

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
STRUCTURAL AND COHESION POLICIES **B**



Agriculture and Rural Development

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**THE RETURN OF CULTURAL
OBJECTS UNLAWFULLY REMOVED
FROM THE TERRITORY OF
A MEMBER STATE
WORKSHOP
4 NOVEMBER 2013**

WORKING DOCUMENTS



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STRUCTURAL AND COHESION POLICIES**

CULTURE AND EDUCATION

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Abstract

Following the European Commission's launching of a Recast proposal for Directive 93/7/EEC, which was adopted to ensure the return of cultural goods classified as "national treasures possessing artistic, historic or archaeological value", the Committee on Culture and Education (CULT) of the European Parliament draw up a report on 'Return of Unlawfully-Removed Cultural Objects'.

Due to its complicated and legal-technical nature, CULT organised a workshop on the subject to promote debate between experts in the field and MEPs, from which conclusions and recommendations were drawn with a view to contributing to the report. The workshop took place in the European Parliament on 4 November 2013.

The present document is the compilation of the background notes and Power Point presentations prepared by the experts invited.

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INTRODUCTION

One of the most important aims of the proposal to recast Council Directive 93/7/EEC of 15 March 1993 is to more closely align the principle of the free movement of cultural objects with the need to protect cultural heritage more effectively. It should be noted that the principle set out in Article 28 et seq. and in Article 34 et seq. of the Treaty on the Functioning of the European Union concerning the removal of obstacles to the free movement of goods and, more specifically, the prohibition of quantitative restrictions on the removal of goods from the territory of a Member State, is fully applicable to the movement of cultural objects. The Court of Justice referred to this in its ruling on the 1968 case on works of art, which includes cultural objects in the broader category of 'merchandise'.¹ The powers which Article 36 TFEU affords to Member States to restrict the movement of objects considered to be national treasures possessing artistic, historic or archaeological value, naturally remain fully in force.

In this context it is therefore no surprise that the legal basis chosen by the Commission is Article 114 TFEU, which enables the EU to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

More specifically, the operational objectives of the recast are 'to increase the number of returns of objects classified as "national treasures" and to reduce the cost of these returns'.² It should therefore be ascertained whether the aims set out in the proposal are indeed pursued by the introduction of new legislative provisions concerning deletion of the Annex, namely **the redefinition of national treasures** and the introduction of criteria underlying the **concept of due care and attention**.

¹ Court of Justice, Case 7/68, *Commission of the European Communities v Italian Republic*, European Court Reports (ECR), p. 617.

² See: Summary of the impact assessment accompanying the document 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 (recast), Brussels, 30.5.2013, SWD(2013) 188 final, p. 3.

1. DEVELOPMENT OF THE CONCEPT OF NATIONAL TREASURE IN THE PROPOSAL FOR A RECAST DIRECTIVE

'Despite the variety of instruments available, trafficking in cultural objects has become one of the most widespread forms of illegal trade. Trafficking in cultural objects classified as national treasures is a particularly serious form of this crime which adversely affects the national identity, culture and history of the Member States, since the disappearance of national treasures deprives a State's citizens of a mark of their identity and history.

In response to this problem and its major impact on the Member States, the Council of the European Union concluded on 13 and 14 December 2011 that measures needed to be taken to make preventing and combating crime against cultural objects more effective. It therefore recommended that the Commission, amongst other bodies, support the Member States in the effective protection of cultural objects with a view to preventing and combating trafficking and promoting complementary measures where appropriate.'

As this extract taken from the text proposed by the Commission³ shows, the proposal for a recast directive is clearly in keeping with efforts to fight the illicit trafficking of cultural objects. This proposal was warmly welcomed by the European Economic and Social Council on 18 September 2013.⁴

With regard to the original text of Council Directive 93/7/EEC of 15 March 1993,⁵ the 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 (recast) (text with EEA relevance)⁶ proposes deleting the Annexes listing the possible categories of national treasures and laying down value thresholds combined with financial thresholds.

The proposal for a recast defines the legal category of cultural objects eligible for return proceedings, referring purely and simply to cultural objects which the Member States have classified as national treasures. Before considering the legal implications of this change, it is essential to go back to the origin of the concept of national treasure in the Treaties and its use in the context of the Directive. It is vital to analyse the concepts in force in order to clarify the challenges presented by the changes in the proposal for a recast.

³ 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 (Recast) COM(2013) 311 final – 2013/0162 (COD), Soc/488.

⁴ OPINION of the European Economic and Social Committee on the '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 (Recast) COM(2013) 311 final – 2013/0162 (COD), Soc/488', 'Since the Committee endorses the contents of the proposal, it decided at its 492nd plenary session of 18 and 19 September 2013 (meeting of 18 September), by 192 votes in favour with 10 abstentions, to issue an opinion endorsing the proposed text'.

⁵ 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, 27.3.1993, p. 74), amended by Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997 (OJ L 60, 1.3.1997, p. 59) and Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 (OJ L 187, 10.7.2001, p. 43).

⁶ 93/7/EEC (adapted), 2013/0162 (COD).

1.1. Concept of national treasure in current EU law

1.1.1. Origin of the concept of national treasure in EU law: Article 36 TFEU

The concept of national treasure as it appears in the Directive relates to the notion contained in Article 36 TFEU which allows a certain number of exceptions to the principle of free movement of goods laid down in Articles 34 and 35 TFEU, which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect between Member States.

Under Article 36 TFEU, 'the provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; **the protection of national treasures possessing artistic, historic or archaeological value**; or the protection of industrial and commercial property. **Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.**'

The cultural protection policies developed by the Member States by virtue of their competences called for special accommodation in the Treaties due to the possible conflict between those policies and the principle of the free movement of goods in force in the EU. A number of Member States have adopted measures prohibiting the removal of objects that they consider to be part of their national heritage, a system underpinned by controls on the movement of works of art and movable property which entails restrictions on exports. This is therefore the subject of Article 36 TFEU (ex Article 30 TEC). This rule has been in Community texts since the very beginning. It is expressed in the same terms as Article XX of the GATT.

The exemption applies to a number of cultural objects of significant importance for the Member States. It remains to be established which cultural objects are concerned, how this legal concept is defined and what the limits of the exception are.

In reality, there is no EU concept of national treasure possessing artistic, historic or archaeological value (a). The text leaves it to the Member States to define what they mean by national treasure, within their own system, in accordance with Article 36 TFEU (b).

a) No positive EU concept of national treasure possessing artistic, historic or archaeological value

As pointed out by the Commission Staff Working Document, 'the Union is not competent for determining what is a national treasure'. According to Article 167 TFEU, the Union's action on cultural matters shall comply with the principle of subsidiarity, in particular with regard to the protection of heritage (conservation and safeguarding of European heritage), but its action shall be confined solely to incentive measures, excluding any legislative or regulatory measures to harmonise the laws of the Member States. They are sovereign in this field.

TITLE XIII
CULTURE
Article 167
(ex Article 151 TEC)

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audio-visual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, **excluding any harmonisation of the laws and regulations of the Member States,**
- the Council, on a proposal from the Commission, shall adopt recommendations.

In 1989, in a proposal for an interpretive communication on the conditions of movement within the Community of objects possessing artistic, historic or archaeological value, the Commission outlined a set of criteria to identify these objects. Under the terms of this communication, an object was to be considered a national treasure in the following cases: if

- the object is so closely entwined with the history or the life of the country that if it were to be removed, it would be a significant loss for the latter;
- the value of the object is such that the country's artistic heritage would be fundamentally diminished in its absence;
- the object has inestimable importance for the study or understanding of a specific sector of the country's art or history;
- the removal of an object belonging to a collection meeting one or more of the above criteria would cause the collection to lose this or these characteristics.

Despite its vague and fairly general nature, the Member States did not endorse this proposal. The method, rather than the substance, attracted a great deal of criticism, especially the idea that EU bodies could have a say in determining the scope of cultural heritage, given the Member States' competence in the matter. As for the concept of 'national treasure', the doctrine also questioned the importance that should be attached to the qualifier 'national'. While the classification of 'treasure' refers to the most important cultural objects, the adjective does not appear to add anything to this requirement, for example, by obliging the Member States to characterise an object's link.

The term 'national' simply refers to the state's sovereignty and to the interest which it will have shown by designating these objects as part of its national heritage.

It therefore falls to each Member State to specify what it means by 'national treasure'.

The fact remains that the term 'national treasure' cannot cover cultural objects as a whole. Certain external limits to the concept may restrict the effect of this exception to the principles of free movement. In particular, the ECJ may verify whether use of the exception in Article 36 has exceeded its limits.

b) National treasure exception reserved for objects of major interest

Although Article 36 TFEU does not specify it expressly, it is widely acknowledged that the exception granted to protect the cultural heritage of the Member States only benefits the most important objects of historic, artistic or archaeological interest. In this respect, the concept of national treasure differs from the wider concept of cultural object. In reality, the application of Article 36 TFEU allows the Member States to use two types of competences.

The first competence falls within the scope of a monitoring function. It consists of the Member States **controlling the movement of cultural objects** by requiring, for example, an **authorisation for their removal from the territory (certification or licensing system)** so that they may identify possible national treasures. The cultural objects subject to this control are clearly not all national treasures. Put simply, the measure seeks to identify, among this group of controlled objects, whether any national treasures are about to leave the territory. If one is identified, the Member States have various legal means at their disposal to keep the object (right of first refusal, right of preferential acquisition). This complies with the exception under Article 36 TFEU. French and Italian courts, for example, have deemed that their national rules controlling the movement of cultural objects comply with EU law, and with Article 36 TFEU in particular.

The second competence falls within the scope of a function for the protection of national heritage. It consists specifically of the Member States **enacting measures to protect important objects**. In particular, Article 36 TFEU allows measures to prohibit objects classified as national treasures being removed from the territory.⁷ This question of national treasures being identified by the States may, where appropriate, be heard before the ECJ if, for example, the EU believes that the classification decided by a Member State does not fall within the scope of Article 36 TFEU. The Court did not settle this matter directly,⁸ which is in itself significant. We will come back to this later. It has, however, ruled indirectly on the concept of national treasure. In a case concerning tax levied by the Italian Government on the exportation of works of art, the Court of Justice points out that, within the meaning of Article 9 of the EEC Treaty, goods are 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions', and states that 'the rules of the Common Market apply to articles possessing artistic or historic value subject only to the exceptions expressly provided by the Treaty' (ECJ, 10 December 1968, Commission v Italian Republic, Case 7-68, ECR 1968, p. 617). Although this case does not concern application of the exception provided by Article 36, here the Court suggests that the basis of the tax, composed of the category of objects of artistic and historic interest, falls outside the framework laid down by Article 36 and points out, moreover, that the envisaged measures do not ensure

⁷ This power is invoked in particular in the regulation on the export of cultural objects to third countries, which expressly reserves the right of the Member States to prohibit the removal of their national treasures.

⁸ Here we are disregarding judgments which reverse the working of the exception, for example regarding the price of books, which are not relevant for our study.

the attainment of the objective referred to in this Article, which is to protect the cultural heritage.

It must still be examined, under each Member State's national law, what concept 'national treasure' refers to, understood as an **object of major interest**.

c) Concept of national treasure in the laws of the Member States

It is up to the Member States to say which of their national heritage objects may be regarded as national treasures. In this matter there is a significant disparity both in how these objects are designated, and in the classification methods used. The difference in approaches can first be seen in the various language versions of the Treaty and the translations of the term 'national treasure'. Certain Member States translate it literally (considering that it derives from the term used in the GATT text which refers to the concept of 'national treasure'). This is true of the French version (*trésor national*). In other language versions, it is translated with reference to the closest concepts in national law, giving rise to '*patrimonio histórico o arqueológico nacional*' in Spanish, '*patrimonio artistico*' in Italian and '*Nationales Kulturgut*' in German.

Apart from pure questions of terminology, these variations indicate profound differences in classification and, more importantly, in conception in the project to protect heritage.

The fact is that in the majority of Member States, the concept of national treasure, whatever its translation may be, has not been explicitly laid down in national law, making it difficult to align this concept, arising from EU law, with each state's categories. Sometimes even these categories of national treasure are the competence not of the state, but of the regions (the *Länder* in Germany, the autonomous communities in Spain, etc.).

1.1.2. Concept of national treasure in Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State

a) Reintroduction of the concept of national treasure within the meaning of Article 36 TFEU

The concept of national treasure contained in this Directive is based on Article 36 TFEU:

'whereas, under the terms and within the limits of Article 36 of the Treaty, Member States will, after 1992, retain the right to define their national treasures and to take the necessary measures to protect them in this area without internal frontiers;

*whereas arrangements should therefore be introduced **enabling Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of the said Article 36** and have been removed from their territory in breach of the abovementioned national measures or of Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods'.*

b) Strengthening of return proceedings for certain national treasures

The definition of national treasures pursuant to this Directive should be understood on several levels:

- Main part of the definition: the point of reference provided by Article 36 TFEU

Article 1 states:

'For the purposes of this Directive, "cultural object" shall mean an **object which:**

is classified, before or after its unlawful removal from the territory of a Member State, among the "national treasures possessing artistic, historic or archaeological value" under national legislation or administrative procedures within the meaning of Article 36 of the Treaty.'

These are objects designated by the Member States as being national treasures, it being understood that, while they are sovereign in this classification exercise under the Directive, they must comply with the external limits laid down by Article 36 TFEU and the requirement of objects of major interest (see above for the applicability of Article 36 TFEU).

From this perspective, it may be considered that its scope is similar to the view taken by the UNESCO Convention of 1970, Article 1 of which specifies:

'For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'. The extent of this concept of importance is, however, controversial.⁹

The Unidroit Convention of 1995 develops a different view, linking the return of the object to the idea that its removal 'significantly impairs one or more of the following interests:

- a) *the physical preservation of the object or of its context*
- b) *the integrity of a complex object*
- c) *the preservation of information of, for example, a scientific character*
- d) *the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.'*

- *Time of designation: object classified before or after its unlawful removal*

The wording according to which the Member State may also designate an object as a national treasure after its unlawful removal is extremely important and useful. The fact that an object is removed unlawfully denies the State the opportunity to exercise its monitoring function during export controls on objects which are not yet protected and, where appropriate, to identify a national treasure. If the text had not provided for this, it would have amounted to limiting the scope of national treasures eligible for return to objects which were already protected.

⁹ In this respect, MAR.

➤ Scope of the Directive limited by an annex

The Directive does, however, limit return proceedings to a more restricted group of national treasures under an annex system which specifies the relevant categories together with financial and age thresholds. It does not fall to this Annex to define what national treasures are. The aim of adopting thresholds below which return proceedings are not possible was simply to reconcile the very different viewpoints of the Member States, some of them very demanding, others much more liberal in their heritage protection systems. Implementation of the arrangements was intended to be 'as simple and efficient as possible'. The Directive further specifies that ***'to facilitate cooperation with regard to return, the scope of the arrangements should be confined to items belonging to common categories of cultural object; whereas the Annex to this Directive is consequently not intended to define objects which rank as 'national treasures' within the meaning of the said Article 36, but merely categories of object which may be classified as such and may accordingly be covered by the return procedure introduced by this Directive.'***

The Convention of 14 November 1970 requires objects designated by States as being of importance for history, archaeology etc. to belong to the categories set out in Article 1 of the Convention. It therefore uses a similar technique, but unlike the Directive's return arrangements, this list does not contain any references to financial or age thresholds.¹⁰

➤ Elimination of the effects of the Annex for objects included in public collections and inventories of ecclesiastical institutions

Cultural objects from public collections listed in the inventories of museums, archives or libraries' conservation collections as well as objects listed in the inventories of ecclesiastical institutions, may be subject to return proceedings, regardless of their age and value. The concept of public collection is defined in the Directive.¹¹ The effects of the Annex are eliminated in this regard.

➤ Unlawful nature of the export

This aspect should not be overlooked. It is when objects are unlawfully removed that a request may be made for their return. This is the justification for Member States being able to designate objects which have already been removed as national treasures. Clearly, we should again point out that the system of controls on objects leaving the territory was established to enable Member States to identify which goods, among the group subject to controls, are national treasures. As a result of an unlawful removal, they have not been able to make this identification. This situation is defined in the Directive as:

'- removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EEC) No 3911/92, or

¹⁰ It can however be seen that certain States have restricted the effect of the Convention to categories affected by these thresholds. This is especially true for France.

¹¹ 'For the purposes of this Directive, "public collections" shall mean collections which are the property of a Member State, local or regional authority within a Member State or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority.'

- *not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.'*

Confirmation of the unlawful nature of an export presumes, however, that the Member States have legislated on this point. If not, they may not seek the return of a cultural object. In the specific case, most Member States have adopted a system to control cultural goods at the time they are exported.

1.2. Proposed change in the proposal for a recast directive: a refocus on national treasures

Assessments of the Directive¹² have demonstrated its limited effectiveness in securing the return of cultural objects classified as national treasures which have been unlawfully removed from the territory of a Member State and are located on the territory of another Member State. The main reasons for this were identified as being:

- the conditions required to make objects classified as national treasures eligible for return, in other words they must belong to one of the categories referred to in the Annex and meet the financial and age thresholds;
- the short period of time allowed to bring return proceedings;
- the cost of compensation.

With regard to the first point (scope of the Annex), the proposal for a recast envisages deleting the Annex, in other words removing one of the limits laid down by the text, an external limit restricting the objects eligible for return proceedings to certain categories affected by value or age thresholds. The logic of the system also provides for deletion of the reference to objects in public collections and ecclesiastical inventories which are not, in the current text, required to fall within a category of the Annex. This deletion is logical insofar as a more general, concise formula is used.

Article 1 would therefore read:

'For the purposes of this Directive: "cultural object" shall mean an object which is classified, before or after its unlawful removal from the territory of a Member State, among the "national treasures possessing artistic, historic or archaeological value" under national legislation or administrative procedures within the meaning of Article 36 of the Treaty.'

The risks posed by deleting the Annex must be examined, before contemplating the guarantees afforded by the new text and considering what improvements it would be appropriate to make to the technical part of the text.

¹² First report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2000) 325 final, 25.05.2000). Second report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2005) 675 final, 21.12.2005). Third report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2009) 408 final, 30.07.09). Fourth report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2013) 310 final, 30.05.13).

1.2.1. Risks relating to removal of the Annex

a) Nature of the risks

Too wide an interpretation of the concept of national treasure could:

- undermine the effectiveness of the Directive on the one hand,
- on the other hand, provide insufficient guarantees for persons liable to be involved in return proceedings,
- more generally, cause uncertainty in the art market if transactions could thus be called into question.

b) Discussion of how real these risks are

- The issue of effectiveness. Taking into account the risks mentioned and the guarantees provided by the text, it is questionable whether the addition of an annex increases the effectiveness of the Directive. We need only refer to the enforcement record of the text for confirmation, although the Directive's indirect effects must not be overlooked (recourse to voluntary return methods).
- The need for legal certainty in the art market is clearly a legitimate interest. With regard to the need to achieve a compromise between the free movement of goods and the protection of national treasures, it is however clear that this compromise was achieved, in the terms under which the Directive was adopted, in favour of the movement of goods and to the detriment of the protection of national treasures.
- The existence of this annex which, it must be remembered, does not have a defining role, in actual fact does very little to contain the risk of the interpretation of the concept of national treasure being too wide. In view of the perceptions held by certain States, it may be considered that neither the category-based approach, nor the yardstick based on financial or dating criteria, suffice to render the concept of national treasure. Moreover, the UNESCO and Unidroit conventions did not consider it appropriate to make their definition subject to value or age thresholds.¹³ In light of this, the important point of reference remains that of major interest, a requirement based on Article 36 TFEU. The removal of thresholds does not, in this regard, weaken this requirement of major interest.

In any case, faced with these risks, certain guarantees may be offered.

1.2.2. Guarantees

- As stated above, the point of reference provided by Article 36 TFEU remains. Only objects of major importance are concerned, and not all goods subject to export controls. These might potentially prove to be national treasures, but not all of them will be classified as such. This means that, where appropriate, the decision to classify an object as a national treasure could be challenged. In this regard it could be noted that Article 36 TFEU does not provide for an annex but that its application has nevertheless not been affected, as shown by the lack of disputes in this area. The same could be said of the provisions granting an exception to national treasures in the GATT.

¹³ Specifically, with regard to market certainty, the Annex complicates various matters: establishment of the thresholds, taking into account uncertainty in the art market and difficulties setting a financial value or dating objects in some cases. The apparent certainty which such an annex provides is therefore an illusion.

- Unlawful removal. The Directive is implemented on the assumption that the object was removed unlawfully, a matter assessed with regard to when the Directive entered into force. The text is implemented with regard to the object's unlawful situation. Anyone who purchases an object must make reasonable enquiries into the capacity of the object he is purchasing to move between states and must request documents certifying its provenance. The Member States as a whole have at their disposal such controls, which do not fall within the scope of arbitrary action by the States.

To be eligible, the request must be accompanied by:

- a document describing the requested object, stating that it is a cultural object within the meaning of the Directive;
 - a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory. It consequently falls to the State requesting the return of a national treasure to prove that it was removed unlawfully. Furthermore, the unlawful removal involves a breach of national law on export regulations.
-
- Means of defence. During the procedure, the persons involved in return proceedings may, in their defence, dispute the object's classification as a national treasure by invoking Article 36. As the proposal for a recast states, 'the court in question will then have to make a ruling, where necessary after sending a referral for a preliminary ruling to the Court of Justice of the European Union', if the provisions of Article 36 have been breached.
 - The Member States' obligation to inform the Commission of the provisions of their national laws with regard to the application of the Directive. Article 18 of the Directive lays down that 'Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive'. The new text therefore creates a most opportune obligation to provide information. The Commission must share this information with the parties concerned.
 - Action available to the Member States. Requests may only be made by Member States, although they may request the return of an object which was privately owned.

1.2.3. Discussion of possible improvements

a) Greater visibility with regard to the delimitation of national treasures

- Retain an annex without thresholds

Retaining an annex without value and age thresholds could provide a certain degree of visibility to the possible scope of national treasures. The difficulty lies in the fact that this should not have a defining role. Since the categories are sufficiently broad and the last one is a category without limits, it could, without too much difficulty, be combined with the generic definition. It would, however, be desirable for category 14 to refer to 'works of art or antique items'.

➤ **Should Member States be required to define the concept of national treasure in their domestic legislation?**

While the diffuse nature of concepts arising from national law (and sometimes from regions with responsibility for cultural legislation) certainly does not facilitate access to information, requiring Member States to define national treasures is not necessarily appropriate.

On the one hand, the concept of national treasure is not a relevant legal category in most legal systems. Obliging Member States to legislate on this concept could be seen as encroaching on their powers.

On the other hand, and certainly more crucially, for those Member States which have chosen to explicitly state in their law which items classify as 'national treasure', the definition adopted does not always provide very precise information. Thus, in French law, Article 111-1 of the Heritage Code states that:

'Objects belonging to public collections and to collections of French museums, objects classified by virtue of provisions on historical monuments and archives, as well as other objects of major interest for the national heritage in terms of history, art or archaeology, shall be considered to be national treasures.'

The first series of objects considered (museum collections, public collections, classified objects) gives an idea of the scope by referring to those categories which are already protected. It could be said that the formal identification method adopted by the French legislator, consisting of referring to categories of protected cultural objects and integrating the concept of national treasure into national law, should offer a certain degree of certainty. However, the final sentence which connects the concept of national treasure to all other objects of major interest in terms of art, history, etc., provides a framework concept which only indicates the idea of an object's importance. This is the limit when providing a definition in an area which often refers to values that are difficult to contain in objective rules (value of art and history, symbolic value, etc.).

Moreover, it is not so much the removal of the Annex and its thresholds which undermines this interest as the fact that the Member States remain sovereign in cultural matters and that their approaches and methods vary greatly. It cannot reasonably be envisaged that the European Union will lay down a uniform concept of national treasure. Therefore, we must work harder on providing better information for citizens.

➤ **Strengthening Member States' obligation to provide information**

Without going so far as creating an obligation to provide a definition, the Directive introduces, on the one hand, an obligation for the Member States to provide information, and on the other, it bases the eligibility of a request on the condition that a Member State indicate the reasons why the object claimed is a national treasure.

Regarding the first point, as stated above, the Directive lays down that 'Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive'. We should examine whether it is appropriate to lay down an obligation to provide information to the parties. The UNESCO handbook on legal and practical measures against illicit trafficking in cultural property calls on the States Parties to 'provide a clear definition of cultural property/objects and/or cultural heritage that are covered within the scope of the legislation'.

Furthermore, under the 'Proper Implementation' of the 1970 Convention, they are called on to make accessible 'the legislation to facilitate better knowledge of it so that potential purchasers and dealers may consult the legislation and thereby perform preventively part of their due diligence exercise', which is possible through the provision of 'official government web sites on the Internet that present national policies and include legislation; and the posting of the legislation on the UNESCO Cultural Heritage Laws Database'.

Moreover, the proposal for a recast directive provides for use of 'the Internal Market Information System ("IMI") in order to facilitate administrative cooperation [...] and the exchange of information between them [Member States]',¹⁴ a system which should raise the guarantee level in terms of user information of artistic, historic or archaeological value.

On the one hand, since return proceedings are connected with a breach of national law, it may be considered that an initial piece of useful information exists. Even though, as has already been stated, not all cultural objects subject to controls are national treasures, they are potentially, which creates the risk that the authorisations required for shipping to another Member State may not be complied with.

¹⁴ French Senate, Investigation by the Committee on European Affairs, written procedure of 9 July 2013, which decided 'not to subsequently intervene on this text which strengthens the fight against the trafficking of cultural objects in Europe'.

2. INTRODUCTION OF THE CONCEPT OF 'DUE CARE AND ATTENTION'

The decision to remove the Annex of categories of relevant objects constitutes an important extension (at the very least potentially) of the scope of the Directive. Taking into account the multiplicity of national laws, the considerable differences in the regulation of categories considered to be national treasures and the lack of a definition in EU law, we must consider the role played by 'due care and attention' in the Directive in order to counterbalance the effects of the changes made. Indeed, the recast appears to give due care and attention a more important role than the current version of the Directive. Article 9 lays down that the competent court in the requested state shall award the possessor fair compensation, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object. The recast adds a second paragraph with the aim of specifying some of the most significant circumstances of the acquisition used to determine whether the possessor exercised due care and attention.

In this regard, in order to more clearly define the context of this proposed change, we should take account of the new recital 10 of the Directive which stresses that 'The scope of this Directive must extend to any cultural object classified as a national treasure possessing artistic, historic or archaeological value under national legislation or administrative procedures within the meaning of Article 36 of the Treaty'. In this regard, it is advisable to remove the criterion of belonging to one of the categories listed in the Annex to Directive 93/7/EEC and, consequently, the said Annex and the criterion of belonging to public collections listed in the inventories of museums, archives and libraries' conservation collections or the inventories of ecclesiastical institutions. Article 36 respects the diversity of national systems for the protection of cultural objects. In this context, 'mutual trust, a willingness to cooperate and mutual understanding between Member States are therefore essential'. Moreover, recital 16 specifies that 'It is desirable to ensure that all those involved in the market in cultural objects exercise due care and attention in transactions involving cultural objects. The consequences of acquiring a cultural object of unlawful origin will be genuinely dissuasive only if the obligation to return is coupled with an obligation on the possessor to prove the exercise of due care and attention in order to obtain compensation. In order, therefore, to achieve the Union's objectives in preventing and combating unlawful traffic in cultural objects, it must be stipulated that the possessor must provide proof that he exercised due care and attention in acquiring the object in order to obtain compensation, and that the possessor may not claim to have acted in good faith if he failed to exercise the level of due care and attention required by the circumstances.'

Lastly, recital 17 states that 'In order to enable Member States to arrive at a uniform interpretation of the concept of due care and attention, the circumstances should be set out which are to be taken into account to determine whether due care and attention have been exercised.'

Therefore, the key concepts include, in particular, respect for the diversity of national systems, but also mutual trust, mutual understanding and the establishment of common criteria seeking to ensure the effective exercise of due care and attention when an object is acquired, with a view to obtaining compensation.

2.1. A shift in perspective

According to Article 9 of the Directive, the burden of proof that due care and attention was exercised in order to obtain fair compensation is governed by the 'legislation of the requested Member State'. In the proposal for a recast, the change is considerable, given that the new Article 9 provides for the introduction of a uniform law, removing reference to the national legislation of the requested Member State and affirming, on the contrary, the principle whereby it is the possessor who claims he acted in good faith who must prove that he exercised due care and attention. In this regard, it should in any case be noted that in most European civil law systems which are based on the Napoleonic Code of 1804 (for example France, Italy, Spain, etc.), the principle 'in the case of movable property, possession is equivalent to title', applies. Under the aforesaid principle (see Article 2276 of the French Civil Code and Article 1153 of the Italian Civil Code), the very fact that movable property is possessed with a property title valid in the abstract amounts to a true right of ownership. In this context, the possessor's good faith is presumed and it is the party challenging the validity of the title (normally the legitimate owner) who must prove that the possessor acted in bad faith.

It is a widely held opinion, not just among experts in art law but also among those involved in the protection of cultural heritage, that the automatic application of the above rules on the movement of movable property and goods to a wholly special category of goods, namely cultural goods, is inappropriate.

At the level of international cooperation, the Unidroit Convention of 1995 on Stolen or Illegally Exported Cultural Objects clearly illustrates this concern.

Unlike the solutions which would arise from application of civil-law countries' ordinary legal rules on the movement of movable property, the Unidroit Convention lays down a duty of restitution (Articles 3 and 4) and of return (Article 5) of the object, even for a possessor who acted in good faith who is simply entitled to fair compensation. It should be stressed that the way in which good faith and the obligation to exercise due care and attention is addressed in the Unidroit Convention is considered a model and a true cornerstone with regard to the movement of cultural objects.¹⁵

Already at EU level, under the Directive, acting in good faith does not suffice to guarantee ownership of the cultural objects falling within its scope (and therefore to avoid having to return them) either, but it falls to each national law to lay down conditions for the burden of proof with a view to obtaining fair compensation from the court hearing the proceedings. The proposal for a recast removes the aforesaid competence and establishes a (uniform) EU law which, once and for all, expressly places the burden of proof that due care and attention was exercised on the possessor, although only for the purpose of entitlement to compensation.

Therefore, it should be underlined that this shift in perspective which, on the one hand, limits the discretionary power of the court hearing the proceedings,¹⁶ above all seeks to standardise the legal framework of proof by eliminating national differences. Moreover, it

¹⁵ See Study on preventing and fighting illicit trafficking in cultural goods in the European Union by the CECOJI-CNRS, final report, October 2011, p. 286.

¹⁶ In this regard, it should be noted that Article 9 of the Directive referred to 'such compensation as it deems fair' provided that 'it is satisfied that the possessor exercised due care and attention', whereas in the proposal for a recast, the two expressions of discretionary power no longer appear, given that in the new text, Article 9 refers to 'fair compensation' provided that 'the possessor demonstrates that he exercised due care and attention'.

should be noted that this decision to take action at legislative level is part of a wider tendency to establish uniform EU laws to replace national laws when it comes to regulating situations that fall within EU competences more rationally. The same phenomenon can be seen in particular in the EU's recent legislation on civil and judicial cooperation, especially with regard to the 'latest generation' regulations on the European Enforcement Order; the European order for payment procedure; the European small claims procedure; the service of judicial and extrajudicial documents in civil or commercial matters; and the jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to maintenance obligations.¹⁷

2.2. The problem of defining the concept of due care and attention

The concept of due care and attention referred to in the Directive does not correspond exactly with the concept of good faith, the first being narrower than the second. It should be stressed that neither Article 9 of the Directive, nor the new text of the proposal for a recast, contains a definition of the concept of good faith, although it has a vital role in the rights of the possessor of the cultural object to be returned. Despite the fact that the concept of good faith is common to several national legal systems, it is clear that it is subject to variable rules as regards both the concept and the applicable provisions.

In general, the concept of good faith can be defined as the positive conviction that the object is lawfully possessed. The conditions and the criteria, however, remain vague and are often left to the discretion of the court. This leads to marked differences, which are a source of legal uncertainty for the market.¹⁸ The same is true of the concept of due care and attention, which is instead a series of criteria and conditions whose existence must be established *in concreto* in each case.

The current version of the Directive also gives wide discretion to the Member States and to their courts. This is probably why there has been relatively little recourse to the Directive until now.¹⁹

It should be highlighted that, according to the Commission Staff Working Document which sets out an impact assessment of the proposal for a recast, in order to prevent the award of compensation to certain possessors acting in bad faith or 'showing a lack of care and attention', 'it would be necessary to amend the Directive in order to (i) indicate common interpretation criteria for the meaning of "due care and attention" on the part of the possessor, and (ii) specify that the possessor must prove that he exercised such care and attention when purchasing the object'.²⁰

¹⁷ Regulation (EC) No [805/2004](#) of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure, Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (1 January 2009), Regulation (EC) No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (13 November 2008). Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (18 September 2010).

¹⁸ See CECOJI-CNRS, Study on preventing and fighting illicit trafficking in cultural goods in the European Union, p. 190.

¹⁹ See Fourth report by the Commission on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, Brussels, 30 May 2013 (COM(2013) 310 final).

²⁰ Commission Staff Working Document – Summary of the impact assessment accompanying the document 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 (recast), Brussels, 30.5.2013, SWD(2013) 188

2.3. Article 4.4 of the Unidroit Convention: a model

Consideration of the different national laws on due care and attention when verifying provenance is not relevant in this regard, given that few states have chosen to codify and/or provide a definition of the obligation to verify provenance.²¹ At the same time, experience at international treaty level is not helpful either, in terms of a general definition of the concept. The appropriate example to use is Article 4.4 of the Unidroit Convention: 'In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances'.

This is an international rule which does not offer a general definition shared by the Contracting States, but clearly prefers to lay down common criteria as a basis to verify, in each case, whether the purchaser has acted with due care and attention.

Furthermore, it should be considered that, when the four reports published by the Commission on the application of the Directive in the Member States²² were prepared, most of the Member State administrations consulted considered it necessary to align the criteria for defining the concept of due care and attention on the part of the possessor; '40 % of the public sector in favour of revising the Directive also wished to establish common criteria for the definition of "due care and attention"'.²³

It therefore appears that the decision to provide criteria by way of example is preferable to drafting a general, abstract definition of the concept. As we have just seen, this is the solution adopted by the Unidroit Convention, and it is therefore not surprising that the Commission's approach is fully in keeping with the model provided by its Article 4.4. Article 9 of the proposal for a recast directive is almost identical to the wording used in the Unidroit Convention.

Article 9 of the proposal for a recast states: 'Where return of the object is ordered, the competent court in the requested States shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object.'

In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the nature of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects, and any other relevant information and documentation which he could reasonably have obtained and whether the possessor consulted accessible agencies or took any other step which a reasonable person would have taken in the circumstances.

The possessor may not claim to have acted in good faith if he failed to exercise the level of due care and attention required by the circumstances.

final, p. 7.

²¹ See Dictionnaire comparé du droit du patrimoine culturel, Paris, 2012.

²² See footnote 7 above.

²³ See footnote 8 above.

The burden of proof shall be governed by the legislation of the requested Member State. In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by that means. The requesting Member State shall pay such compensation upon return of the object.'

Practice has shown the complexity of objective and subjective assessments which the court is required to make when it comes to applying the rules of good faith to the movement of cultural objects. In this regard, it is useful to study the case-law. For example, in a famous decision on the purchase of the painting 'Still Life with Fish' by Giorgio de Chirico, the Italian Court of Cassation held that presumptions which allow the exclusion of good faith must indirectly lead to the belief that the purchaser had a reasonable doubt regarding the unlawful origin of the object. The elements on which these presumptions are based can also be represented by extrinsic circumstances prior to the purchase. In this specific case, the Court had been able to deduce by presumption that the purchaser had suspicions regarding the unlawful origin of the painting, such that his good faith was to be excluded, given that he was a gallery owner and art expert, and was in a position to have checked whether the painting in question was one of those subject to a criminal investigation.²⁴

The psychological aspect may also be decisive. According to French case-law, the negligence or carelessness of a person acquiring an object arising, for example, from the fact that he did not make enquiries about the origin of a work, may, in certain circumstances, constitute bad faith. A purchaser's position is also taken into consideration.

A museum which purchased a work by Klimt at a very low price was held to have acted in bad faith: the court criticised it for not having made more thorough enquiries about the origin and history of this work, which was acquired at the time of the German occupation of Alsace during the Second World War, while its owner had taken refuge in Paris.²⁵

Recourse to certain decisive criteria regarding the obligation to exercise due care and attention, which are determined objectively and subjectively, is, moreover, suggested by German law. Section 932(2) of the Bürgerliches Gesetzbuch (BGB) (German Civil Code) provides a legal definition *a contrario* of good faith, laying down that the purchaser is not acting in good faith if he knows that the object does not belong to the seller or if his ignorance of this is due to gross negligence. Good faith is therefore excluded not only in the event of positive knowledge that the seller is not the owner, but also due to ignorance of this fact owing to gross negligence. According to the legal definition in Section 276(2) of the BGB, a person acts negligently if he fails to act with the necessary care and attention. The concept of gross negligence does not have a legal definition; on the other hand, the case-law of the Bundesgerichtshof (German Federal Court of Justice) provides a definition for this too. To be accused of gross negligence, the purchaser must have seriously failed in his obligation to exercise appropriate behaviour and omitted to consider elements that were required by all in the specific case. The Court also takes into consideration the personal situation of the purchaser, commercial practices and whether the purchaser often enters into transactions of this nature.²⁶

²⁴ See Italian Court of Cassation No. 9782, 14 September 1999.

²⁵ See Tribunal de Grande Instance (TGI) de Strasbourg, 11 January 1999, confirmed by Colmar, 8 December 2000, Dictionnaire comparé du droit du patrimoine culturel, p. 286.

²⁶ See BGH, judgment of 13 April 1994, NJW 1994, p. 2022; judgment of 9 February 2005, NJW, 2005, p. 1365, Dictionnaire comparé du droit du patrimoine culturel, p. 277.

2.4. Assessment of the text

It should be emphasised that the decision not to lay down a general, abstract definition of the obligation to exercise diligence, and in particular, the concept of 'due care and attention' based on the model of Article 4.4 of the Unidroit Convention, would appear, in itself, wholly convincing. This is the position taken in the Study on preventing and fighting illicit trafficking in cultural goods in the European Union of 2011.²⁷

One of this study's most interesting conclusions in this regard stressed that 'the goal is not specifically to reconcile different and sometimes far removed legislations, but to provide secondary and highly practical criteria to the interpreter who is required to apply the law. At the same time, the interpreter must enjoy considerable freedom in applying the rule, since it concerns the gathering of elements and criteria aimed at an accurate evaluation of human behaviour'.²⁸ It continues: 'Consequently, it does not seem useful or necessary to make changes with regard to the legal rules themselves, but rather to contribute to issues of legal interpretation in a field that may present conditions and situations that might be completely different when it comes to concrete application'.²⁹ In this regard, it would seem that the proposal for a recast is entirely in line with the suggestions made in the study.

In terms of the impact of the new legislation, it is particularly important to emphasise one aspect which concerns the legislation's role in its application. The legal systems of the Member States, as well as national rules and interpretive practices regarding good faith and the evaluation of due care and attention, are rather varied. The adoption of common criteria such as those referred to in Article 9 of the proposal for a recast should provide a very helpful guide and facilitate national courts' assessment of the circumstances. Adoption of the aforesaid criteria could create a true virtuous circle by contributing to the development of a common line of case-law which would be a guide not only for the courts responsible for the cases concerned, but which could also serve as a warning for parties involved in the trade in cultural objects.

In the first case, the effect would be similar to that produced, at international level, by the mechanism referred to in Article 7.1 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention of 1980), which specifies that 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. The effect of the aforesaid rule has been to make a wide contribution to the creation of interpretive practices followed and shared by the national courts of the Contracting States. Indeed, in legal practice, the possibility of referring to the case-law of other countries through uniform laws has been highly effective. If this objective has been pursued multilaterally at international level by a whole series of national jurisdictions of states which are very distant, not just geographically, but above all in terms of their legal and cultural traditions, we might envisage an equivalent result among the jurisdictions of the EU Member States. In this regard it should be added that these are also (jurisdictions of) countries which should already be part of a process for legal cooperation, if not integration, in civil matters, in the context of the area of freedom, security and justice governed by Title V of the Treaty on the Functioning of the European Union.

With regard to the second case, it could play a significant role in preventing the illicit trafficking of cultural objects, and in providing practical assistance to the police, customs and administrative authorities which are fighting this phenomenon. The very fact of knowing that the burden of proof falls on them in the event that a return is requested

²⁷ See footnote 3 above.

²⁸ See CECOJI-CNRS, Study on preventing and fighting illicit trafficking in cultural goods in the European Union, p. 288.

²⁹ *Ibid.*

could result in all market participants being encouraged to check more carefully the circumstances surrounding the provenance of acquired objects, and it could therefore be a true deterrent against the trade and trafficking in objects of dubious provenance.

In conclusion on this point, we must add that the decision not to formulate an abstract definition and to lay down common criteria by way of example is entirely preferable here. These criteria will help national courts hearing disputes on requests for returns to assess the circumstances more effectively. This approach is akin to certain conclusions suggested by the study prepared in 2011 for the EU, which highlighted the need to consider the judge's task when examining a reasonable doubt regarding a situation of unlawful origin of property and which suggested developing criteria in the form of 'reasonable steps' that should be included among the criteria for interpreters of the law.³⁰

This approach could also be supported by means of a non-binding instrument consisting of an interpretive guide presented as a recommendation which could be adopted by the Commission, for example, in the form of a communication. This method, used in other fields such as competition law, would be entirely appropriate in pursuing the stated aim.

2.5. Impact of the Directive on the right of ownership

In this regard, it should be noted that the Directive could, in principle, affect the limits laid down by Article 345 TFEU on the right of ownership. According to the above rule, which has existed in an identical form since the Treaty of Rome of 1957, 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. We could therefore question whether a binding EU act laying down the duty of a possessor to return an object unlawfully exported from its country of origin to a Member State which may not (necessarily) be the owner, might violate the above principle declared so assertively.

The Commission's answer to this hypothetical question is that it would not: 'the Directive does not relate to aspects concerning ownership of the object for which a return request has been made, and is thus in line with Article 345 TFEU.'³¹ Indeed, it should be emphasised that while the rule seeks to ensure that the Member States regulate, in general, the public and/or private system of property ownership within the State, it does not prevent EU intervention by means of rules which concern ownership. In this respect, we need only consider EU institutions' measures to liberalise certain public sectors.³²

Furthermore, the right of ownership is protected by EU law as an integral part of its general legal principles. The Court of Justice ensures compliance with the latter principles whenever EU acts have an impact on them. Nevertheless, it is a firmly established principle that, even at EU level, the right of ownership is not an absolute right but should be considered in the light of its social function. Consequently, EU acts may limit the exercise of this right should this be justified by the public interest objectives pursued by the EU.³³

The Commission's answer as to whether the proposal for a recast is compatible with Article 345 TFEU therefore appears entirely justified.

³⁰ See CECOJI-CNRS, Study on preventing and fighting illicit trafficking in cultural goods in the European Union, p. 190; this would include: contacting the State of origin or the potential owner (often an institution) of the cultural object and/or the State that occupies the territory of the place of origin of the cultural object; contacting the potential employer of the seller (if it is a State); contacting INTERPOL; contacting a specialist in the good sold; the issue of certificates on cultural goods by an auction house; the confirmation of the origin of cultural goods by the representative of the possessor of the cultural good; meetings with the possessor of the cultural good.

³¹ See: Summary of the impact assessment accompanying the document 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 (recast), Brussels, 30.5.2013, SWD(2013) 188 final, p. 4.

³² See in this regard A. VERHOEVEN, Privatisation and EC law: is the European Commission 'Neutral' with Respect to Public versus Private Ownership of Companies?, ICLQ, 1996, p. 865.

³³ See the relevant case-law of the Court of Justice starting from the judgments Nold v Commission, 14.5.1974, Case 4/73, ECR 491 and Hauer, 13.12.1979, Case 44/79, ECR 3727.

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INTRODUCTION

UNIDROIT wishes to thank Parliament's Committee on Culture and Education for the opportunity to present the UNIDROIT Convention on stolen or illegally exported cultural objects, adopted on 24 June 1995 in Rome (cf. the attached Note) and to comment on links between this Convention and the recently proposed recast of the *Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State* ³⁴.

All of the EU Member States are members of UNIDROIT, but not all are party to the UNIDROIT Convention of 1995 ³⁵. The Convention has however had a considerable impact in this area, since it has been the basis for the process which led to the adoption of *Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State* and the proposals for a recast of this Directive which have recently been put forward. Many of the EU Member States have also made use of the principles, concepts and rules enshrined in the 1995 Convention when transposing the Directive into their national legislation.

In view of the fact that the fight against the illegal trade in cultural objects involves more than simply facilitating the restitution and return of these objects, and given the number of stakeholders and disciplines involved, UNIDROIT recognises the importance of cooperation between all partners. The preamble to the 1995 UNIDROIT Convention highlights the fact that, '[...] the implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation'. This is why the preamble recognises 'the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector'.

³⁴ 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 (recast), as presented in the Commission document COM(2013) 311 final – 2013/0162 (COD).

³⁵ - EU Member States which are party to the UNIDROIT Convention of 1995: Cyprus, Croatia, Denmark, Spain, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia and Sweden.
- EU candidate countries which are party to the UNIDROIT Convention of 1995: Turkey.
- Other European states (non-EU) which are party to the UNIDROIT Convention of 1995: Azerbaijan and Norway.
The 1995 Convention was also signed by France, the Netherlands (Member States) and Switzerland (other European state).
The non-European states which are party to the 1995 Convention are: Afghanistan, Argentina, Bolivia, Brazil, Cambodia, China, Colombia, Ecuador, El Salvador, Gabon, Guatemala, Honduras, Iran, New Zealand, Nigeria, Norway, Panama, Paraguay and Peru.

1995 UNIDROIT Convention and Directive 93/7/EEC

The central objective of the 1995 Convention is to protect cultural heritage by combating the illegal trade in cultural objects and simultaneously allowing the legal art market to flourish: in any case it lies in the interests of the market itself to maintain a strict distinction between legal and illegal trade (cf. recital 7 of the preamble).

The aim of the Directive is to secure the return of cultural objects which have been illegally removed from their EU Member State of origin; the UNIDROIT Convention pursues the same goal but has a broader scope, since it also applies to stolen cultural objects. The Directive and the Convention thus share a common objective, and also use virtually identical methods and instruments. The only significant differences between the two pieces of legislation relate to the concept of a possessor in good faith and the statute of limitation, which is longer in the case of the UNIDROIT Convention.

In view of the fact that there is no ECJ-like central judicial body at global level able to guarantee the uniform interpretation of UNIDROIT Conventions by the national authorities, the Conventions are drafted with a greater level of detail in order to obtain the highest possible level of certainty, predictability and uniformity. In the context of international public law, the UNIDROIT Conventions can be regarded as self-executing or directly applicable instruments, which means that there is a relatively high level of consistency in their implementation.

The 1970 UNESCO Convention and Directive 93/7/EEC both require national implementing legislation. Evaluations of the 1970 Convention and the Directive have revealed an unsatisfactory situation in which there is little uniformity in either the application or interpretation of these instruments by the judiciary in the various Member States. This makes it all the more important to have rules which do not allow the Member States too much room for interpretation, in keeping with the principles of subsidiarity and proportionality.

Definition of cultural objects

The **UNIDROIT Convention** is based on a much broader definition of cultural objects than the Directive, and it does not include a financial threshold. The same drafting technique is used as for the 1970 UNESCO Convention and the Directive, namely a *general definition backed up by a reference to various categories listed in an annex*. The choice of a broader definition was also motivated by the fact that the 1995 Convention aimed to protect not only the interests of the States, but also those of private persons who are equally exposed to the risk of theft, if not more so.

At the time the Convention was adopted, certain States were in favour of a narrower definition limited to cultural objects of 'major' or even 'exceptional' significance (which may have corresponded to the concept of a 'national treasure' in certain States), even at the risk of limiting the Convention's scope of application. However, the vast majority of governments which participated in the diplomatic conference opposed this move, not least because it would have negated some of the Convention's most important principles, in particular the requirement for everyone acquiring a cultural object to be diligent in their enquiries into the origin of the object rather than continuing the current practice of wilful ignorance which pervades the art market. It was also noted that a limitation of this kind would exclude cultural objects belonging to private collections or those which hold particular local significance from the Convention, even though they meet the criteria for

protection under the latter and despite the fact that the constant rise in thefts of such objects means that it is important for them to be covered.

The general definition is more restricted for illegally exported cultural objects than for stolen objects, since exported objects are only covered if they have been exported in contravention of a ban, if their export significantly impairs one of the interests cited by the Convention (cf. Article 5(3)) or if the object is of significant cultural importance for the requesting State (backed up by the information of a factual or legal nature which must accompany the request for return pursuant to Article 5(4) of the UNIDROIT Convention).

Article 2 makes no reference to the national law of the Contracting States in relation to the designation of cultural objects protected under the Convention, unlike the EU Directive and the 1970 Convention which each include the classification or 'designation' by each State of important objects as a criterion. It has been proposed that each Contracting State should be free to determine which of its cultural objects should be subject to the provisions of the Convention, on the basis that each State is better able to decide which of its objects of cultural heritage are important enough to justify their restitution or return in the event of theft or illegal export than a judge in another State. Even though experts regard it as self-evident that all States which are party to the Convention should be able to adopt national regulations to protect their national heritage, the majority also believed that this system of designating cultural objects would undermine the Convention's objective of uniformity, and it was also noted that it could result in objects which had not been designated as cultural objects by the State (in particular those belonging to local bodies or private persons) being excluded from the scope of the protection regime.

As regards the **Directive and the proposed recast of Article 1**, several States commented in the impact assessment (SWD(2013) 189 final) that a number of objects fell outside the definition in Article 1(1), in particular those held by private persons (which are neither in public collections nor an integral part of monuments nor part of the inventory of an ecclesiastical institution). The impact assessment also notes that the financial threshold should be removed.

Within the bounds of Article 36 TFEU, each Member State is free to determine what is meant by a 'national treasure' since the EU has no jurisdiction in this area. This means that different definitions are in force which reflect varying classifications and beliefs (not least because it is not always the central government which is competent to establish a definition). The term 'national treasure' is furthermore not intended to cover all cultural objects.

Even though it would be a good idea to expand the Directive's scope of application, the issue is how to provide a 'framework' for the Member States' freedom to define what is meant by a 'national treasure' above and beyond Article 36 of the Treaty, rather than simply to remove the Annex. A list of categories could prove helpful in this regard.

Regardless of which definition is chosen, it must be remembered that **Article 14 of the Directive** stipulates that **each Member State may extend its obligation to return cultural objects to cover categories of objects** other than those listed in the Annex (similarly to Article 9 of the UNIDROIT Convention, which states that the Convention shall not prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported objects than provided for by this Convention, whereby the protection of heritage shall be the determining factor when deciding whether a rule is more favourable).

Statute of limitation for restitution proceedings

The UNIDROIT Convention and the Directive provide for short and relative (three years and one year respectively) and long and absolute (50 years and 30 years respectively, with exceptions) statutes of limitation. The 1970 UNESCO Convention makes no reference to this issue, leaving it to the jurisdiction of national law.

The **proposed recast** of the Directive (Article 7) aims to extend the period within which return proceedings must be brought from one to **three years**, which would bring the Directive into line with the UNIDROIT Convention. The proposal also aims to specify the date on which this period commences ('after [the date on which] the central authority of the requesting Member State became aware of...').

It should be noted that the UNIDROIT Convention makes no provision for exceptional extensions to the statute of limitation similar to those in Article 3(4)-(8) for objects of a particular origin (monuments, public collections etc.). This is due in part to the fact that that illegal exports have been seen as less damaging in terms of cultural heritage than theft, but also because in the majority of cases this type of object will have been stolen before being illegally exported, in which case Chapter II would apply. It is interesting to note that acceptance of the UNIDROIT Convention by the EU Member States would mean that the rules applying to stolen public collections would be the same as those applying to illegally exported collections under the Directive (Article 7(1)). It may seem counterintuitive to grant more a generous statute of limitation for illegal exports than for thefts, but this is exactly what would happen in the case of States bound by the EU Directive but not party to the UNIDROIT Convention³⁶.

The concepts of good faith, due diligence and the burden of proof

Whereas at national level and from a terminological point of view the concepts of good faith and due diligence are often used interchangeably but are sometimes distinct, instruments at international level use the concepts indiscriminately (1970 UNESCO Convention, 1995 UNIDROIT Convention, EU Directive).

Both the UNIDROIT Convention and the Directive stipulate that **'good faith' is a precondition for compensating a possessor** obliged to return a stolen or illegally exported cultural object, but the Directive (in common with the 1970 UNESCO Convention) does not lay down any criteria for defining the due diligence required, which undermines the uniformity of the concept by leaving the Member States to establish their own interpretations.

The Directive has hitherto established the principle that the **burden of proof** is governed by the legislation of the requested Member State (which was also the approach chosen in the 1970 UNESCO Convention, although it should not be forgotten that this was one of the shortcomings of this Convention, which UNIDROIT was tasked with addressing). The **proposed recast** of Article 9 of the Directive now follows UNIDROIT's approach, namely that the burden of proof of due care and attention will lie with the possessor. This principle has been an integral aspect of the UNIDROIT Convention since the very start of preparatory work on its provisions, and it is a crucial legal weapon in the fight against the illegal trade in cultural objects.

³⁶ L. V. Prott, *Biens culturels volés ou illicitement exportés, Commentaire relatif à la Convention d'UNIDROIT (1995)* [Stolen or illegally exported cultural objects, Comments on the UNIDROIT Convention (1995)], p. 106, *les droits de l'homme en perspective*, Editions UNESCO, 2000.

The aim is to encourage those acquiring cultural objects to be even more vigilant, and to penalise those who fail to make serious inquiries into their origin. If the sanction were to be the risk of their having to return the cultural object without any compensation, potential acquirers would refrain from purchasing such objects in the absence of adequate information, which would discourage theft and at the same time alter the present practice of dealers and auction houses of not disclosing the names of sellers and that of purchasers of not questioning the statements of sellers. It should be noted that this provision applies to possessors who have acquired objects both with and without payment (donation or inheritance).

Some Member States are opposed to this change on the grounds that it is incompatible with their national legislation, but it represents a vital weapon in the fight against the illegal trade in cultural objects. It is true that it would represent a derogation from the law of certain Member States where there is a presumption of good faith, even if the burden of proof is shifted under certain circumstances in a number of civil law jurisdictions. The category of cultural objects has long been regarded as a legal classification in its own right which may be subject to special rules which deviate from the general rules. It should also be noted that the UNIDROIT Convention which dictated this change does not aim to regulate movable property, but instead establishes a mechanism for recovery under hypothetical and exceptional circumstances. As far as evidence of good faith is concerned, it should be noted that various legal systems, including the French civil law system, operate on the presumption of good faith but allow the original owner to overturn this presumption by means of indirect proof that the possessor did not exercise due diligence when checking that the object of acquisition was of non-suspect origin³⁷.

Use of the **concept of due diligence** indicates that the requirements are higher than the diligence normally required in the acquisition of any object; the term 'due diligence' has a very precise meaning in certain countries, but in this case should be interpreted autonomously in keeping with the UNIDROIT Convention (the Directive used the term 'due care and attention'). The Convention thus pursued the goal of establishing an autonomous definition for the concept of due diligence (Article 4(4)).

The explanatory memorandum for the **proposed recast** rightly states that 'certain common criteria for interpreting the concept of due care and attention [should be set out] so that it is easier for national judges to arrive at a more uniform interpretation of this concept for the purposes of compensating the possessor' (cf. p. 7), reiterating the arguments put forward at the time by UNIDROIT. However, account should also be taken of the fact that possessors must prove that their ignorance of the illegal nature of the acquisition was not due to negligence on their part, and they must therefore be given an indication of appropriate practices during acquisition.

The **definition of due diligence in Article 4(4) of the UNIDROIT Convention**: the underlying aim was to make compensation dependent on proof of the exercise of 'due diligence' at the time of acquisition (Article 4(1), and so it was necessary to explain this concept (Article 4(4)) in order to establish criteria for judicial assessments and ensure a certain uniformity of application for the Convention given the very different interpretations of the concept of good faith in the different legal systems. The criteria were primarily established with reference to Article 7(2) and (3) of the *Draft providing a*

³⁷ Cf. J.-S. Bergé, *La Convention d'Unidroit sur les biens culturels: remarques sur la dynamique des sources en droit international* [The UNIDROIT Convention on cultural objects: comments on the dynamic nature of sources of international law], *Journal du droit international*, 2000, N. 1.

*Uniform Law on the Acquisition in Good Faith of Corporeal Movable (LUAB)*³⁸, taking account of the specific nature of cultural objects. These criteria for consideration by judges are listed for illustrative purposes only, and are neither exhaustive nor solely determining, as indicated by the use of the word 'including' before the list.

Article 7 LUAB:

2. – The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case.

3. – In determining whether the transferee acted in good faith, account shall, *inter alia*, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor's acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded.'

UNIDROIT, Article 4(4):

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

The proposed recast includes all of the criteria listed in Article 4(4) of the UNIDROIT Convention (as commented on in the explanatory statement for the Convention³⁹) and adds a reference to 'documentation on the origin of the object'.

Draft recast of the Directive:

Article 9: In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the nature of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects, and any other relevant information and documentation which he could reasonably have obtained and whether the possessor consulted accessible agencies or took any other step which a reasonable person would have taken in the circumstances.

The possessor may not claim to have acted in good faith if he failed to exercise the level of due care and attention required by the circumstances.

The significance of the reference to the consultation of registers of stolen goods should perhaps be emphasised. It is true that the Directive only concerns the restitution of cultural objects which have been illegally removed from the territory of a Member State, but it remains the case that the objects covered by the Directive are particularly significant objects which will frequently have been stolen before being illegally removed from the territory of a Member State. In certain cases, consultation of a register of this kind could help to prove the date upon which the object was illegally removed from the territory of the Member State, since this date would necessarily be subsequent to any

³⁸ This draft concerned the acquisition against payment of corporeal movables in general, and formed part of the work carried out by UNIDROIT in connection with the drafting of the Hague Conventions of 1964 on international sales (the *Convention relating to a Uniform Law on the International Sale of Goods (ULIS)*) and the *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS)*. In this context, and with a view to increasing the legal certainty of international commercial transactions, the LUAB chose to recognise the acquirer's *a non domino* title. This draft was approved in 1974 by the Governing Council of UNIDROIT, but was never adopted as an international instrument, since the level of consensus was deemed too low to hold a diplomatic conference for its adoption.

³⁹³⁹ Cf. the following UNIDROIT webpage:

<http://www.unidroit.org/french/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-f.pdf>

theft, and problems in this respect have frequently been invoked as reasons for the failure of the procedure. The UNIDROIT Convention was criticised upon its adoption and during the first few years of its application because such databases or registers were non-existent or inaccessible or because certificates were not issued for their consultation, but this is no longer the case. The market's reluctance to use such tools is well documented, and dealers are particularly guilty in this respect. Account should also be taken of the increased significance of professional codes of ethics since the adoption of the UNIDROIT Convention, for example the 'International Code of Ethics for Dealers in Cultural Property' adopted by UNESCO in November 2000, which makes explicit reference to Article 4 of the UNIDROIT Convention. This will make it easier in future for those acquiring cultural objects to identify sellers who have undertaken to comply with transparency standards and who can be expected to have checked the origin of objects. Recital 8 to the Convention recognises that the Convention's procedures aim 'to maintain a proper role for legal trading' and recognises the progress made, in particular by UNESCO, in the development of codes of conduct (Recital 10).

It goes without saying that judges will make combined use of the various criteria cited and any other relevant criteria depending on the case in question. It is also important to avoid prioritising one criterion over others (in particular by focusing on the consultation of a database). The list is non-exhaustive and provided for illustrative purposes only, but it is important for the text to provide as many indications as possible, as otherwise another 'explanatory instrument' containing examples would be necessary for interpretative purposes, in order to avoid incomplete harmonisation. The aim is to 'guide' potential acquirers and the judge or authority with jurisdiction in the event of a request for restitution.

What should be abundantly clear is that trade in cultural objects requires **greater vigilance** than trade in other objects.

Disconnection clause

One of the conclusions of the Aparicio Sánchez report (A5-0122/2001) (report by the Committee on Culture, Youth, Education, the Media and Sport of the European Parliament on the Commission report on the implementation of the Regulation and the Directive – COM(2000) 325 – C5-0509/2000 – 2000/2246(CNS)) was to 'invite the Commission to examine the possibility of the Union (...) or the Community itself (...) acceding to the UNIDROIT Convention'. This was reiterated in Parliament's 2001 resolution. This invitation has not been taken up, and the suggestion made during the public consultation on the possible revision whereby the Member States should be encouraged to ratify the UNIDROIT Convention has not been followed, despite the positive responses from a significant number of the public authorities which participated in the consultation.

Upon request by a delegation of the Member State holding the Presidency of the EU Council in June 1995 (France), a 'disconnection' clause was included in order to allow the EU Member States (and others, cf. the Commonwealth Scheme) to declare that they are applying the internal rules of these organisation or bodies instead of those of the Convention the scope of which coincides with that of those rules.

The Contracting States which are members of organisations of economic integration or regional bodies are free under the Convention to invoke this disconnection clause on an individual basis by means of a declaration to that effect. It is interesting to note that the

seven EU Member States which are party to the UNIDROIT convention have not taken up this option (Croatia, Cyprus, Denmark, Hungary, Lithuania, Slovakia and Slovenia according to the Depository).

Jurisdiction of courts

The **Directive** establishes the principle that the competent court for ordering the return of objects shall be the court in the requested Member State. Article 8(1) of the **UNIDROIT Convention** lays down a uniform rule for determining competence in respect of requests for the restitution of a stolen cultural object and the return of an illegally exported object, stating that the following shall be competent: 'the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States'. This principle of direct jurisdiction represents a major innovation for many legal systems, and acts as a key tool for implementing the Convention by allowing requesters to act rapidly and courts to take effective measures with a view to restitution or return. The decision by the court or competent authority is directly applicable, without any need for the exequatur procedure which would be necessary if the object were in a Contracting State different to that which hold competence. This new allocation of jurisdiction thus does away with the need for a provision on the recognition and execution of decisions. Any questions arising when the requester chooses to bring proceedings on the basis of general jurisdiction can be settled by the applicable multilateral or bilateral treaties.

As far as the recovery of a cultural object by its former owner is concerned, it is interesting that **Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters** provides for the creation of a forum for civil recovery proceedings based on ownership at the courts of the place where the object is located. This new provision would also cover civil proceedings brought for the recovery of cultural objects.

Article 7 (integrated into Article 8)

A person domiciled in a Member State may be sued in another Member State:

4) as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised;

CONCLUSIONS

It goes without saying that the purpose of the UNIDROIT Convention is to facilitate the restitution and return of stolen or illegally exported cultural objects through the establishment of specific mechanisms. Yet its overriding objective is to modify buyers' behaviour, and this means that shortcomings in the implementation of the Directive or the 1995 Convention should not be seen as proof or indication of their ineffectiveness, since this would underestimate their impact as a 'moral compass'.

No one would be naïve enough to believe that accession to a convention could prevent all abuses and eliminate all crime in this field. Yet well-designed instruments such as the 1995 Convention act as a practical deterrent and serve as a moral yardstick of the responsibility borne by the community and each of its members.

The fight against illegal trade is and must be multidisciplinary (legislative measures, awareness-raising campaigns and training programme for police and customs services). Rules are not enough; they must be backed up by cooperation between governments and the exchange of information, since a legislative text can only be effective if the moral principles underpinning it are widely spread and accepted.

The impact assessment accompanying the proposed recast of the Directive states on p. 126 that 'a repeal of the Directive could only be considered in a context where all of the Member States had become party to the UNIDROIT Convention. In such a context the advantages offered by the Directive in terms of restitution would be inferior to those offered by the Convention. This situation does not appear feasible in the near future.' It will undoubtedly be some time before all the EU Member States become party to the UNIDROIT Convention, but the recasting proposals put forward today would have been unimaginable in 1992, and this can mainly be ascribed to the provisions of the UNIDROIT Convention.

This document was requested by the European Parliament's Committee on Culture and Education.

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UNESCO's comments on the draft recast of the Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State

(Réf. 2013/0162 (COD))

INTRODUCTION⁴⁰

One of the most significant legal obstacles to combating the traffic in cultural objects and securing their return is the diversity of civil and criminal law provisions in force in the Member States, which enables traffickers to choose the market places which are the least closely policed and therefore the least risky. As a result, the 1993 directive, which seeks to bring about the mutual **recognition** of Member States' national laws rather than their **approximation**, has been limited in its impact. Approximating **or, better still, harmonising** these laws would do more to combat the illegal trafficking of stolen or unlawfully removed cultural objects.

One area which this desired policy of approximation would cover would be the legal arrangements for **protecting good faith purchasers**. No further reminder is needed of the extent to which legislation differs from one country to another, or to what extent these differences dictate the place of sale of the stolen or unlawfully exported objects and the degree of likelihood of their being returned. Neither the 1993 directive nor the UNESCO Convention provides a satisfactory solution to this problem, since both refer back to national law (and thus to differing sets of legal provisions). The UNIDROIT Convention sidesteps these differences by laying down substantive rules of uniform law.

In the light of Member States' recent ratifications of the 1970 UNESCO Convention, it is clear that they favour an instrument which, with regard to returns, sets goals which can be achieved through the application of national law or the mutual recognition of differing national laws. Becoming Parties to the 1995 UNIDROIT Convention which lays down **uniform substantive rules** would have constituted an important step forward for these States. This is the goal we should now be aiming for.

The recast proposals make clear that the aim should be to improve the effectiveness of the directive by widening its **scope** to cover more cultural objects (see below) and lengthening the **prescription period** from one to three years (in line with the 1995 UNIDROIT Convention, which was fiercely criticised at the time for setting just such a period). Member States would thus have less leeway to **determine precisely which cultural objects are covered by the directive**. UNESCO and UNIDROIT fully support this approach and hope to cooperate with the Union authorities by contributing their knowledge in this area.

Comments on the second indent of Article 1(1) (p. 16 of the Document)

The aim of extending the scope of the directive to include all cultural objects classified as 'national treasures' without defining common categories and setting financial and/or age thresholds cannot be achieved simply by doing away with the second part of Article 1, as proposed in the draft recast.

The problem does not stem from the accumulation of conditions, as the impact assessment seems to imply⁴¹, but rather from the restriction imposed right from the first

⁴⁰ This introduction is based on a note drawn up jointly by the UNESCO and UNIDROIT Secretariats.

⁴¹ See Commission staff working document – Summary of the impact assessment, Document SWD(2013)

paragraph of that article by the use of the **term 'national treasures'**. Admittedly, this term, which has to be used for the sake of consistency with the wording of Article 36 of the Treaty⁴², was meant to limit the scope of the directive to specific cultural objects, in order to prevent the internal market in these objects from being disrupted by return claims for all kinds of goods. Unfortunately, this term is far from ideal since:

- at international level, it generally refers to 'exceptional' objects;
- at national level, the term is used in a very specific way (e.g. in France) and implies the use of a particular administrative procedure (e.g. classification).

What is more, the current draft inevitably raises the issue of **legal security**, since, if the draft is adopted, each State will have to clarify what it understands by 'national treasure', if it has not already done so⁴³. Cooperation on returns, which is encouraged by the EU, thus hinges on the annex to the directive, which does not define objects which qualify as 'national treasures', but rather sets out categories of object which may be classified as such.

Consequently, the **scope** of the first paragraph should be broadened somewhat ('designating' national treasures rather than 'classifying' them). The second paragraph should then **counterbalance** this by defining more precisely which categories and objects are eligible for designation as national treasures and for a return procedure. This approach is all the more desirable because the categories set out in the annex to the directive are more or less the same as those incorporated in the 1970 and 1995 conventions, which the States are accustomed to using. That first step towards **harmonising the definition of 'cultural object'** through categorisation facilitated the use of the term at supranational and international levels. Going back on this point would make no sense at all.

The new proposal outlined below would offer the following **advantages**:

- it would broaden the scope of the directive to include all cultural objects designated as 'national treasures' by each State (doing away with the problem of classifying exceptional objects);
- the impact of broadening the reach of the directive would be offset by introducing a system for categorising objects which qualify as national treasures, in order not to obstruct the trade in cultural objects not regarded as having special significance by the relevant Member State;
- the revised directive would offer a degree of legal certainty as regards the use of the term 'national treasures'.

New proposal:

For the purposes of this Directive:

1) 'cultural object' shall mean

- an object which: ~~is classified, before or after its unlawful removal from the territory of a Member State,~~ → is designated by each Member State ← among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty;
- and
- belongs to → : ←

188 final.

⁴² This statement is undermined by the use of the term 'cultural objects' in the very title of the directive.

⁴³ See the analysis of subsidiarity in Document SWD(2013) 188 final, p. 3.

- → either ← one of the categories listed in the annex, ~~or does not belong to one of these categories but forms an integral part of~~
- → or ← public collections listed in the inventories of museums, archives or libraries' conservation collection.
- → or ← ~~of~~ inventories of ecclesiastical collections;

NB:

- The reference to public collections should be retained in order to assist the States which have to draw up an inventory of all their national treasures. It would in fact be better for Member States to have their public collections 'protected' by the directive from the outset.
- The reference to objects of worship should also be retained, given the scale of illegal trafficking in religious objects in Europe.
- With regard to the annex, point B concerning the value thresholds should be deleted, since it is both extremely difficult to implement in practice and subject to fluctuations in the value of objects and thus compromises the legal certainty of the text. It is true, however, that some countries, one of them being France, are particularly keen on this provision.

Comments on Article 9 (p. 21 of the Document)
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One of the proposals involves reversing the burden of proof in cases where the possessor claims to have exercised due care and attention in acquiring the object. Where return of the object is ordered, the possessor claiming compensation would be responsible for proving that they were unaware of the illegal nature of the purchase, rather than a decision being taken solely on the basis of national law, as stipulated in the current directive and in the 1970 UNESCO Convention. This is the arrangement provided for in the 1995 Convention. It seems that some States, having for the most part bowed to pressure from the art market lobby, have signalled their opposition to this proposal. This change is vital, however, since the protection enjoyed by good faith purchasers in many countries is seen as THE main obstacle in the fight against illegal trafficking of cultural objects.

The fact that the directive has been applied only in relatively few cases (see the third report of the European Union for reasons⁴⁴), just like the 1995 UNIDROIT Convention (little information available on reasons), does not mean that these instruments are not effective. Like the directive, the 1995 UNIDROIT Convention achieves the intended purpose of **reminding on potential buyers of their responsibilities** (amicable out-of-court settlements represent a positive outcome).

The new wording of the first paragraph is taken from Article 4(4) of the UNIDROIT Convention, but includes the additional section '...the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State...'

In the third paragraph, it would be better not to make reference to 'good faith', a term which the directive carefully avoids using, referring instead to 'due diligence'.

New proposal:

The possessor may not ~~claim to have acted in good faith~~ → claim compensation ← if he failed to exercise the level of due diligence required by the circumstances.

⁴⁴ Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on 30 July 2009 - Third 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 [COM(2009) 408 final - not published in the Official Journal].

PROGRAMME

DRAFT PROGRAMME



POLICY DEPARTMENT B
STRUCTURAL AND COHESION POLICIES

Return of cultural objects unlawfully removed from the territory of a Member State



DATE
4 NOVEMBER 2013

TIME
15:00 - 17:00

ROOM
ALTIERO SPINELLI
3G2

Committee on Culture
and Education

CHAIR
Ms Doris Pack

- 15:10 – Introduction by Chair of the Committee on Culture and Education (CULT), *Ms Doris PACK*
- 15:15 – *Ms Marie CORNU*, Director of Research at CECOJI-CNRS
- 15:30 – *Mr Manlio FRIGO*, Professor of International Law, University of Milan
- 15:45 – *Ms Marina SCHNEIDER*, UNIDROIT
- 16:00 – *Mr Edouard PLANCHE*, UNESCO
- 16:15 – Debate & Questions from MEPs

PRESENTATIONS

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B

STRUCTURAL AND COHESION POLICIES



**Projet de refonte de la DIRECTIVE DU PARLEMENT
EUROPÉEN ET DU CONSEIL relative à la restitution
de biens culturels ayant quitté illicitement le territoire
d'un État membre**

**Note pour la Commission de la Culture et
de l'Éducation - Parlement européen**

Marie Cornu – Directrice de recherches CNRS – CECOJI
Manlio Frigo, professeur de droit, Université d'Etat de Milan

Article 36 TFUE, point central d'appui de la directive

“Les dispositions des articles 34 et 35 ne font pas obstacle aux interdictions ou restrictions d'importation, d'exportation ou de transit, justifiées par des raisons (...) **de protection des trésors nationaux ayant une valeur artistique, historique ou archéologique.** Toutefois, ces interdictions ou restrictions ne doivent constituer ni un moyen de discrimination arbitraire ni une restriction déguisée dans le commerce entre les États membres”.

Définition de la notion de trésor national au sens de l'article 36 TFUE

- *Absence d'une notion communautaire positive de trésor national*

Culture - Art. 167 TFUE (...) — le Parlement européen et le Conseil, statuant conformément à la procédure législative ordinaire et après consultation du Comité des régions, adoptent des actions d'encouragement, **à l'exclusion de toute harmonisation des dispositions législatives et réglementaires des États membres;**

- *Exception de trésor national réservée aux biens d'intérêt majeur*
- *Dispersion des notions de trésor national dans les législations des États*

Définition de la notion de trésor national au sens de la Directive 93/7

- *Reprise de la notion de trésor national au sens de l'article 36 TFUE*
“bien classé, avant ou après avoir quitté illicitement le territoire d'un État membre, comme «trésor national de valeur artistique, historique ou archéologique», conformément à la législation ou aux procédures administratives nationales au sens de l'article 36 du traité”.
- *Resserrement de l'action en restitution autour de certains trésors nationaux : limitation en vertu d'une annexe*
- Neutralisation de l'annexe pour les biens des collections publiques et les inventaires des institutions ecclésiastiques;

Le dispositif envisagé : le recentrage sur les trésors nationaux

L'article premier serait ainsi libellé :

“Aux fins de la présente directive, on entend par «bien culturel»: un bien classé, avant ou après avoir quitté illicitement le territoire d'un État membre, comme «trésor national de valeur artistique, historique ou archéologique», conformément à la législation ou aux procédures administratives nationales au sens de l'article 36 du traité”.

Les risques

Une interprétation trop large de la notion de trésor national pourrait :

- d'une part nuire à l'efficacité de la Convention,
- d'autre part présenter un niveau de garanties insuffisant pour les personnes susceptibles d'être impliquées dans une procédure de restitution,
- enfin plus généralement, produire de l'insécurité dans le marché de l'art si des transactions peuvent ainsi être remises en question.

Les garanties

- *Borne de l'article 36 TFUE*
- *Condition de sortie illicite*
- *Possibilité de contestation des acteurs impliqués*
- *Système d'information IMI*
- *Obligation de communication des textes pertinents*
- *Action réservée aux États*

Autres garanties ?

- **Imposer aux États de définir la notion de trésor national dans leur droit interne ?**
- **Renforcer l' obligation d'information à la charge des États ?**

Art. 9 - Diligence requisite

- devoir par le possesseur de prouver qu'il a exercé la diligence requise pour obtenir une indemnité équitable
- charge de la preuve régi par la législation de l'Etat membre requis

Art. 9 - Diligence requise-refonte

- *Changement de perspective*
- Élimination du renvoi à la loi nationale
- Adoption d'une règle uniforme = charge de la preuve attribuée au possesseur
- Limitation du pouvoir discrétionnaire du juge
- Tendance générale vers l'adoption de règles de droit uniforme européen



Art. 9 - Diligence requise-refonte

- Absence de définition
- Modèle → article 4.4 Convention d'Unidroit 1995
- Indication de critères communs pour vérifier si l'acheteur a eu recours à la diligence requise au lieu d'une définition abstraite et générale

Appréciation du texte

- Choix en conformité avec les indications des administrations des États membres (Quatre rapports de la Commission)
- Choix en conformité avec l'Étude sur la prévention et la lutte contre le trafic illicite des biens culturels dans l'UE, 2011

Impact de la norme

- En présence de lois et de pratiques interprétatives variées et différentes sur bonne foi et diligence
- Aide remarquable pour faciliter l'appréciation des circonstances par les tribunaux nationaux
- Contribution à élaborer un filon jurisprudentiel commun
- Guide aux juges
- Alerte pour les acteurs du commerce de biens culturels
- Fonction de prévention

Merci!

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The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

A solid achievement and
a base for the future



Marina SCHNEIDER, UNIDROIT
Senior Officer

ΕΒΡΟΠΕΪΚΗ ΠΑΡΛΑΜΕΝΤ PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPÉEN PARLAIMINT NA HEORPA EUROPSKI PARLAMENT PARLAMENTO EUROPEO
EIROPAS PARLaments EUROPOS PARLAMENTAS EUROPAI PARLAMENT IL-PARLAMENT EWROPEW
EUROPEES PARLEMENT PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU PARLAMENTUL EUROPEAN
EVROPSKY PARLAMENT EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROPA-PARLAMENTET



WORKSHOP

POLICY DEPARTMENT
STRUCTURAL AND COHESION POLICIES 

Return of cultural objects
unlawfully removed from the
territory of a Member State



DATE
4 NOVEMBER 2013

TIME
15:00 - 17:00

ROOM
ALTIERO SPINELLI
3G2

Committee on Culture
and Education

CHAIR
Ms Doris Pack

Protection of cultural property - A shared vision and a joint responsibility





Convention pour la lutte
contre le trafic illicite
des biens culturels

The 1970 UNESCO Convention

- **The starting point** – the foundations of a genuine international law of cultural property and in enunciation of certain values and principles
- **But with some recognised weaknesses for restitution** - it raises a number of important private law questions such as its impact on the existing rules of national law concerning the protection of the good faith purchaser, without solving them because it refers the solution to national legislations
- **The 1970 Convention needs an implementing legislation** – it seems that many States have not enacted specific legislative measures to implement the Convention



UNIDROIT has brought a new piece to the “mosaic” at the request of UNESCO

Private law aspects of the protection of cultural heritage

- **Non conventional law not satisfactory** (protection of the good faith acquirer)
- **Existing conventions not satisfactory as regards private law aspects of the protection of cultural objects** (protection of the good faith acquirer, time limitations, court jurisdiction...)

DEFINITION

UNESCO 1970 (art. 1) and UNIDROIT 1995 (art. 2) share the same definition (importance and categories)

Article 2

.... cultural objects are those which, on religious or secular grounds, **are of importance for** archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

An important difference

objects must not be “specifically designated” by the State to benefit from the protection given by the 1995 Convention



Two procedures

- **Restitution** of stolen cultural objects



Return of illegally exported cultural objects

The restitution of stolen objects

The principle

→→ The possessor of a cultural object which has been stolen shall return it (Article 3(1)) ← ←

Two accessory rules

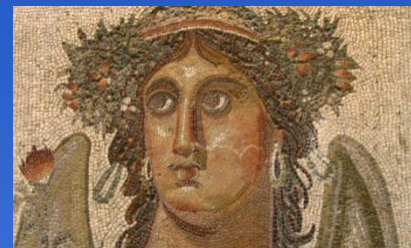
- › Time limitations to claim
- › Right to payment of a reasonable compensation for the good faith acquirer

Right to payment of a reasonable compensation for the “good faith” acquirer

Notion existing in the 1st Protocol to the 1954 and 1970 UNESCO Conventions, in the EU Directive 93/7, **but no criteria**

UNIDROIT – severe conditions to admit “good faith”

The “possessor neither knew nor ought reasonably to have known that the object was stolen **and** can prove that it exercised **due diligence** when acquiring the object” (art. 4(1))



→ Article 4(4) ←



4) In determining whether the possessor exercised **due diligence**, regard shall be had to all the circumstances of the acquisition, including

- ✓ the **character** of the parties,
- ✓ the **price** paid,
- ✓ whether the possessor consulted any reasonably accessible **register** of stolen cultural objects,
- ✓ whether the possessor consulted **any other relevant information and documentation** which it could reasonably have obtained,
- ✓ and whether the possessor consulted **accessible agencies** or took **any other step** that a reasonable person would have taken in the circumstances.

The return of illegally exported cultural objects

The principle

- Removal of the object ... **contrary to the law regulating the export** of cultural objects (Article 5(1)), and
- The export significantly impairs a scientific or historic interest, [...] or the **object is of significant interest for the requesting State** (Article 5(3))

The conditions for return

- Time limitations
- Compensation or other possibilities





Archaeological objects

Specific provisions, for example

Illicit excavation = theft

....., a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, **when consistent with the law of the State where the excavation took place** (Article 3(2))

No time limitation to action

[...] a claim for restitution of an object forming an integral part of an **identified** monument or archaeological site [...] shall **not be subject to time limitations other than** a period of three years [...]



A shared vision - the UNIDROIT Convention

- ✓ **An achievement which is solid and certain** (best possible compromise on common, minimal legal rules)
- ✓ **A Convention**
- ✓ **A base for the future** (use of the Convention as a benchmark for due diligence evaluation)



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A strong influence on national legislations and on case law also in countries not Parties to the Convention



Revision of the European Directive

2013 - The European Commission proposed to strengthen the possibility for restitution available to Member States since the current legislation is not proving sufficiently effective in achieving the recovery of unlawfully removed national treasures. The changes proposed would ensure:

- more cultural goods will be recovered
- extension of time limitations for restitution claims
- requirement for possessor requiring compensation for return to prove the object was not knowingly acquired illegally
- definition of “due care and attention”
- improvement of information sharing between national authorities on the movement of culturally significant objects

The proposal to update the Directive is currently being discussed (Member States, the European Parliament and the Council). The new provisions should enter into force in 2015

« good faith » - burden of proof

- ◎ **UNIDROIT** – The “possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object” (art. 4(1))
- ◎ **Proposal for a Directive (recast)** – “the competent court ... shall award the possessor fair compensation ~~according to the circumstances of the case~~, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object” (art. 9)

Prop. Recast Directive (Article 9)

In determining whether the possessor exercised due care and attention, consideration shall be given to all the **circumstances of the acquisition**, in particular

- the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State,
- the nature of the **parties**,
- the **price** paid,
- whether the possessor consulted any accessible **register** of stolen cultural objects and **any relevant information** and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took **any other step** that a reasonable person would have taken in the circumstances.

UNIDROIT (Article 4(4))

4) In determining whether the possessor exercised due diligence, regard shall be had to all the **circumstances of the acquisition**, including

- the character of the **parties**,
- the **price** paid,
- whether the possessor consulted any reasonably accessible **register** of stolen cultural objects,
- whether the possessor consulted any **other relevant information** and documentation which it could reasonably have obtained,
- and whether the possessor consulted accessible agencies or took **any other step** that a reasonable person would have taken in the circumstances.

**Regulation N. 1215/2012 of the European Parliament and
of the Council of 12 Dec. 2012
on jurisdiction and the recognition and enforcement of
judgments in civil and commercial matters
(entry into force on 10 January 2015)**

The **owner of a cultural object** as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (1) **should be able** under this Regulation **to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated** at the time the court is **seized**. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

= UNIDROIT Convention, Article 8(1)



Increase the number of States Parties

➤ **34 States Parties**

Afghanistan, Argentina, Azerbaijan, Bolivia, Brazil, Cambodia, China, Colombia, Croatia, Cyprus, Denmark, Ecuador, El Salvador, Finland, Gabon, Greece, Guatemala, Honduras, Hungary, Iran, Italy, Lithuania, New Zealand, Nigeria, Norway, Panama, Paraguay, Peru, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden

➤ **4 new accessions** (waiting for the deposit of the instrument with the Depositary)

Algeria, Angola, Bosnia-Herzegovina, FYROM

➤ **Decision taken to become Party**

European Union - STATUS of the 1970 and 1995 UNIDROIT Conventions as of 1st November 2013

Austria
Ireland
Latvia
Luxembourg
Malta

1995 UNIDROIT Convention –

Croatia	Lithuania
Cyprus	Portugal
Denmark	Romania
Finland	Slovakia
Greece	Slovenia
Hungary	Spain
Italy	Sweden

1970 UNESCO Convention

Belgium, Bulgaria, Czech Republic, Estonia, **France**, Germany, **Netherlands**, Poland, United Kingdom

A possible abrogation [of the Directive] could be analyzed only in a context where all Member States would become parties to the UNIDROIT Convention. In this context, the benefits of Directive 93/7/EEC for the return would be less than those offered by the Convention. However, this does not seem feasible in the near future.

(Impact assessment, p. 128)

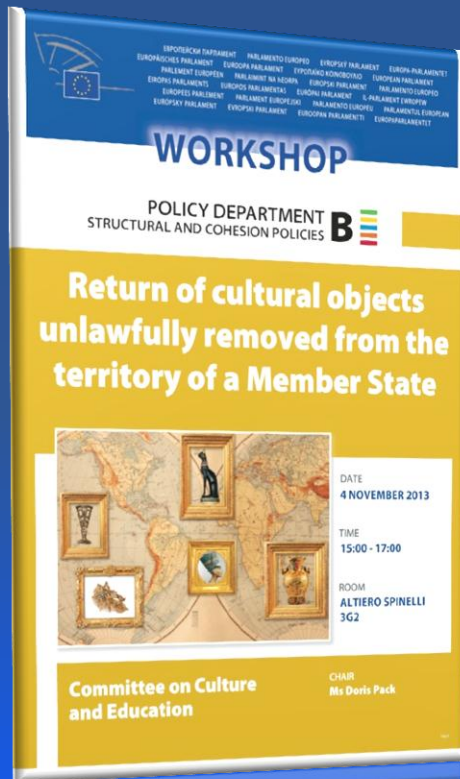
CONCLUSION

Instrument geared to facilitating the return and restitution of cultural objects,

the primary goal of the Convention is nevertheless to reduce illicit traffic by bringing about a gradual but deep-seated change in the conduct of all operators, those in the marketplace as well as government authorities

Ars grata legi

Workshop on Return of cultural objects unlawfully removed from a territory of a Member States



Brussels
4 November 2013
3-5 pm

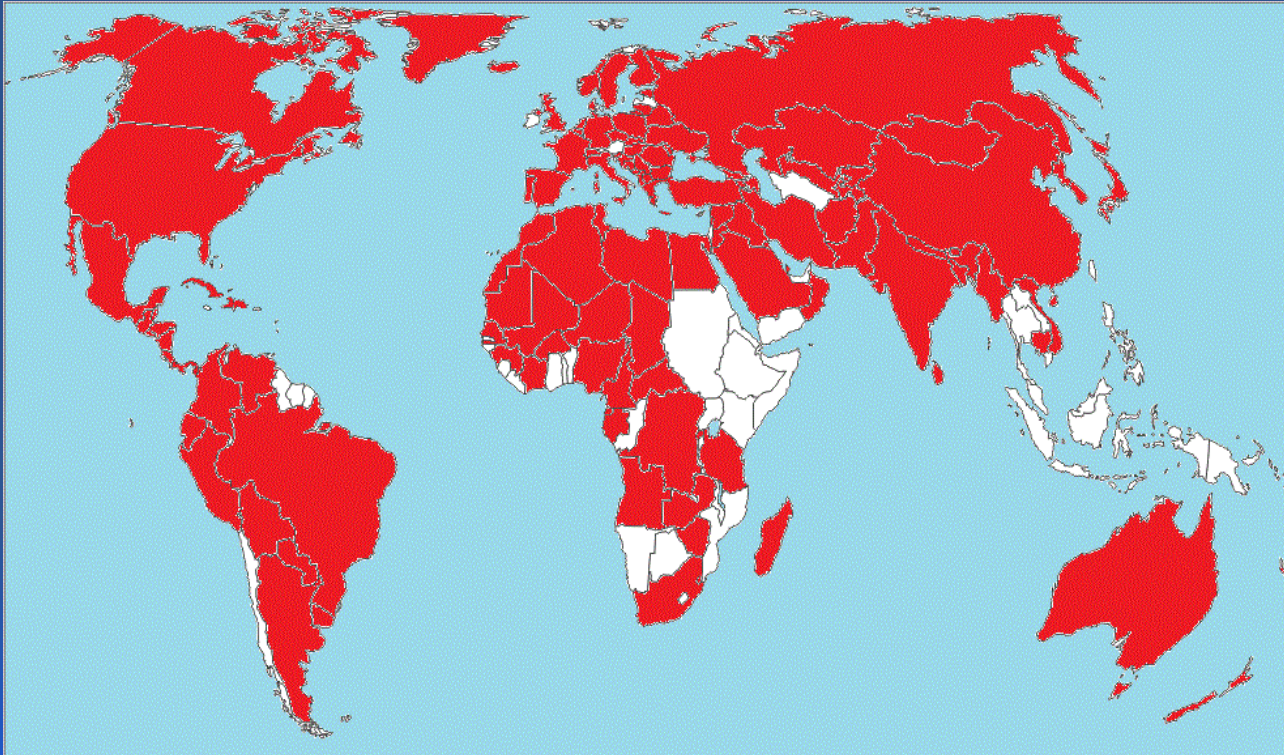
E. Planche
Programme Specialist
UNESCO



1970 Convention



- Ratifications at international level



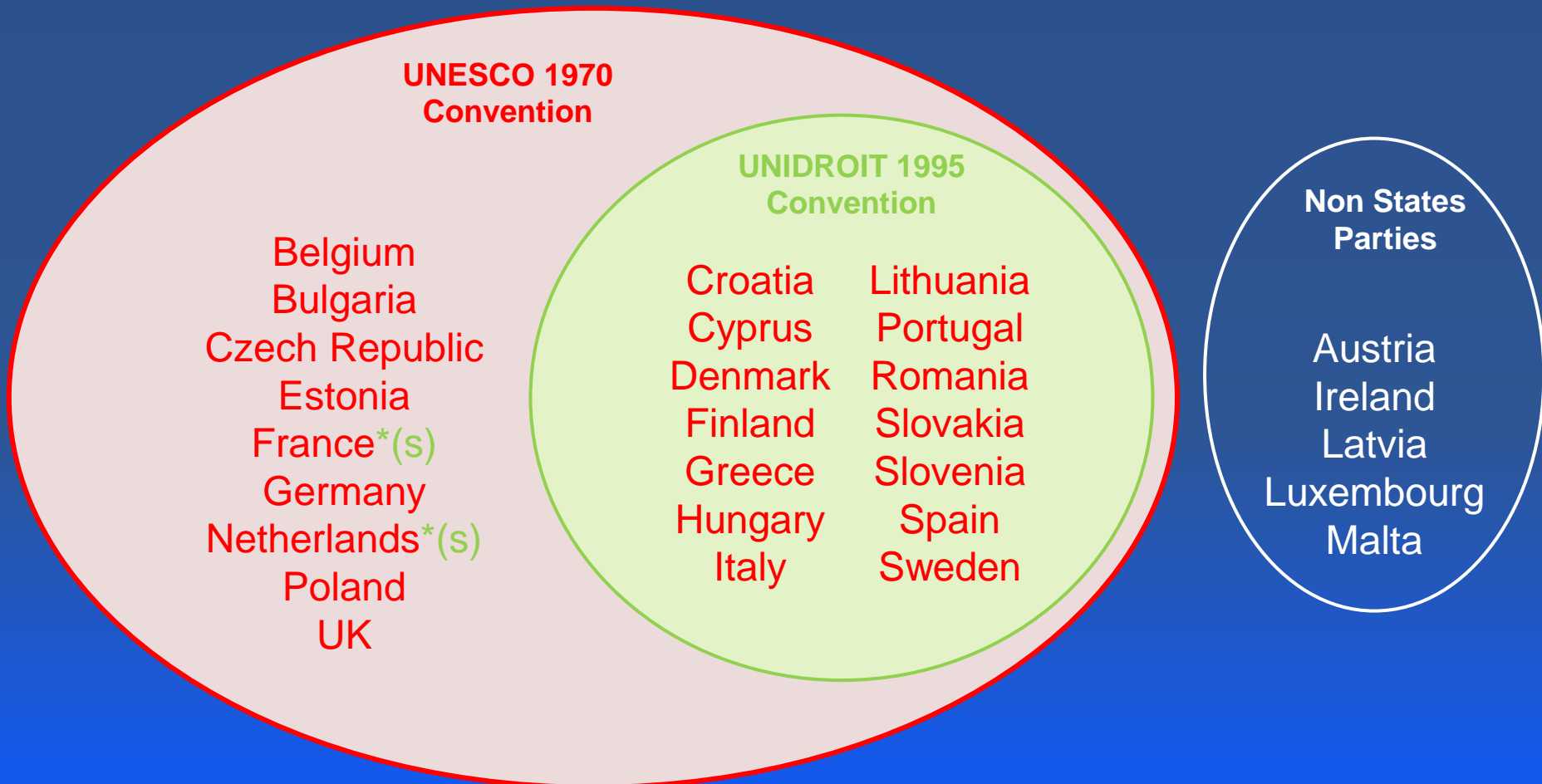
124 States Parties

Latest: Myanmar
(in October 2013)

1970 Convention



- Ratifications at european level: 23 States Parties



1970 Convention



■ 3 PILLARS

Preventive measures

Restitution provisions

International cooperation

Preventive measures

- national services
- drafting laws on export, import and transfer of ownership of important cultural property
- national inventories of protected property
- promoting museums
- educational campaigns
- rules for curators, collectors and dealers
- regulation of the art market
- export certificates
- sanctions

Restitution provisions

- **after** the entry into force of the Convention in both States concerned: **no retroactivity** of the Convention
- “**just compensation**” is paid to an innocent purchaser or to person who has a valid title to that property
- **diplomatic channels**: the requesting State has to produce the evidences
- applies **to inventoried objects** stolen from a museum, a religious or secular public monument or a similar institution

International cooperation



Article 9

Any State to the Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected;

The State Parties are invited to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific material concerned

Article 13

The Parties to the Convention are required to have their police forces and other competent authorities cooperate to ensure speedy return and restitution of trafficked items

Article 15

The Parties can conclude special agreements among themselves or continue to implement agreements already concluded regarding the restitution of cultural property removed from its territory of origin before the entry into force of this Convention

Comments on the recast proposal for Directive 93/7/EEC

■ General comments

In the area of restitution and return of cultural objects which have been stolen or illicitly exported, an harmonization of the national legislations is necessary to better combat the illicit trafficking

Key points :

- Scope of the Directive
- Protection of the purchaser in good faith
- Limitation periods

■ Proposal for Article 1, 1)

For the purposes of this Directive:

1) 'Cultural object' shall mean

- an object which: ~~is classified, before or after its unlawful removal from the territory of a Member State among the~~ → **is designated by each Member State as** ← 'national treasures possessing artistic, historic or archaeological value', under national legislation or administrative procedures within the meaning of Article 36 of the Treaty;

and

- belongs to → : ←

→ **either** ← one of the categories listed in the Annex, ~~or does not belong to one of these categories but forms an integral part of~~

→ **either** ← public collections listed in the inventories of museums, archives or libraries conservation collections

→ **either** ← ~~the~~ inventories of ecclesiastical institutions

- Proposal for Article 9, para,3

The possessor may not ~~claim to have acted in good faith~~ → **claim for compensation** ← if he failed to exercise the level of due care and attention required by the circumstances.



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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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