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The Internal Market Information System (IMI) on the Return of Cultural Objects – Its Principles, Application, and Evaluation of Its Effectiveness for the Protection of Cultural Heritage

Abstract: The aim of this study is to present and critically analyses a new special module of the Internal Market Information System (IMI), designed for the purposes of Directive 2014/60/EU. The module will serve as both a platform for the exchange of information between the Member States of the European Union (EU) and mean for realising the objectives of the Directive 2014/60/EU. First, the study presents the underlying causes and reasons behind the change in rules on the return of cultural objects in the EU, which gave basis for the employing the IMI system for the cultural heritage purposes. Next, it explains legal foundations for the use of this module and discusses the benefits and shortcomings of this new instrument for the protection of cultural heritage from illicit trafficking within the EU. Finally, the study also examines the differences and similarities with other instruments used in the search for cultural objects lost as a result of criminal acts.

Keywords: Internal Market Information System, European Union, national treasures, cultural objects, international cooperation

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Introduction

In various parts of the world the illegal export of cultural material is threatening the integrity of states' cultural heritage. The plunder of archaeological sites, trading in stolen artworks (fencing and receiving), as well as money laundering on antique markets are closely linked to the illegal transfer of these objects between states. The phenomenon of smuggling cultural objects is transborder in nature and policies and methods to combat it have to deal with an array of problems derived from, *inter alia*, the different legal systems in force in particular states, the difficulties in proving the fact an illegal transfer has occurred, as well as the significant costs incurred by the search process. Undoubtedly one of the key problems in combating the smuggling of cultural objects is the question of information transfer and exchange, both with regard to the search for objects illegally exported and the application of legal procedures to secure a return of these objects.

The aim of this study is to present the latest instrument – a special module operating within the Internal Market Information System (hereinafter: IMI), designed to serve as a platform for the exchange of both information and proposals for realising the aims of the 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 (Recast) (hereinafter: Directive 2014/60/EU).¹

The study is comprised of five sections that analyse the usefulness of the IMI system for protection of national cultural heritage by evaluating the factors connected with its adoption and the purposes for which it could be used. The first part of the study (Section One) presents the underlying causes and reasons behind the change in rules on the return of cultural objects. It also discusses how these changes led to the development of new solutions including the legal basis for the functioning of the IMI system for the return of cultural objects. In this section a brief account of the evolution of European Union (EU) law on the return of cultural objects demonstrates the information exchange problems amongst Member States that are to be improved within the framework of the IMI system. Section Two presents the legal basis and technical functioning of the IMI system, in which a special module was created to be utilised for the return of cultural objects. Taking into consideration that the main legal principles and regulations underlying this instrument for information exchange are of key significance in its practical use, both the various procedures involved in using IMI and the functions fulfilled by the institutions and employees registered in the system are discussed in this paper. Section Three covers the actual construction of the IMI module that, as indicated, is designed for the realisation of the solutions contained in Directive 2014/60/EU with respect to the return of cultural objects. This section also presents the legal foun-

¹ OJ L 159, 28.05.2014, p. 1.

dations for the utilisation of this instrument, as well as information on the forms developed for realisation of the procedures listed in the Directive 2014/60/EU. The subsequent section, Section Four, discusses the practical questions connected to the possibility of utilising the IMI module in order to search for and obtain the return of cultural objects illegally exported abroad. This section also presents potential problems that can limit the effectiveness of the IMI module's functioning. Section Five examines the IMI module's ability for attaining the goals connected with cultural heritage protection. This section also examines the differences and similarities between IMI and other instruments used in the search for cultural objects lost as a result of criminal acts. The final part of this study summarizes the main conclusions on the new IMI module system.

Changes to the rules regulating the return of cultural objects illegally exported abroad

The rules enabling the return of illegally exported cultural objects between EU Member States are grounded in Article 36 of the Treaty on the Functioning of the European Union (TFEU).² Article 36 gives Member States the right to maintain, within their own internal law, regulations limiting the free movement of those goods that constitute objects of cultural heritage and which are deemed national treasures. This rule of the EU law does not define the scope of the term "national treasures" which means that each state has freedom in defining such treasures.³ In connection with the establishment in 1993 of a joint and internally border-free area on the basis of the Maastricht Treaty,⁴ the possibility of limiting the export of the most important cultural objects on the part of particular European states was introduced through the instruments of EU secondary law, i.e. in the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of an EEC Member State.⁵ For many years an inseparable element of the European system of control over the transfer of cultural objects – one which in principle should balance out the weakening of control over internal borders – were the national rules regulating the return of objects implemented on the basis of this directive.⁶

² Consolidated version, OJ C 202, 7.06.2016, p. 47.

³ Doubts are here raised with regard to the scope of the definition, something that can be of marked significance in the practice of searching for, recovering, and control of the movement of cultural objects within the European Union.

⁴ The European Union Treaty, 7 February 1992 (consolidated version), OJ C 202, 7.06.2016, p. 13.

⁵ OJ L 74, 27.03.1993, p. 74, with amendments (hereinafter: Council Directive 93/7/EEC).

⁶ In the subject literature it is stressed that the actual aim of the Council Directive 93/7/EEC was to a large extent the realisation of Article 36 TFEU, which constitutes an exception to the principle of free movement of goods for cultural objects. See P. Stec, *Dyrektywa 93/7/EEC z perspektywy dwóch dekad funkcjonowania* [Directive 93/7/EEC from the perspective of two decades of its operation], "Santander Art and Culture

The legal regime introduced by the Council Directive 93/7/EEC has been widely acknowledged to be ineffective. In practice it was significant only for states like Poland, which had not ratified the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁷ The Directive only created a legal framework of principles for the return of illegally exported goods.⁸ In accordance with the content of Article 16 of Council Directive 93/7/EEC, the European Commission (hereinafter: the Commission) every three years presented a report containing an overview of its application to the European Parliament, Council, and the European Social-Economic Committee.⁹ A four-stage evaluation of the functioning of the Directive made it possible to ascertain its minimal effectiveness for the return of cultural objects classified as “national cultural objects” (national treasures). The reports showed a range of factors that resulted in the ineffectiveness of the Council Directive 93/7/EEC. Amongst the most important of these were:

- requirements making it essential to classify objects as “objects of national culture” through a formal return procedure, i.e., they had to belong to one of the categories listed in the Appendix to Council Directive 93/7/EEC, as well as fulfil certain criteria relating to the value and age of the protected cultural good;
- the short time period for submitting a claim for return; and
- the cost of recompensation paid out on the basis of Article 9 of the Directive.¹⁰

In addition, in my opinion the low level of effectiveness of Council Directive 93/7/EEC also derived from other significant reasons:

- the limitations on border control within the Schengen area;
- the problematic lack of linkage between the national data bases of stolen cultural objects of the countries of the EU; and

Law Review” 2015, Vol. 1(2), pp. 104-105. Limitations with regard to the Directive have also been noted by I.A. Stamatoudi, *Cultural Property Law and Restitution. Commentary to International Conventions and European Union Law*, Edward Elgar, Northampton 2011, p. 143.

⁷ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322 (hereinafter: 1995 UNIDROIT Convention).

⁸ See P. Stec, *Zwrot dóbr kultury wyprzewodzonych niezgodnie z prawem z terytorium UE* [The return of cultural objects unlawfully exported from the EU territory], “Prawo Europejskie w Praktyce” 2010, Nos. 7/8, pp. 101-102; M. Schneider, *Protection and Return of Cultural Objects – the Interplay of Law and Ethics* in: L.V. Prött, R. Redmond-Cooper, S. Urice (eds.), *Realising cultural heritage law: Festschrift for Patrick Joseph O’Keefe*, Institute of Art and Law, Leicester 2013, pp. 130-131.

⁹ The data cited here on the practice of the Directive’s application come from the European Commission reports for the years: 2000, 2005, 2009 and 2013, <http://eur-lex.europa.eu/legal-content/PL/TX-T/?uri=uriserv%3A111017b> [accessed: 20.09.2016].

¹⁰ See Proposal for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State, COM(2013)311 final [not published in the Official Journal], pp. 2-3.

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- significant differences in the legal systems of the Member States, which hampered the effective return of cultural objects illegally exported.¹¹

It also should be emphasised that one of the significant shortcomings resulting from the postulates of Council Directive 93/7/EEC was the lack of an unambiguous mechanism regulating cooperation between the Member States of the EU. National reports emphasised the significance of good cooperation and information exchange between all the relevant organs, and in particular between the central organs responsible for the Directive's application. In the fourth, final report of the Commission on the application of Council Directive 93/7/EEC it was asserted, on the basis of a questionnaire directed to Member States, that administrative cooperation between central state organs had improved, yet it was too insufficiently structured and that difficulties arose as a result of language barriers.¹² The reports also demonstrated that the frequent cases of a lack of information exchange between the relevant organs reduced the effectiveness of cooperation.

As a result of the above-illustrated reports, and other research into the functioning of the Council Directive 93/7/EEC that had demonstrated its minimal effectiveness, work on the reshaping of this act into a more effective instrument was undertaken. For the period from 30 November 2011 to the 5 March 2012 consultation was sought amongst all parties interested in the undertaking/initiative. These consultations were conducted within the framework of an interactive shaping of policy ("Your Voice in Europe") with the use of two questionnaires, devised respectively for public administration organs and other public entities as well as for non-state subjects: citizens (natural persons) and legal persons connected with the field of movable cultural heritage or operating in this field (Chart 1).¹³ The majority of respondents from the private sector (61%) considered Council Directive 93/7/EEC to be an appropriate response to the needs of Member States and that there was no need to change it. Only 22% of these respondents actually supported change. In contrast, 54% of public organs and subjects of public law considered the Directive to be an ineffective guarantee of the actual return from the territory of a Member State of national cultural objects illegally exported abroad. Support for the solutions under consideration to improve the effectiveness of Council Directive 93/7/EEC was distributed in a fairly equal way: 29% of respondents supported change of the Directive; 29% were for an improvement in administrative cooperation and in information exchange between relevant organs; 17% were inclined

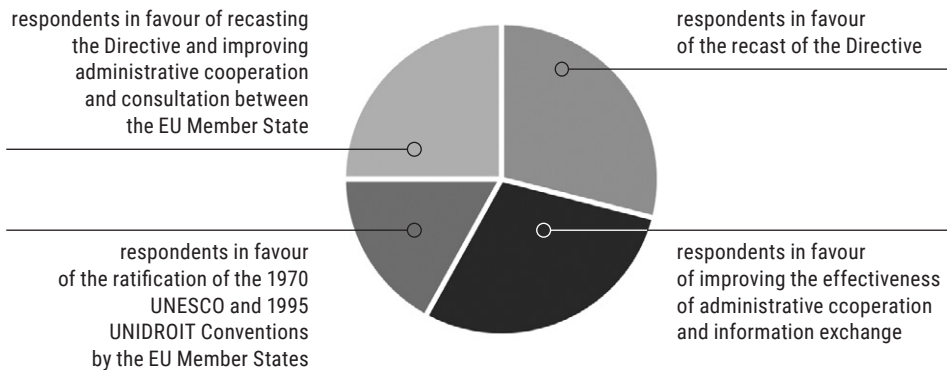
¹¹ For more O. Jakubowski, *Illegal export of cultural heritage after the opening of borders in the Schengen Area*, in: *Stop heritage crime - Good practices and recommendations*, National Heritage Board of Poland, Warszawa 2011, pp. 39-42, www.interpol.int/Media/Files/Crime-areas/Works-of-art/Stop-heritage-crime [accessed: 20.12.2016].

¹² Fourth report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, 30 May 2013, COM(2013) 310 final.

¹³ Proposal for a Directive of the European Parliament and of the Council, op. cit.

towards the ratification of international treaties (the 1970 UNESCO¹⁴ and 1995 UNIDROIT Conventions) by Member States; while 25% were for an approach combining various solutions, including changes in the Directive and an improvement in administrative cooperation and consultation between the relevant organs.¹⁵

Chart 1. Support for the solutions considered in view of improving the effectiveness of the Directive



Source: [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/514078/IPOL-JOIN_NT\(2013\)514078_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/514078/IPOL-JOIN_NT(2013)514078_EN.pdf) [accessed 29.12.2016].

As an effect of the legislative works, a new instrument of secondary EU law was adopted – Directive 2014/60/EU, which introduced new detailed principles for the return of cultural objects and rationalised the procedure in relation to the previous legal act i.e., Council Directive 93/7/EEC. The most important changes introduced by the new Directive include:

- 1) the transfer of the burden of proof (*onus probandi*) of due diligence onto the possessor of the cultural good to be returned. The justification for this new approach was that it is easier for such a subject to produce positive proof that they have performed certain acts of diligence, e.g., verification as to whether the cultural object was listed in a register of objects illegally exported, than it was for the state demanding the return of said object to prove the negative, i.e. that the defendant had not adhered to certain standard procedures undertaken as routine in the sale of cultural objects;
- 2) bestowing on Member States more freedom in defining national cultural objects and resigning from use of a list of cultural objects subject to return (Appendix to the Council Directive 93/7/EEC) and conditioning the pos-

¹⁴ 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.

¹⁵ Proposal for a Directive of the European Parliament and of the Council, op. cit., p. 4.

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- sibility of return on predetermined financial and age thresholds. As far as the scope of national cultural protection is concerned, Article 36 TFEU still constitutes the boundary;
- 3) fleshing out the definition of “due diligence” to allow a court to relatively simply establish whether a possessor has the right to compensation;
 - 4) imposing onto the central organs of Member States the obligation to attempt to amicably resolve disputes concerning the illegal export of cultural objects; and
 - 5) making possible information exchange between Member States in the sphere of procedures covered by the Directive, as well as reinforcing the obligation for them to inform each other about stolen cultural objects.

As indicated above, Directive 2014/60/EU does not contain an appendix specifying value and age thresholds that must be met in order to designate categories of objects covered by the Directive’s protection. The previous Appendix has been abandoned in favour of greater freedom on the part of Member States to define national cultural objects. Thus the development of an effective instrument for information exchange between the EU Member States is essential as the possibility to rapidly establish the legal status of an object taken abroad is extremely significant in any decision on whether to apply the EU law. If each state separately established the scope of its national heritage protection it would create difficulties, if not chaos, without specific regulations on the methods of cooperation and information exchange and new instruments aiding the return of illegally exported cultural objects.

The final date for implementation of the Directive 2014/60/EU expired on 19 December 2015. Unfortunately not all states have yet fulfilled this obligation.¹⁶

The resolutions developed in the Directive 2014/60/EU should be consistent with solutions adopted in other EU acts on the control over the sales of cultural objects, for instance with the act aimed at unifying the criteria for the export of cultural objects. At present this matter is regulated by the Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods.¹⁷ This Regulation also applies to the external aspect of the transfer of cultural objects, i.e., concerning cases in which a cultural object is transported outside of the EU territory. The Regulation’s procedural matters are regulated by the Commission Implementing Regulation (EU) No. 1081/2012 of 9 November 2012 for the purposes of amending Council Regulation (EC) No. 116/2009 on the export of cultural goods.¹⁸

The pressing problem of conflicts in the Middle East has meant that EU import restrictions for certain archaeological objects have taken on a new significance.

¹⁶ At present four countries have not implemented the regulations of this directive: http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=uriserv:OJ.L_.2014.159.01.0001.01.ENG [accessed: 20.12.2016].

¹⁷ Codified version, OJ L 39 of 10.02.2009, p. 1.

¹⁸ Codified version, OJ L 324 of 22.11.2012, p. 1.

In principle, the import of cultural objects into the joint customs area is not restricted, but there are important exceptions in the regulations concerning a ban on the import, or bringing into the EU for sale, of the cultural property of Iraq as well as other goods derived from this country that are of archaeological, historical, and cultural importance and/or are of special academic or religious worth.¹⁹ The European Union introduced a similar solution in relation to the import, export, transfer or provision of intermediary services connected with the import, export or transfer of Syrian cultural objects as well as objects of archaeological, historical, cultural, religious significance or of exceptional academic value.²⁰

Both Directive 2014/60/EU and the regulations on the export of cultural objects beyond the customs zone of the EU, create a system intended to protect European cultural heritage.²¹ The development of an instrument to unify cooperation, in the form of the IMI module system specifically adapted to this field, could be the solution which will in the long term increase safety in the trade of cultural objects in Europe. In my opinion in the future the construction of this instrument could allow (after appropriate legal changes in EU regulations) for its application beyond those cases indicated in the Directive 2014/60/EU.

The IMI system as an instrument for information exchange

The functioning of the IMI system is regulated by 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”).²² This Regulation regulates a series of questions connected with the functioning of the system, including: the principles for processing personal data and their protection in storage; the rights of those whom the data concerns; supervision over the system and also the conditions for using the system within the scope of information exchange in a given

¹⁹ Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No. 2465/96, OJ L 169, L 169, 8.07.2003, p. 6.

²⁰ Council Regulation (EU) No. 1332/2013 of 13 December 2013 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 335 of 14.12.2013, p. 3.

²¹ At present discussion is taking place in the course of working meetings (the Experts Group on customs issues related to cultural goods) of the European Commission into the establishment of a new regulation aimed at allowing the import of cultural objects to the European Union, http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3313&news=1&mod_groups=1&month=05&year=2016&Lang=PL [accessed: 20.12.2016].

²² OJ L 316, 14.11.2012, p. 1. In this current work training materials on the IMI system have also been used, these being available on the website of the Polish Ministry of Development: *Materiały informacyjno-szkoleniowe*, <https://www.mr.gov.pl/strony/zadania/wsparcie-przedsiębiorczosci/instrumenty-pomocy-przedsiębiorcom-na-rynku-unii-europejskiej/system-wymiany-informacji-na-rynku-wewnetrznym-imi> [accessed: 20.12.2016].

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state; and information exchange with third-party countries.²³ The system itself and its modules (through the support of expert groups from European Union Member States) are being worked on by the Commission, which can also change the modules and their functions.²⁴

The IMI system is used for administrative cooperation between the relevant organs of Member States as well as between the relevant organs of Member States and the Commission, a cooperation essential for the fulfilment/realisation of EU acts in the field of the internal market.²⁵ The IMI system is available online and does not require users to install any additional programs. The system is multilingual, secure, and allows for information exchange between the relevant organs in an ongoing and effective way. The IMI system has a separate interface for information exchange between two or more national institutions and the (European) Commission. Users within the IMI system are able to monitor the circulation of their information and IMI system users can communicate by forms available in every EU official language.

Depending on the aims of the administrative cooperation the forms may contain lists of earlier-translated questions and answers, data fields, or proposals on actions to be undertaken.²⁶ Member States do not have to allocate any additional financial resources in order to utilise the IMI system. Nor does use of the system require any specialist or detailed IT knowledge; consequently the system may be used by competent individuals from those offices responsible for administrative cooperation in this field. To date the IMI system is used in eleven areas of EU law, including services, professional qualifications, employee delegation, public commissions and orders, and the return of cultural objects. Technical modules are offered by the system for various types of communication procedures, including:

- 1) one-to-one communication allows for information exchange and/or the sending of proposals on a bilateral basis; this module is used not only to send questions and answers, but also to send proposals on actions or the withdrawal of resources (funds), as well as replies to such proposals. The relevant organs are obliged within this module to respond to the proposals they receive;
- 2) one-to-many communication permits organs to send information to many recipients at one time; and
- 3) repositories in which organs are able to store information are subsequently made available to a specific group of users.

²³ National legal acts created to serve the IMI system should not encroach on the matters regulated by the IMI Regulation.

²⁴ The IMI system relates to areas allocated and regulated by EU legislation.

²⁵ IMI Regulation relates to the internal market within the understanding of Article 26.2 TFEU.

²⁶ An integral part of the system is an automatic translator.

Organs and authorised users within the IMI system have restricted access to the entirety of its resources. They only have access to those legal areas and modules for which they are responsible. For instance, the legal area “return of cultural objects” and its modules of information exchange are only available to those organs that are responsible for realisation of the provisions of the Directive 2014/60/EU.

Both the construction of the system as well as the provisions of the Regulation establishing its functions show how the institutions and their authorised employees registered in the system can fulfil various functions,²⁷ in particular:

- 1) **The IMI national coordinator.** Each Member State appoints one national coordinator for the IMI system. With the aim of ensuring the efficient functioning of the system, the coordinator registers the relevant organs, administers access to the individual modules, ensures support for users, and watches over the efficient functioning of the IMI system. The coordinator also performs the function of administrator. In accordance with IMI Regulation the coordinator is an organ designated by the Member State.
- 2) **Module coordinator.** One or several associate coordinators may be appointed with regard to each module. This function involves monitoring the course of information exchange, and may in practice denote the confirmation of proposals, replies, or notifications or warnings sent by the organs with which the coordinator is connected. In the case of proposals for information this may also denote reacting in a situation when the organ sending or receiving a proposal sends it on to the coordinator with a request for help. The institution(s) registered as coordinator(s) within a given module can also carry out, within this module, all those activities corresponding to the organ’s functions (e.g., the drawing up and sending of information requests).
- 3) **An “organ” within the IMI module.** The relevant organs of public administration of EU Member States chiefly use the IMI system. They can, depending on their competencies and IMI access rights, send and receive information requests, requests to be informed or warned, and the management of repository entries. This system is elastic inasmuch as the organs of administration registered in the IMI system differ significantly in terms of their size and organisational structure. In accordance with the IMI Regulation a “relevant organ” means each organ at a national, regional or local level registered in the IMI as having specific responsibilities in applying the law in at least one field of the internal market.
- 4) **IMI participant.** A participant includes the relevant organs, IMI coordinators, and the Commission.

²⁷ See Article 5 of the IMI Regulation. See also: *IMI roles and responsibilities*, http://ec.europa.eu/internal_market/imi-net/_docs/training/roles_responsibilities_pl.pdf [accessed: 20.12.2016].

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- 5) **“User” in the IMI module.** IMI users are physical persons carrying out work under the authority of an IMI participant, as well as those registered in the IMI as an IMI participant.

Importantly, entries into the system may be made by all IMI users. In accordance with the IMI Regulation only authorised (IMI) users, i.e. relevant organs, IMI coordinators, and the Commission, have access to the system. Each state applies its own principles of confidentiality to its IMI participants and IMI users, or imposes on them other equivalent responsibilities for maintaining confidentiality in accordance with the regulations of national or EU law. The Regulation forbids the use of personal data that could be processed within IMI for a goal or in a way not in accordance with its initial aim, unless such a use is clearly allowed for by national law in accordance with EU law. The guarantee of the technical means enabling external subjects to interact within the IMI is only possible in cases where such an interaction:

- is foreseen in an EU act (e.g. directly within a directive);
- is foreseen in certain European Union executive acts; and
- is necessary for the submission of proposals to enable the execution of one’s rights as the individual the data concerns, on the basis of Article 19 of the Regulation 1024/2012.²⁸

IMI Regulation defines, from amongst other regulations, the principles to be applied in the processing of personal data. This matter is of particular significance, as it both defines and limits the means of using particular modules and the storage and obtainment of certain data. IMI participants exchange personal data exclusively for the aims defined in the relevant regulations of EU law, while the data supplied to IMI by persons whom the data concerns may be used only for the goals for which such data was supplied.²⁹ Article 19 of the IMI Regulation establishes that personal data processed in the IMI system will be blocked at the moment it ceases to be needed for the goals for which it data was gathered, depending on the specifics of the given type of administrative cooperation, and in any case not later than six months from the date of the formal closing of the procedure for administrative cooperation, although in special cases the personal data processed within the framework of IMI may be kept in the system for a maximum period of eighteen months from the date of the formal closing of the procedure for administrative

²⁸ In accordance with this regulation IMI participants guarantee those whose data are used the possibility to access the data which concerns them in the IMI, the right to demand elaboration or correction of inexact or incomplete data and, the removal of data processed in violation of the law, in accordance with the regulations of national law. The correction or removal of data is the responsibility of an IMI participant and shall be carried out immediately and, in any case not later than 30 days from the date of application of the person whom the data concerns.

²⁹ See Article 13 of the IMI Regulation.

cooperation.³⁰ While the regulations on the protection and processing of personal data in practice limit the creation, within the IMI system, of modules of data bases containing personal data, at the same time the 13th sub-paragraph in the “Whereas Clause” of the Preamble to the IMI Regulation provides that none of its provisions should constitute a hindrance to the undertaking, on the part of Member States and the Commission, of a decision to use IMI for the needs of information exchange which does not bring with it the necessity to process personal data and which may constitute the assembly of and cataloguing of information that does not contain personal data, for example in the search for cultural objects.

In analysing the construction and means of utilising particular modules of the IMI system, the regulations of EU law that were created to control and supervise the system must be interpreted consistently with the norms contained in Regulation 1024/2012. Only by employing a complementary analysis of the legal acts cited is one able to talk about the scope and possibility of utilising these instruments for information exchange within the European Union.

The construction of the IMI module for the return of cultural objects

The scope of executive tasks carried out in the IMI system module is regulated in Articles 5 and 7 of the Directive 2014/60/EU, which is worthwhile to reproduce here. Article 5 states:

In order to cooperate and consult with each other, the central authorities of the Member States shall use a module of the Internal Market Information System (‘IMI’) established by Regulation (EU) No 1024/2012 specifically customised for cultural objects. They may also use the IMI to disseminate relevant case-related information concerning cultural objects which have been stolen or unlawfully removed from their territory. The Member States shall decide on the use of the IMI by other competent authorities for the purposes of this Directive.³¹

Article 7 provides:

The competent central authority of the requesting Member State shall forthwith inform the competent central authority of the requested Member State that proceedings have been initiated with the aim of securing the return of the object in question. The competent central authority of the requested Member State shall forthwith inform the central authorities of the other Member States.

³⁰ Blocked data are automatically removed from the IMI system after three years from the formal date of closing the administrative procedure for cooperation.

³¹ In the legal area concerning “cultural objects”, the relevant organs are the central authorities as defined in Article 4 of Directive 2014/60/EU. Besides these authorities, Member States can take a decision to create, establish and register other relevant organs.

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The exchange of information shall be conducted using the IMI in accordance with the applicable legal provisions on the protection of personal data and privacy, without prejudice to the possibility for the competent central authorities to use other means of communication in addition to the IMI.

Thus in accordance with the above regulations the Member States may utilise modules on cultural objects:

- for the dissemination of relevant information concerning a given matter of cultural objects stolen or illegally exported from their territories;
- to bring a claim with the aim of insuring the return of a given object, without excluding the possibility of the relevant central organ(s) utilising other additional means of information exchange outside the IMI system; and
- in order for the central organ of the Member State that has received a claim for the return of a cultural object to provide relevant information concerning the claim to other Member States.

Directive 2014/60/EU clearly demonstrates that the Member States's relevant organs themselves decide on the use of the IMI system in order to achieve the Directive's aims.³² The legal basis and procedures are set forth in sub-paragraph 21 of the Preamble to Directive 2014/60/EU, as follows:

Since the tasks of the committee set up by Regulation (EC) No 116/2009 are rendered obsolete by the deletion of the Annex to Directive 93/7/EEC, references to that committee should be deleted accordingly. However, in order to maintain the platform for the exchange of experience and good practices on the implementation of this Directive among Member States, the Commission should set up an expert group, composed of experts from the Member States' central authorities responsible for the implementation of this Directive, which should be involved, inter alia, in the process of customising a module of the IMI system for cultural objects.

On this basis a group of experts was formed, including representatives of the Member States, which in 2014 supported the Commission in creating the guidelines for the new module. During the course of their undertakings the experts proposed amendments to both the construction of individual parts of the new module, its functions, as well as the creation within the system of procedures and forms for information exchange. Work and cooperation between the national experts and the Commission took place during meetings organised in Brussels, as well as through suggestions sent via electronic channels. Considering the fact that users of the IMI system communicate through the use of standard forms available in all EU official languages, one of the most important tasks of the working group and

³² In the legal area concerning "cultural objects", the relevant organs are the central authorities as defined in Article 4 of Directive 2014/60/EU. Besides these authorities, Member States can take a decision to create, establish and register other relevant organs.

the Commission's employees was the processing of information on cultural objects contained in these forms so that it would be possible to send uniform proposals on the search for or return of antiques to all concerned parties in their own language. Another important matter was the creation (within the module) of forms adapted to the individual tasks outlined in Directive 2014/60/EU. As a result of this work, at present the module provides four forms for the realisation of the procedures of Directive 2014/60/EU:

- informing other Member State(s) that a cultural object has been illegally exported (in those cases where a state is looking for an illegally exported or stolen cultural object and does not know where it is located);³³
- filing an application to search for illegally exported cultural objects and the identification of the possessor (holder) (in those case where a state searching for an illegally exported or stolen cultural object justifiably believes that the object in question is to be found within the territory of another Member State);³⁴
- informing other Member State(s) that an illegally exported cultural object has been found and that an application with respect thereto may be submitted (in those cases when a Member State has found a cultural object and suspects or is certain that this object has been illegally exported from another state);³⁵
- informing other Member State(s) that the procedures for returning a cultural object have been initiated (in cases where the Member State from which the cultural object was illegally exported initiates the procedure connected with the return of the object).³⁶

The above-mentioned procedures can be performed through the following communication functions:

- a one-to-one (application), which enables the relevant organ to obtain information from another Member State or to send applications for the actions and funds relating to the return of a cultural object (e.g. searching for a specific cultural object in an identified Member State);
- a one-to-many (notification), which enables the relevant organ to involve many Member States in the undertakings connected with the search for or return of a cultural object.

³³ Article 5.1. (1) of Directive 2014/60/EU as well as Article 5.2 of Directive 2014/60/EU.

³⁴ Article 5.1. (1) of Directive 2014/60/EU.

³⁵ Article 5.1. (2) as well as Article 5.1.(3) of Directive 2014/60/EU.

³⁶ Article 7. 1-3 of Directive 2014/60/EU. This form was developed on the basis of training materials from the meeting "Return of Cultural Objects Training", which concerned the functioning of the IMI module system for the return of cultural objects and was organised in Brussels by the Commission for the internal market, industry, entrepreneurialism and small and medium-sized EU businesses on 3 December 2015: *Return of Cultural Objects Training*, 3 December 2015, European Commission, Brussels (unpublished).

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In addition, the IMI module for the return of cultural objects envisages the construction of a repository for information containing, among other things, the legislative processes of states within the EU on the return of cultural objects. However, as a result of the failure to implement the regulations of Directive 2014/60/EU on the part of all Member States work on this repository is still in progress.

The utilisation of the IMI module for the purposes of Directive 2014/60/EU

Despite the fact that the deadline for the implementation of Directive 2014/60/EU on the return of cultural objects passed in December 2015, the IMI module was only made available in June 2016. This delay was due to technical problems and a lack of registration within the IMI system on the part of some Member States. At present the module is functional, although some of its functions still require some additional work (for example the translation of the forms into the various Member State languages) and the planned repository is only in the creation phase. However, despite the short period during which this new cooperative instrument has been operationally functioning, since the start of September 2016, the IMI module for the return of cultural objects has already undertaken a series of activities, in particular:

- the establishment of four bilateral information exchanges by means of the IMI module;
- processing one notification on finding an object previously illegally exported from another Member State;
- sending out 58 notifications on sought-after objects (three of which were closed shortly after being sent);³⁷ and
- over 100 institutions have been registered in the IMI module.

Despite the relatively high number of proposals sent, in my opinion the four-month period the IMI module has been operational is too short to be able to give a full appraisal of its effectiveness. Nevertheless, in evaluating the provisions of the Directive 2014/60/EU, IMI Regulation, and the technical side of the IMI module concerning the return of cultural objects, one may already observe some of the crucial aspects and functional problems. In particular attention should be drawn to the provision in Article 18 of the IMI Regulation that requires the fastest possible notification to those whose personal data is connected to the IMI system on their rights and the way in which their data will be processed. Article 19 of this Regulation may be potentially problematic in this regard. In accordance with its provisions

³⁷ This data comes from the report of the fourth expert meeting “Return of Cultural Objects,” which took place in Brussels on 16 September 2016; *Return of Cultural Objects Training*, 16 September 2016, European Commission, Brussels (unpublished).

the designated IMI participants/institutions (IMI actors) “shall ensure that data subjects may effectively exercise their right of access to data relating to them in IMI, and the right to have inaccurate or incomplete data corrected and unlawfully processed data deleted, in accordance with national legislation.” Here the question arises as to how in practice the procedure for the submission of applications for the return of or the search for cultural objects will look when such applications contain personal data. In the case of legal disputes over access to personal data processed in the IMI system resulting from the realisation of Directive 2014/60/EU, complications could arise over what to do with what data and for whom, and at what level of the process must the possessor of the illegally exported cultural object be informed about and/or be granted access to the data. In addition each application for the correction or removal of data needs to be reviewed individually on the basis of the relevant national law on personal data protection. These regulations mean that in a given case different principles and provisions regarding the storage and accessibility of information will be binding in individual EU Member States, which may have an influence on the process of recovering a cultural object. Issues regarding the storage of personal data are regulated in Article 14 of the IMI Regulation requiring the blockage and removal of such data. The application of these provisions will be of great significance to the practice of data storage within the IMI system and the realisation of Directive 2014/60/EU. In this context the development of additional ways of archiving applications outside the IMI module system on the return of cultural objects also becomes significant.

A related important question is how the courts will approach issues surrounding data generated by the IMI system in the context of evidence in court cases for the return of cultural objects. Will the opposing parties challenge computer print-outs from the IMI system, and if so, how will this be handled? In my view the actual documentation sent by IMI will constitute important evidence in both criminal and civil cases, although in certain situations it may require additional confirmation via other means of information exchange, something provided for in Article 7 of Directive 2014/60/EU. A good example of this issue might be an application for the search for an illegally exported cultural object sent by the IMI module system in accordance with the procedure of Article 5.1.(1) of Directive 2014/60/EU. The information on the search for a cultural object may lose its currency over time, in particular if the object is found. Here the risk arises that information about the discovery will not be sent through the IMI module system for the return of cultural objects.³⁸

³⁸ In connection with my professional activities I have encountered the problem of the absence of information reporting on the finding of stolen objects within the functioning of the Polish database for sought objects, i.e. “The Polish National Register of Objects Stolen or Illegally Exported.” Unfortunately situations have arisen whereby the law enforcement agencies have, despite having found a stolen item, not informed the administrators of the database of this fact. As a result situations have arisen whereby a different cultural object has been retained by the police based on the information contained in the database, when in fact

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In my opinion the dynamics of application transfers will develop differently depending on which of the various procedures are carried out by means of the IMI system module for the return of cultural objects. In the event applications are sent out with respect to cultural objects identified as illegally exported their transfer will result in a return procedure based on Directive 2014/60/EU. This will subsequently allow for an evaluation of the effectiveness of the new regulations and the IMI module. A different situation concerns the sending of applications for searches for cultural objects. In the context of this procedure the problem may arise with respect to the decisions taken and verifications on the part of Member States, which create the criteria for assessing the circumstances of the property loss and thus play an important role with respect to the information that would be sent by the IMI module system for the return of cultural objects. If states are going to send information on all cultural objects sought within their territory as a result of theft, hundreds of such applications directed to the IMI module might appear for those objects that could potentially have been illegally exported.³⁹

It follows that in evaluating the potential problems in using the IMI module system for the return of cultural objects, the limitations in the procedure for informing interested Member States of a cultural object found on their territory must be addressed. An unequivocal statement as to whether there exists a justifiable basis for accepting or acknowledging that a given object has in fact been taken abroad illicitly at a given point in time and in a way contrary to the law of a Member State would appear equally problematic.⁴⁰ Admittedly the regulations clearly point to a six-month period for verification on the part of the organs of the Member State to which the application was sent. However, with respect to the question whether the given object is an item being looked for, the regulations do not specify the time period during which the relevant organ is to express its willingness to undertake the verification. Thus if, for example, during the course of an inspection by the customs services a transported cultural object arouses suspicion sending this information by means of the IMI module does not give any guarantee of a rapid reply on the part of a Member State.

An equally significant test for the realisation of Directive 2014/60/EU by means of the IMI module will arise from questions surrounding the difficulties in

the listing is no longer current. A similar situation may occur with the transfer of information about searches within the IMI module system on the return of cultural objects.

³⁹ In the longer term it is worthwhile considering legislative changes giving the basis for the creation of a European database for sought cultural objects. The IMI system is devised first and foremost for information exchange following the closure of an administrative procedure on the basis of Article 14 of Regulation 1024/2012. The personal data from the applications are blocked and then removed from the system. The creation of a publicly accessible database for citizens of the European Union based on information about searches for cultural objects would, in my opinion, improve safety in the sales conducted on the antiques market.

⁴⁰ Article 5.1. (1-3) Directive 2014/60/EU.

defining the notion of a national treasure. In the subject literature it is emphasised that this designation does not refer to all cultural objects, but only to those that have an inseparable link to the culture and history of a given country.⁴¹ In this context, until such time as a clear demarcation regarding this notion is elaborated, it is possible that a substantial number of the applications sent by means of the IMI system will not actually refer to the designated category of cultural objects.

To sum up, with respect to the forecasted functioning of the IMI system in the context of Directive 2014/60/EU emphasis needs to be placed on the development of mechanisms making it possible to rectify the problems that arise out of the cooperation as they arise. Here it is worth noting the cyclical meetings of the groups of experts called into being on the basis of the recommendations contained in sub-paragraph 21 of the Preamble to Directive 2014/60/EU. Thanks to the discussions arising during the course of these meetings, as well as the exchange of information between group members, any potential mistakes can be corrected on the spot and new solutions that could be the basis for changes in the contents of form within the IMI system module can be adopted, as well as supplemented with additional information.⁴² The second mechanism, contained in Article 17 of Directive 2014/60/EU, consists of the cyclical reports which Member States will submit to the Commission every five years.⁴³ This information will constitute the basis for the presentation of a joint report evaluating the application and effectiveness of the new IMI module; a report to be presented on the part of the Commission to the European Parliament, the Council, and the European Social Committee. If needed this report will be submitted with relevant motions containing the basis for legislative change. Both mechanisms will allow for the short-term and long-term evaluation and rectification of the mechanisms elaborated in Directive 2014/60/EU referring to the IMI system.

Evaluation of the utility of the IMI module for aims connected with the protection of cultural heritage

In analysing the solutions created by and contained in the IMI system module on the return of cultural objects, one may carry out an initial evaluation on the usability of the instrument in relation to its protection of cultural heritage. It is also worth pointing out the way in which the module under discussion differs from the other solutions for the protection of cultural objects that are currently in existence and

⁴¹ See 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, pp. 1173 and ff.

⁴² See Information on the expert group meetings: *Return of Cultural Objects*, 16 September 2016, European Commission, Brussels, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3204> [accessed: 20.12.2016].

⁴³ The first report is to be presented by Member States by the 29th of December 2016.

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functioning in the practice of international legal protection. First and foremost the IMI system should be differentiated from data bases of lost cultural objects which for many years were one of the main instruments employed in the battle against illegal trade in cultural objects.⁴⁴ The basic difference here is the function of the instruments, which in the former case concentrates on the potentially rapid transfer of information enabling the return of works, and in the latter on the collection of information and access to information, i.e. in a limited or broad range.⁴⁵ It is worth noting that many databases are available, for example the Interpol International "Stolen Works of Art" database.⁴⁶ However they need constant updating, as national export regulations are subjected to frequent changes and a cultural object that requires permission to be taken abroad in a given year may quite possibly no longer require permission in the subsequent year.

A certain similarity to the working of the IMI system module on the return of cultural objects can be seen, with respect to information exchange, in the functioning of networks of law-enforcement organs and competent experts in the field of cultural objects (EU CULTNET).⁴⁷ Another similar instrument is the ARCHEO network, which concentrates specialists and experts focused on cultural heritage protection and has as its goal facilitating the identification of suspected subjects as well as the exchange of experiences on the part of customs officers involved in this field.⁴⁸ The functioning of the ARCHEO network is supported by WCO (World Customs Organization). The WCO recommends using this instrument for the identification and verification of transported cultural objects.⁴⁹ The above-listed systems for information exchange on lost cultural objects serve first and foremost to facilitate the exchange of information between relevant experts, and consequently do not have such a formalised legal state as the IMI system.

⁴⁴ For more, see O. Jakubowski, *Bazy danych skradzionych i nielegalnie wywiezionych dóbr kultury jako element systemu ochrony dziedzictwa kulturowego*, "Przegląd Prawa i Administracji" 2012, No. 89, pp. 11-20.

⁴⁵ Depending on whether the database is accessible only to law enforcement agencies or whether it is an open database for the greatest number of subjects.

⁴⁶ K. Kind, *The Role of INTERPOL in the Fight Against the Illicit Trafficking in Cultural Property*, in: S. Manacorda, D. Chappell (eds.), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer, New York - Dordrecht - Heidelberg - London 2011, pp. 175-177.

⁴⁷ This network functions in connection with the Council Resolution 14232/12 of 4 October 2012 on the creation of an informal network of law enforcement authorities and expertise competent in the field of cultural goods (EU CULTNET), <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014232%202012%20INIT> [accessed: 20.12.2016].

⁴⁸ Information exchange takes place on the platform CENcomm codename Archeo. It has been developed by RILO (Regional Intelligence Liaison Offices) for western Europe and hosted by the WCO (World Customs Organization). See <http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/trafficking-of-cultural-objects.aspx> [accessed: 20.12.2016].

⁴⁹ See WCO Council Resolution on the Role of Customs in Preventing Illicit Trafficking of Cultural Objects adopted in July 2016, <http://www.wcoomd.org/en/media/newsroom/2016/july/~media/5F40621127B-D4E2EA366EB868D8817C2.ashx> [accessed: 20.12.2016].

In addition, in evaluating the utility for cultural heritage protection of the IMI module system for the return of cultural objects, attention should be paid to the limitations of such an instrument. In particular it should be emphasised that the range of activities for which the IMI module is designed will be limited to the realisation of Directive 2014/60/EU, and consequently will only have an effect on combating trafficking within the European Union and with respect to those objects classified as national cultural objects. Thus this instrument, in its current legal state, cannot be directly utilised to combat the illegal trade in cultural objects imported into the European Union from third party states. However, despite the limitations indicated, using the IMI system to realise the aims of Directive 2014/60/EU may be the first step in the creation of further forms of administrative cooperation in the area of cultural heritage protection, as has been postulated by experts.⁵⁰ To recap, it may be said that the IMI system module for the return of cultural objects is an innovative solution that can to a large degree supplement the existing solutions for fighting the illegal export of cultural objects within the territory of the European Union.

Conclusion

The IMI module system on the return of cultural objects is an integral part of the changes within the European Union system of controls over the export of cultural objects brought about by Directive 2014/60/EU. Without an effectively operating instrument for information exchange, the legal solutions introduced by this Directive would have a limited effectiveness. However, the scope of use of the new IMI system module may be different in individual countries implementing the Directive, as Member States decide which organs can be registered in it and have their own notions of “cultural objects”. Only after the implementation of legal solutions by all states will the time be ripe for a comprehensive evaluation of the IMI module system. The real test for the evaluated module will be when the first proceedings begin for the return of an illegally exported cultural object based on Directive 2014/60/EU, with the utilisation of information sent via the IMI system.

⁵⁰ See Study on preventing and fighting illicit trafficking in cultural goods in the European Union by the CECOJI-CNRS – UMR 6224 Contract No. Home/2009/ISEC/PR/019-A2, Final Report – October 2011, pp. 216-217, http://ec.europa.eu/homeaffairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf [accessed: 20.12.2016].

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