sanction measures directed against Iraq and Syria, the trade in cultural goods is explicitly forbidden. Could standardized sanction measures be more targeted tool to protect cultural goods from conflict areas?

The proposal furthermore doesn't seem to connect with the usual and proven import systems the EU already knows, like CITES and FLEGT. The proposal may lead to an administrative burden with the member states of the EU, where it tries to protect the cultural interests of non-EU countries. The clarification and impact assessment don't seem to provide enough ground to prefer the proposed system above a system which makes use of export certificates issued by non-EU countries, on basis of their own legislation. This has been proposed by the Netherlands at an earlier stage.

In the proposal and impact assessment there is hardly any focus on the effects to be expected for the legal art trade. The proposal introduces a system with formalities, which will mainly hit the legal art trade. How does this fit with the goal to strengthen EU competitiveness? The art trade strongly opposes to further measures on the import of cultural goods, as is also written in the impact assessment, also because they question the presumption that terrorism organizations benefit from the trade in cultural heritage. In the view of the Netherlands the legal art trade is a

sector that should also be involved as an ally to combat the illicit traffic in cultural goods. Therefore the measure(s) to take should be effective, fair, and with a clear unbiased explanation of the problem that is being solved.

In the proposal and impact assessment there is consideration on the implementation issues seems to be lacking. Firstly, we notice the situation in which the member state of entry (which is responsible for the customs process of entering the EU) is not the member state where the goods will be declared for free circulation. For example, the proposal does not prohibit cultural goods (that require an import licence or importer declaration) to enter the Union without one. Secondly, in practice, there will be a need to check and find confirmation of documents and goods, get into contact with countries of origin, look into the rules of each of the more than 190 countries, verification of possible stolen or infringed goods. This will lead to an substantial administrative burden in the operation.

The proposal offers the possibility to implement an electronic system to process and store the data regarding import licences and importer statements. The Netherlands strongly supports the idea of a EU-wide system to process and store these data in a harmonized way, although this is not completely clarified in the proposal yet.

The proposal lacks a return procedure to the rightful owner. It also misses the juridical link with current international legislation and treaties.

Regarding the power to adopt delegating and implementing acts, it is preferred that all relevant and defining rules and definitions are within the scope of the regulation itself. In that regard the delegating act in article 2, sub 2 concerning the minimum age of threshold, should be in the regulation itself. Changing the minimum age might cause serious consequences for competent authorities. According to article 2 of regulation 182/2011, the research procedure (as in article 13 of this proposal) should always be followed regarding the implementing acts, the Netherlands agrees on this.

More detailed comments and questions in general and on article 1 to 5 will follow at and after the CUG-meeting on 5 September

Comments of the Netherlands on articles 1 to 5 of the proposal for a Regulation on the import of Cultural goods.

Dear Presidency and colleagues,

In addition to the general comments regarding the proposal of Regulation 2017/375 which we send last week, hereby our written comments in regard to article 1 to 5 and a question regarding the annex. These are the expert opinions on article 1 to 5 (in line with the concept government position), since there is no official position at this stage yet, as the proposal is under discussion in our Parliament.

Article 1

- The use of Customs terminology in this article is not consistent with the use of the terminology in Articles 3 and 4. In article 1 "entry of cultural goods into the customs territory" is used, whereas article 3 and 4 mention "the release of cultural goods for free circulation and placing under a special procedure other than transit". This makes a huge difference for Customs processes on entry.
- Following the UCC, the definition of "transit" does not concern "trans-shipment", is this assumption correct?
- The Netherlands proposes to prohibit the entry of goods into the customs territory of the Union where the obligation of an import licence (art. 4) or the obligation of an importers statement (art. 5) for goods as defined in art. 2.1.a and Annex I of the proposal is not met. Through such a prohibition, customs can stop goods at the border of the Union. Otherwise, customs (in the MS of entry) cannot stop cultural goods before they enter into transit to another EU MS, where the goods are being intended to be released for free circulation.

Article 2

- *Par 1a:*
 - The Netherlands has a strong preference for using the definition of the 1970 UNESCO Convention. This definition is used in the national heritage law. In the Netherlands the choice of ratifying the UNESCO Convention was precluded by an extensive debate in Parliament where the width of the 1995 UNIDROIT Convention definition of cultural goods, was one of the most important reasons to choose for the 1970 UNESCO Convention.
 - The 1970 UNESCO Convention is ratified by 132 countries, while UNIDROIT has only 41 Contracting States. Therefore it provides a better international framework for cooperation in this field.
 - The Netherlands does not see the problem that non excavated archaeological artefacts are not protected under the definition of the UNESCO Convention. Under national law these objects can be protected as a category. Example of Dutch Heritage Law: It is prohibited to export national monuments and parts thereof or illegally excavated archaeological finds without consent of the owner or Minister. These objects do not have the obligation to be registered on object level.
 - The Netherlands proposes to focus more specifically on categories which have a high risk with regard to terrorism financing. The exact categories should be based on a further risk analysis. Is this part of the Deloitte report? In our opinion all other categories of goods can be imported, following the existing national legislation. All EU MS but three have ratified the UNESCO Convention and implemented it in national law, so there is no need for EU regulation for all cultural goods.
 - The definition, and especially the age threshold of 250 years is unknown in the present international and EU legislative framework. Why is this specific minimum age threshold used and why a period of 250 years? The Netherlands is of the opinion that the definitions should follow the existing legal framework with no age threshold (as in the 1970 UNESCO Convention). The age thresholds that are used in the Council Regulation No 116/2009 on the export of cultural goods and in the Sanction measures seem adequate.
- *Par 1d:*
 - Why has a period of one month been chosen for a permanent status? This seems very short as to considered as being in the country permanently.
 - It can also be considered to delete the term 'permanently' in the definition of the export country, and therewith also delete it from the definition list, as it has not been used in the further text of the regulation.
 - As it is written in the definition of the export country that the cultural goods should be held in accordance with that country's laws and regulations before their dispatch to the

Union' it is perhaps not even necessary to have a distinction between export and source country. If the goods have been illicitly exported from a source country we may presume that the goods in the export country are not held according to its laws and regulations.

- Should the system of source and export country remain, it would be advisable to clarify from which date onwards the source country can be taken into account. Otherwise the regulation could include a retroactive effect that we do not know under international conventions, including the UNESCO 1970 Convention.
- *Par 2:* If a minimum age threshold is chosen, the Netherlands is of the opinion that it should be within the body of the text of the regulation itself.

Article 3

- This Article should focus on cultural goods with a high risk of being traded for terrorism financing. (see under 2.1.). Other heritage can be protected under national regulation based on international conventions.
- *Par 1:*
 - Why does this article (and this proposal in general) mainly focus on measures for the legal art trade and not on effective measures to stop illegal trade? The proposal only contains measures to act upon legal trade flows at the declaration to release for free circulation. It does not contain any measures to prevent the illegal entering of cultural goods to the customs union, nor its trade after the release for free circulation.

Article 3 and 4

- Furthermore it is not clear why the proposal places the responsibility for protecting cultural heritage from non-EU countries on the EU-member states (with an import licence), whereas you could also place the responsibility with the non-EU countries by using an export licence, like the one used in Council Regulation No 116/2009 on the export of cultural goods. The Netherlands already proposed this several times in the expert meetings. For this the UNESCO/WCO model export licence, very similar to the EU-form of Reg 116/2009, could be chosen as standard licence.

Article 4

- *Par 1:*
 - See also Article 3, under 1.
 - This Article should focus on goods with a high risk of being traded for terrorism financing (see under 2.1.). Other cultural goods can fall under the national regulations based on international conventions.
 - Why was a system of export licences not used, for example as used with FLEGT and CITES in the EU?
 - The proposal does not define a starting date for the application of the licence. If the application starts when the goods are in storage, we could end up with a situation that the maximum storage period of 90 days in the UCC is exceeded.
- *Par 3:*
 - Review statements on the day to day operations for competent authorities are only to be made after the elements of the import licence, importer statement and the standardized document become clear.
 - How to stop the goods at the point of entry, when the proposal does not give any ground for that? There is no prohibition for cultural goods that are affected by this proposal to enter the EU (see also Article 1).
 - How to check and verify the authenticity of the required documents from the exporting countries?
 - What should a competent authority do after the period of 30 days with respect to the application and to the goods (at entry)?
- *Par 4:*
 - See last bullet from Article 4, under 1.
 - A balance should be found: 90 days is long if you are an art dealer waiting for the release of a good, but could be short for a national authority that needs to verify information, especially if that should be undertaken with a country suffering from a conflict. The question is if in that case the period of 90 days is long enough. A sub paragraph (4d) could be added what to do if the good stems from a country in conflict, with which contact is difficult within 90 days. In the to be developed guidelines it could be emphasized that the national authorities work as swiftly as possible, not using the 90 days period, but have an option to use more time, should it be hard to verify information and come to a conclusion on the import certificate.

- *Par 4 c*: Is “reasonable grounds” the correct judicial terminology? It does need further explication in the definitions (Article 2).
- *Par 5*:
 - Linguistic point: “public authorities” in the English version and “competent authorities” in the Dutch version?
 - Why ‘licenses’ in Article 4, under 5, versus ‘licence’ in other articles?
- *Par 6*: What is the time frame for adopting the procedures and template at the starting situation? Also bearing in mind the proposed date to enter into force and the possible electronic system?

Article 5:

- *Par 1*:
 - See also Article 3 under 1 regarding the proposed system.
 - This article is about goods not falling under Article 3, to release them for free circulation. How does this work in the situation where goods enter via a different member state than the member state where the goods are released into free circulation?
 - How to stop the goods at the point of entry, when the proposal does not give any ground for that? There is no prohibition for cultural goods that are affected by this proposal to enter the EU (see also Article 1 and 4).
 - The article does not state that it is forbidden to enter the EU without an importer statement. A statement could also be given after entry. Is this correct?
 - See also Article 4 par 3 for the remarks regarding the day to day practice.
 - A standard importer statement should be developed, should this Article be adopted.
- *Par 3*: What is the time frame for adopting the procedures and template at the starting situation? Also bearing in mind the proposed date to enter into force and the possible electronic system?
- What is requested from the competent authorities under this article. This should be added to this Article.

Annex:

- We would like to know when the Presidency will discuss the Annex as this is a crucial part of the discussion, because it will determine the scope of the regulation.