

# RESEARCH ARTICLES

Marja van Heese\*

---

vanheese@erfgoedinspectie.nl  
Cultural Heritage Inspectorate  
P.O. Box 16478  
NL-2500 BL The Hague  
The Netherlands

## The Implementation of Directive 2014/60/EU in the Netherlands

**Abstract:** The Implementation Act for Directive 2014/60/EU on the return of cultural objects was published in the “Netherlands Bulletin of Acts, Orders and Decrees” in June 2015. Even though this new instrument represents a considerable enlargement of the protection of cultural heritage in the EU, its implementation has not led to major changes in Dutch legislation. The implementation of the previous Council Directive 93/7/EEC of 15 March 1993 already resolved the impasse in the Netherlands over a reasonable balance between the interests of original owners and those of innocent purchasers. With the 1992/93 adjustments to Dutch law the most important steps for accepting the 1970 UNESCO Convention were also taken. The Netherlands’ definition of protected works of art is in accordance with the criteria of a cultural object as stated in Article 2(1) of Directive 2014/60/EU. At the same time, facilitating a greater awareness of due diligence and research into provenance is high on the Dutch agenda, as they are considered important aspects in the fight against illicit trafficking in cultural objects.

---

**Keywords:** Directive 2014/60/EU, Netherlands, protection cultural heritage, unlawful removal, due diligence and provenance

---

---

\* **Marja van Heese** is an art historian (graduated from Leiden University) and worked as a senior cultural policy advisor in the Netherlands Ministry of Education, Culture and Science and at present works as a senior inspector in the Cultural Heritage Inspectorate. Within the Inspectorate she coordinates matters regarding European and international legislation on cultural objects. A subject of special interest to her is the protection of cultural objects and the fight against illicit trafficking, about which she has written several articles.

## Introduction

The Implementation Act for Directive 2014/60/EU on the return of cultural objects (hereinafter: Dutch Implementation Act) was published in the “Netherlands Bulletin of Acts, Orders and Decrees” in June 2015.<sup>1</sup> Even though this new instrument, the recast of Council Directive 93/7/EEC,<sup>2</sup> represents a considerable enlargement of the protection of cultural heritage in the European Union (EU) its implementation has not led to major changes in Dutch legislation, although several national laws did have to be adapted. The Cultural Heritage Inspectorate<sup>3</sup> is responsible for supervising compliance with the provisions of the Directive 2014/60/EU;<sup>4</sup> the decision to assign this task to the Inspectorate was published in the “Government Gazette” on 16 December 2015.<sup>5</sup> The Directive has been ratified for the Kingdom of the Netherlands.<sup>6</sup>

This article explains the changes in Dutch law which have accompanied the introduction of the Directive 2014/60/EU and the definition of Dutch cultural heritage, also taking into account the Dutch Heritage Act which came into force on 1 July 2016,<sup>7</sup> and discusses the implementation of this Directive in relation to the 1970 UNESCO Convention<sup>8</sup> and the Netherlands’ experiences with respect to the return of cultural objects.

---

<sup>1</sup> Act of 4 June 2015 amending the Civil Code and several other laws to implement 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 (28 May 2014, OJ L 159/1), Staatsblad 2015, 225.

<sup>2</sup> 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.

<sup>3</sup> The Cultural Heritage Inspectorate is an independent part of the Ministry of Education, Culture and Science. The Inspectorate is charged with overseeing an important part of the Dutch cultural heritage at a national level. This supervision encompasses archaeological excavations, central government archives, and movable cultural heritage. The Inspectorate supervises compliance with the heritage laws at the national, European, and international levels and promotes improvements to the management and care of cultural heritage and its proper handling. In the fight against illicit trafficking the Inspectorate works closely together with Dutch Customs and Dutch Police.

<sup>4</sup> 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.

<sup>5</sup> Decision of 8 December 2015 designating Cultural Heritage Inspectorate as the central authority within the meaning of Directive 2014/60/EU, Staatscourant 2015, 45561.

<sup>6</sup> The Directive is not applicable in the Caribbean part of the Netherlands.

<sup>7</sup> Act of 9 December 2015, Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (Heritage Act), Staatsblad 2015, 511.

<sup>8</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

## Changes in Dutch law with the introduction of the Directive

A major change in Dutch cultural law occurred in 1992/93 with the implementation of Council Directive 93/7/EEC of 15 March 1993<sup>9</sup> and the provisions regarding the property rights and the duty to return stolen or unlawfully removed cultural objects by a possessor in good faith. Previously, a purchaser in good faith could become the owner of an object, even if it came from a person who was not the owner. In a case where the original owner had lost the object by theft, the purchaser in good faith could become the new owner only three years after the theft, during which period the person robbed could claim his or her property. In the event the purchaser did not make the purchase in good faith, the person robbed could recover the object within 20 years; after this period the right of the robbed person became prescribed and the purchaser could become the owner. With the implementation of Council Directive 93/7/EEC a new situation arose for possessors in good faith – they had a right to a fair compensation. The Code of Civil Procedure<sup>10</sup> was changed by a new article on the return procedure, as well as articles on the required documents for the summons, the necessary measures for safeguarding, and the costs which might result from the execution of a court order. The Civil Code<sup>11</sup> was amended by new terms of limitations, of 30 and 75 years, for cultural objects within the meaning of Article 1(1) of Council Directive 93/7/EEC and provided for the possibility of a return procedure for legally protected cultural objects. The provision in the Civil Code that the competent court shall award the possessor compensation as it deems fair, according to the circumstances of the case, so long as the possessor exercised due care and attention in acquiring the object, was a breakthrough in Dutch jurisprudence.<sup>12</sup>

In addition, Council Directive 93/7/EEC improved the protection for cultural objects against unlawful export from Dutch territory. Until 1992/93 there was

---

<sup>9</sup> Act of 9 March 1995 amending some laws in connection with the obligation to return cultural objects unlawfully removed from the territory of a Member State of the European Union or another State party to the Agreement on the European Economic Area, *Staatsblad* 1995, 145. See on the implementation process and compliance with EU directives also: A.L. Dimitrova, B. Steunenbergh, *The power of implementers: A three level game model of compliance with EU policy and its application to cultural heritage*, "Journal of European Public Policy", pp. 1-22, 19 September 2016, <http://www.tandfonline.com/doi/abs/10.1080/13501763.2016.1223156?journalCode=rjpp20> [accessed: 12.12.2016].

<sup>10</sup> Dutch Code of Civil Procedure (consolidated version), <http://wetten.overheid.nl/BWBR0001827/2016-07-01> [accessed: 12.12.2016].

<sup>11</sup> Dutch Civil Code (consolidated version), <http://wetten.overheid.nl/BWBR0005291/2017-01-01> [accessed: 31.01.2017].

<sup>12</sup> Civil Code, Articles 86a, 310a and 310b. See also: M.H. Wissink, *De reikwijdte van het cultuurgoederenregime in Boek 3 BW*, *Weekblad voor privaatrecht, notariaat en registratie*, SDU, jrg. 129 nr. 6321, The Hague 1998, pp. 455-462; P.S. Sjouke, *Het behoud van cultuurgoederen, twee werelden, twee visies*, *Ars Aequi Libri*, Nijmegen 1999; P.S. Sjouke, *Internationaal Recht*, *Museumrechtwijzer*, *Juridisch handboek voor musea*, Amsterdam 2000, pp. 136-164.

no real law to protect Dutch cultural objects from sale and export.<sup>13</sup> The introduction in the EU of a complementary regulatory mechanism on the export of cultural goods with the introduction of the single EEC internal market, and a controlling system at the outer borders of the EU, contributed as well to the prevention of the unlawful export of legally protected cultural objects.<sup>14</sup>

The implementation of Directive 2014/60/EU led to amendments in the 1984 Cultural Heritage Preservation Act,<sup>15</sup> the Civil Code, and the Code of Civil Procedure. The most important amendments are in the Civil Code, whereby the notion of due diligence when acquiring an object now takes into consideration all the circumstances,<sup>16</sup> and there was an extension of time to three years for return proceedings,<sup>17</sup> and in the Code of Civil Procedure by making the definition of a cultural object in accordance with the meaning of Article 2(1) of Directive 2014/60/EU.<sup>18</sup>

Arrangements and obligations between states do not need transposition into Dutch legislation. This principle explains why the time limit of six months<sup>19</sup> and the Internal Market Information system (IMI)<sup>20</sup> are not included in the Implementation Act. With respect to the obligations towards other Member States only an internal regulation is required.

---

<sup>13</sup> There was a regulation after the Second World War that dealt with the export of works of art above a certain financial value; their export was permitted only with a statement of “no objection” by the Ministry of Culture, Recreation and Social Welfare (Foreign Exchange Control Decree of 10 October 1945 (Staatsblad 1945/F 222) and Decision on export of art treasures of 1977 (Staatscourant 1977/95).

<sup>14</sup> Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods (OJ L 395, 31.12.1992, p. 1), codified by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (OJ L 39, 10.02.2009, p. 1). For more on the introduction of the EU legislation, see for example T.J. Nicholas II, *EEC Measures on the Treatment of National Treasures*, “Loyola of Los Angeles International and Comparative Law Review” 1993, Vol. 16, p. 127; V.J. Viantrio, *Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects*, “Fordham International Law Journal” 1993, Vol. 17, Article 8; A. Loman, K. Mortelmans, H. Post, S. Watson, *Culture and Community Law, Before and after Maastricht*, Kluwer Law and Taxation Publishers, Deventer – Boston 1992, pp. 37-39, 174-176.

<sup>15</sup> Cultural Heritage Preservation Act of 1 February 1984, Staatsblad 1984, 49.

<sup>16</sup> Civil Code. Book 3, Article 87a(1).

<sup>17</sup> Civil Code, Book 3, Article 310a.

<sup>18</sup> Code of Civil Procedure, Article 1008.

<sup>19</sup> The time-limit of six months (cf. Article 5(3) of the Directive 2014/60/EU) can be found in: the Explanatory Memorandum, Implementation Act for Directive 2014/60/EU on the return of cultural objects (Kamerstuk 2014-2015, 34 097 No. 3, p. 3), point 4. It was considered that for the adjustment to the period of six months no further adaptation was necessary, because Article 1010 of the Dutch Code of Civil Procedure does not mention any period for the taking of the necessary measures. This decision was also taken with respect to the implementation in 1993 of the Council Directive 93/7/EEC.

<sup>20</sup> The use of IMI is mentioned in the Explanatory Memorandum of the Implementation Act under point 3. For the exchange of information via the IMI the appropriate legal provisions regarding the protection of personal particulars and of the law for safeguarding individual privacy shall be taken into consideration.

## Dutch cultural heritage legislation

In 1984 the Cultural Heritage Preservation Act (CHPA) came into force, which was aimed at preventing objects and collections of special historical or scientific meaning from being lost to Dutch cultural heritage. The CHPA was merged into the new Heritage Act, which came into force on 1 July 2016. This new Heritage Act combines six Dutch cultural laws and one regulation<sup>21</sup> in order to stop the fragmentation of Dutch cultural heritage legislation and to promote a comprehensive protection regime for cultural heritage, with shared definitions, procedures, and protection measures for immovable, movable and intangible cultural heritage. New provisions, compared to the “old” statutory regulations on cultural heritage include, *inter alia*, the introduction of structured arrangements for financing the cost of managing the national collection, the obligation to accept cultural objects and collections that are of high quality into the national collection, the opportunity for parties other than the state to register as the potential purchaser of a protected cultural object that is at risk of disappearing abroad, a system of statute-based certification for carrying out archaeological excavations and harmonized enforcement and monitoring of the national collection, and administrative coercion and penalties for non-compliance.<sup>22</sup>

The definition of cultural heritage in Section 1.1. of the Heritage Act is inspired by the definition of cultural heritage in Article 2 of the Framework Convention on the Value of Cultural Heritage for Society (Faro Convention, 2005) of the Council of Europe,<sup>23</sup> and reads as follows:

Tangible and intangible resources inherited from the past, created in the course of time by people or arising from the interaction between man and the environment, which people, irrespective of the ownership thereof, identify as a reflection and expression of continuously evolving values, beliefs, knowledge and traditions, and which offer a frame of reference to them and to future generations.<sup>24</sup>

---

<sup>21</sup> Regulations of 6 December 2012, on Material Management of Museum Objects, *Staatscourant* 2012, 26 235; National Museum Services (Privatisation) Act of 30 July 1993, *Staatsblad* 1993, 398; Monuments and Historic Buildings Act of 23 December 1988, *Staatsblad* 1988, 638; Cultural Heritage Preservation Act of 1 February 1984, *Staatsblad* 1984, 49; UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property Implementation Act of 12 June 2009, *Staatsblad* 2009, 255; Cultural Property Originating from Occupied Territory (Return) Act of 8 March 2007, *Staatsblad* 2007, 123 (the latter act implemented to the Dutch law system: Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954, 249 UNTS 240) and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (First Hague Protocol) (249 UNTS 358)).

<sup>22</sup> Explanatory Memorandum, Dutch Heritage Act, Kamerstuk 2014-2015, 34 109, No. 3, point 1.4 (Main points of the legislative proposal).

<sup>23</sup> Framework Convention on the Value of Cultural Heritage for Society (Faro Convention, 2005), 27 October 2005, CETS No. 199.

<sup>24</sup> Explanatory Memorandum to the Dutch Heritage Act, *op. cit.*, p. 3.

The designation of cultural heritage in the Netherlands is a combination of a generic and a specific protection regime. Legal protection in the Netherlands is given to part(s) of historical monuments, unlawfully excavated archaeological finds, and public collections of museums, archives and libraries (partly) financed by a public body, as well as ecclesiastical collections.<sup>25</sup> The Minister of Culture can decide to preserve a cultural object, or a collection of particular cultural/historical or scholarly significance or exceptional beauty, being indispensable and irreplaceable to Dutch cultural heritage.<sup>26</sup>

The Heritage Act includes European legislation and the 2009 and 2007 Implementation Acts of the 1970 and 1954 UNESCO Conventions;<sup>27</sup> meaning that there are no substantive changes in the Heritage Act to the Implementation Acts of the Directive 2014/60/EU and of the 1970 and 1954 UNESCO Conventions.<sup>28</sup>

The authorization of export licences and customs control at the outer borders of the EU offer the possibility to check the importance and legal status of cultural objects.<sup>29</sup> In the event an object might leave the territory of the Netherlands and it meets the criteria of Section 3.7 of the Dutch Heritage Act, there is the possibility for an emergency procedure to keep the object or collection in the Netherlands.<sup>30</sup> So far, however, this possibility has never been exercised. The Netherlands definition of protected cultural objects in the Heritage Act falls within the meaning of Article 36 of the Treaty on the Functioning of the European Union,<sup>31</sup> as constituting “national treasures possessing artistic, historic or archaeological value” (Article 2(1) and 2(8) of Directive 2014/60/EU). The removal of the Annex with its classification of cultural objects is an advantage for the Netherlands, as now cultural objects that do not meet the financial and age thresholds may also qualify for a return procedure.

---

<sup>25</sup> Dutch Heritage Act, Section 3.18 (Designation as cultural objects under the 1970 UNESCO Convention and Directive 2014/60/EU *op. cit.*). It is prohibited to remove these objects from the Netherlands without permission by the owner (Dutch Heritage Act, Section 4.22).

<sup>26</sup> Dutch Heritage Act, Section 3.7 (Designation as protected cultural object or collection). The Netherlands Agency for Cultural Heritage administers the database for legally protected cultural objects: <http://www.digitalecollectienederland.nl/> [accessed: 13.09.2016].

<sup>27</sup> UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property Implementation Act, *op. cit.*; Cultural Property Originating from Occupied..., *op. cit.*

<sup>28</sup> Dutch Heritage Act, Section 4.23 (Prohibition on export outside the EU without a permit), Section 8.8 (Investigation of protected cultural objects of EU member states), Chapter 6 International Return (para. 6.1 Return of cultural property from states parties to the 1970 UNESCO Convention and para. 6.2 Return of cultural property from occupied territory).

<sup>29</sup> Conform Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods. For objects which are specially designated by the Minister of Culture approval for temporary export is also required.

<sup>30</sup> Dutch Heritage Act, Section 3.8.

<sup>31</sup> Consolidated version, OJ C 326, 26.10.2012, p. 47.

## The implementation of the Directive and the 1970 UNESCO Convention

The most important steps for acceptance of the 1970 UNESCO Convention were taken in the 1992/93 adjustments to Dutch law, although it was not until July 2004 that the decision was made to implement the 1970 UNESCO Convention, along with several elements of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: 1995 UNIDROIT Convention).<sup>32</sup>

The implementation of the 1970 UNESCO Convention is based on the implementation of Council Directive 93/7/EEC and includes provisions on due diligence and fair compensation, limitation periods, sanctions, and safeguarding.<sup>33</sup> The return of objects touches upon the aspects of expropriation proceedings and matters such as who is the possessor or holder, whether the possessor is also the owner, and in cases where the possessor is not the owner whether he or she is entitled to fair compensation. Therefore, a civil court procedure is the appropriate mechanism to set this process in motion, as courts have the experience and expertise necessary to determine the compensation owed.<sup>34</sup>

The notion of the exercise of due diligence in acquiring objects, and the parallel notion of taking account of all circumstances of the acquisition (Article 10 of Directive 2014/60/EU) were already elaborated in Section 6 of the 2009 Implementation Act of the 1970 UNESCO Convention<sup>35</sup> and were derived from Article 4(4)

---

<sup>32</sup> 24 June 1995, 34 ILM 1322; for more on the history of the implementation of the 1970 UNESCO Convention in the Netherlands, see N.M. van der Horst, *The Dutch Ratification of UNESCO: Implementation Acts and the Protection of Cultural Property*, "Art Antiquity and Law" 2010, Vol. 15, pp. 261-273; Explanatory Memorandum, approving the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (Kamerstuk, 2007-2008, 31 256 (R 1836), No. 3), English translation: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_approvalconv1970\\_memo\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_approvalconv1970_memo_engtof.pdf) [accessed: 12.12.2016]; M. van Heese, *The Implementation of the 1970 UNESCO Convention in the Netherlands, a Legal and Practical Approach*, "The Cambrian Law Review" 2011, Vol. 42, pp. 33-51.

<sup>33</sup> Explanatory Memorandum, UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property Implementation Act of 12 June 2009, English translation: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_implementationact\\_conv1970\\_memo.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_implementationact_conv1970_memo.pdf) [accessed: 12.12.2016], at p. 5. The Cultural Property Originating from Occupied Territory (Return) Act of 8 March 2007 (implementing the 1954 Hague Convention and its First (Hague) Protocol) also followed this line. See Explanatory Memorandum, Cultural Property Originating from Occupied Territory (Return) Act of 8 March 2007, English translation: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_memo\\_returnoccupiedterritory\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_memo_returnoccupiedterritory_engtof.pdf) [accessed: 12.12.2016], at p. 8.

<sup>34</sup> Explanatory Memorandum, Cultural Property Originating..., p. 9. Code of Civil Procedure, Articles 1008-1012. On the basis of Article 1008 of the Code of Civil Procedure, legal proceedings for the return of movable property must be instituted before the court that has jurisdiction in accordance with the rules of this Code. On the basis of Article 99 this is the competent court in the place of residence of the defendant.

<sup>35</sup> As of 1 July 2016, changed in Section 6.15 of the Dutch Heritage Act. Book 3 of the Civil Code, Articles 87 and 87a. With respect to a dealer and an auctioneer, a greater degree of due diligence is expected regarding the circumstances of the acquisition. A dealer must also ascertain the identity of the seller, require the seller to provide a written declaration that he is competent to dispose of the property, and record

of the 1995 UNIDROIT Convention, later elaborated in Article 10 of Directive 2014/60/EU together with provisions concerning the documentation on the object's provenance and the authorizations for removal required under the law of the requesting Member State. In addition, the periods for initiating a return procedure are almost the same, being 30 years from the date on which the object was unlawfully removed from the territory of the state party from which it originates, and 75 years in the case of objects that form part of public collections or ecclesiastical institutions. However the limitation period for filing a claim differs, as Section 6.7 of the Dutch Heritage Act<sup>36</sup> provides that it is five years from the start of the day following that on which the whereabouts of the object and the identity of the possessor or holder became known, and not three years as provided in Article 8(1) of Directive 2014/60/EU.

Inasmuch as both laws are considered private law,<sup>37</sup> sanction measures include the right of reclamation by a Member State or a rightful claimant. Additional sanction measures for theft, fencing, misappropriation, or any other criminal offence are found in the Penal Code.<sup>38</sup>

The Cultural Heritage Inspectorate can take measures to safeguard an object that might be unlawfully removed from the territory of a Member State, which means it will be stored in a safe and climatized place while awaiting further legal steps. The inspectors are empowered to enter a dwelling without the consent of the occupant, to demand that the occupant show them the cultural property present in the dwelling, to seal off areas and objects insofar as it is reasonably necessary, and to exercise the powers referred to with the help of the police where necessary.<sup>39</sup>

---

in a register to be kept by him the provenance of the cultural property, the name and address of the seller, the purchase price paid to the seller and a description of the cultural property. Also all appropriate registers of stolen cultural property must be consulted. The Penal Code, under Section 437 (Dutch Penal Code (consolidated version), <http://wetten.overheid.nl/BWBR0001854/2016-07-01> [accessed: 12.12.2016]), refers to a register which has to be maintained by (all sorts of) dealers; this registration must include all goods, as well as the identity of the person who offers it for sale to the dealer; it is forbidden to acquire or to hold a good which is listed as stolen or lost. Businesses have a duty to keep records for seven years (Civil Code, Article 3:15i in conjunction with Article 2:10(2-4) of the Civil Code).

<sup>36</sup> Cf. Article 3:310c Civil Code.

<sup>37</sup> Explanatory Memorandum to the 2009 Implementation Act of the 1970 UNESCO Convention, pp. 5-6.

<sup>38</sup> Sanctions for Council Regulation 116/2009, the Sanction Orders for Iraq (United Nations Security Council Resolution No. 1483, 22 May 2003, UN Doc. S/RES/1483 (2003)) and Syria (Council Regulation (EU) No. 168/2012 of 27 February 2012 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria (OJ L 54, 28.02.2012, p. 1), and the unlawful removal of legally protected Dutch cultural objects fall under the Economic Offences Act of 22 June 1950 (Staatsblad 1950, K258, as amended) and the Sanctions Act of 15 February 1980 (Staatsblad 1980, 93, as amended). Violations are seen as an economic crime (Article 1(2), Economic Offences Act) and can be punished by imprisonment, community service, or a fine.

<sup>39</sup> Other tasks and competences of the Inspectorate regarding Directive 2014/60/EU are in conformity with the obligations of the central authorities and laid down in the Heritage Act Sections 8.8 and 8.6.

Council Regulation (EC) No. 116/2009 on the export of cultural goods envisions a controlling mechanism at the outer borders of the EU. Even though the aims and applicable scope of Directive 2014/60/EU and Council Regulation 116/2009 on the export of cultural goods are different, as well as their legal basis, they are nevertheless complementary to each other and together meet the need to reconcile the protection of national cultural heritage with the general principle of the free movement of cultural goods in the EU.<sup>40</sup> The concept of unlawful export encompasses the failure to return an object at the end of a period of lawful temporary removal or any breach of conditions regarding this removal. It also refers to any export of such items from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No. 116/2009.<sup>41</sup> An export licence can be refused when cultural objects are legally protected when they are part of the national artistic, historical or archaeological heritage<sup>42</sup> or are exported outside the EU without the proper permissions of the national authorities. A reference to the due diligence requirement as contained in Consideration 17 and in Article 10 of Directive 2014/60/EU can also be found in Council Regulation No. 116/2009, and especially in box 17 of Council Regulation No. 1081/2012 of 9 November 2012 for the application of Regulation No. 116/2009.<sup>43</sup> Box 17 also lists other characteristics that might be useful when applying for an export licence, to establish the identification of a cultural object such as historical antecedents, conditions of execution, former owners, state of preservation and restoration, bibliography, and electronic code or marking. This extra information might give the customs employees and issuing authorities more certainty about the identification of cultural goods offered for export.

Facilitation of a greater awareness of the due diligence requirement and research on provenance is high on the Dutch agenda and is, *inter alia*, discussed with art dealers, umbrella organisations of the art trade, and heritage institutions in the Netherlands. It is also included in a standardized procedure for delivering information to the Customs Central Licensing Institute and the Cultural Heritage Inspectorate. When a private person or an institution applies for an export licence,<sup>44</sup> documents on the provenance of the objects in question have to be delivered in order to give the authorities the opportunity to check the legitimacy of cultural goods exported out of the Netherlands or of the other Member States of the EU.

---

<sup>40</sup> Consideration 7 of Directive 2014/60/EU.

<sup>41</sup> Directive 2014/60/EU, Article 2(2).

<sup>42</sup> Article 2(2)(b) of Council Regulation (EC) No. 116/2009.

<sup>43</sup> Commission Implementing Regulation (EU) No. 1081/2012 of 9 November 2012 for the purposes of Council Regulation (EC) No. 116/2009 on the export of cultural goods, OJ L 324, 22.11.2012, p. 1.

<sup>44</sup> Cf. box 17 of Council Regulation No. 1081/2012 of 9 November 2012 for the purposes of Council Regulation No. 116/2009 on the export of cultural goods and Article 2 of the latter. The Central Licensing institute does the administrative handling of the export licenses and the Cultural Heritage Inspectorate authorizes the application for export.

Unfortunately, there is no uniform procedure in the EU to deal with this issue. Also the issuance of export licences with regard to non-Western cultural objects that might be legally protected and/or unlawfully removed from a third country<sup>45</sup> are not uniformly interpreted by the Member States, and the interpretation of the information and the legal basis for requesting provenance information need further clarification. The export licensing system should be more in line with other international legal systems in order to become a more effective instrument in the control of cross-border trafficking in legally protected cultural objects.<sup>46</sup> However, an export licence does not prevent illicit trafficking. Fortunately, the European Council has decided to start a Project Group in the Fall of 2016 to assist the Commission in preparing Guidance for customs control officials concerning the export of cultural goods, in order to improve the current practices in the Member States with regard to handling the provenance of cultural goods and to streamline controls and verification procedures before issuing export licences. The end of 2017 foresees the expected results.<sup>47</sup>

Inasmuch as it may be expected that illicit trafficking in cultural objects will increase, more activities could be undertaken in order to establish a concerted effort by customs (administrations), in close cooperation with heritage institutions, with respect to the recognition of cultural objects, as well as to attain a level playing field regarding the controls for the EU's outside borders. The use of the ICOM Red Lists,<sup>48</sup> a system of risk management and risk analysis, training programmes for Customs officials (a system of permanent education with structured transfer of knowledge about cultural heritage and cultural legislation), and research into and monitoring of the art trade are important aspects in the fight against illicit trafficking.

## Experiences in the Netherlands

The aim of the Directive is the physical return of a cultural object that has unlawfully left the territory of a Member State. The responsibility to protect cultural property in its artistic, historical and archaeological context is a basic aspect of international cultural heritage law. Requests from Member States regarding possible unlawful removals of cultural objects are always 100% attended to in the Netherlands.

---

<sup>45</sup> See Article 2(2) (b) of Council Regulation No. 116/2009.

<sup>46</sup> For more on this subject, see also A. Biondi, *The Merchant, the thief and the citizen: the circulation of works of art within the European Union*, "Common Market Law Review" 1997, Vol. 34; J.A.R. Nafziger, R.K. Paterson (eds.), *Handbook on the Law of Cultural Heritage and International Trade*, Edward Elgar Publishing, Cheltenham – Northampton 2014, pp. 581-583, pp. 596-602.

<sup>47</sup> Project Guidance for customs controls over the export of cultural goods. The project shall be executed under the Programme Customs 2020 (proposal number 645), by Directorate-General TAXUD-B1. The project is based on a non-paper prepared by Belgium and the Netherlands "On the need to check the provenance before issuing an EU export licence", and was discussed at the 2<sup>nd</sup> meeting of the Experts Group on Customs Issues related to Cultural Goods (Brussels, 11 April 2016).

<sup>48</sup> The International Council of Museums has developed 15 Red Lists of categories of objects which are at risk, see its database at: <http://icom.museum/resources/red-lists-database/> [accessed: 10.09.2016].

At the same time, the Netherlands does not have much experience with return procedures. There were two formal return procedures under Article 5(2) (currently Article 6 in Directive 2014/60/EU): a request by the Czech Republic in 2009 and a request by Italy in 2002 for the return of armour.<sup>49</sup>

The German authorities refused a request in 2006 for the safeguarding of archival material originating from an archive in Amsterdam, lodged under Article 4(1) (currently Article 5 in Directive 2014/60/EU). In other cases amicable settlements have been reached with several Member States, e.g. the return of manuscripts by the UK to the Netherlands (2003), and the return of a painting to Austria (2000).<sup>50</sup>

In several requests for identification the Netherlands has assisted and informed central authorities in the EU. In all cases these concerned legally protected cultural objects (ecclesiastical heritage, paintings, sculpture, archival documents and (underwater) archaeological heritage) that left their territory unlawfully. In most cases the removal was either before 1 January 1993, of an uncertain period, or the financial and age thresholds did not meet the criteria in the Annex. In one case a sculpture was stolen in 1990 from a museum and given in consignment to a Dutch art dealer, where it was discovered as “stolen” when consulting the Interpol database for stolen works of art. It took a long time for the authorities to decide whether to start a return procedure under the Council Directive 93/7/EEC (the time of unlawful removal from the territory could not be proven) or to deal with this case under the Penal Code. Eventually it was decided to proceed under the latter. The Public Prosecutor wanted to return the object to its rightful owners, but the court decided that the Dutch private collector had bought it in good faith and was therefore the rightful owner, and it could not be proven that the stolen statue was the same as the one in the possession of the private collector. The judge followed the reasoning that more statues of the same type, using one mould, were made and that therefore it was not certain that the statue in question was the one stolen.<sup>51</sup>

Among all these requests there were also several returns by heritage institutions, although they were outside the use and scope of the Directive in the Netherlands. One can say that these returns were stimulated in great part by the International Council of Museums (ICOM) Code of Ethics,<sup>52</sup> translated in the Netherlands

<sup>49</sup> *Italian Republic v. Museum of Antiquities Leiden*, Judgment of the Court in The Hague, 9 June 2004, Nr. 02/3321. The court was of the opinion that the Italian Republic could not prove that the armour bought by the Museum originated from Italy and was unlawfully removed after 31 December 1992.

<sup>50</sup> Explanatory Memorandum, Implementation Act for Directive 2014/60/EU..., p. 3.

<sup>51</sup> Rechtbank Amsterdam, Beschikking, RK: 14/2951, 16 Oktober 2014.

<sup>52</sup> ICOM Code of Ethics for Museums, 4 November 1986, last version: 8 October 2004, [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf) [accessed: 12.12.2016].

into an ethical guideline for museums,<sup>53</sup> and inspired by the 1970 UNESCO Convention and the Dutch implementation process. The guideline requires that museums must conduct research into the origins of an object or a specimen before acquiring such object, or for loan or exchange purposes, and that they are satisfied that a valid title is held and that the objects or specimens were not illegally obtained or exported from their country of origin.<sup>54</sup>

The ICOM Code of Ethics (and also the ethical codes in the heritage fields of Archives and Archaeology) has certainly made heritage institutions more aware of the necessity to conduct research into provenance, the legal status of objects and specimens, and exercise of due diligence. In one case a Dutch museum acted on behalf of a private person to facilitate the return of an archaeological fragment from the Parthenon. The fragment was picked up by a tourist in the 1950s (who regretted this later), and was returned formally to the Greek authorities in 2011.

In 2015 a sculpture was returned by a Dutch museum to a church in France. The sculpture was stolen in 1996, and via art dealers in Paris and in Antwerp was bought by the Dutch museum in 2007, where it was discovered by a French expert to have been stolen. The museum had acted in good faith and was willing to cooperate in the return via a mediation procedure. After almost 20 years the sculpture was returned to its place of origin, while in the meantime better safety and security measures for the ecclesiastical heritage were undertaken.<sup>55</sup>

The most recent example concerns the University of Amsterdam. During the preparations for the exhibition *Sicily and the Sea, dive into the past* (Allard Pierson Museum), it was discovered that objects which were acquired in the 1980s by the museum appeared to be from the so-called Capistello wreck, which was discovered in 1957 near the Liparian Islands. When their questionable underwater provenance was discovered, the Museum decided to return approximately 40 objects to the proper Sicilian and Italian authorities following the end of the exhibition in April 2016.

The Netherlands police also assist in the return of cultural objects. In November 2015 a rare and invaluable 15<sup>th</sup> century jug of pewter, stolen in 1990 from a Belgium museum and offered for sale in the summer of 2014 by an antiquarian in Amsterdam, was returned as the result of close cooperation between the Belgian and Netherlands police.

---

<sup>53</sup> The ICOM Code of Ethics was translated in the Netherlands in 1991, 1999, and last revised in 2004. Registered museums in the Netherlands (as of the end of 2015 there were 481 registered museums out of a total number of 679 museums) receive certification if they comply with a number of basic requirements, based on the ICOM-definitions (Dutch Museum Register Foundation).

<sup>54</sup> ICOM Code of Ethics, Articles 2.1-2.4.

<sup>55</sup> *Vingt ans après avoir été volée, 'Ecce Homo' fait son retour à Beauvais*, "Le Parisien", 24 Septembre 2015.

The experiences in the Netherlands with amicable settlements<sup>56</sup> are consistent with the experiences of other Member States, as is reflected in concrete figures in the fourth report on the application of Council Directive 93/7/EEC:<sup>57</sup> 28 amicable settlements in the period 1999-2011 (mostly returned by Germany and requested by the Czech Republic) against 17 formal requests for return in conformance with Article 5(2) (mostly requested by the Czech Republic and returned by Austria).<sup>58</sup>

## Conclusions

As can be seen in the above-mentioned fourth report on the application of Council Directive 93/7/EEC,<sup>59</sup> the Member States did not apply the Directive very broadly. The most important obstacles to the application of the Directive were the burden of proof of the possessor in good faith; the fact that a legally protected cultural object did not meet the criteria contained in the 15 categories listed in the Annex to the Directive; the short time period for Member States to initiate a return procedure; and the limited cooperation and exchange of information between the Member States. The new Directive has addressed these bottlenecks. Much is expected from the enhanced cooperation and communication facilitated through a new administrative system, which gives the authorities of the EU Member States the possibility to more rapidly exchange information.

Nonetheless it should be noted that, based on the Netherlands' experience, the time of theft and the moment of transfer of the object to the territory of another Member State are difficult issues to deal with. Member states thus consider the pros and cons of a return procedure. The possibly high costs of a legal procedure (lawyers' fees, court fee, and fees for witnesses and experts, as well as seizure costs and costs for transport, storage and insurance) require one has to think twice about the application of the Directive.<sup>60</sup> Thus it would seem that Member States would also consider the use of other possibilities, for example mediation.<sup>61</sup>

But it certainly can be said that the Directive has had a stimulating and preventive effect in the sense that buyers of cultural objects will be more aware of the importance of cultural heritage and the due diligence requirements in the acquisition of cultural objects. The Netherlands considers the Directive to be an important

---

<sup>56</sup> Explanatory Memorandum, Implementation Act for Directive 2014/60/EU..., p. 5.

<sup>57</sup> COM (2013) 310 final.

<sup>58</sup> COM (2000) 325 final, and COM (2009) 408 final.

<sup>59</sup> COM (2013) 310 final.

<sup>60</sup> Explanatory Memorandum, Implementation Act for Directive 2014/60/EU, p. 2.

<sup>61</sup> M. Cornu, M. Renold, *New developments in the restitution of cultural property: alternative means of dispute settlement*, "International Journal of Cultural Property" 2010, Vol. 17.

instrument in the fight against illicit trafficking in cultural objects due to the possibilities it gives for the return of an unlawfully removed object, be it via prevention, the exchange of information, the use of formal requests and return proceedings, or the use of amicable settlements.

## References

- Act of 9 March 1995 amending some laws in connection with the obligation to return cultural objects unlawfully removed from the territory of a Member State of the European Union or another State party to the Agreement on the European Economic Area, *Staatsblad* 1995, 145.
- Act of 12 June 2009 implementing the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970, *Staatsblad* 2009, 255.
- Act of 4 June 2015 amending the Civil Code and several other laws to implement 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 (28 May 2014, OJ L 159/1), *Staatsblad* 2015, 225.
- Act of 9 December 2015, Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (Heritage Act), *Staatsblad* 2015, 511.
- Biondi A., *The Merchant, the thief and the citizen: the circulation of works of art within the European Union*, "Common Market Law Review" 1997, Vol. 34.
- Commission Implementing Regulation (EU) No. 1081/2012 of 9 November 2012 for the purposes of Council Regulation (EC) No. 116/2009 on the export of cultural goods, OJ L 324, 22.11.2012, p. 1.
- Cornu M., Renold M., *New developments in the restitution of cultural property: alternative means of dispute settlement*, "International Journal of Cultural Property" 2010, Vol. 17.
- 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.
- Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods, OJ L 39, 10.02.2009, p. 1.
- Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1.
- Council Regulation (EU) No. 168/2012 of 27 February 2012 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 54, 28.02.2012, p. 1.
- Cultural Heritage Preservation Act of 1 February 1984, *Staatsblad* 1984, 49.
- Cultural Property Originating from Occupied Territory (Return) Act of 8 March 2007, *Staatsblad* 2007, 123.
- Decision of 8 December 2015 designating Cultural Heritage Inspectorate as the central authority within the meaning of Directive 2014/60/EU, *Staatscourant* 2015, 45561.
- Decision on export of art treasures of 1977, *Staatscourant* 1977/95.
- Dimitrova A. L., Steunenberg B., *The power of implementers: A three level game model of compliance with EU policy and its application to cultural heritage*, "Journal of Eu-

- European Public Policy”, 19 September 2016, <http://www.tandfonline.com/doi/abs/10.1080/13501763.2016.1223156?journalCode=rjpp20> [accessed: 12.12.2016].
- 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, 28.5.2014, p. 1.
- Dutch Civil Code (consolidated version), <http://wetten.overheid.nl/BWBR0005291/2017-01-01> [accessed: 31.01.2017].
- Dutch Code of Civil Procedure (consolidated version), <http://wetten.overheid.nl/BWBR0001827/2016-07-01> [accessed: 12.12.2016].
- Dutch Penal Code (consolidated version), <http://wetten.overheid.nl/BWBR0001854/2016-07-01> [accessed: 12.12.2016].
- Economic Offences Act of 22 June 1950, Staatsblad 1950, K258, as amended.
- Explanatory Memorandum, Dutch Heritage Act, Kamerstuk 2014-2015, 34 109, No. 3.
- Explanatory Memorandum, approving the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (Kamerstuk, 2007-2008, 31 256 (R 1836), No. 3), English translation: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_approvalconv1970\\_memo\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_approvalconv1970_memo_engtof.pdf) [accessed: 12.12.2016].
- Explanatory Memorandum, Cultural Property Originating from Occupied Territory (Return) Act of 8 March 2007, English translation: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_memo\\_returnoccupiedterritory\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_memo_returnoccupiedterritory_engtof.pdf) [accessed: 12.12.2016].
- Explanatory Memorandum, Implementation Act for Directive 2014/60/EU on the return of cultural objects, Kamerstuk 2014-2015, 34 097, No. 3
- Explanatory Memorandum, UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property Implementation Act of 12 June 2009, English translation: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_implementationact\\_conv1970\\_memo.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_implementationact_conv1970_memo.pdf) [accessed: 12.12.2016].
- Foreign Exchange Control Decree of 10 October 1945, Staatsblad 1945/F 222.
- Framework Convention on the Value of Cultural Heritage for Society (Faro Convention, 2005), 27 October 2005, CETS No.199.
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.
- Heese M. van, *The Implementation of the 1970 UNESCO Convention in the Netherlands, a Legal and Practical Approach*, “The Cambrian Law Review” 2011, Vol. 42.
- Horst N.M. van der, *The Dutch Ratification of UNESCO: Implementation Acts and the Protection of Cultural Property*, “Art Antiquity and Law” 2010, Vol. 15.
- <http://icom.museum/resources/red-lists-database/> [accessed: 10.09.2016]
- <http://www.digitalecollectienederland.nl/> [accessed: 13.09.2016].
- ICOM Code of Ethics for Museums, 4 November 1986, last version: 8 October 2004, [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf) [accessed: 12.12.2016].
- Italian Republic v. Museum of Antiquities Leiden*, Judgment of the Court in The Hague, 9 June 2004, Nr. 02/3321.

## RESEARCH ARTICLES

Marja van Heese

---

- Loman A., Mortelmans K., Post H., Watson S., *Culture and Community Law, Before and after Maastricht*, Kluwer Law and Taxation Publishers, Deventer, Boston, 1992.
- Monuments and Historic Buildings Act of 23 December 1988, Staatsblad 1988, 638.
- Nafziger J.A.R., Paterson R.K. (eds.), *Handbook on the Law of Cultural Heritage and International Trade*, Edward Elgar Publishing, Cheltenham – Northampton 2014.
- National Museum Services (Privatisation) Act of 24 June 1993, Staatsblad 1993, 398.
- Nicholas T.J. II, *EEC Measures on the Treatment of National Treasures*, "Loyola of Los Angeles International and Comparative Law Review" 1993, Vol. 16.
- Project Guidance for customs controls over the export of cultural goods. The project shall be executed under the Programme Customs 2020 (proposal number 645), by Directorate-General TAXUD-B1 (Brussels, 11 April 2016).
- Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (First Hague Protocol), 249 UNTS 358.
- Rechtbank Amsterdam, Beschikking, RK: 14/2951, 16 October 2014.
- Regulations of 6 December 2012, on Material Management of Museum Objects, Staatscourant 2012, 26 235.
- Reports from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Report on the application of Council Directive 93/7/EEC on the return of objects unlawfully removed from the territory of a member state: COM (2000) 325 final, COM (2005) 675 final, COM (2009) 408 final, COM (2013) 310 final.
- Sanctions Act of 15 February 1980, Staatsblad 1980, 93, as amended.
- Sjouke P.S., *Het behoud van cultuurogoderen, twee werelden, twee visies*, Ars Aequi Libri, Nijmegen 1999.
- Sjouke P. S., *Internationaal Recht*, Museumrechtwijzer, Juridisch handboek voor musea, Amsterdam 2000.
- The decision to assign this task to the Inspectorate was published in the Government Gazette on 16 December 2015, Staatscourant 2015, 45561.
- Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 6.10.2012, p. 47.
- UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property Implementation Act of 12 June 2009, Staatsblad 2009, 255.
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.
- UNIDROIT Convention on Stolen of Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322.
- United Nations Security Council Resolution No. 1483, 22 May 2003, UN Doc. S/RES/1483 (2003).
- Viantrio V.J., *Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects*, "Fordham International Law Journal" 1993, Vol. 17.
- Vingt ans après avoir été volée, 'Ecce Homo' fait son retour à Beauvais*, "Le Parisien", 24 Septembre 2015.
- Wissink M.H., *De reikwijdte van het cultuurogoderenregime in Boek 3 BW*, Weekblad voor privaatrecht, notariaat en registratie, SDU, jrg. 129 nr. 6321, The Hague 1998.