

GERMANY

The reform of the law on the protection of cultural property in Germany

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1. Introduction

In the course of this year, an amendment to the cultural property protection legislation will be passed in Germany, the purpose of which, inter alia, is to implement the EU Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.

The cultural protection legislation, which is currently dispersed in three texts, will be harmonised and merged into a single Act. This legislation will make improvements in various areas. According to the preliminary ministerial draft, “the draft legislation includes improved import and export restrictions to better protect national cultural property [*nationales Kulturgut*] against exodus, to regain cultural property unlawfully removed from Germany and to more effectively return cultural property of, and unlawfully removed from, foreign states, to them.” (Unofficial translation from German)

During the summer of 2015, there was an uproar in the German art scene after an unofficial draft version of the planned Act was leaked. Artists, collectors and art dealers sharply criticised both the unofficial draft bill, as well as the responsible German Federal Commissioner for Culture and the Media, Prof. Monika Grütters.

The official draft bill, which had been long awaited and was finally published on 15 September 2015, provides for less severe restrictions than initially expected. Is it then anything to be concerned about?

To answer this question and to illustrate the concerns of the German art dealers regarding the draft bill, this article will compare the current law with the expected changes. In this respect, special attention is paid to the changes in the rules regarding the prevention of the exodus of German cultural property.

2. Prevention of the exodus of German cultural property

a. Current legal situation

Regarding the exodus of cultural property, German law currently differentiates between exports to EU Member States and those to non-EU countries. Whereas, according to Regulation (EG) No 116/2009, exports to non-EU countries require a license from the competent authority, if the cultural goods exceed certain thresholds with regard to their respective age and value (e.g. for paintings: €150,000 and 50 years); such restrictions do not apply regarding exports within



the EU. In contrast to other jurisdictions, according to German law, cultural goods can be circulated and sold freely within the EU, except if they are listed on the so-called Register of Cultural Property of National Significance (*Verzeichnis national wertvollen Kulturgutes*, hereinafter referred to as the Register). Thus far, however, the Register is rather small. The reason for this might be that collectors refrain from complying with requests for registration due to the trade restrictions imposed on the artwork and the corresponding diminution in value as a consequence thereof. Moreover, the German federal states that are authorised to put cultural goods on the Register, were not aware of planned exports of artworks to other EU member states in the past.

If cultural goods are brought into other EU Member States with no requirement for any export license, they can also be sold there - for example, at auction - to collectors from non-EU countries. This again does not require any export license from a German authority. At this point, the export to non-EU countries and its potential licensing are governed by the laws of the state in which the artwork is sold. This other Member State is generally not interested in the preservation of German cultural property and then authorises the export.

Consequently, there remains the possibility of indirect, unauthorised export of German cultural property to non-EU countries.

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b. Changes in the planned amendment

In the past, it was difficult for the German Federal Republic to repurchase cultural goods of national importance – especially valuable ones – and to return them to Germany after they were sold abroad. In order to keep artworks of national significance in Germany, the preliminary ministerial draft includes stricter export restrictions.

Generally, the preliminary ministerial draft preserves the principle of free movement of cultural property. However, this principle is limited by various rules. For instance, cultural goods that are classified as nationally significant may only be exported, whether temporarily or permanently, with an appropriate license.

National cultural property is defined as such cultural property, which is

- a) listed on the Register, or
- b) publicly owned and held by a public institution that preserves cultural property, or
- c) owned and held by an institution that preserves cultural property and is mostly publicly financed, or
- d) part of an art collection owned by the German Federal Republic or by a German federal state (exception: Regarding privately owned cultural property, this only applies if the lender agrees; such an agreement is revocable at any time.).

Furthermore, exports to EU Member States shall only be permitted, if the cultural property either does not exceed a certain age and value (e.g. for paintings: € 300,000 and 70 years) or if the export is authorised by the competent supreme federal state authority. Before allowing any export of works that exceed these limits, the vendor must apply for an export license. The failure to comply with this duty may trigger criminal liability.

The competent authority must make a decision within ten days after receipt of the application. After receiving the request, the authority will review whether the artwork in question is considered “national cultural property”. This presupposes

- a) that the work is of special significance for the cultural heritage of Germany, of its federal states or of one of its historical regions and thereby gives identity to the German culture, and
- b) that its exodus would constitute a substantial loss for the German cultural heritage and, as a result, there is an outstanding cultural and public interest in keeping the work within the Federal Republic.

If these legal preconditions for registration are not fulfilled, the authority has to grant the license. If they are fulfilled, however, the approval of a pluralist expert committee is required before the artwork can be added to the Register. The authority must convene this committee and it is composed of experts from institutions that preserve cultural property, academics, art dealers and private collectors.

The requirement for an export license is highly contested among collectors, artists and dealers alike. This reason for this is that, in contrast to the position under current law, the authorities will become aware of considerably more artwork. They have the opportunity to consider whether the artworks should be considered national cultural property or not. Accordingly, the number of entries on the Register will rise. Owners of cultural goods fear this fact, since the smaller market (only within Germany) will consequently diminish the value of their property. The government was accused of expropriation and, when the draft bill was leaked, German artists like the painter Georg Baselitz announced that they would withdraw their works from the German museums and/or already took them abroad.

In comparison to the unauthorised leak, however, the official preliminary ministerial draft is considerably more moderate. In particular, the following key points apply within the context of the new rules

for the protection against exodus:

- During the lifetime of the artist, the export to another EU Member State of work still owned by the artist does not require any license. Moreover, during the artist’s lifetime, the classification of his or her artworks as cultural property of national significance is only possible, if the artist agrees. Thereby, this does not intrude upon the creative phases of the artists.
- There are no changes regarding the export of cultural property to a non-EU country; insofar the requirements of the Regulation (EC) No 116/2009 on the export of cultural goods still apply.
- For cultural property that was formerly permanently located in Germany, was then located outside Germany for more than five years and should now be returned to Germany, the competent authority can assure that the artwork will not be registered as cultural property of national significance. Such assurance requires that the artwork has been located in Germany for more than five years and is publicly displayed or available for research purposes as a loan.
- Contemporary art is excluded from the requirement for a license. Paintings, for instance, are only affected if they are more than 70 years old and have a value of at least € 300,000; watercolor paintings are affected, if they are more than 70 years old and have a value of at least € 100,000.
- The authority is obligated to grant the license, if the export helps to return cultural property which was taken from its former owner as a result of NS persecution.
- If cultural property is unlawfully exported, this gives rise to a claim for return against the state to which the goods were exported.
- In case the authority’s approval to export an artwork is denied, but the owner is forced to sell the artwork due to economic hardship, the state shall work towards equitable relief for the loss of profit.
- Entries in the Register shall still be possible upon request or by the authorities.
- Entries in the Register grant tax advantages in terms of the German Income Tax Act and the German Inheritance and Gift Tax Act.
- Furthermore, the protection of public collections shall be enhanced by giving them statutory protection. This improves the opportunities for recovery of cultural property, which has been illicitly exported or lost in any other way. Artworks loaned to museums by private collectors can be classified as national property and given statutory protection too, if the lender approves. This approval is revocable at will.

3. Duties of care when putting cultural property into circulation

Illicit trade with cultural property, as well as illegal excavation, shall be combated by a sophisticated system of duties of care for those who put cultural goods into circulation.

First, there shall be a general duty of care for everyone who brings cultural property into circulation. Such a person has to make sure whether the work of art was lost or illicitly imported or excavated. Since the general duty of care shall also apply to private individuals who, on the other hand, shall not be excessively burdened, the general duty of care will only apply in cases in which suspicion of an illegal origin would be obvious to a reasonable person. A violation of the general duty of care renders the contract void. This means that anyone who fails to comply with the duty of care becomes liable for a

potential claim for damages by the other contracting party.

Concerning art dealers, however, stricter rules shall apply: In addition to the general duty of care, *inter alia*, the name and address of both the vendor and buyer must be recorded and shall be accompanied by a description and an image of the artwork, in order to allow the determination of the identity of the cultural property and its provenance. Furthermore, documents which prove the lawful import and export must be scrutinised. All inspections and their results must be recorded and those records must be kept for a period of 30 years. A violation of the duties of care in commercial trade is a non-criminal offence, which is punishable with an administrative fine.

However, the draft bill also contains penal provisions. Criminal liability arises, if

- a) cultural property is exported without a license, even though a license is required, or
- b) illicitly exported cultural property is the subject of a contract, or
- c) cultural property is imported despite an import prohibition, or
- d) cultural property, which was lost in any way, imported or excavated illegally, is put into circulation.

4. Import controls and simplified return procedure

The amendment of the cultural property protection legislation effects new regulations for the import of cultural goods, which shall facilitate the recovery and return of illicitly exported cultural objects to their country of origin. Instead of the previous so-called “list method”, which required an entry in the Register of the contracting states and was therefore ineffective in practice, in the future there will be an import check. At the time of the import, one must submit evidence of the legal export from the country of origin. Illicit exports of cultural property from EU Member States or contracting states will then constitute illegal imports to Germany.

5. Conclusion

To sum up, one can draw the following conclusions:

It is unlikely that the reform of the law will have any negative impact on artists.

The reform will bring certain restrictions for heirs, collectors and dealers. However, these restrictions will presumably not be as draconian as was formerly assumed after the leak of the unofficial draft bill. The planned statutory regulations are also more liberal than those of other EU Member States.

The new rules that restrict the principle of free movement of cultural property – which are explicitly stipulated in the draft bill – must be interpreted restrictively. In addition, the conditions which must be fulfilled seem to indicate that there are high hurdles for the classification of cultural property as one of national significance. The German federal government estimates that 90 to 95 percent of the cultural property that requires an export license is not “culturally significant”.

Nonetheless, these legal concepts are indeterminate and therefore require interpretation. The authorities will decide on this interpretation. Thus, there is a lack of legal certainty. The risk that the competent supreme federal state authorities will prefer an extensive interpretation cannot be ruled out. At the moment, it is impossible to predict the number of cultural goods which will practically lose their merchantability because of the registrations. Only the future administrative practice will lead to clarification. The equitable relief for the diminution in value resulting from registration will not play a major role in practice, due to the requirement for economic hardship. It also remains to be seen whether the export applications can be processed quickly enough to guarantee free-moving trade.

For the international market, the planned reform will probably lead to a decreasing supply of German artworks of a certain age and value.