British Institute of International and Comparative Law

BREXIT

FAQ: Cultural Heritage post-Brexit

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This FAQ discusses:

- The current EU framework for the movement of cultural goods
- The benefits of the current system
- What happens after Brexit
- The potential future arrangements between the UK and the EU

This FAQ is intended to present a very short outline of the main issues relating to cultural heritage post-Brexit, with a particular focus on the movement of cultural goods. It is therefore not comprehensive.

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Q: What is the current status of cultural goods within the single market?

A: In order to reconcile the free movement of goods within the single market with the desire of Member States to exempt certain cultural goods from this principle, the EU adopted an exception to one of the four freedoms for "the protection of national treasures possessing artistic, historic or archaeological value" (Article 36 TFEU). Therefore, quantitative restrictions on exports (Article 35 TFEU) are possible with regard to cultural goods which classify as 'national treasures', as long as they do not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". The EU does not define what constitutes a 'national treasure', except for the requirement that it must hold an "artistic, historic or archaeological value". It has thus been left to each Member State to define what it considers a 'national treasure' for the purpose of the exception to the free movement of goods provided in Article 36 TFEU.

In the UK, a cultural object is generally considered a 'national treasure' if it is over 50 years old, has reached a specific financial threshold, and meets one of the three Waverley criteria (a close connection with British history and national life, an outstanding aesthetic importance, or an outstanding significance for the study of some particular branch of art, learning or history).

Q: What is the current legal framework applicable to the return of cultural goods within the EU?

A: EU Directive 2014/60/EU on the return of certain cultural objects unlawfully removed from the territory of a Member State was adopted on 15 May 2014 to replace Directive 93/7/EEC, which was not deemed sufficiently effective as only few returns were concluded under this instrument. For example, while the UK was involved in a few cases, such as the return of six icons to Greece and the return of two 14th and 15th century manuscripts and a 14th century missal to Italy, they both took place in 2011 through amicable out-of-court settlements.

Several Member States highlighted the financial thresholds applicable to certain national treasures and the one-year time limitation for initiating return proceedings as the key limitations of Directive 93/7/EEC. As a result, some of the key changes include an extension of the scope of the Directive to all cultural objects classified or defined as national treasures under domestic law, an extension to the time-limit to initiate return proceedings (from one year to three years), and the establishment that the burden of proof of due diligence lies with the possessor for the purpose of compensation.

Directive 2014/60/EU was implemented in the UK with the Return of Cultural Objects (Amendment) Regulations 2015, which amended the Return of Cultural Objects Regulations 1994, the law that had implemented Directive 93/7/EEC.

Q: What is the current legal framework applicable to the export of cultural goods from the EU?

A: In order to prevent cultural goods from one Member State from leaving the Union via another Member State, EU Council Regulation 116/2009/EC of 18 December 2008 on the export of cultural goods (Codified version) was adopted to provide uniform controls at the EU's external borders. Commission Implementing Regulation 1081/2012/EU of 9 November 2012 for the purposes of Council Regulation 116/2009/EC on the export of cultural goods details the three types of licences which can be issued (standard licences, and the specific open or general open licences which apply to temporary exports such as for loans/exhibitions), as well as their use and period of validity, and model forms for such licences.

In accordance with EU Council Regulation 116/2009/EC, in order to be exported from the EU, a cultural object, which is listed in Annex I of the Regulation and (for some of those objects) also reaches a certain age and/or financial threshold, requires a specific export licence from the competent authorities of the Member State where the object is located. In the UK, this authority is the Arts Council (England), which has a specific Export Licensing Unit dealing with all export licences, including those falling under the Export of Objects of Cultural Interest (Control) Order 2003. Furthermore, under the EU system, a licence for export outside the EU may also be refused when the object in question is protected as a "national treasure of artistic, historical or archaeological value" by another Member State. This means that any cultural object, which is considered a UK national treasure under domestic law but is situated in another EU State, could have its export licence refused by that third State on the basis of this Regulation.

Q: What is the current legal framework applicable to the import of cultural goods into the EU?

A: Trafficking in cultural goods has been recognised as supporting the financing of armed conflicts and terrorism. Therefore, the EU has also adopted instruments with regard to the import of cultural heritage from areas of conflict, including Regulation 1210/2003/EC on Iraqi cultural property and Regulation 1332/2013/EU on Syrian cultural property, which ban the import, export and trade of these objects, and introduce provisions that shift the burden of proof in both instruments. Furthermore, a new set of rules was proposed by the European Commission in July 2017 in order to expand and strengthen its import system to counter the trafficking in cultural goods more efficiently. In

the UK, the Export Control (Syria Sanctions) (Amendment) Order 2014, which provides for trade sanctions with regard to Syrian cultural objects was adopted as a result of Council Regulation 1332/2013, while the Iraq (United Nations Sanctions) Order 2003, which prohibits the import or export of illegally removed Iraqi cultural objects from the UK, was adopted in application of a UN Security Council Resolution.

Q: What are the advantages of the current system?

A: The current framework aims at combatting the illegal trade in cultural goods, which is an area that requires cooperation between the competent national authorities, as well as information-sharing, in order to be successful. It is not possible for a State to combat cross-border trafficking without international cooperation. For example, in order to request the return of a cultural object unlawfully removed from its territory, an EU Member State must first be aware of the whereabouts of the object in question. With regard to the former Directive on the return of certain cultural objects unlawfully removed from the territory of a Member State (Directive 93/7/EEC), the UK had specifically criticised the insufficient cooperation and exchange of information amongst the respective competent authorities of the Member States. As a result, Directive 2014/60/EU now requires the use of the Internal Market Information System (IMI) for administrative cooperation and exchange of information amongst national authorities.

Q: What happens after Brexit?

A: Once the UK is not an EU Member State, Directive 2014/60/EU will no longer apply to it. While requesting the return of a national treasure from another Member State would still be possible, such a claim would no longer benefit from the facilitated system established by the Directive. The UK would also be excluded from its improved cooperation framework, including the IMI, unless a separate agreement on this issue can be negotiated with the EU. Given that cooperation and information sharing is a key component for the return of unlawfully exported objects, both the UK and the EU have an interest in continuing to cooperate and share information about unlawfully exported cultural objects.

The Export of Objects of Cultural Interest (Control) Order 2003, which provides for export licences from the UK, would continue to apply. However, the export outside the EU of any UK cultural object that falls under EU Council Regulation 116/2009/EC – but is situated in another EU Member State – would no longer be prohibited. In the same way, cultural goods from other EU Member States would no longer be prohibited from being exported from the UK, which may be problematic given that the UK is a major exporter of cultural goods from the EU: according to the EU Commission report dated April 2015 (which covers the period 2011-2013), the UK is cited as one of the main issuers of standard and specific open licences. Again, both the UK and the EU thus have an interest in the UK staying within the EU export licensing scheme established under Regulation 116/2009/EC.

Even if the European Union (Withdrawal) Bill enters into force, the rest of the EU will have to agree on the participation of the UK in EU legal agreements that are based on mutual recognition. While the UK may declare its wish to remain a party to the system of returns within Directive 2014/60/EU, for example, this cannot be done unilaterally.

With regard to the return of cultural objects, the UK is a party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), but not to the more detailed UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995), which strengthened the implementation and enforcement mechanisms of the 1970 UNESCO Convention. As a party to the 1970 UNESCO Convention, the UK must "take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned" (Article 7(a)). At the request of the state party of origin, it must also "take appropriate steps to recover

and return any such cultural property imported after the entry into force of this Convention in both States concerned" (Article 7(b)(ii)). This Convention is not limited to national treasures but, contrary to the new EU Directive, it puts the burden of proof on the requesting state (as opposed to the possessor). In addition, there is no system for information sharing among state parties, which may be another hurdle for the return of cultural objects under this Convention.

In relation to the import of cultural goods from areas of armed conflict, the UK would not depend on EU rules and could adopt its own legislation in order to ban cultural objects originating from states affected by armed conflicts, whether on its own initiative or in upholding a non-EU obligation, such as UN Security Council Resolution 2347, which was adopted on 24 March 2017 and which requires UN Member States to request them "to take appropriate steps to prevent and counter the illicit trade and trafficking" in cultural objects "where States have a reasonable suspicion that the items originate from a context of armed conflict" (para 8).

Q: Is there any precedent for a bespoke agreement on the movement of cultural goods?

A: The situation of the UK outside of the EU may be compared with the situation of Switzerland, which also has a strong art market. Switzerland has signed bilateral agreements with several EU Member States (including Italy, Greece and Cyprus), which prohibit the export of antiquities to Switzerland if national legislation (including rules implementing the EU Directive) is not respected. So far, the UK has not entered into any specific bilateral agreements regarding the movement of cultural goods.

Q: Beyond the movement of cultural goods, how will cultural heritage be affected in the UK post-Brexit?

A: In November 2017, the European Commission cancelled the UK's role as host of the European Capital of Culture. This is only one of the many cultural schemes that the UK will no longer be able to join. With respect to funding in the field of culture, the UK could still benefit from certain specific EU programmes, depending on how particular terms are negotiated in the course of Brexit, and whether the UK can adhere to the EU requirements in order to be granted access to such funds. For example, the Creative Europe Programme, which has a budget of 1.46 billion EUR for the period 2014-2020, has spent 40 million on the UK since 2014. While Creative Europe is open to non-EU states, through an agreement with the European Commission, such third state participation is only possible if the conditions under Article 8 of Regulation 1295/2013/EU are satisfied, which include the provision of funding. A restriction on the free movement of persons may also have an impact on cultural heritage as it could limit the possibility for heritage professionals (who are EU citizens) to work in the UK. These examples show that cultural heritage may be negatively affected in the UK if it is not specifically considered during the Brexit negotiations.

For more information, see: 'Outside the Debate? The Potential Impact of Brexit for Cultural Heritage in the UK', K. Hausler and R. Mackenzie-Gray Scott, in Art Antiquity and Law, Volume XXII, Issue 2, July 2017, pp. 101-117.

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