

Initial appraisal of a European Commission Impact Assessment

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

Impact assessment (SWD (2013) 189 final, SWD (2013) 188 final (summary))
accompanying the Commission proposal for a Directive of the European
Parliament and of the Council on the return of cultural objects unlawfully
removed from the territory of a Member State (COM (2013) 311 final) (recast)

• Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment accompanying the aforementioned proposal submitted on 30 May, 2013.

Directive 93/7/EEC¹, which was adopted at the time of the abolition of internal border controls when the single market was created, seeks to ensure that some national treasures possessing artistic, historic or archaeological value that have been illegally shipped or exported after 1 January 1993 are returned to the territory of the EU Member States of origin. One of the main objectives of the Directive is to reconcile the fundamental principle of free movement of goods with the need for effective protection of national treasures.²

According to a UNESCO report of 2011, the trafficking of cultural objects is worth at least EUR 1.5 billion a year³ and, according to the UN, is the third largest illegal trade, after drugs and arms trafficking⁴. According to the impact assessment, between 2007 and 2010 the number of crimes against cultural heritage (theft, illegal excavations, illicit removal, etc.) detected at EU level ran at an average of 8 000 a year. The countries most affected are France, Germany, Poland and Italy.⁵

Directive 93/7/EEC provides that the Commission shall submit a report every three years on the application of the Directive, drawn up on the basis of national reports. The assessments of this Directive have highlighted the limited effectiveness of this instrument: it appears that only

¹ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. This Directive completes Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods which makes the export of some of these goods subject to an export authorisation by Member States.

² At international level, the protection of cultural objects is also ensured by UNESCO's Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects. These Conventions have still not been ratified by all Member States (22 in the case of the UNESCO Convention, 13 in the case of the UNIDROIT Convention).

³ Impact Assessment, p. 9.

⁴ Idem.

⁵ Ibidem.

fifteen recovery proceedings have been brought by Member States since 1993¹ on the basis of the Directive.

The European Parliament had already taken the view in 2001, in its resolution on the first report on the application of the Directive, that the provisions of the latter were inadequate, particularly the one-year limitation period, and called upon the Commission to organise a campaign aimed at raising public awareness of the adverse effects of the illegal trade in cultural goods and to make practical proposals to combat it².

In the light of the conclusions of the third report³, the Commission has taken steps to revise the Directive. Thus, in 2009 it set up the working group on the 'Return of Cultural Goods'⁴, which is charged with identifying the main problems posed by the application of the Directive and proposing solutions to overcome them. This working group was established within the Committee on the Export and Return of Cultural Goods.

It concluded in 2011 that Directive 93/7/EEC should be revised in order to make the system more effective in returning cultural objects classified as 'national treasures' and that administrative cooperation and exchanges of information between the competent authorities needed to be improved through non-legislative mechanisms.

In its conclusions of 13 and 14 December 2011 on preventing and combating crime against cultural goods, the Council of the European Union recommended that the Commission support the Member States in the effective protection of cultural goods with a view to preventing and combating trafficking and promoting complementary measures where appropriate.

• Problem definition

According to the IA, this Directive is perceived by the national authorities responsible for implementing the Directive (hereinafter the 'central authorities') as a necessary instrument for safeguarding national heritage. However, these authorities are critical of the limited effectiveness of the Directive in securing the return of certain cultural goods classified as 'national treasures possessing artistic, historic or archaeological value' in accordance with the national administrative legislation or procedures, within the meaning of Article 36 of the Treaty on the Functioning of the European Union⁵.

According to the reports on the application of the Directive and the working group on the 'Return of Cultural Goods', the main causes of the limited effectiveness of the Directive are⁶:

1. The conditions set for objects classified as 'national treasures' in order for them to be returned, i.e. to belong to one of the common categories referred to in the Annex and to pass a minimum age threshold and/or a minimum financial threshold.

¹ Impact Assessment, p.11.

² European Parliament resolution of 12 June 2011 on the Commission report to the Council, the European Parliament and the 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 (OJ C 53E, 28.2.2002).

³ COM (2009) 408 final, 30 July 2009

⁴ This group was composed of the national authorities charged with implementing the Directive

⁵ Impact Assessment, p. 10.

⁶ Impact Assessment, p. 12.

2 . The short one-year deadline for initiating return proceedings; the central authorities also believe the two-month period accorded to the requesting Member State to verify whether an object found in another Member State is a cultural object illegally removed from its territory to be insufficient.

3. The cost of compensating the possessor; the Directive provides that where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object. The concept of due care and attention in acquiring the object is not defined in the Directive.

The IA indicates that the legislation of some Member States does not recognise the concept of due care and attention; instead they have the notion of 'good faith'. As a result, in transposing the Directive, some Member States have used the term 'good faith' rather than 'due care and attention' as a precondition for compensating the possessor . However, the Commission does not indicate whether and how this creates problems in practice, nor does it explain the differences between these two concepts and their implications¹.

The second problem raised by the central authorities in connection with the compensation of the possessor resides in the fact that, under the Directive, the burden of proof of 'due care and attention' is governed by the legislation of the requested Member State; this, they consider, could result in different decisions being taken on the granting of compensation in similar circumstances. The central authorities criticise the fact that some possessors acting in bad faith and / or not having to prove 'due care and attention' receive compensation.

The Commission states that, owing to the above restrictive conditions imposed by the Directive, Member States prefer, wherever possible, to seek the return of cultural goods through the UNESCO and UNIDROIT Conventions; these are broader in scope than the Directive, since they do not require that the objects be classified as 'national treasures' and do not impose financial thresholds on them.

In this regard, the Commission does not provide full enough explanations on the content of the above Conventions and their link with the Directive. It fails to explain why the Directive was not aligned from the outset on the provisions of the 1970 UNESCO Convention, nor does it indicate why some Member States have still not yet ratified and implemented the UNESCO and UNIDROIT Conventions.

• Objectives of the legislative proposal

The general objective of this initiative is to help protect cultural goods in the context of the internal market. This objective is in line with the conclusions of the EU Council of 13 and 14 December 2011 on preventing and combating crime against cultural goods. The specific objective is to allow Member States to secure the return of cultural objects classified as 'national treasures' which were unlawfully removed from their territory after 1993. This translates into two operational objectives, namely to increase the number of returns of objects classified as 'national treasures' and to reduce the cost of these returns.

¹ The IA refers merely to the study on preventing and combating the illegal trade in cultural objects in the EU by the CECJI, 2011.

• Range of options considered

The IA examines four strategic options. It specifies that a number of options were abandoned during the initial stages of examination on grounds of effectiveness and feasibility which are set out in detail in Annex 7. These are the options relating to: (i) ratification by the Union of the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995, (ii) shaping a Union approach towards ratification by all Member States of the UNIDROIT Convention, (iii) replacing Directive 93/7/EEC with a regulation and (iv) renouncing EU action and repealing Directive 93/7/EEC.

The four options considered are¹:

Option 1: the 'status quo' (the baseline scenario): Directive 93/7/EEC remains unchanged. According to the Commission, leaving the Directive unchanged will not address the reasons making it difficult or even impossible to secure the return of objects classified as national treasures and will not meet the demands of the central authorities to make the Directive more effective.

Option 2: promoting the use of common tools by the central authorities: this option would involve using the Internal Market Information System (hereinafter IMI) to facilitate administrative cooperation and the exchange of information between the central authorities. If the IMI were to be used, an ad hoc module suited to the requirements of the Directive would need to be developed. According to the Commission, such a tool would make enforcing the Directive easier and would have a positive impact on the number of returns, in particular those organised on an amicable basis. However, according to IA, better cooperation and consultation between the central authorities would not address the main causes of the limited effectiveness of the Directive, in particular its scope and short period of time for bringing return proceedings.

Option 3: Revision of Directive 93/7/EEC: the Directive would be revised in order to:

- i. extend its scope to all objects classified as 'national treasures' by the Member States: in order to do this, the financial and age thresholds would be abolished, as would the common categories of object referred to in the Annex to the Directive;
- ii. extend the time-limits for bringing return proceedings and for checking whether the object found is a cultural object; and
- iii. align the conditions for compensating the possessor: the Directive would set out common criteria for interpreting the concept of due care and attention and would impose on the possessor the burden of proving that he had exercised such due care and attention.

According to the Commission, these changes would help increase the number of return proceedings that could be brought successfully and reduce the cost of such proceedings. The requirement for the possessor to prove that he had exercised the necessary care and attention in acquiring the object would encourage art market stakeholders to make the necessary checks on the provenance of cultural objects, which would act as a disincentive for the trade in objects of dubious origin.

According to IA, in the work of the working group on the 'Return of Cultural Goods', only a minority of members wished the Directive to specify that the burden of proving the exercise of due care and attention lay with the possessor.¹

¹ Impact Assessment, pp.20-33.

Option 4: Encourage the ratification and implementation by the Member States of the 1970 UNESCO Convention on Cultural Property: the Directive would not be amended, but the Commission would launch an information campaign aimed at raising the awareness of the Member States with a view to encouraging the ratification and implementation of the Convention by all Member States. This would increase the number of returns, but would not solve all the problems in this connection, since this Convention only allows the States Parties to recover objects illegally exported from their territory if it is consistent with the law of the State where the property is located. In addition, the Commission considers that the costs of implementing this option are too high compared to the uncertainty it creates, since the ratification and implementation of the Convention depend on the willingness of each State.

The IA advocates a combination of options 2 and 3.

It is interesting to note that the issues of cooperation and consultation that Option 2 seeks to address are not mentioned in the introductory section of the IA on problem definition. Moreover, it is not clear how these two options will help achieve the goal of reducing the cost of returns.

- **Scope of the Impact Assessment**

The analysis of the options is more particularly qualitative in nature, with the Commission pointing out that it is difficult to quantify the potential economic impacts of the proposed options.

The Commission explains that, 'in principle, none of the options described above has any effect on the creation of jobs, or on the environment, competitiveness or the Charter of Fundamental Rights'², but that they have an impact on the safeguarding of national cultural heritage.

The options are compared in terms of effectiveness, efficiency and consistency with regard to the operational objectives being pursued, namely to increase the number of returns and reduce their costs.

The IA includes an assessment of the costs of each option, in particular the administrative burden related to the drawing-up of a report on the application of the Directive every three years (Annex 8 provides additional information on this analysis). According to the Commission, the proposal will not add to the administrative burden; it should, in fact, reduce it:

Re option 1 (baseline scenario (the status quo), the Commission explains that, on the basis of information received from the central authorities, the operational costs associated with enforcing the Directive would be about EUR 7 000 per year by Member State, either representing the cost of three staff members, or in terms of the number of the number of working days (1/2 to 5 working days per action)³. Under the EU Standard Cost Model, the Commission estimates the administrative cost of drafting a report on the enforcement of the Directive at EUR 55 000 every three years, which represents an annual cost of a little over EUR 18 000⁴ per Member State. How the Commission arrived at this figure is not set out in

¹ Impact Assessment, p. 31.

² Impact Assessment, p. 22.

³ Impact Assessment, p. 23.

⁴ Impact Assessment, p. 8, pp. 133-134. The Commission states, without providing any further explanation, that the time necessary for drawing up this national report is estimated at approximately 80 hours of work by several national officials.

any detail in the IA. A table of costs by Member State is given in Annex 8, but no explanations are provided.

Re option 2: the Commission states that the costs of developing an ad hoc module, and of using and maintaining the IMI system would be covered by the EU budget, without, however, giving any figures. The costs relating to IMI operations (including the cost of human resources, training, promotion and technical assistance as well as administration of the system at national level would be the responsibility of the Member States. The Commission considers that since there already exists in each Member State a national IMI coordinator, as well as national helpdesks for technical assistance, the operational costs borne by Member States should not increase significantly.

The IA indicates that this option would help reduce the administrative cost by 50 % due to simplification, through the IMI system, of the data-gathering necessary for drafting the reports on the enforcement of the Directive: the administrative cost could be reduced to EUR 27 500 every three years, i.e. an annual charge of approximately EUR 9 000 (as against EUR 18 000 in the baseline scenario). However, no explanation is provided as to how these figures were arrived at.

Re option 3: the Commission specifies that the costs of implementing this option would be those relating to the transposition of the new Directive into national law. According to the IA, this option should not impose additional operational costs on Member States compared to the current situation, since the Commission believes that the hoped-for increase in the number of return proceedings could continue to be managed by the same staff within Member States. The reasoning behind this assumption is not explained.

As far as the administrative cost is concerned, extending the interval between the drafting of each report on enforcement of the Directive to five years would reduce the administrative burden by about EUR 7 000 a year, i.e. EUR 11 000 a year rather than EUR 18 000 in the baseline scenario.

Finally, re option 4: according to the IA, the minimum cost of an awareness-raising and information campaign in all the Member States would be between EUR 500 000 and EUR 1 million. The administrative cost of this option would match that of the baseline scenario.

According to the Commission, the suggestion of combining options 2 and 3 would reduce the administrative cost to EUR 5 500 a year. As for the operating costs, they should not increase significantly¹. The explanations given in this regard are, however, rather vague.

It should be noted that the IA does not refer to any potential negative impact associated with the removal of the Annex to the Directive. Nor does not indicate whether some States will be more affected than others by the proposed measures. Furthermore, with regard to the requirement for the possessor to prove that he has exercised due care and attention when acquiring the property, the IA does not contain any discussion of the difficulty for art market stakeholders to access databases of stolen and / or illegally exported goods, even though the Commission acknowledges this difficulty².

¹ Impact Assessment, p. 37.

² Impact Assessment, p. 31.

- **Subsidiarity and proportionality**

The proposal is based on Article 114 TFEU which allows the EU to adopt measures to facilitate the functioning of the internal market in goods, including cultural goods. Setting rules on the return of objects is a way of making it easier for this market to function.

The Commission recalls that, under the principle of subsidiarity, it is not within the EU's competence to define national treasures or determine the types of national courts responsible for hearing return proceedings.

It explains that the cross-border dimension of the unlawful removal of cultural goods means that the EU is best placed to take action regarding these aspects and allows for the return of unlawfully removed objects on the territory of a Member State. It emphasises that, in accordance with the principle of proportionality, the action taken by the Union should not go beyond what is necessary to achieve the objectives that have been set, which is why it will not encroach upon the exclusive prerogative of Member States to bring restitution proceedings or regarding the cost of such proceedings.

- **Impact on the budget and public finances**

The proposal requires administrative expenditure. The impact on the budget of the European Union is estimated at EUR 1.25 million for the period 2015-2019.

- **SME test and competitiveness analysis**

The impact assessment merely states that 'Option 3 is likely to have an impact on certain stakeholders in the art market, such as antique dealers or auction houses, the vast majority of which would be small-and medium-sized enterprises'¹, without any other further discussion.

- **Simplification and other regulatory implications**

This proposal is a recasting of Directive 93/7/EEC, as amended by Directives 96/100/EC and 2001/38/EC. It is a simplification of the legislation in force and will lead to the repeal of Directives 93/7/EEC, 96/100/EC and 2001/38/EC.

- **Quality of data, research and analysis**

The analysis is based on studies, reports and other information provided by the Member States and, in particular, on the work of the working group on the 'Return of Cultural Goods' that produced the document entitled 'Information on the definition of national treasures possessing artistic, historic or archaeological value [in the Member States]' in Annexe 2 of the IA, as well as the national implementation reports.

Among the documents cited are a restricted working document of the Council of the European Union dated October 2011 and entitled 'Analysis of the scale of the crime threat against cultural property in the Member States and the selected countries of Eastern Partnership' and the 'Study on preventing and fighting illicit trafficking in cultural goods in the European Union' drawn up at the request of the Commission. This study which was presented in December 2011 contains a whole series of recommendations to address this illegal trade. Although this study is cited

¹ Impact Assessment, p. 22.

repeatedly in the IA, it is not at all clear whether the options selected are in line with these recommendations. More details about the role played by this study in the context of the development of the AI would have been desirable.

Overall, the impact assessment appears to be well documented and includes a number of explanatory annexes. However, the calculation of the administrative cost is not at all clear, and some issues would have benefited from further exploration, such as the potential risks associated with the deletion of the Annex to the Directive, the manner in which the selected options will help reduce the cost of returns in practice and the difficulty for the possessor of a cultural object to prove that he has exercised due care and attention.

• **Consultation with stakeholders**

Between 30 November 2011 and 5 March 2012, the Commission conducted a public internet consultation on a possible revision of Directive 93/7/EEC. This consultation was carried out on the basis of two questionnaires, one addressed to public authorities and entities working in the field of cultural property and the other to concerned citizens and economic operators.

The public consultation generated 142 responses, of which only 24 came from the public sector (16 public administrations and 8 public bodies) and 118 from the private sector (77 citizens and 41 private operators). The responses of the public authorities and bodies came from 12 Member States, the majority from Germany. A detailed summary of the responses is attached as Annex 1. According to the Commission, 'these results are not statistically representative but are useful in analysing the problems and comparing the options.'¹

The results of the public consultation show a significant divergence of views between the public sector and the private sector: the majority of participants (66.1 % for the private sector and 54.2 % for the public sector) consider that Directive 93/7/EEC is adequate or fully adequate. However, as regards the effectiveness of the provisions of this Directive, the majority of private sector respondents (61.0 %) confirm that the Directive fully meets the needs of Member States, as against 20.8 % in the public sector.

A majority of citizens and private operators do not consider it necessary to resort to either of the options mentioned in the questionnaire to ensure the return of national treasures, while a majority of public sector stakeholders have expressed support for measures to improve the effectiveness of the Directive. 62.5 % of the public sector respondents believe that existing EU legislation is not sufficient to help Member States protect their cultural objects.

The views of interested parties are well reflected throughout the report.

• **Monitoring and evaluation**

The Commission will verify the conformity of national transposition measures. This monitoring will be complemented by a report on the application of the Directive drawn up after the first five years of application. It will be drawn up on the basis of the Member States' five-yearly reports. The Commission also provides for a series of indicators to measure the effectiveness of the revised Directive.

- **The Commission's Impact Assessment Board**

The Impact Assessment Board (IAB) issued its opinion on the draft IA on 19 September 2012. It made a number of recommendations, the majority of which were incorporated in the final version of the IA. However, it seems that DG ENTR has not acted on the recommendations for it to provide more detailed information on how Member States have implemented and interpret the provisions of the Directive and the consequences of any differences of opinion on its effectiveness, or on the reasons for failure to ratify the UNESCO and UNIDROIT Conventions. Moreover, contrary to the IAB's request, DG ENTR has not analysed the impact of the proposals on SMEs, nor has it indicated whether some Member States will be more affected than others.

- **Consistency between the legislative proposal and the impact assessment**

The legislative proposal and the impact assessment seem to be consistent. It should be noted that the time limits of three years for bringing return proceedings (compared to one year now) and five months (compared to two months at present) to verify whether an object that has been found is a cultural object, as provided for in the legislative proposal, are not discussed in the IA, which merely states that five months is the time limit proposed by the central authorities.²

¹ Impact Assessment, p. 41

² Impact Assessment, p. 29.

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This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Culture and Education (CULT), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/activities/committees/studies.html>

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