

RESEARCH ARTICLES

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Directive 2014/60/EU: A New Legal Framework for Ensuring the Return of Cultural Objects within the European Union

Abstract: The aim of the new Directive is to improve the efficiency of mechanisms to secure the return of cultural objects unlawfully removed from the territory of a Member State, on or after 1 January 1993, introduced initially by way of Council Directive 93/7/EEC. Over the years it had been concluded that the application of Council Directive 93/7/EEC had, for a variety of reasons, a limited effect in terms of the actual return of cultural objects. The new Directive attempts to address these deficiencies and introduces substantial changes to the 1993 Directive. In particular, it extends the scope of the Directive to all cultural objects classified or defined as national treasures. It introduces the use of the Internal Market Information System (IMI) for administrative cooperation and exchange of information within national authorities. It extends the time-limit to initiate return proceedings. Finally, it establishes that the burden

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of proof of due diligence lies with the possessor for the purpose of compensation. The new Directive had much support during the legislative procedure, both in the European Parliament and in the Council. Adopted on 15 May 2014, the Directive was due to be transposed by the Member States by 18 December 2015. It now remains to be seen whether the new rules are applied in practice and will bring about the expected results.

Keywords: European Union, Directive 2014/60/EU, Council Directive 93/7/EEC, Internal Market Information System, movement of cultural goods

Introduction¹

Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State was adopted in 1993,² when the internal frontiers were abolished, in order to protect the Member States' cultural objects which are classified as national treasures. This Directive aimed at reconciling the fundamental principle of free movement of goods with the need for effective protection of national treasures. Since 18 December of last year (2015), Directive 2014/60/EU replaces Council Directive 93/7/EEC.³

Background

Reports and post-evaluation

Pursuant to the Directive, the Commission drew up four reports reviewing Council Directive 93/7/EEC on the basis of national reports. In the third report of

¹ See selected literature on the subject: M. Cornu, M. Frigo, *The return of cultural objects unlawfully removed from the territory of a Member State: workshop 4 November 2013*, Luxembourg 2014, [http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/513983/IPOL-CULT_AT\(2013\)513983_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/513983/IPOL-CULT_AT(2013)513983_EN.pdf) [accessed: 28.11.2016]; A. Maniaki-Griva, *Return of cultural objects unlawfully removed from the territory of a Member State: initial appraisal of a European Commission impact assessment*, Brussels 2013, [http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL-JOIN_NT\(2013\)514078](http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL-JOIN_NT(2013)514078) [accessed: 28.11.2016]; L.V. Prott (ed.), *Witnesses to history: a compendium of documents and writings on the return of cultural objects*, UNESCO Publishing, Paris 2009; A.F. Vrdoljak, *International law, museums and the return of cultural objects*, Cambridge University Press, Cambridge 2006; J. Greenfield, *The return of cultural treasures*, 2nd edn., Cambridge University Press, Cambridge 1995.

² Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.

³ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012, OJ L 159, 28.05.2014, p. 1.

30 July 2009, the Commission concluded there was a need to engage, together with the central authorities responsible for the implementation of the Directive, in a reflection on a possible revision of the Directive.⁴ A working group of representatives of the central authorities within the Committee on the Export and Return of Cultural Goods was charged with identification of the problems and the suggestion of solutions.

The group finished its work in 2011 and concluded that the effectiveness of the Directive was limited (there were very few actual returns over the years of cultural objects unlawfully removed from the territory of Member States). The reasons identified were as follows: the strict eligibility criteria for objects to fall within the scope of the Directive (the categories of objects referred to in the Annex, along with the financial and age thresholds); the short time available for bringing return proceedings (not more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder); and the cost of compensation to which the possessor might have been entitled according to the Directive.

The group recommended that the Directive be revised to make it a more effective instrument for the return of national treasures. The evaluations also highlighted the need for improved administrative cooperation and consultation between the central authorities in order to enable them to better implement the Directive.

Process of revision

In November 2011 the Commission launched a public consultation in order to obtain the views of all the parties concerned with or working in the area of cultural objects (mostly public authorities, citizens, and economic operators). The majority of the public authority representatives took the view that the Directive did not guarantee the return of national treasures unlawfully removed from the territory of a Member State.

As a result, an impact assessment examined and compared four options: 1) no change to the current situation (no amendment to Council Directive 93/7/EEC as amended by Directives 96/100/EC⁵ and 2001/38/EC⁶); 2) promoting the use of

⁴ See Third Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State, Bruxelles, 30 July 2009, COM (2009) 408 final.

⁵ Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997 amending the Annex to Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 60, 1.03.1997, p. 59.

⁶ Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 amending Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 187, 10.07.2001, p. 43.

common tools by the central authorities (the Internal Market Information System or “IMI”⁷ module developed to facilitate administrative cooperation, consultation and the exchange of information between these authorities); 3) revision of Council Directive 93/7/EEC with a view toward: (i) extending its scope to include all objects classified as national treasures; (ii) extending the time-limits for bringing return proceedings and for checking the cultural object; and (iii) aligning the conditions for compensating the possessor); and 4) encouraging ratification and application by the Member States of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁸ (i.e. leaving Council Directive 93/7/EEC unchanged and focusing action on ratification and application by the Member States of the 1970 UNESCO Convention on cultural property).

Other options (such as ratification by the Union of the 1970 UNESCO and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;⁹ defining a strategy for the European Union towards ratification by all Member States of this UNIDROIT instrument;¹⁰ and replacing Council Directive 93/7/EEC with a regulation or repealing Council Directive 93/7/EEC without any alternative) were abandoned during the initial stages of examination of the various solutions on grounds of infeasibility and/or lack of effectiveness. The preferred approach, accepted by the Impact Assessment Board in 2012, was a combination of above-mentioned options 2 and 3, which meant a revision of the Directive (with respect to, for instance, its scope, the duration of the time-limits, and the conditions for compensating the possessor) and making the use of the IMI compulsory for the administrative cooperation between the central authorities.

Consequently, on 31 May 2013 the Commission presented a proposal for a recast of Council Directive 93/7/EEC, as amended by Directives 96/100/EC and 2001/38/EC. The most important suggested changes in the proposal were: 1) the extension of the scope so as to cover all cultural objects classified as being among national treasures within the meaning of Article 36 of the Treaty on the Functioning of the European Union (TFEU)¹¹ (i.e. deletion of the Annex); 2) the compulsory use of the IMI system for administrative cooperation and information exchanges between the central authorities; 3) an extension to five months of the time-limit

⁷ See Regulation (EU) No. 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (“the IMI Regulation”), OJ L 316, 14.11.2012, p. 1.

⁸ 14 November 1970, 823 UNTS 231 (hereinafter: 1970 UNESCO Convention).

⁹ 24 June 1995, 34 ILM 1322 (hereinafter: 1995 UNIDROIT Convention).

¹⁰ At present, 15 out of 28 Member States are parties to the Convention; see the list: <http://www.unidroit.org/status-cp> [accessed: 28.11.2016].

¹¹ Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26.10.2012, p. 47.

given to the authorities of the requesting Member State to check the nature of the cultural object found in another Member State; 4) an extension to three years of the time-limit for bringing return proceedings and clarification of the central authority as being the authority of the requesting Member State which starts the period for bringing return proceedings; 5) the uniformisation of the burden of proof of due care and attention in acquiring the cultural object, the burden lies with the possessor; 6) the establishment of non-exhaustive criteria for interpreting the concept of due care and attention, inspired by the 1995 UNIDROIT Convention; and 7) the extension to five years of the time-period for the presentation of the national reports assessing, and the Commission's report reviewing, the application of the Directive.

Adoption of Directive 2014/60/EU: main changes

The Commission's proposal had much support during the legislative procedure, both in the European Parliament (EP) and in the Council. They developed the Commission's proposal in two aspects: the EP proposed to introduce a reference to the Council conclusions of 13 and 14 December 2011, inviting Member States to ratify two international treaties: the 1970 UNESCO Convention and 1995 UNIDROIT Convention, and the Council proposed to insert, in a recital, that the Commission should set up an expert group, composed of central authorities responsible for the implementation of the Directive, to be involved in, *inter alia*, the preparation of a module for the IMI.

Directive 2014/60/EU, as adopted by the European Parliament and the Council on 15 May 2014,¹² confirms the novelties proposed by the Commission. The scope of the Directive has been extended so that it applies to all cultural objects identified as "national treasures possessing artistic, historic or archaeological value" under national legislation (Article 1). The central authorities must cooperate and promote consultation by means of the IMI in order, for instance, to seek a specified cultural object unlawfully removed and the identity of its possessor, to notify the discovery of a cultural object, to enable a check for the cultural object, and to act as an intermediary with regards to its return (Article 5). The return proceedings should be brought no later than three years after the time when the central authority of the requesting EU country became aware of the location of the object and of the identity of its possessor (Article 8). The person acquiring the object will be entitled to compensation provided that he or she can prove that they exercised due care and attention in acquiring the object with respect to whether the cultural

¹² Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012, OJ L 159, 28.05.2014, p. 1.

object was lawfully removed from the territory of the requesting Member State (Article 10, para. 1). Some non-exhaustive criteria are established for interpreting the concept of the due care and attention exercised by the possessor in acquiring the object (Article 10, para. 2). These criteria are based on those set out in Articles 4(4) and 6(2) of the 1995 UNIDROIT Convention. And finally, the time-period for the presentation of the national reports assessing, and the Commission's report reviewing, the application of the Directive has been extended to five years (Article 17).

Implementation: Expert Group and IMI module

Following recital 21 of Directive 2014/60, the Commission in 2014 set up an Expert Group "Return of cultural objects" (EG). This group should be a platform for the exchange of experience and good practices related to the implementation of the Directive. In particular, it should be involved in the process of preparing a module of the IMI for the return of cultural objects. The EG has worked closely with the Commission in order to implement the operating procedure for using the IMI with respect to the return of cultural objects. On the basis of documents prepared by the Commission, the EG has agreed on the forms, scenarios and sets of questions/answers to be used in the IMI module.

In order to make the IMI fully operational with respect to the return of cultural objects, Member States have set up their competent authorities in the IMI. In order to ensure the timely handling of requests and notifications and to avoid a situation whereby a communication via the IMI remains unattended, all Member States must set up at least one authority with the role of coordinator for the module.

Each Member State has appointed a central authority to deal with the return of cultural objects. The list of these central authorities has been published in the Official Journal of the European Union of 4 May 2016.¹³

Transposition by Member States

The Directive was to be transposed by 18 December 2015. As of the end of July 2016, the Commission received 19 communications with the national measures transposing Directive 2014/60/EU. These measures are currently being checked by the Commission's services as to their conformity with the Directive.

For the remainder of the Member States, the Commission has opened infringement proceedings for non- or partial communication, which will continue until the

¹³ List of central authorities nominated by the Member States to deal with the return of cultural objects unlawfully removed from a Member State and applying Article 4 of Directive 2014/60/EU, OJ C 160, 4.05.2016, p. 2.

receipt of the national measures.¹⁴ It remains to be seen whether and how the new rules will be applied in practice and will bring about the expected results.

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¹⁴ On 22 July 2016, the Commission decided to send reasoned opinions to Cyprus, Finland, France, Spain, Lithuania, Poland, Portugal and Romania (see Press Release *The July infringements package: key decisions*, 22 July 2016, http://europa.eu/rapid/press-release_MEMO-16-2490_en.htm [accessed: 28.11.2016]). In Germany, the law was adopted on 23 June by Bundestag and on 8 July by Bundesrat (see *Kulturgutschutz*, https://www.bundesregierung.de/Webs/Breg/DE/Bundesregierung/BeauftragtefuerKulturundMedien/kultur/kulturgutschutz/_node.html [accessed: 28.11.2016]).

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