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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)

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1. PROBLEM DEFINITION

Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State¹ is intended to guarantee the return of certain national treasures which were unlawfully removed from the territory of a Member State after 1 January 1993.

This Directive is perceived by the national authorities responsible for 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 Union (hereinafter "national treasures").

The impact assessment identifies three main causes:

1. the conditions set for objects classified as "national treasures" in order for them to be returned, i.e. to also belong to one of the 15 categories referred to in the Annex (including archaeological objects, pictures, paintings, engravings and archives) and to pass a minimum age threshold (of 50, 75 or 100 years) and/or a minimum financial threshold (a value of EUR 15 000, EUR 30 000, EUR 50 000 or EUR 150 000).
2. the short one-year deadline for return proceedings;
3. the cost of compensating the possessor; the Directive provides that the court award the possessor compensation if he/she has exercised due care and attention in acquiring the object. When applied in the Member States, the award of compensation (and/or its amount) could be subject to differing decisions in similar circumstances. This provision would be a source of ambiguity and could make returning the object more difficult, or even impossible, for some Member States.

In view of the difficulties encountered when returning objects, the national authorities often need to resort to the mechanisms provided for in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of

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, 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 by Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001, OJ L 187, 10.7.2001, p. 43.

Cultural Property and/or to those set out in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects².

2. ANALYSIS OF SUBSIDIARITY

Article 114 of the Treaty on the Functioning of the European Union (TFEU) 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. However, it is not within the EU's competence to define national treasures or determine the types of national courts responsible for handling restitution cases.

Directive 93/7/EEC was adopted when the internal market was created, since any action taken in isolation by Member States towards the return of objects might be thwarted by differences between national laws.

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. During the public consultation, the vast majority of central authorities and public-sector representatives expressed their support for action by the EU to improve the system of returning goods classed as "national treasures". On the other hand, the majority of citizens and private-sector businesses did not consider it necessary to resort to action by the EU to guarantee the return of cultural goods classified as "national treasures".

3. OBJECTIVES

The general objective of this initiative is to help protect cultural goods in the context of the internal market. 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.

The operational objectives of this initiative are to increase the number of returns of objects classified as "national treasures" and to reduce the cost of these returns.

These objectives are in line with the conclusions of the Council of the European Union of 13 and 14 December 2011 recommending that the Commission provide its support to the Member States in order to effectively protect cultural objects with a view to preventing and combating illegal trade and to promoting additional measures, where appropriate.

4. POSSIBLE OPTIONS

The strategic options were developed on the basis of the assumptions set out below:

- the free movement of cultural objects is a fundamental principle recognised by the Treaty (TFEU). This Treaty likewise recognises the Member States' right to restrict this freedom in order to protect cultural objects classified as "national treasures";
- the definition of what is covered by the concept of "national treasure" and the related protection measures thus remains a prerogative of each Member State;

² These Conventions were not ratified by all EU Member States. The UNESCO Convention of 1970 was ratified by 22 Member States and the UNIDROIT Convention of 1995 by 13 Member States.

- only the Member State is entitled to initiate a return procedure irrespective of the nature of ownership of the object (public or private);
- 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.

The report did not analyse the options which do not fall within the competences of the EU or do not comply with the rules of the Treaty (TFEU).

Apart from the **baseline scenario (no change) (option 1)**, the following options were examined³:

Option 2: Promoting the use of common tools between the central authorities

The Commission would propose using an IT tool to improve administrative cooperation and dialogue between the central authorities.

Option 3: Revision of Directive 93/7/EEC

Directive 93/7/EEC, as amended by Directives 96/100/EC and 2001/38/EC, would be revised in order to i) extend its scope to all objects classified as "national treasures" by the Member States; 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.

Option 4: Encourage the ratification and implementation by the Member States of the 1970 UNESCO Convention on cultural property

The Commission would launch an information campaign aimed at raising the awareness of the Member States with a view to ratifying or even implementing the 1970 UNESCO Convention⁴.

5. IMPACT ASSESSMENT

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.

These options have an impact on the safeguarding of national cultural heritage because the existence of efficient return mechanisms is an important condition for such protection.

Options 1, 2 and 3 also have an impact on the smooth functioning of the internal market because they help to reconcile the free movement of cultural objects with the protection of national treasures. 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.

The analysis of the options is more particularly qualitative in nature.

³ Other options, such as: i) ratification by the EU of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention; ii) the definition of an EU strategy aiming for the ratification by all the Member States of the UNIDROIT Convention; iii) replacement of Directive 93/7/EEC by a regulation and iv) the repeal of Directive 93/7/EEC, were rejected in the preliminary stages of examining the various solutions for reasons of feasibility.

⁴ The UNESCO site contains detailed information on the implementation of the 1970 UNESCO Convention by the 22 Member States and the measures taken to combat illegal trade.

<http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/1970-convention/examination-of-national-reports/#c280797>

5.1. Option 1: Baseline scenario (no change)

This option would mean that requests from the central authorities to make the Directive a more effective instrument for returning any object classed as a "national treasure" would not be followed up.

Responses to the public consultation show that 61.02% of private-sector respondents consider that the Directive provides an adequate response to the needs of the Member States as regards the return of national treasures. On the other hand, only 20.83% of public-sector representatives share this opinion.

The Commission does not have any general information on the operational costs associated with enforcing the Directive. The administrative cost of drafting a report on the enforcement of the Directive every three years is estimated to be EUR 55 000, representing an annual cost of around EUR 18 000⁵.

5.2. Option 2: Promoting the use of common tools between the central authorities

In previous evaluations of the Directive, the central authorities noted a progressive improvement but these authorities report that their contacts are poorly structured, in particular owing to the lack of a common consultation system and language barriers.

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. This tool was developed by the Commission and is accessible online. No software needs to be installed. It is a secure, multilingual application which allows the rapid exchange of information between competent authorities. It contains a system of electronic notifications, standard forms in all languages, lists of pre-translated questions and answers, an automatic translation tool incorporated into the system and a mechanism for monitoring the requests submitted.

If the IMI were to be used, an ad hoc module suited to the requirements of the directive would need to be developed.

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.

During the public consultation, one third of the public-sector representatives considered that strengthening administrative cooperation and consultation was the best way to facilitate the return of national treasures. However, 61.02% of the private-sector representatives were of the opinion that the existing situation should not be changed and that enhanced cooperation was not necessary for the return of national treasures.

The costs of developing an ad hoc module, and of using and maintaining the IMI system would be covered by the EU budget. The Commission would also assume responsibility for organising the training sessions necessary for launching the module and for its success in the long term.

The costs relating to IMI operations, including the cost of human resources (IMI users at national level should in principle also be those who are already dealing with this dossier), training for the various users, promotion and technical assistance as well as administration of the system at national level would be the responsibility of the Member State. Using the IMI system, the administrative cost arising from the obligation to draw up a national report every three years on the enforcement of the Directive could be reduced to EUR 27 500; the annual administrative cost would be around EUR 9 000.

⁵

<http://adminburden.sg.cec.eu.int/calculator.aspx>

5.3. Option 3: Revision of Directive 93/7/EEC

The aim of this option would be to revise the current arrangements, while at the same time consolidating Directive 93/7/EEC, as amended by Directives 96/100/EC and 2001/38/EC.

In principle, this option could remedy the main reasons behind the Directive's limited success in achieving the return of national treasures. It would provide a framework for the repeated requests of the central authorities and would be in line with the recommendation of the European Council to the Commission of December 2011 to promote additional measures to effectively protect cultural objects.

It is evident from the public consultation that most public-sector respondents consider that action should be taken to achieve the aim of successfully returning national treasures by means of revising the Directive, as an isolated initiative or by combining revision with other solutions, such as improved administrative cooperation. On the other hand, only 22.03% of the private-sector respondents were in favour of revising the Directive.

5.3.1. Extending the scope of the Directive

Extending the scope of the Directive to all cultural objects classified as "national treasures", without recourse to common categories, financial and/or age thresholds should have a very positive impact on the protection of the heritage of the Member States. Such an amendment would allow the Member States to request the return of any cultural object classified as a "national treasure" which was unlawfully removed from their territory after 1993.

The fear that the elimination of thresholds and/or categories of objects might have an impact on the number of requests for return should by no means be a reason to oppose this amendment, because increasing the number of returns is one of the objectives of this initiative.

Most central authorities agree on the need to extend the scope of the Directive. While the idea of reducing the financial thresholds has received widespread support, that of revising the age threshold, adding categories or deleting the annex met with a less enthusiastic response. During the public consultation⁶, the opinions of the public-sector representatives were as follows: i) 25% were in favour of reducing the financial thresholds, ii) 50% wanted to discontinue the age thresholds and iii) 25% supported the deletion of the annex.

5.3.2. Extending the time-limits for bringing return proceedings and for checking the object

Extending these time-limits would reflect the complexity of cross-border relations, without neglecting the requesting State's obligation to exercise due care and attention. These amendments would allow the requesting State to act under optimum conditions and therefore to have more chance of securing the return of the object concerned.

Such amendments would thus have a positive impact on the number of return proceedings which could be instituted successfully. Furthermore, the existence of more favourable conditions for return proceedings would have a dissuasive effect for the possessor of the object, which could result in an increase in amicably arranged returns.

The vast majority of central authorities and 80% of the public-sector representatives to whom this question was put during the public consultation were in favour of extending the time-limits.

⁶

http://ec.europa.eu/enterprise/policies/single-market-goods/internal-market-for-products/cultural-goods/results_public_consultation_cultural_goods_en.htm

5.3.3. Aligning the compensation arrangements

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.

The existence of common criteria would make it easier for national courts to assess the circumstances. Furthermore, having the burden of proof would encourage market stakeholders to always make the right checks regarding the origin of the object when making a purchase. This would deter trade in objects of questionable origin.

These amendments would have a highly beneficial effect on the number of returns and on the prevention and combating of the illegal trade in cultural goods, in particular in States which suffer most from the effects of illegal trade.

Most central authorities consider it necessary to align the criteria for defining the term due care and attention on the part of the possessor; on the other hand, only a minority would like the Directive to specify that the possessor bears the entire burden of proof of such care and attention. During the public consultation, 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". However, it was not deemed necessary for the Directive to specify who bears the burden of proof of due care and attention.

The costs of implementing this option would essentially be those relating to the transposition of the new Directive into national law.

The administrative cost of drafting a report on enforcement of the Directive would be reduced to EUR 11 000 a year as a result of extending the interval between the drafting of each report to five years.

5.4. **Option 4: Encourage the ratification and implementation by the Member States of the 1970 UNESCO Convention**

The Commission would launch an awareness-raising and information campaign directed at those Member States which have not yet signed and/or incorporated the Convention into their national law.

Implementation of the Convention by all the Member States would add a further recourse mechanism to the system set up by the Directive, guaranteeing: i) a broader definition of the cultural objects which should be returned; ii) more time to request returns, and iii) enhanced cooperation between the national authorities.

This option would have a positive impact on the prevention and combating of illegal trade because the Convention provides for mechanisms to deal with it, in particular the creation of special national services or the obligation for art dealers to keep a register relating to the origin of the objects. However, it is difficult to foresee when such ratifications and/or the adoption of national laws to implement the Convention would take place.

This option would not solve all the problems linked to the return of objects classed as "national treasures" because the Convention allows the Member States to recover cultural objects which have been illegally exported only where such action is compatible with the law of the State in which the object is located. As regards compensating the possessor, the Convention provides that the requesting State pay compensation to anyone who purchased the object in good faith or who is the legal owner thereof. During the public consultation, 16% of

the public-sector participants and 27% of the private-sector participants expressed their support for this option for increasing the number of returns of national treasures.

According to available information, 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 requirement to draft a report on enforcement of the Directive would result in the administrative cost of this option matching that of the baseline scenario.

6. COMPARISON OF THE OPTIONS

The following comparison table summarises the qualitative impact of the various options:

Comparative table of options

	Option 1 Status quo	Option 2 Promote a common tool for the central authorities	Option 3 Revise Directive 93/7/EEC	Option 4 Encourage the MS to ratify and implement the UNESCO Convention
Increase the number of returns	0	+	++	+
Reduce the cost of returning objects.	0	+	++	0
Effectiveness	0	+	++	+
Efficiency	0	+	++	-
Consistency with other EU policies	0	+	++	+

N.B.: Note: very positive (++) ; positive (+) ; neutral (0); negative (-).

- Option 1, which reflects the current legal situation, should be rejected. Indeed, evaluation of Directive 93/7/EEC has shown its limited effectiveness in achieving the return of objects classed as "national treasures".
- Option 2 would effectively increase the number of returns, in particular those on an amicable basis, through improved enforcement of the Directive.

This option also proves to be efficient since most of the costs of the Internal Market Information System would be covered by the EU budget. It would be consistent with the strategy aimed at improving the governance of the internal market by strengthening administrative cooperation and also with the recommendation of the Council of the European Union of 13 and 14 December 2011 that measures be adopted to support action taken by Member States to protect their heritage.

This option would help to reduce the administrative burden by 50%, since it would make it easier to collect the data needed to draft reports on enforcement of the Directive, which would represent an annual reduction of around EUR 9 000, compared with the EUR 18 000 under the baseline scenario.

- Option 3 would seem to be the most effective for increasing the number of returns and reducing their cost.

The Directive would be amended in order to extend its scope to all objects classified as "national treasures", which would consequently remove the requirement to come under one of the categories in the Annex, be part of a public collection or be included in the inventories of ecclesiastical institutions. Furthermore, the requesting Member State could request return under more favourable conditions and pay compensation only to possessors who prove that they acted with the due care and attention required when acquiring the object. This option would then have particularly beneficial effects for Member States whose heritage is hardest hit by illegal trade.

This option would also be fully in line with the recommendations of the Council of the European Union of December 2011, and with the conclusions obtained from evaluations of the Directive.

Moreover, the revision would present an opportunity to simplify EU law in this field by recasting Directive 93/7/EEC, as amended by Directives 96/100/EC and 2001/38/EC.

Choosing this option would in principle incur costs linked to the transposition of the new Directive, making it very efficient in relation to the intended objectives.

Extending to five years the intervals at which reports are drafted on enforcement of the Directive would reduce the administrative cost by around EUR 7 000 a year, i.e. the difference between EUR 18 000 and EUR 11 000.

- Option 4 would effectively increase the number of returns but would have no effect on the cost of returns.

This option would be in line with the recommendation to the Member States by the Council of December 2011, namely to consider ratifying the Convention and cooperating more with UNESCO in the prevention of the illegal trade in cultural goods.

The estimated costs of launching the campaign would appear too high in relation to the uncertainty of achieving the objectives. Indeed, ratification and/or implementation of the Convention by the Member States depends on the goodwill of each of these States. Furthermore, the impact of this option on the reduction of costs, in particular those relating to compensation for the possessor and to the administrative burden, would be neutral.

In view of the comparative analysis above, it is suggested that an approach be followed which combines the two strategic options offering the most positive impact in order to increase the number of returns and reduce the related costs:

- Option 3: revision of Directive 93/7/EEC in order to extend its scope to all objects classed as "national treasures", extend the deadline for verification and the deadline for bringing return proceedings, and align the conditions for compensation of the possessor.
- Option 2: promoting the use of the Internal Market Information System between the central authorities to facilitate administrative cooperation and consultation for implementing the Directive.

This choice would follow on from the Council's call in December 2011 for supplementary measures to be adopted where appropriate, and from the requests of the central authorities. Furthermore, one third of the representatives of the authorities and public bodies expressed their preference for a combined approach during the public consultation.

The combined approach would make it possible to further reduce the administrative cost of drafting the report on the enforcement of the Directive to EUR 5 500 a year, compared with an annual administrative cost of EUR 18 000 under the baseline scenario.

7. MONITORING AND EVALUATION

The preferred approach (combination of options 2 and 3) will be applied by means of a proposal to recast Directive 93/7/EEC, which should be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure.

Organising a system to monitor and evaluate the new Directive would first involve a check, by the Commission, of the conformity of the national transposition measures. This monitoring would be accompanied by an evaluation report on the enforcement of the new Directive after the first five years of application. The Commission would draw up this report on the basis of the five-year implementing reports from the Member States and would submit it to the European Parliament, the Council and the European Economic and Social Committee.

Assessment of the effectiveness of the revised Directive will be measured on the basis of a number of indicators, including the number of return proceedings brought before the national courts, cases of returns ordered by the courts and following an amicable negotiation, or the monitoring of administrative cooperation requests between the central authorities.