Emanuele Spina
Studio Legale "Iureconsulti", Florence
e.spina@iureconsulti.it
ORCID: 0000-0001-7421-0199

https://doi.org/10.26881/gsp.2021.2.13

The annulment of the export license for artworks in Italian law: The guarantee of legal certainty in relation to recent administrative and legal measures

1. A brief *excursus* on the institution of administrative self-defense

Wishing to analyze the legal arguments on the basis of which some self-defense annulments of free-circulation certificates[1] were issued by the Ministry of Culture, highlighting the most problematic aspects relating to the principle of legal certainty that must govern a legal system, it is necessary to briefly review, for the benefit of the reader not accustomed to Italian administrative law, the principles governing the annulment instrument in self-defense[2], pursuant to art. 21 *nonies* L. 241/1990.[3]

---

[1] Terminology with which Italian law qualifies export licenses for artworks, issued by export offices pursuant to art. 68 of Legislative Decree 42/2004. Artworks by an author no longer living, which were produced more than seventy years previously, and which have a value of less than €13,500, are subject to the release of the free-circulation certificate.The free-circulation certificate is issued at the request of the interested parties after verifying the importance of the artwork for the national cultural heritage.

[2] This *excursus* will necessarily be of a schematic character, without any pretention to such completeness since a complete discussion of the topic would require an independent monograph.

[3] Art. 21 *nonies* L. 241/1990:

1. The illegitimate administrative provision pursuant to art. 21-octies, excluding the cases referred to in the same art. 21-octies para. 2, can be annulled ex officio, if there are reasons of public interest, within a reasonable time, in any case not exceeding eighteen months from the time of the adoption of the authorization measures or the attribution of economic advantages, including cases in which the provision was formed pursuant to art. 20, and taking into account the interests of the recipients and counter-interested parties, by the body that issued it, or by another body required by law. The responsibilities connected with the adoption and failure to annul the illegitimate provision remain valid.
2. This is without prejudice to the possibility of validating the voidable provision, provided there are reasons of public interest and within a reasonable period of time.

The administrative measures achieved on the basis of false representations of facts or substitutive declarations of certification and false or untruthful notary deed as a result of conduct constituting a crime, ascertained with a final judgment, can be annulled by the administration even after the expiry of the eighteen month period referred to in para. 1, without prejudice to the application of criminal sanctions as well as the sanctions provided for in Chapter VI of the consolidated act as per the decree of the President of the Republic of 28 December 2000, no. 445.

The annulment ex officio of an administrative measure presupposes the existence of a defect that could lead to its annulment by a judge; in this event, the administration that issued it, ex officio or upon request of interested parties, having become aware of its unlawful conduct, can provide for the annulment in self-defense where it recognizes a public interest. The law provides that the annulment cannot be ordered beyond eighteen months from the issuance of those provisions which are of an authorization nature, or which confer economic advantages. (The free-circulation certificate falls within the first type of administrative act, since it is an authorization to export a cultural property outside national borders.)

The defects of the provision are traditionally identified within the categories of incompetence, violation of the law, and excess of power. The defects of "incompetence" and "violation of the law" refer to administration behavior contrary to the positive rules of the legal system; the defect of "incompetence" refers more specifically to the violation of the rules that attribute to a body the power to issue the administrative act in question; the "violation of the law" defect more generally relates to all the other rules that regulate the action of the public administration. On the contrary, by "excess of power" we generally mean a defect in the administrative act concerning the exercise of a discretionary power; it, therefore, includes all cases in which the administrative authority, although not formally violating any rule of law, has not, however, exercised its power well, not pursuing, thus, the public interest in the best possible way. The annulment of the administrative act produces retroactive effects, as if the act had never been issued.

2. The errors of assessment of the administration that lead to annulment

Leaving aside, for the reasons of brevity already discussed, the analysis of the various categories of defects in an administrative act, it is appropriate to focus the reader's attention on the case in which the administration detects a misrepresentation of the facts,[4] which, during the investigation stage, led the Export Office to grant a permit that, otherwise, would not have been granted.

To be relevant for the purposes of annulment, in fact, the misrepresentation of the facts must have had a relevance in the reasoning that prompted the administration to grant the free-circulation certificate; for example, there are numerous cases in which a judge has recognized the influence of an erroneous attribution of an artwork, where the artwork's importance from a cultural point of view can be affirmed or excluded on the basis of other factors.[5]

[4] The case attributable to the category of excess of power.

[5] See, for example, the following decisions: Consiglio di Stato, sec. II, 29 January 2014; Consiglio di Stato, sec. II, 30 May 2011, n. 2165; TAR Toscana, sec. I, 10 February 2017, n. 218.

To better clarify these aspects, two case studies are offered here, chosen from among the numerous recent cases of annulment in self-defense of free-circulation certificates which we have had the opportunity to analyze.

The first case concerns a pair of portraits presented for export as belonging to a "Dutch school of the seventeenth century"; having obtained the free-circulation certificate, they were taken abroad, where a signature not visible to the naked eye was discovered belonging to a well-known painter of the Golden Age. Upon the return of the two artworks to Italy, the discovery was duly reported to the authorities who automatically canceled ex officio the previous free-circulation certificate, on the assumption that its issuance was the result of a negligent examination carried out by the Export Office when issuing the export license. In this case, the annulment may be considered legitimate upon the discovery of a suitable element to establish authorship of the two artworks which, from being classed as anonymous, pass to being attributed to the hand of a well-known Dutch artist of the seventeenth century. Here the administration demonstrates that the changed attribution has affected the relevance of the two artworks in terms of the conservation of Italian national cultural heritage (for example, as the author is not well represented in national collections).

On the other hand, reasons based on the particular value of the artwork are irrelevant, since these later evaluations were already originally known to the Export Office, which had already considered them irrelevant for the purposes of protecting cultural heritage. The new attribution does not affect this judgment.

The second case concerns a portrait of an illustrious figure of the Napoleonic period, presented for export with the correct indication of the portrait subject and its author (whose signature was indicated on the artwork). The Export Office, after analyzing the artwork, considered the portrait to be devoid of interest for the Italian cultural heritage, noting that it had not found the signature reported by the owner; it did not, however, disavow the attribution. However, once the portrait appeared on the international market as a signed artwork, the Ministry canceled the free-circulation certificate by arguing that, if the signature had been noticed by the Export Office, the artwork would have been subject to restriction.

In this case, I believe that the annulment is completely illegitimate, as the error of the Export Office, which did not find the signature of the author (which is actually present on the artwork), did not cause any misrepresentation of the facts, from the moment that the painting was evaluated for what it actually is, including its correct attribution.

The fact that an erroneous conviction, which gives rise to the administration's erroneous conviction, is caused by misleading information provided by the owner, or is discovered independently, is considered irrelevant: what matters is the error itself and not its cause. In this regard, the words of the Council of State[6] in a case linked to a panel depicting a Madonna are illuminating. In this case, the administration, based on the owner's declarations and the presence of heavy nineteenth-century interventions, had

[6] Consiglio di Stato, sec. IV, 14 January 2009, n. 136.

initially considered that the panel was a Giotto copy from the nineteenth century and had granted a free-circulation certificate; the artwork had been exported to the United Kingdom and, subsequently, re-imported to Italy under a temporary import regime[7] in order to be restored.

Following the restoration, after the nineteenth-century additions disappeared, it became clear that the panel was directly attributable to the hand of the great Tuscan master and that the Office that had originally granted the right to export it had committed a macroscopic error of assessment. For this reason, the administration had canceled the original free-circulation certificate, superseding, by virtue of the retroactivity of the annulment, also the temporary regime in which the artwork was in Italy, and forbidding a new export of the artwork.

A dispute arose which, in the first instance, was resolved in favor of the owner, since the Regional Administrative Court of Lazio accused the administration alone of not being able to distinguish between a nineteenth-century imitator of Giotto and the master himself.[8]

On appeal, however, the Council of State radically altered the point of view, stressing that the error previously made by various offices does not preclude that the public interest in removing the illegitimate act is still satisfied; therefore, in the presence of a new assessment of the facts, different from the original assessment, the administration is always allowed to cancel the illegitimate act, replacing it with one more compliant with the protection of the public interest.[9]

In conclusion, therefore, the principle must be considered established, according to which any error committed by the administration in the assessment of facts – which appears to have been relevant in relation to the purpose of issuing the free-circulation certificate – can lead to the annulment of the provision.

3. The time limit within which annulment is possible

As mentioned above, the provision on administrative self-defense provides that the power of annulment must be exercised within a reasonable period of time, in any case

[7] The temporary import regime is provided for those artworks that come from abroad and that will remain only temporarily in Italy; in these cases, the artwork maintains its permit to circulate on the international market, no state control over its later export being provided for.

[8] TAR Lazio, sec. II *quater*, 9 February 2007, n. 1046: "despite the said (restoration) interventions having brought out a historical and artistic relevance, this already existed, albeit hidden by the nineteenth-century repainting, which the administration was unable to recognize. Nor is an incorrect historical-artistic evaluation by the administration attributable to the applicant, as its value had been hidden by nineteenth-century repainting and not by its artifices, which had the only 'wrong' of having understood or known what (...) the administration was unable to recognize".

[9] Also in this case, the public interest lies in the conservation and enhancement of the national cultural heritage, in the face of a re-examination of the artwork, which, after the restoration and without the nineteenth-century additions, is "extraordinary workmanship and perhaps attributable to one of the greatest exponents of the Italian school of painting"

not exceeding eighteen months from the moment of the issuance of authorizations or conferring of economic advantages.

The administrative practice adopted by the Ministry of Culture and Activities has always observed this time limit, believing that free-circulation certificates are to be considered in all respects within the category of authorization documents (authorizing, precisely, the export of an artwork beyond national borders).

However, a curious sentence issued by the Regional Administrative Court of Lazio[10] has been recorded, which, with an obvious oxymoron, declares that "the nature of authorization cannot be recognized, in the sense understood by art. 21 *nonies* of Law 241/90, as part of the provisions that allow the export of artworks abroad". According to the Court, in fact, the aim of the regulation would consist in safeguarding those "measures to regulate private activities subject to authorization, which, once started on the basis of this title, continue over time, and for the realization of which the interested party allocates time and money, giving up investing in alternative activities, for which the legislator considered that the mere legal fact of the passage of time, given the various interests involved, is sufficient to consolidate the legitimate expectation of the interested party to continue the activity carried out in the absence of repressive actions by the supervisory authorities, putting the repressive aspects of the latter in strict terms of forfeiture". The Court motivates the exclusion of free-circulation certificates from the category of authorization documents by the opinion that "the object belongs to the owner, but the beauty belongs to everyone", and, therefore, the "superior national interest (…) does not permit attributing to a mere legal fact (such as the passage of time) a nullifying effect of the protected collective interest in order to privilege the purely economic interest of the owner of making a profit by selling the asset abroad".

Actually, the sentence in question appears rather weak from a motivational point of view and moved more by a "political" intent to safeguard the national cultural heritage, understood in an almost collectivist sense, than by a real investigation of legal hermeneutics, so much so that it appears to be a *unicum* in the Italian jurisprudential panorama. In fact, the exclusion of the free-circulation certificate from the category of provisions with an authorization content is not convincing, in the first place, in purely semantic terms, since the court itself is forced on more than one occasion to recognize that the order generically prohibits the export of artworks, unless they are provided with this certificate (from which the authorizing effect of the provision in question clearly emerges).

The thesis appears equally unfounded that limits the concept of an authorizing act to those acts that bind the private individual from an economic or temporal point of view; this appears to be built more on an alleged *ratio legis* aimed at the protection of economic activities[11] only, than on the text of the law, which does not contemplate

[10] TAR Lazio, sec. II *quater*, 10 July 2018, n. 10018.

[11] Moreover, this is not very acceptable and the result of an ideological and superficial vision of the art market which, in addition to mere speculation activities, entails the presence of numerous and

such a distinction. In conclusion, therefore, it can be argued that the free-circulation certificates can be annulled in self-defense within eighteen months from the date of issue, while noting a thesis that excludes the cogency of this time limit, but which appears to be absolutely in a minority, even if supported by an important voice in the Italian jurisprudential panorama.

4. The consequences of annulment of a free-circulation certificate

At this point, it is necessary to move the investigation on to the effects that the exercise of the power of annulment in self-defense has on the international circulation of artworks. As has been noted, in fact, the annulment has a retroactive effect and, therefore, any free-circulation certificate annulled must be considered, at least for Italian national law, as never having been issued.

This retroactive effect does not create particular problems where the artwork has not yet been exported: it goes without saying that the owner will no longer be able to transfer it outside the national borders, unless he/she obtains a new free-circulation certificate. But what effects are produced if the artwork has already been exported and, perhaps, sold to third parties on the international market?

Undoubtedly, consequences of a criminal nature for having unlawfully exported an artwork[12] must be excluded, since the original presence of the free-circulation certificate, even though it was later annulled, excludes the possibility that there was willful misconduct on the part of the owner who, at the time he/she exported the artwork, could not have done other than to believe in good faith in the validity of the export license. Equally, it can be excluded that there exists a generic obligation on the part of the owner to bring the artwork back to Italy; even in the absence of specific jurisprudence on this point, it can be considered that the artwork is now outside the sphere of national law and, as there is no provision that penalizes the owner for a failure to restore a piece of property, an eventual administrative measure that might make provision in this sense would prove to be essentially ineffective.

Furthermore, if such an obligation were to be considered to exist, a clear difference in treatment would be created between the case of the owner who limited him/herself to exporting only, who could well comply with the obligation to bring the artwork back into the national territory, and that of the former owner who, in addition to having exported the artwork, had already sold it to third parties; in the latter case, in fact, the person affected by the order to have the artwork returned to Italy could not

---

perhaps prevalent business activities that cannot be seen, because they cannot find protection like any other economic activity.

[12] Pursuant to art. 174 of Legislative Decree 42/2004, anyone who transfers objects of artistic, historical, archaeological, ethno-anthropological, bibliographic, documentary, or archival interest abroad without a free-circulation certificate or export license, is punishable by imprisonment from one to four years or with a fine of €258 to €5,165.

fulfill it, even if he/she wanted to. Having clarified this, it is necessary to ask whether it is possible for Italy to invoke the rules of European law or international treaties on the return of illegally exported cultural assets to obtain the return of an artwork that has left the national territory.

Regarding the UNIDROIT convention on stolen or illicitly exported cultural goods, the main international treaty on the subject, the answer would appear to be positive: in fact, art. 1 clarifies that "illicitly exported cultural goods" must be understood as those "cultural goods exported from territory of a Contracting State in violation of its law governing the export of cultural property in order to protect its cultural heritage". The express reference to the internal legislation of the Contracting State makes, in our case, the retroactive effect recognized on annulment of absolute importance: once the free-circulation certificate has been annulled, with retroactive effect, the exported good could no longer be said to be lawfully present abroad. In the abstract, an interpretation of the Convention in a more literal sense,[13] which examines the lawfulness of the factual and legal circumstances at the time the export took place, cannot be excluded; however, this thesis seems to me less adherent to the regulatory context, which favors interpretations based on the internal order of the requesting state, as well as on the aim of ensuring the best protection of cultural heritage.

Even more so, the EU Directive of 15 May 2014, n. 60, must be deemed applicable, not only because it, too, refers to the law of the injured country to establish whether exit from the territory took place lawfully, but also because, in this case, the discipline of annulment in self-defense has obtained important recognition since the sentence *Algera* made by the EC Court of Justice on 12/7/1957,[14] confirmed by all subsequent jurisprudential elaboration.[15] In this regard, it should be remembered that the Court of Justice has intervened on the matter several times, establishing, in the *De Compte*[16] case, a method of assessing the protection of legitimate expectation against the pursuit of the public interest, based on two distinct levels of analysis, according to which the private individual who claims to have acquired legitimate expectation should demonstrate that the administration has given rise to an objective and reasonable ex-

[13] It is recalled that, pursuant to art. 5 of the Convention, it will be the judge of the state in which the artwork is present who must provide the correct interpretation of the Convention itself; therefore, it is extremely probable that opposite theses and readings will arise on this point. In particular, not all legal systems afford the public administration an equal power of retroactive annulment of their acts; consequently, it is probable that in those states where this option is not envisaged, or is envisaged in an attenuated form, giving, for example, greater weight to the principle of the protection of legitimate expectations on the part of the citizen, judges will adopt a different attitude.

[14] EC Court of Justice, 12 July 1957, C 7/56 – C 3/57 – C 7/57.

[15] To supplement the discussion even if the topic undoubtedly goes beyond the limits of this article it should be noted that community jurisprudence on self-defense places greater emphasis on the protection of legitimate expectations as a guarantee of the principle of legal certainty, compared to the position taken by Italian jurisprudence, which, on the contrary, further enshrines the pursuit of the public interest, even to the detriment of the legitimate expectation of the private individual, shifting the protection of the latter eminently to the level of compensation for any damage caused (cf. Consiglio di Stato, sec. IV, 8 August 2019, n. 856).

[16] EU Court of Justice, 18 March 1999, C 2/98 P.

pectation to maintain the situation that arose with the measure then annulled, while the administration would have the burden of demonstrating the existence of a public interest sufficient to justify the sacrifice of this expectation.

This evaluation mechanism, however, does not fit the case of the protection of cultural heritage, since the matter is characterized by a very high degree of technical discretion on the part of an administration that does not allow a judicial review of the choices made to protect the national cultural heritage. In fact, where an administration has consistently and logically motivated the identification of a public interest in the cancellation of the free-circulation certificate, the judge is prohibited from investigating the merits of the arguments put forward.

This basically means that the dualistic criterion identified by the Court of Justice will find little possibility of concrete application, since the existence of a public interest in the annulment of the act will be recognized whenever the arguments put forward by the administration do not appear *ictu oculi* unreasonable, with all due respect to the protection of private expectations as to the preservation of the *status quo*.

5. Conclusions

If we want to draw the lines of the arguments presented up to now, it is evident that the Italian legal and jurisprudential system does not make it possible to consider the custody by the owner of an artwork as protected if a free-circulation certificate obtained is annulled, except if it is annulled for a clearly unsuitable reason. At present, therefore, only the expiry of eighteen months from the issuing of the deed allows the legal situation created with the release of the free-circulation certificate to be considered reasonably certain. This causes an obvious problem of certainty and stability of the right to be able to export artworks outside the national territory, with deleterious effects on the stability of the international market in Italian art.

The state of legal uncertainty has, up to now, been accompanied by prudent administrative action, aware of the delicacy of the matter and of the risks resulting from an abuse of its position of strength. The administrative authorities have tried to favor a management of the protection of cultural heritage based on export denials, rather than on the *ex post* review of an authorizations already granted. Today, however, we are witnessing a radical turnabout, with a pressing monitoring by the central bodies of the Ministry on the legitimacy of free-circulation certificates already granted; this state of affairs, in addition to representing an obvious *vulnus* in terms of legal certainty, runs the serious risk of causing a serious contraction of the art market, as well as the onset of a large number of disputes.

Summary

Emanuel Spina

**The annulment of the export license for artworks in Italian law:
The guarantee of legal certainty in relation to recent administrative and legal measures**

This article originates from recent measures taken by the Italian Ministry of Culture which have ordered the annulment of some free-circulation certificates for administrative self-defense, pursuant to art. 21 *nonies* L. 241/1990. Such *ex post* control on the release of free-circulation certificates has alarmed national and international professional operators, and has created a situation of objective uncertainty about the possibility of exporting art objects purchased in Italy. This article, therefore, aims to analyze the legal substratum within which the Ministry's control and verification action moves, to determine, wherever possible, the limits of the lawfulness of such behavior.

Keywords: annulment of export licenses, Italian artworks, fine art international market, illegal artworks export

Streszczenie

Emanuel Spina

**Stwierdzenie nieważności pozwolenia na wywóz dzieł sztuki w prawie włoskim –
nowe instrumenty administracyjnoprawne a zasada pewności prawa**

Impulsem do powstania artykułu były niedawno wprowadzone przez włoskie Ministerstwo Kultury zasady stwierdzania nieważności *ex officio* funkcjonujących w obrocie prawnym pozwoleń na wywóz dzieł sztuki w myśl art. 21(9) ustawy nr 241 z 1990 r. (art. 21-*nonies* L. 241/1990). Taki rodzaj kontroli *ex post* zaniepokoił przedsiębiorców zawodowo zajmujących się międzynarodowym obrotem dziełami sztuki i stworzył obiektywny stan niepewności prawnej co do przysługującego uprawnienia do wywozu dzieła poza terytorium Włoch. W artykule poddano analizie ramy prawne, w których minister sprawuje kontrolę oraz wytycza – gdzie to możliwe – granice legalności takiej ministerialnej kontroli.

Słowa kluczowe: stwierdzenie nieważności pozwolenia na wywóz dzieła sztuki, włoskie dzieła sztuki, międzynarodowy rynek sztuki, nielegalny wywóz dzieł sztuki