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RESEARCH ARTICLES

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The Lady or the Tiger? Legal Pitfalls of Implementing the Return of Cultural Goods Directive

Abstract: The process of implementation of the EU cultural goods Directive is more complicated than it would seem *prima facie*. Member States have been given a large degree of freedom in defining their national treasures, ecclesiastical goods, and public collections. This gives the Member States the opportunity of either narrowing these notions to the most treasured cultural goods, or expanding them to cover almost everything that can be classed as a "heritage item". Both extremes may lead to unexpected and potentially harmful results. Furthermore, it is the job of the Member States to define procedural rules for internal restitution proceedings, and to establish rules of representation for claims brought before foreign courts. Last but not least, there will be the perennial problem of determining the proper law to rule on the validity of ownership transfers of the returned object. The final outcome of the implementation thus depends largely on lawmakers' ability to predict the future outcome of proposed solutions, but since law is not an exact science, in the end it will be reduced to the old fashioned "lady or the tiger" dilemma. The purpose of this paper is to show possible ways of avoiding the tiger.

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Introduction

The Lady or the Tiger?[1] is the title of a short novel by Frank Stockton, a nineteenth-century writer whose works, except for the aforementioned novel, are largely forgotten. His "tiger novel" is still remembered not because of its literary qualities, but because of its unexpected finale. And yes, it is about law, lawyers, and a swift, albeit bizarre, justice system.

A long time ago, in a country far, far away, its ruler introduced an unusual version of trial by ordeal. Every criminal caught red-handed was brought into an arena that had two exit doors. The poor fellow had to pick one door and open it. Yes, just like in some TV shows, the henchman can be pictured asking the perennial set of questions: "Which door do you choose? Number ONE? Are you sure? Perhaps it would be wise to change your mind? So, which door do you choose? Is this your final decision?" etc. The trick was that there was a beautiful maiden hidden behind one of the doors, and a ferocious tiger behind the other. Basically, the convict had a choice between being shanghaied to marry a girl and live (un)happily ever after, or being eaten alive by a tiger.

Yes, I know that this legal system was not fair and did not comply with those standards set forth in the European Convention on Human Rights,[2] that it was sexist (nobody asked those girls if they wanted to marry a criminal) and favoured luck over justice (lucky criminals went free; unlucky ones were torn to pieces), and was probably unfair to the poor tigers. The latter question however requires further research into tiger dignity, and probably consent from a bioethics committee. And yes, I know that the reader would probably rather focus on these questions than read an analysis about the implementation of the cultural goods Directive, which unfortunately is exactly the aim of this paper. But before that we have to deal with one particular case from Stockton's novel. Once upon a time a young boy fell in love with the ruler's daughter. They were madly in love, but her father did not approve so the boy was apprehended and brought into the arena and forced to pick a door. Standing there in the arena, he noticed that his loved one pointed discreetly at door number one. Trusting her he opened the door. And guess who was behind the door? The lady or the tiger?

[1] F. Stockton, *The Lady or the Tiger and Other Stories*, David Douglas, Edinburgh 1884; the text is also available online at: http://www.eastoftheweb.com/short-stories/UBooks/LadyTige.shtml [accessed: 30.11.2016].

[2] 4 November 1950, 213 UNTS 221, as amended.

Lawmakers' work often resembles this poor boy's actions in the arena. We are creating laws in the hope that they will turn out the way they should. While drafting them we rely on hints and assumptions, often trusting that the stakeholders we consult make *bona fide* statements and that the policy we want to implement is right. And in many cases we lack tools to make an informed decision – after all law is more of an art than a science. So many acts are created by people trying to "guess" the right answer and pick the right door. Even worse, the "guessing machine" in our minds often tries to cheat or is simply biased or misinformed. That may influence our decision too. So picking the right door is largely about being aware of most of the pitfalls of the decision-making process. And it is these legal pitfalls in the implementation process that are analysed in this short article.

Starting Point – From the 1993 Directive to the 2016 Recast

The return of cultural goods, in its various aspects, is one of key problems of cultural property law. Two important conventions, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[3] and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: 1995 UNIDROIT Convention)[4] are the principal instruments dealing with the problem on the international level. In the European Union (EU), the return of cultural goods is regulated on three different levels. The top level is the Treaty on the Functioning of the European Union (TFEU), which grants Member States, in the form of an exception to the general rule of free movement of goods, the right to limit exports of "national treasures".[5] The export of cultural goods outside the EU is regulated by Council Regulation (EC) No. 116/2009, limiting the "cultural goods exception" to objects belonging to a special list.[6] Finally, a cultural goods Directive regulates the return of cultural treasures illegally exported from one EU Member State to the territory of another Member State. Its first version, the Council Directive 93/7/EEC on return of cultural goods was "a poor cousin" of the 1995 UNIDROIT Convention and not a very effective instrument.[7] There were only a handful of reported cases, which mostly ended with an amicable compromise at the government level, and a very small number of cases that actually wound up in court.[8]

3 14 November 1970, 823 UNTS 231.

4 24 June 1995, 34 ILM 1322.

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

6 Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1

7 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.

8 See: E. Psychogiopoulou, *Integration of Cultural Considerations in European Union Law and Policies*, Brill-Nijhoff, Leiden – Boston 2008, pp. 153 ff.; I.A. Stamatoudi, *Cultural Property Law and Restitution: A Com-*

The Polish National Treasures Act

When the new cultural goods Directive, the Directive 2014/60/EU, was introduced,[9] the general feeling in Poland was that its implementation would go smoothly, with only some minimal changes required – some brushing-up and eventually some add-ons correcting minor flaws in Polish law. Based on the French example, we assumed that the lawmakers would deal with refurbishing the Polish law on the return of cultural goods before the parliamentary elections 2015, so in December 2015 we would celebrate one of the rare occasions when we had managed to implement a European Directive on time. Oh how we were wrong…

Something that started as a short, rather lean amendment to the Polish 2003 Act on the Protection and Guardianship of Monuments (APGM)[10] soon got bigger, and became a full-fledged bill for a new statute. Its first version was not really much shorter than the APGM, and now it has grown even bigger, proving that the worldwide epidemic of obesity affects not only humans, but also statutes. If we compare its 36 pages with, e.g., the Portuguese implementing act (which is only 2.5 pages long), we get Stuart Little standing near Godzilla. The original project of the Polish bill was overgrown, yet it contained many interesting provisions facilitating the return of cultural goods. Its newer version is still oversized and the reader gets the feeling that not only is "lean" a taboo word for the officials of the Ministry of Culture and National Heritage, but also that governmental lawmakers have gone for an overkill this time.

At the procedural level, the Polish bill of transposing EU law – the National Treasures Act (NTA)[11] – raises two major doubts, relating to the guidelines for implementing EU law and general legislative guidelines. My major concern relates to the fact that EU law implementation guidelines specifically state that the domestic implementing act of a Member State should not regulate another subject matter; and general legislative guidelines forbid legislators to duplicate provisions of other acts or to regulate subject matter that belongs to other acts. In case of the NTA bill, its subject matter goes well beyond the scope of the Directive 2014/60/EU. The NTA bill contains specific rules of civil procedure, mostly duplicating what is and should remain in the Code of Civil Procedure,[12] which it eventually amends in

mentary to International Conventions and European Union Law, Edward Elgar, Cheltenham – Northampton 2011, pp. 141 ff.; P. Stec, *Dyrektywa 93/7/EWG z perspektywy dwóch dekad funkcjonowania* [Directive 93/7/EEC: a twenty-year retrospective], "Santander Art and Culture Law Review" 2015, Vol. 1(1), pp. 103-118.

[9] Directive 2014/60/EU of the European Parliament and 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), OJ L 159, 28.05.2014, p. 1.

[10] Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami [Act on the Protection and Guardianship of Monuments] (consolidated version), Dz. U. 2014, issue 1446, as amended.

[11] Ustawa o narodowych dobrach kultury – projekt [Polish Draft Act on National Cultural Objects], http://legislacja.rcl.gov.pl/projekt/12282700/katalog/12339502#12339502 [accessed: 29.12.2016].

[12] Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [Code of Civil Procedure] (consolidated version), Dz. U. 2014, issue 101, as amended.

an unorthodox way that *prima facie* seems to be constructed with the principle that the "government always wins" in mind.[13]

In this paper however I will limit the focus to matters pertinent to the implementation of the 2014/60/EU Directive, and will refer to other provisions of the NTA bill only if they affect the implementation process. In particular, I will focus on the return of cultural goods and functioning of the International Market Information (IMI) system.

The Polish legislative project adopts a very wide definition of "national treasures", comprising practically all cultural goods, including archives, which cannot be exported without a license, i.e. both goods that can be exported permanently and goods that cannot be exported permanently and have to be returned to Polish territory after expiration of the export permit. It also covers archives and library materials classed as National Library deposits, and objects in museum inventories, even if they are not heritage items (Article 2 point 4 of the NTA). This is a very wide definition, which can be considered too broad in the context of the Directive 2014/60/EU. There is no doubt that items which cannot be exported permanently (certain antiquities, archives, and National Library deposits) are cultural goods that fall within the scope of the Directive, and perhaps other goods that require an export license may fall within this category. However, in my opinion, adding items in museum inventories to the list is a step too far. Museum inventories contain all kinds of historic items owned by a museum, regardless of their pecuniary or historic value. Therefore, if the bill becomes a statute one day, a pair of 19th century glasses or an old syringe enema bulb entered into a museum inventory will become a Polish national treasure.

Another surprise is the definition of unlawful removal of a cultural object from Polish territory. The Directive 2014/60/EU clearly states, in Article 2(2), that only objects removed 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, or not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal, are to be considered as "unlawfully removed". The NTA provides surprise additions to this list: unlawful removal resulting from theft or unlawful appropriation (Article 2.3(c)) and removal in connection with the Second World War (WWII) (Article 2.3(a)). The first addition is clearly overkill – stolen or illegally appropriated goods can hardly be exported legally from any territory. The second one, however, is "interesting". The proposed wording is unambiguous: any cultural object removed from Polish territory as a result of, or in connection with, WWII is deemed to be illegally exported. Certainly, this does not conform to the regime of the Directive 2014/60/EU, and it may raise constitutional doubts. If we interpret it literally, almost everything which dates back to WWII will be an illegal export, starting from goods owned by foreign

[13] A thorough analysis of procedural provisions would require a separate paper.

citizens who had fled Poland in 1939 with all their belongings, through to goods evacuated by the Polish government to prevent their destruction during military activities, up to goods Polish citizens took with them while fleeing Nazi-occupied Poland. In theory, goods that had been evacuated and then returned to Poland, or goods exported after the end of WWII, may be captured by the definition of "unlawfully removed" if there is any connection between their removal from Polish territory and WWII. This could mean that recent exchanges of archaeological items between Polish and German museums constitute illegal exports – both museums returned items that as a consequence of WWII ended up on the wrong side of the border.[14] We could go even further and claim that the return to Germany, as a gesture of friendship, of a copy of Martin Luther's Bible from the collections of the former Prussian State Library (*Preußische Staatsbibliothek zu Berlin*), nationalised as a derelict German property on Polish territory,[15] would also constitute an instance of illegal exportation. The practical consequences of this extended definition of "unlawful removal from Polish territory" could be twofold: At the legal level this provision is equal to an irrebuttable legal presumption of bad faith on the part of anyone acquiring an object removed (even lawfully at the time of export) from Polish territory as a consequence, or in connection with, WWII. Any protection of the goods' owner, as a good faith purchaser, would be excluded. On the purely technical level, this provision of the NTA will most probably be used by the government as an excuse for spamming the IMI system with an endless list of Polish war losses. This is because it could be possible to attempt to use this provision to circumvent the rules and use the Directive 2014/60/EU as a tool to recover war losses, since technically they will become illegal exports when the NTA enters into force.

The Polish lawmakers' tendency to overstretch the scope of application of the Directive 2014/60/EU is also visible in the definition of "public collections". According to Article 2(8) of the Directive, only collections that "are the property of that Member State, of a local or regional authority within that Member State, or of an institution situated in the territory of that Member State, such institution being the property of, or significantly financed by, that Member State or local or regional authority" can be defined as "a public collection". However, according to the proposed Article 2.6(c) and (d) of the NTA, the definition of public collections extends to cultural property owned by non-governmental organisations (NGOs)

[14] P. Stec, *Problem likwidacji skutków II wojny światowej w zakresie dóbr kultury i archiwaliów w stosunkach polsko-niemieckich w świetle Traktatu o dobrym sąsiedztwie i przyjaznej współpracy* [The problem of liquidation of the consequences of the Second World War in the field of culture and archives in Polish-German relations, in light of the Treaty on Good Neighbourliness and Friendly Cooperation], in: W.M. Góralski (ed.), *Przełom i wyzwanie. XX lat polsko-niemieckiego Traktatu o dobrym sąsiedztwie i przyjaznej współpracy 1991--2011* [Breakthrough and challenge. Twenty years of the Polish-German Treaty on Good Neighbourliness and Friendly Cooperation 1991-2011], Elipsa, Warszawa 2011, pp. 405-406.

[15] Ibidem, p. 407; also see A. Jakubowski, *Territoriality and State Succession in Cultural Heritage*, "International Journal of Cultural Property" 2014, Vol. 21, pp. 384-386.

and certain other private entities fulfilling public tasks relating to culture, art, or the protection of cultural property and national heritage, even if the said collections are not financed by the state. "Public collections" will also include cultural goods owned by entities which manage or use public funds, regardless of the purpose of these funds, or whose collections are directly or indirectly supported *in any way*, significantly or not, by the use of public funds. This means in short that any entity that owns cultural property and uses public funds, or has its cultural goods financed by public funds, even in an insignificant way, owns "a public collection" under the NTA.

The return proceedings of the proposed bill generally conform to the Directive 2014/60/EU and are well drafted. Interestingly, the proposed wording of Article 33.4 of the NTA sets out general guidelines for the court on how to establish just compensation for the possessor of a cultural good. According to the bill the court will establish just compensation *ex aequo et bono*, taking into account, in particular, ownership issues and outlays and expenses borne by the possessor in order to restore or maintain a cultural good. The NTA bill also contains numerous procedural rules on the execution of judgements and the technicalities of return proceedings, which are generally well written and fill potential legal loopholes that could hamper the effective implementation of the Directive 2014/60/EU.

There are two other provisions worth mentioning. The first deals with alternative dispute resolution (ADR). According to the proposed Article 24 of the NTA, the Minister of Culture and National Heritage (MCNH) will act as an intermediary between the possessor and the requesting state and will inform the parties on rules of mediation, amicable compromise, and arbitration possibilities provided by the Code of Civil Procedure. This attempt to introduce ADR to cultural disputes is somewhat strange. The MCNH, as a representative of the state to which a request is addressed, is a party to the return proceedings, so his/her role as a trusted third party is doubtful. The duty to inform the parties about the possibility of using ADR and about relevant laws works well in the case of parties that are consumers, but in case of proceedings involving sovereign nations it sounds a bit out of place. What is really needed is not information, but a full-fledged arbitration court, with arbiters competent to deal with complex cultural property disputes.

Last but not least, in the case of cultural objects returned to Poland the act provides the state with a tool for the nationalisation of such objects (Article 9 of the NTA). They will be treated as goods which by law cannot be privately possessed, and may be seized by the state using a procedure stipulated for such goods in the Customs Law.[16] This will not apply to stolen goods, unless the ownership of such goods has passed after the theft to a third party. This means that the rules of good faith acquisition will not apply to illegally exported goods, and that the state will be able to nationalise the returned objects even if they are owned by a good

[16] Ustawa z dnia 19 marca 2004 r. Prawo celne [Customs Law] (consolidated version), Dz. U. 2015, issue 858, as amended.

faith purchaser, or a person who had bought the goods (or the claim for their return) from an original owner. This amounts to expropriation without indemnity and is obviously unconstitutional.

The Heritage Treasures List

One of the elements of the "I want it all and I want it now" policy was the introduction of a controversial Heritage Treasures List (*Lista Skarbów Dziedzictwa*; hereinafter: either HTL or LSD)[17]. This new instrument was proposed in 2014 as a special tool to protect the most important cultural goods of Poland's national heritage. The popular gossip is that the main reason for the LSD was the government's intention to limit international loans of the only Leonardo da Vinci painting in Poland (*Lady with an Ermine*, 1489-90).[18] This painting is owned by a private charity, the Princes Czartoryski Foundation,[19] which uses it to market and finance its activities. The wording of the Act which introduced the HTL to the Polish legal system[20] hints that what the lawmaker really had in mind was very strong control over national treasures, while transferring the duty of care from the state to individual owners.

Cultural goods that can be classified as Heritage Treasures are those goods of utmost importance for cultural heritage and belonging to one of the categories stipulated in Article 64.1 of the APGM. This list is a verbatim copy of the annex to the Council Directive 93/7/EEC and is located in that part of the APGM dealing with the implementation of this EU legal instrument. This suggests that the original intent of the Polish lawmakers' was to create a subspecies of national treasures protected against illegal exportation. Cultural goods can be entered on the HTL by the MCNH either upon request of the owner or *ex officio*. The prerequisites for entry of a cultural object on the HTL are twofold. The first threshold is relatively simple to pass. As already mentioned, the item has to be classified as one of the objects listed in Article 65 of the APGM, which contains a list of cultural goods identical to the one provided in the Annex to the Council Directive 93/7/EEC. The second threshold is much more complex. An object that passes the first phase of the test has to be of "utmost importance" for Polish national heritage. It is for the

[17] This abbreviation has been introduced by Wojciech Szafrański. For an overview of the LSD, see P. Dobosz, *Koncepcja Listy Skarbów Dziedzictwa w systemie prawa ochrony zabytków w Polsce* [The concept of the List of Heritage Treasures in the legal system of protection of monuments in Poland], in: A. Jagielska-Burduk, W. Szafrański (eds.), *Kultura w praktyce. Zagadnienia prawne* [Culture in Practice. Legal Issues], Vol. 2, Poznańskie Towarzystwo Przyjaciół Nauk, Poznań 2013, pp. 199-224.

[18] http://www.polskieradio.pl/7/129/Artykul/1483208,Powstanie-Lista-Skarbow-Dziedzictwa-To-ekskluzywna-grupa [accessed: 17.11.2016].

[19] http://www.muzeum-czartoryskich.krakow.pl/pl/strona-glowna.html [accessed: 28.11.2016].

[20] Ustawa z dnia 10 lipca 2015 r. o zmianie ustawy o ochronie zabytków i opiece nad zabytkami oraz ustawy o muzeach [Act Amending the Law on the Protection and Guardianship of Monuments and the Museums Act], Dz. U. 2015, issue 1330.

MCNH to assess if a given object passes the second phase of the test. The APGM itself contains no further guidelines for the MCNH regarding the qualities an object has to possess in order to be qualified as fit for entry on the NHL. This means the MCNH can decide in an arbitrary manner, and has almost unlimited freedom to decide whether a cultural good is, or is not, an object of utmost importance to national heritage. While the MCNH's decisions will be subject to control by the administrative courts, with no clear guidelines as to the qualities an object/s must possess to be classed as a national treasure it can be supposed that the courts will be sympathetic towards extending the scope to include many different categories of cultural goods. It can be expected that the courts will try to extend this notion in such a way that each and every cultural good listed in Article 64.1 of the APGM will potentially be a national treasure.

The HTL is a controversial instrument. In the course of legislative proceedings many issues regarding its constitutionality, effectiveness, and potential dangers for the art market were raised,[21] which is why the President of Poland decided to subject this Act to constitutional control. The doubts expressed by the President related to the proportionality of the measures applied to protect national treasures which, in the opinion of the President, could interfere with the constitutionally guaranteed right of possession. The Constitutional Court did not share the President's doubts and stated that the Republic's constitutional duty to protect cultural heritage justifies limitations on ownership of national treasures.[22] The reasoning of the Constitutional Court is very concise and shows that the Court had no doubts on the priority of heritage protection over private ownership. This position seems to be aligned both with constitutional and international law, which tend to prefer public interests over private ones. However, the Court's reasoning contains one extremely dangerous element – a suggestion that heritage protection is so important that it has total priority over other constitutionally protected rights, and that the government's authority to restrict private ownership of cultural goods is almost unlimited. The potential unconstitutionality of the HTL on other grounds is yet to be analysed because the Constitutional Court was bound by the claims in the President's motion. One of the possible attack points could be, for instance, that the entry of a privately-owned object onto the list amounts to a so-called "indirect expropriation". This term relates to acts of state that are not aimed at legally taking away someone's ownership rights, but which create conditions concerning the use and enjoyment of one's property which are so onerous that the they amount to a deprivation of ownership, and/or the owner (un)willingly surrenders it to the

[21] W. Szafrański,*"Dama" na liście skarbów* ["Lady" on the Treasures List], "Rzeczpospolita", 8.01.2014; http://archiwum.rp.pl/artykul/1228820-%E2%80%9EDama%E2%80%9D-na-liscie--skarbow.html [accessed: 16.11.2016].

[22] Constitutional Court of the Republic of Poland, Judgement of 25 May 2016, Kp 2/15; http://trybunal.gov.pl/rozprawy-i-ogloszenia-orzeczen/wyroki-i-postanowienia/art/9000-zasady-wpisywania-zabytkow-ruchomych-na-liste-skarbow-dziedzictwa-zasady-przejecia-zabytku-ruch [accessed: 18.11.2016].

state. An example invoked by A. Stelmachowski was that setting residential rent at a level well below maintenance costs and the high property taxes. This practice would *de facto* force private owners of residential blocs in Communist-era Poland to either renounce ownership or go bankrupt.[23] It can be argued that the HTL contains a very similar mechanism – ownership restrictions are very severe and the owner has to pay for additional safety measures and devices aimed at safeguarding heritage treasures, while the state does not guarantee that it will compensate the owner for the restricted enjoyment of the property and for incurred outlays and expenses. In many cases these costs will be so high that owners will not be able to cover them and will either suffer penalties or surrender the cultural good to the state. Therefore, at least in the case of objects entered onto the list *ex officio*, this is equal to an indirect expropriation without compensation.

Another problem connected with the HTL is its relation to the Directive 2014/60/EU. Undoubtedly, items entered on the HTL constitute cultural goods covered by the Directive, although the HTL was never meant as an act implementing the Directive. What could cause a headache to lawyers is to try and answer the following question "Are goods on the HTL the only national treasures in the sense of Article 36 of the TFEU and the Directive 2014/60/EU, or is it possible to extend this notion to other cultural goods?" The NTA, which will hopefully transpose the Directive in the future, extends the notion of "national treasures" well beyond the HTL items. According to the bill, national treasures are the National Heritage Treasures and "some other treasures", thus HTL items are like other "animals", only slightly more equal. The bill uses, and possibly abuses, the exact wording of the Polish version of the Directive 2014/60/EU, where "national treasures" are translated as "narodowe dobra kultury" i.e. *national cultural goods.* This means that it is technically possible to claim that national cultural goods cover more than national heritage treasures. This is the kind of word puzzle lawyers love so much.

Arguably, the proper interpretation of both the Directive 2014/60/EU and the pertinent provisions of the TFEU require more than the simple assumption that whatever Member States' designate as "national cultural goods" constitute *de facto* cultural goods. We should bear in mind that the national goods exception is still an *exception*, so extending the notion to cover all, or nearly all, cultural goods would be an abuse of rights. Thus, *following the intent rather than the form*, we must check if the "national treasures" of a given country are really of utmost importance for national heritage, and whether this is reflected in national legislation. In my opinion, the existence of two different types of national treasures, national cultural goods and its subspecies – national heritage treasures – constitutes a natural source of confusion, especially if we take into account that it will be a foreign court handling the case and applying the translated Polish statute. Foreign courts will be might

[23] See A. Stelmachowski, *Zarys teorii prawa cywilnego* [The theory of private law], Wydawnictwa Prawnicze PWN, Warszawa 1998, p. 184.

be tempted to choose verbatim interpretations and decide that only what is called a national treasure is really a national treasure. Furthermore, adopting a very wide notion of cultural goods can be understood as an attempt to circumvent, if not abuse, both the letter and the intent of the TFEU exception. The cultural goods exception cannot be used as an excuse for hampering the free movement of goods or free movement of capital. The idea that "national treasure" can be defined as covering all or most cultural goods on the market should be inadmissible. What could be admissible would be to limit the notion to: 1) public and ecclesiastical collections; 2) cultural goods that cannot be exported permanently, provided that only select cultural goods are non-exportable; 3) goods covered by a statutory buy-out right; and 4) archival materials. If, however the scope of the notion of a "national treasure" covers goods that can be exported permanently, such goods cannot generally be treated as national treasures covered by the exception provided by the TFEU and the Directive 2014/60/EU. The rationale underpinning the Directive is that some cultural goods are so important to the cultural heritage of Member States that they have to stay permanently (subject to temporary exhibition rights) within the territory of a given Member State; otherwise such goods are not national treasures.

Conclusion – *The Lady or the Tiger* and other options

So, who was behind that door? The author of the novel, despite endless questions from readers, never answered this question. What we know is that the solution was binary – either a girl or a tiger. What is true in a novel is not necessarily true in legislation. Confronted with a *Lady or the Tiger* dilemma we do not always deal with such sharply pointed alternatives, because what we find behind the door sometimes is not what it looks like at first sight. Our win-win solution would be an arena with Cinderella behind one door and the mild and merry Tiger from *Winnie the Pooh* behind the other. A lose-lose solution would be a vicious tiger and the Evil Queen standing behind each door. The worst case, and most probable scenario, would be Shere Khan hidden behind one door and the Evil Queen behind the other. However, a lawyer's life is always full of surprises so for the time being we have a third solution provided. Since the Sultan's lackeys (the legislators) are in arrears with the delivery of both the lady and the tiger, we have empty places left behind each door.

As for the moment we do not have a working definition of national treasures, so all the goods exported since 18 December 2015 cannot be returned with the help of the procedures provided in the cultural goods Directive of 2014. This will not change, surprisingly, with the entry into the force of the amendments to the APGM and creation of the Heritage Treasures List. Although objects on the list will no doubt be national treasures covered by the Directive 2014/60/EU, the trick is that so far we do not even have regulations on the technicalities connected with the list, and it will take some time before the first item will be classified as a heritage treasure. Furthermore, this list will be rather modest, so the number of Polish

national treasures will be very low, at least until the National Treasures Act comes into force. It will be our Shere Khan and a lesser evil.

The aforementioned act, the NTA, is the Evil Queen of our story.[24] It is too complex, poorly written, potentially unconstitutional, and goes far beyond the cultural goods exception provided by the TFEU. Its entry into force may potentially block the exportation of cultural goods, and its complexity may make every exporter a potential criminal. Moreover, the state will be able to issue a unilateral declaration that all goods exported from Poland in the 1939-1945 period were exported illegally and that Poland has a restitution claim on all such property, regardless of legal title thereto. At the same time, if the National Treasures Act enters into force, as it is now, we may have even more problems because almost all cultural items will be national treasures, but some of them (those entered on the NTA) will be more treasured than the others. This may lead to competition between two types of national treasures – listed and unlisted – which may or may not fall into the classified-declared division under the Directive 2014/60/EU. If the courts proceed to interpret the new laws as predicted in this article we can expect a turbulent period of legal instability; at least until the moment the courts decide what is and what is not a Polish national treasure. This may also adversely influence return proceedings before foreign courts, which may not be able to easily decide whether the object in question is a national treasure. This probably could be solved via prejudicial questions, but some courts may be tempted to refuse to apply Polish public law on policy grounds.

It seems that currently there are two competing ways of thinking about national treasures in Poland – minimalist and maximalist. Minimalists would like to limit the number of national treasures only to selected cultural goods, either of exceptional artistic or historic value, and to focus all available means on protecting such treasures from illicit exportation. For the maximalists, all heritage items and goods of artistic quality are national treasures that should preferably be owned by the state and chained to a wall in a museum. Both the Heritage Treasure List and National Treasures Act will probably enter into force this year. They represent the minimalist and maximalist approaches, respectively, and are mutually contradictory. That means that the Polish Parliament will be forced in the near future to redesign our art export legislation, including the provisions dealing with the implementation of the Directive 2014/60/EU. So, barely escaping Shere Khan and the Evil Queen, we will soon once again stand in the arena, trying to pick the right door and wondering who is behind it – the lady or the tiger.

[24] Yes, I've always liked Shere Khan better.

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