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Subject: 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
- General approach

I. Introduction

1. On 30 May 2013, the Commission adopted 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)¹.

¹ Doc. 10471/13 + ADD 1 + ADD 2.

The aim of the proposed directive is to improve the efficiency of mechanisms to secure the return of cultural objects, classified as national treasures within the meaning of Article 36 of the Treaty on the Functioning of the European Union, illegally removed after 1 January 1993 from one Member State and situated on the territory of another Member State.

2. Council Directive 93/7/EEC², which is the object of the recast, was adopted in 1993 when the single market was created and consequently internal borders were abolished. In this regard, the directive aimed to reconcile the fundamental principle of free movement of goods with the need to protect effectively cultural objects which are of specific and high importance to Member States. The directive introduced mechanisms for administrative cooperation between national authorities and for proceedings before the court concerning the return of cultural objects illegally removed from a Member State.
3. However, the Directive 93/7/EEC was found³ to have only limited effectiveness in securing the return of national treasures removed from a Member State, due in particular to its limited scope, the limited period allowed for initiating return proceedings, to the cost of compensation and finally to the lack of sufficient administrative cooperation between the Member States.

² Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State of 15 March 1993 (OJ L 74, 27.3.1993, p. 74).

³ Four Commission reports on the application of Directive 93/7/EEC (2000, 2005, 2009 and 2013).

4. The Commission, in its proposal for the recast of Directive 93/7/EEC, therefore proposed specific measures to address the shortcomings of the current directive with a view of improving the situation and consequently increasing the number of returns. In particular, the Commission is proposing to delete the Annex (which contains a number of limitations) in order to allow any cultural object a Member State considers as national treasure to be eligible for the return. The Commission is also proposing to extend time-limits which were found too short: thus Member States would have 5 months, instead of the current 2 months, to check that the object discovered in another Member State is a national treasure, and they would have 3 years, instead of 1 year, to initiate the return proceedings. Another important change concerns the burden of proof of due care and attention in acquiring an object belonging to national treasures, where the Commission is proposing that that burden of proof would lie with the possessor for the purpose of compensation. In that regard, the proposal contains common criteria for interpreting due care and diligence. In order to improve administrative cooperation and exchange of information between the central authorities of the Member States, the Commission is proposing to use the Internal Market Information System (IMI)⁴ which is already used in several policy areas.
5. In terms of legislative technique, the Commission decided to apply the recasting technique⁵ which should result in the simplification of legislation in force, where the current directive 93/7/EEC and two amending directives⁶ will be repealed and replaced by the proposed recast directive.

⁴ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System (OJ L 316, 14.11.2012, p. 1).

⁵ In accordance with the Interinstitutional Agreement of 28 November 2001 (OJ C 77, 28.3.2002, p. 1).

⁶ Directives 96/100/EC and 2001/38/EC.

6. The European Economic and Social Committee delivered its opinion⁷ on 18 September 2013.
7. On 25 June 2013, the European Parliament's Committee on Culture and Education appointed Mme Marie-Christine Vergiat (GUE/NGL-FR) as rapporteur. A draft report is scheduled to be presented on 27 November 2013 with the Committee vote taking place in January 2014.

II. Work in the Council

8. Under the Lithuanian Presidency, the Commission proposal was examined in detail at the working party level during September and October 2013 and by Coreper on 13 November 2013. The Member States welcomed the Commission's proposal to review certain aspects of the current directive which have limited its use, such as the extension of various time limits, including the one for drawing up reports on the application of the Directive (from 3 years to 5 years). A majority of delegations also welcomed the deletion of the annex and the introduction of the IMI system, both perceived as contributing to a more widespread use of the return mechanism proposed by the Directive. Member States' opinions differed on the issue of the burden of proof to be placed on the possessor and on the deletion of the reference to the Committee on the export and return of cultural goods⁸ which is currently used to examine questions arising from the application of the annex to the directive.
9. The concrete results of the examination by the Council's preparatory bodies can be found in the Annex to this note.⁹ The main changes can be summarised as follows:

⁷ CES 4678/2013.

⁸ Committee established by Article 8 of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (codified version) (OJ L 39, 10.2.2009, p. 1.)

⁹ For the sake of readability, the text is presented in a clean form, without the shading and markings used by the recasting technique.

a. *Objects classified/defined (Article 1(1))*

The term "defined" was added to reflect the different practices existing in Member States, which either designate concrete objects to be classified as national treasures or set up certain criteria which a cultural object needs to fulfil in order to become a national treasure. Given the deletion of the Annex which contained the categories of cultural objects as well as financial and age thresholds, examples of different cultural objects were added to recital 10.

b. *Due care and attention (Article 9)*

The majority of the Member States supported the Commission's proposal to unify the provisions on the burden of proof and not to maintain the current system (according to which the burden of proof was governed by the national legislation of the requested Member State). The Commission proposes to place the burden of proof on the possessor, i.e. that the possessor will be entitled to compensation in relation to an object unlawfully removed from a Member State provided that he proves that he exercised due care and attention in acquiring that object. However, the FR delegation maintains reservation on this issue.

While Member States endorsed the inclusion of common criteria for interpreting the concept of due diligence, the list of criteria, which is non-exhaustive, was slightly modified in order to make them more general.

c. *Expert group (modified recital 19)*

The Commission proposes to delete all reference to the Committee on the export and return of cultural goods, which is a Comitology committee set up by the Council Regulation (EC) No 116/2009. The reason for the deletion is that the annex of the Directive, for whose application the Committee was responsible, has been removed. Furthermore, the Commission considers that the proposed Directive does not foresee any implementing act to be adopted by the Commission, and therefore the use of a Comitology committee would not be in line with the rules on comitology (Regulation (EU) No 182/2011).

Nevertheless, the Member States wish to maintain a platform for the exchange of experience and good practices, and inserted new provisions in recital 19, according to which the Commission will set up an expert group. Whilst the Commission intends to create such a group, it does not want to be obliged to do so by way of an explicit reference in the text of the Directive, as the establishment of expert groups is solely under the competence of the Commission. Therefore, the Commission entered a reservation on this issue.

d. *Transposition period (Article 18)*

The Commission has proposed that the directive be transposed within 12 months after its adoption, arguing that only a limited number of articles need to be transposed by the Member States, for which this rather short period should be sufficient. However, Member States asked for more flexibility and the transposition period was extended to 18 months. The Commission is opposed to such an extension, while the FR delegation would like to extend the period further to 24 months. Both the Commission and FR delegation entered reservations on this issue.

10. Other minor changes have been made as follows:

- the word "competent" was added before "central authority" in order to give more flexibility to those Member States who have more than one central authority responsible for carrying out the tasks related to the Directive (*Articles 6 and 7*);

- the term "ecclesiastical goods" was replaced with the term "objects belonging to inventories of ecclesiastical or other religious institutions" in order to allow the application of the Directive also to objects belonging to religious institutions which do not have the ecclesiastical structure (*Article 7(1) third subparagraph and related recital 14*);
- the possibility for Member States to return cultural objects other than those classified or defined as national treasures was moved from the first paragraph of Article 14 to *recital 9*. In addition, in the same recital, it was added that Member States can also return cultural objects removed unlawfully before 1 January 1993, which is expressed in Article 14(2);
- it was clarified in *recital 9* that the Directive applies to cultural objects illegally removed regardless of the date of accession of Member States;
- the need to keep the costs associated with return proceedings reasonably limited is addressed in modified *recitals 8 and 9*.

III. Outstanding reservations

11. The FR and UK delegations maintain general scrutiny reservations, while the FR delegation also has a parliamentary scrutiny reservation.
12. The FR delegation maintains a reservation on the fact that the burden of proof will lie with the possessor (see point 9(b) above), and a reservation on the transposition period (see point 9(d)).
13. The Commission has a general reservation on the whole text pending the opinion of the European Parliament. In addition, the Commission has also two specific reservations concerning recital 19 (expert group) and Article 18 (transposition period) (see point 9(c) and (d) respectively).

IV. Tasks for Council

Given the broad support of delegations, the Council is invited to reach a general approach at its meeting on 25-26 November 2013.

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹⁰,

Acting in accordance with the ordinary legislative procedure,

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HAVE ADOPTED THIS DIRECTIVE:

¹⁰ OJ C [...], [...], p. [...].

¹¹ Recitals will be dealt with at a later stage.

Article 1

For the purposes of this Directive:

- 1) 'Cultural object' shall mean an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as one of the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty.¹²
- 2) 'Unlawfully removed from the territory of a Member State' shall mean:
 - (a) removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No 116/2009,
 - or
 - (b) not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

¹² *Revised wording of recital 10:*

"The scope of this Directive should extend to any cultural object classified or defined as being one of 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 criterion of falling under one of the categories referred to in the Annex to Directive 93/7/EEC should therefore be removed and thus the Annex itself should be deleted and the criterion of forming an integral part of public collections listed in the inventories of museums, archives and libraries' conservation collections or the inventories of ecclesiastical institutions should also be removed. This Directive would thus cover cultural objects such as objects of historical, paleontological, ethnographic, numismatic interest or scientific value, whether or not they form part of public or other collection or are single items, provided that they are classified or defined as national treasures. Furthermore, cultural objects classified or defined as national treasures would not have to comply with thresholds related to their age and/or to their financial value to qualify for the return under the Directive. Taking into account that the diversity of national arrangements for protecting national treasures is recognised in Article 36 of the Treaty, mutual trust, a willingness to cooperate and mutual understanding between Member States are therefore essential."

- 3) 'Requesting Member State' shall mean the Member State from whose territory the cultural object has been unlawfully removed.
- 4) 'Requested Member State' shall mean the Member State in whose territory a cultural object unlawfully removed from the territory of another Member State is located.
- 5) 'Return' shall mean the physical return of the cultural object to the territory of the requesting Member State.
- 6) 'Possessor' shall mean the person physically holding the cultural object on his own account.
- 7) 'Holder' shall mean the person physically holding the cultural object for third parties.
- 8) '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.

Article 2

Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive.

Article 3

Each Member State shall appoint one or more central authorities to carry out the tasks provided for in this Directive.

Member States shall inform the Commission of all the central authorities they appoint pursuant to this Article.

The Commission shall publish a list of these central authorities and any changes concerning them in the C series of the Official Journal of the European Union.

Article 4

Member States' central authorities shall cooperate and promote consultation between the Member States' competent national authorities. The latter shall in particular:

- 1) upon application by the requesting Member State, seek a specified cultural object which has been unlawfully removed from its territory, identifying the possessor and/or holder. The application must include all information needed to facilitate the search with particular reference to the actual or presumed location of the object.
- 2) notify the Member States concerned, where a cultural object is found in their own territory and there are reasonable grounds for believing that it has been unlawfully removed from the territory of another Member State;
- 3) enable the competent authorities of the requesting Member State to check that the object in question is a cultural object, provided that the check is made within five months of the notification provided for in paragraph 2. If it is not made within the stipulated period, paragraphs 4 and 5 shall cease to apply;

- 4) take any necessary measures, in cooperation with the Member State concerned, for the physical preservation of the cultural object;
- 5) prevent, by the necessary interim measures, any action to evade the return procedure;
- 6) act as intermediary between the possessor and/or holder and the requesting Member State with regard to return. To this end, the competent authorities of the requested Member State may, without prejudice to Article 5, first facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested Member State and provided that the requesting Member State and the possessor or holder give their formal approval.

The central authorities of the Member States shall use the Internal Market Information System ("IMI") established by Regulation (EU) No 1024/2012 to cooperate and consult with each other. The Member States shall decide on the use of the IMI for the purposes of this Directive by other competent authorities.

Article 5

The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory.

Proceedings may be brought only where the document initiating them is accompanied by:

- (a) a document describing the object covered by the request and stating that it is a cultural object;
- (b) a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory.

Article 6

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

The competent central authority of the requested Member State shall forthwith inform the central authorities of the other Member States.

The exchange of information shall be conducted using the IMI.

Article 7

1. Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder.

Such proceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State.

However, in the case of objects forming part of public collections, referred to in Article 1 (8), and objects belonging to inventories of ecclesiastical or other religious institutions in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States laying down a period exceeding 75 years.¹³

2. Return proceedings may not be brought if removal from the national territory of the requesting Member State is no longer unlawful at the time when they are to be initiated.

Article 8

Save as otherwise provided in Articles 7 and 13, the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1 (1) and to have been removed unlawfully from national territory.

¹³ *Revised wording of recital 14:*

"The time-limit for bringing return proceedings should be set at three years after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder. In the interest of clarity, it should be stipulated that the time-limit for bringing proceedings begins on the date on which the information came to knowledge of the central authority of the requesting Member State.

Directive 93/7/EEC provided that such proceedings may not, at all events, be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. However, in the case of objects forming part of public collections and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law, return proceedings are subject to a longer time-limit under certain circumstances.

Due to the fact that Member States may have special protection arrangements under national law with religious institutions which lack ecclesiastical structure, this Directive should also extend to those other religious institutions."

Article 9

Where return of the object is ordered, the competent court in the requested Member State 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.^{14 15}

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 character of the parties, the price paid, whether the possessor consulted any relevant information which he could reasonably have obtained or took any other step which a reasonable person would have taken in the circumstances.

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.

¹⁴ *Revised wording of recital 16:*

"It is desirable to ensure that all those involved in the market 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 payment of a compensation is coupled with an obligation on the possessor to prove the exercise of due care and attention. Therefore, in order to achieve the Union's objectives of preventing and combating unlawful trafficking in cultural objects, the Directive should stipulate that the possessor must provide proof that he exercised due care and attention in acquiring the object, for the purpose of compensation".

¹⁵ FR: reservation on the burden of proof placed on the possessor.

Article 10

Expenses incurred in implementing a decision ordering the return of a cultural object shall be borne by the requesting Member State. The same applies to the costs of the measures referred to in Article 4 (4).^{16 17}

Article 11

Payment of the fair compensation and of the expenses referred to in Articles 9 and 10 respectively shall be without prejudice to the requesting Member State's right to take action with a view to recovering those amounts from the persons responsible for the unlawful removal of the cultural object from its territory.

Article 12

Ownership of the cultural object after return shall be governed by that law of the requesting Member State.

¹⁶ *Revised wording of recital 8:*

"The objective of the Directive 93/7/EEC was to ensure the physical return of the cultural objects to the Member State from whose territory these objects have been unlawfully removed irrespective of the property rights to such objects. The application of that Directive has shown the limitations of the arrangements for securing the return of objects classified as national treasures which have been unlawfully removed from the territory of a Member State and discovered in the territory of another Member State. The national reports on the application of the Directive have pointed to an infrequent application of the Directive due in particular to the limitation of its scope, the short period of time allowed to initiate return proceedings and the costs associated with return proceedings."

¹⁷ *Revised wording of recital 9:*

"Member States should facilitate the return of cultural objects to the Member State from whose territory those objects have been unlawfully removed regardless the date of accession of that Member State, and should ensure that the return of such objects does not give rise to unreasonable costs. Member States may return cultural objects other than those defined or classified as national treasures within the respect of the relevant provisions of the Treaty, as well as cultural objects removed unlawfully before 1 January 1993."

Article 13

This Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993.

Article 14

1. [...]
2. Each Member State may apply the arrangements provided for by this Directive to requests for the return of cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993.

Article 15

This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen.

Article 16

1. Member States shall send the Commission every five years, and for the first time in [...], a report on the application of this Directive.
2. The Commission shall send the European Parliament, the Council and the European Economic and Social Committee, every five years, a report reviewing the application and effectiveness of this Directive. The report shall be accompanied by any appropriate proposals.

Article 17

The following point 6 shall be added to the Annex to Regulation (EU) No 1024/2012:

"6. European Parliament and Council Directive xxxx/xx/EU on the return of cultural objects unlawfully removed from the territory of a Member State (*): Articles 4 and 6."

(*) OJ L [...]."

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Article 18

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the [following] articles: [Article 1(1), the first subparagraph of Article 4, Article 4(3), the fourth subparagraph of Article 4, the third subparagraph of Article 6, Article 7, Article 9 and Article 16] of this Directive at the latest eighteen¹⁹ months from the date of its adoption.

¹⁸ *Revised wording of recital 19:*

"Since the tasks of the committee set up by Article 8 of Regulation (EC) No 116/2009 are rendered obsolete by the deletion of the Annex to Directive 93/7/EEC, references to that committee should be deleted. In order to maintain the platform for the exchange of experience and good practices on the implementation of the Directive among Member States, the Commission will set up an expert group, composed of experts from the central authorities responsible for the implementation of this Directive."

Commission: reservation on the implied obligation to set up an expert group and to an explicit reference to such a group.

¹⁹ Commission: reservation on the transposition period to be 12 months.

FR: reservation on the transposition period to be 24 months.

They shall forthwith communicate the text of these provisions to the Commission. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive(s) repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. 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.

Article 19

Directive 93/7/EEC, as amended by the Directives listed in Annex I, Part A, is repealed with effect from [...], without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 20

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Articles [...] shall apply from [...].

Article 21

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

For the Council

The President

The President

ANNEX I

Part A

Repealed Directive with list of its successive amendments

(referred to in Article 19)

Council Directive 93/7/EEC	(OJ L 74, 27.03.1993, p. 74)
Directive 96/100/EC of the European Parliament and of the Council	(OJ L 60, 1.3.1997, p. 59)
Directive 2001/38/EC of the European Parliament and of the Council	(OJ L 187, 10.7.2001, p. 43)

Part B

List of time-limits for transposition into national law

(referred to in Article 19)

Directive	Time-limit for transposition
93/7/EEC	15.12.1993 ²⁰
96/100/EC	1.9.1997
2001/38/EC	31.12.2001

²⁰ The time-limit for transposition for Belgium, Germany and the Netherlands was 15 March 1994.

ANNEX II

CORRELATION TABLE

Directive 93/7/EEC	This Directive
Article 1(1), first indent	Article 1(1)
Article 1(1), second indent, introductory phrase	_____
Article 1(1), second indent, first sub-indent, first subparagraph	_____
Article 1(1), second indent, first sub-indent, second subparagraph	Article 1(8)
Article 1(1), second indent, second sub-indent	_____
Article 1(2), first indent	Article 1(2)(a)
Article 1(2), second indent	Article 1(2)(b)
Article 1(3) to (7)	Article 1(3) to (7)
Articles 2 and 3	Articles 2 and 3
Article 4, first subparagraph	Article 4, first subparagraph
Article 4(1), second sentence	Article 4, second subparagraph
Article 4(6), second sentence	Article 4, third subparagraph
_____	Article 4, fourth subparagraph
Article 5, first subparagraph	Article 5, first subparagraph
Article 5, second subparagraph, first indent	Article 5, second subparagraph, point (a)
Article 5, second subparagraph, second indent	Article 5, second subparagraph, point (b)
Article 6, first subparagraph	Article 6, first subparagraph
Article 6, second subparagraph	Article 6, second subparagraph
_____	Article 6, third subparagraph

Articles 7 and 8

Article 9, first subparagraph

Article 9, second subparagraph

Article 9, third and fourth subparagraphs

Articles 10 to 15

Article 16, paragraphs 1 and 2

Article 16, paragraph 3

Article 16, paragraph 4

Article 17

Article 18

Article 19

Annex

Articles 7 and 8

Article 9, first subparagraph

Article 9, second subparagraph

Article 9, third subparagraph

Article 9, fourth and fifth subparagraphs

Articles 10 to 15

Article 16, paragraphs 1 and 2

Article 17

Article 18, paragraph 1

Article 18, paragraph 2

Article 19

Article 20, first subparagraph

Article 20, second subparagraph

Article 21

Annex I

Annex II