

# EDITORIAL

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*Dear Reader,*

We are delighted to present you with our new, second English issue of the biannual “Santander Art and Culture Law Review” (SAACLR) (2016, Vol. 2). The publication of this journal, initiated in 2015, is a part of the project entitled *Creating and Managing an Interdisciplinary Legal Journal Dealing with Culture-Related Issues*, which is funded by an individual grant of the Santander Group awarded to the Kazimierz Wielki University in Bydgoszcz within the Programme Santander Universidades. The main objective of this project is to disseminate innovative, interdisciplinary research relating to current problems arising from the intersection of law, culture, and cultural heritage. As of 2016 there are a few important changes. We have a new board of Thematic Editors and the composition of the Editorial Board has been extended. We have also invited many new reviewers, both academics and practitioners – renowned experts in cultural heritage law and policy. The general strategy of the SAACLR however remains unchanged. Accordingly, each odd-numbered issue of our biannual is published in Polish and each even-numbered issue is published in English. The contributions published in the Polish issues include a summary and keywords in English. We also follow the original structure in terms of the specific sections in each issue of SAACLR. You will, therefore, find eight sections: interviews, research articles, commentaries, varia, debuts, cultural heritage law and policy, events and conferences, and book reviews.

The first section of this issue includes an interview with Antonio Escámez Torres, President of the Santander Bank Foundation and Chairman of Santander Consumer Finance, S.A. and of Openbank S.A. The interviewee addresses the role of the so-called “third sector of NGOs” in supporting the development of culture at the national and international levels. In particular, he explains the strategy of the Santander Bank

Collection of contemporary art and current and projected commitments of the Santander Bank Foundation to various cultural, educational, and environmental projects and grants – one of which includes SAACLR as a beneficiary.

As in the case of the former three issues of our journal, this one is dedicated to one main theme. For the present issue we chose *the movement of cultural goods in the European Union (EU)*, with particular focus on Directive 2014/60/EU,<sup>1</sup> which amends the harmonised regime for the return of cultural objects unlawfully displaced through the internal borders of the EU Member States. The articles included in four consecutive sections of this issue (research articles, commentaries, varia, debuts) and in the appendix annexed to it explore this topic from different perspectives (national, international, institutional, practical etc.). This collection is the fruit of cooperation between the SAACLR and the consortium of HEURIGHT, an international research project focusing on “The Right to Cultural Heritage Its Protection and Enforcement through Cooperation in the European Union,” which is co-financed by the European Commission within the programme ERA-Net Heritage Plus programme.<sup>2</sup> The majority of contributions were presented and debated during a conference held in Warsaw (Poland) on 21-22 March 2016 at the Institute of Art of the Polish Academy Sciences,<sup>3</sup> while some were received in response to an open call for papers circulated earlier in the year.

Since Directive 2014/60/EU had to be transposed by Member States into their internal legal systems by 18 December 2015, the leading theme of this issue is particularly timely and important for the entire system of protecting cultural heritage from illicit transfers within Europe. In this regard, some preliminary data needs to be presented to set up the context surrounding the topic of this issue.

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<sup>1</sup> Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast), OJ L 159, 28.05.2014, p. 1.

<sup>2</sup> This project (No. 030/DSAP-PF/HERITAGEPLUS/2015) is jointly managed by an international consortium, comprising three research teams based in Poland, the United Kingdom, and Italy: the University of Fine Arts in Poznań (Project Leader), Institute of Law Studies and Institute of Arts of the Polish Academy of Sciences in Warsaw, the British Institute of International and Comparative Law in London, and the University of Trieste. The project investigates how human rights guarantees in relation to cultural heritage are understood and implemented in the European Union (EU) and in its neighbouring countries. Acknowledging the changing and often contested nature of the right to cultural heritage (or more precisely the right to access or enjoyment of cultural heritage), the project endeavours to map out how this right’s evolving content affects the forms of protection, access to, and governance of cultural heritage, within the institutional, operational and legal structures of the EU. In particular, the project deals with the complex organisational and regulatory frameworks concerned with cultural heritage and human rights in place in the EU Member States, as well as their interaction, cross-fertilization, and possible overlaps. For more, see <http://heuright.eu> [accessed: 10.12.2016].

<sup>3</sup> This event gathered together more than 80 participants from nine EU Member States, Switzerland, the USA, and Serbia, as representatives of EU institutions, the Council of Europe, national public institutions, non-governmental organizations, students, scholars and museum practitioners. See <http://heuright.eu/news/the-return-of-cultural-objects-within-the-european-union-implementing-the-directive-201460eu-21-22-march-2016-institute-of-art-of-the-polish-academy-of-sciences-in-wars> [accessed: 12.12.2016].

## Cultural goods and the market

The commodification of art and culture is as ancient as art itself and is expanding in today's age of global institutions. The economic value of "cultural property" is immediately apparent in its literal expression, which brings together two concepts – "culture" and "property" – that have long been considered in conflict and irreconcilable.<sup>4</sup> The notion of "cultural property", much more than the twin notion of "cultural heritage", has the virtue of underlining the natural subjection of cultural objects to property law regimes, in other words, to some degree of alienability. This opens the gates to a market for cultural property. Yet, it is a market afflicted by specific problems.

First, the dual nature of cultural objects must be taken into consideration. Indeed, the notion includes objects capable of conveying a cultural message that may be directed to individuals, states and communities at the same time. Seen in this perspective, cultural objects – even, for instance, privately owned tangible objects – cannot be regarded as subject (only) to a regime of classic individual, absolute and exclusive ownership in the Blackstonian meaning.<sup>5</sup> On the contrary, their cultural, collective dimension gives even tangible objects some inherent attributes of an immaterial, intangible character, which supports including them under the regime of "public property" or even, from the perspective of the "commons", as a *tertium genus* in between "public" and "private".<sup>6</sup>

Secondly, this dual nature of cultural objects explains why, when determining its economic value, one must consider that it is comprised of the sum of various dimensions. It includes, at the very least, the intrinsic value of a cultural object (the materials from which it is made: gold, silver, stone etc.) and its attributed value (deriving from, *inter alia*, the rarity of the object, its aesthetic qualities, and its historical or archaeological relevance), as well as its value as a part of the larger cultural property industry (e.g. as a tourism and employment resource). This demonstrates that the market value of cultural property may fluctuate depending on the social setting in which it circulates and even on the perspective from which it is considered.<sup>7</sup>

<sup>4</sup> N. Mezey, *The Paradoxes of Cultural Property*, "Columbia Law Review" 2007, Vol. 107, pp. 2004-2046.

<sup>5</sup> A. Gambaro, *Community, State, Individuals and the Ownership of Cultural Objects*, in: J. Sánchez Cordero (ed.), *La convención de la UNESCO de 1970. Sus nuevos desafíos/The 1970 UNESCO Convention. New Challenges*, Universidad Nacional Autónoma de México, Mexico City 2013, pp. 135, 149.

<sup>6</sup> This dual dimension of cultural property is also reflected in the language of the 1954 Hague Convention (Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240), according to which "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world" (preamble). For more on the dual nature of cultural objects see, e.g., F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, "European Journal of International Law" 2012, Vol. 23, pp. 719, 722. On cultural property as a commons, following the theories by Hardin 1968 and Ostrom 1990, see P.A. Gonzales, *From a Given to a Construct: Heritage as a Commons*, "Cultural Studies" 2013, Vol. 27, pp. 359-390; and L.V. Prott, *International Standards for Cultural Heritage*, in: *World Culture Report*, UNESCO, Paris 1998, pp. 222-236.

<sup>7</sup> D. Throsby, *The Economics of Cultural Policy*, Cambridge University Press, Cambridge 2010.

Thirdly, it is manifestly visible that the art market has gone global. Globalization emphasizes the clash between the opposing understandings traditionally associated with cultural property. This clash can also impact the economic value of cultural objects and the functioning of its market, but certainly cannot be limited to a pricing problem. On the contrary, it has a much larger dimension. To describe the driving forces of the global art market one may recall the well-known perspective of Merryman, according to which there is, on one hand, the search for a universal cultural heritage to protect, so as to assure an international distribution and circulation of art. This has been called “cultural internationalism” and is usually the view of “market nations”. On the other hand, there is the need to protect the diverse national patrimonies that are perceived by the various national communities as a fundamental part of their identity. This perception has been called “cultural nationalism” and it is allegedly the approach typically adopted by “source nations”, i.e. countries which are rich in cultural objects but often poor in economic resources, and which are usually prone to retain cultural property and oppose its marketability.<sup>8</sup>

At the same time in the age of global institutions, the accuracy of this dual perspective in describing the ideologies governing the global art market is being called into question. It is suggested that this black-and-white view is being replaced by the more sophisticated, nuanced, and pluralistic idea of “cultural expressions”,<sup>9</sup> grounded on different core-values, above all the preservation of and access to cultural heritage and objects.<sup>10</sup> It is in the light of these transversal concepts that the large plurality of conflicting interests and values governing this market should be aggregated. For instance, besides the interests of “market” versus “source” nations, there is the concept of the identity of a people, which is not necessarily coincident with the idea of national identity. Indeed, a community might be cohesively integrated by linguistic or ethnic elements which are not, or not entirely, represented by the state (suffice it to think of the various indigenous groups living in the US and in Latin America, or the Saami people of Lapland, spread over the boundaries of Norway, Sweden and Finland).<sup>11</sup> Moreover, there is the connection of cultural objects with landscape and the environment (as testified to by the 2012 UNESCO Florence Declaration on Landscape).<sup>12</sup> Then there are the interests of professional groups. In the global art market, museums, art dealers, and private collectors have

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<sup>8</sup> J.H. Merryman, *Two Ways of Thinking About Cultural Property*, “American Journal of International Law” 1986, Vol. 80, pp. 831-853; idem, *Cultural Property Internationalism*, “International Journal of Cultural Property” 2005, Vol. 12, pp. 11-39.

<sup>9</sup> F. Francioni, op. cit., p. 721; M. Bussani, *The (Legal) Culture of Cultural Property*, in: J. Sánchez Cordero (ed.), op. cit., pp. 401-410.

<sup>10</sup> R.W. Mastalir, *A Proposal for Protecting the “Cultural” and the “Property” Aspects of Cultural Property Under International Law*, “Fordham International Law Journal” 1992, Vol. 16, pp. 1033, 1091.

<sup>11</sup> S. Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, “European Journal of International Law” 2011, Vol. 22, pp. 121-140.

<sup>12</sup> Available at: [whc.unesco.org/document/119922](http://whc.unesco.org/document/119922) [accessed: 21.12.2016].

their own set of values to defend, which can conflict with what the state-related positive law rules require of them. Furthermore, socio-economic constraints of a different nature can also impact upon this market: in poor countries people are often compelled to give up their cultural rights in the hope of finding some windfall, and this may also happen in fast-growing economies such as China.<sup>13</sup> As the example of China demonstrates, many states are at the same time source and market countries, and Merryman's theory seems inadequate to embrace this phenomenon.

From a policy perspective, one of the crucial problems of the global art market is how to draw the boundary between state (or another similar form of) regulation limiting the free tradability of cultural movables, and the enhancement, preservation of, and public access to culture and, more generally, cultural protection and the preservation of cultural diversity. With reference to the problem of finding the proper regulatory framework for the global art market, scholars have observed that while “[c]ultural [property] regulation usually aims at removing objects from the commercial sphere, reserving them for the purpose of contemplation, reflection and enjoyment”,<sup>14</sup> at the same time “any attempt to ‘protect’ cultural heritage by its elevation to a legal position above that of commodity, so as to eliminate the market, only results in that market going underground.”<sup>15</sup> The point seems to be that illicit trafficking in cultural property constantly increases (it is counted among the main criminal activities worldwide, on the same level as illicit weapons’ and drugs’ trade)<sup>16</sup> under both free alienability regimes and inalienability regimes. The acknowledgment of this simple fact calls for a deeper reflection on finding alternative and/or supplementary methods of regulation, different from strictly state-related national and international legislation, as well as effective ways of enforcement of cultural property law, whatever form it may take.

In this context, this issue of SAACLR is a contribution to the understanding of how a specific layer of the global regulation of the art market, i.e. EU law, is dealing with this regulatory problem.

## The multilevel structure of the rules governing international art trade

It must be highlighted that the globalization of the art market inherently leads to a market impacted by a plurality of rules of different origin, acting at different levels.

<sup>13</sup> Z. Huo, *A Protracted War: the Fight against Illicit Traffic of Cultural Property in China*, in: J. Sánchez Cordero (ed.), *op. cit.*, pp. 151-174.

<sup>14</sup> M. Hutter, *Economic Perspectives on Cultural Heritage: An Introduction*, in: M. Hutter, I. Rizzo (eds.), *Economic Perspectives on Cultural Heritage*, McMillan, London 1997, pp. 3-10.

<sup>15</sup> C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London – New York 2010, p. 6.

<sup>16</sup> See <https://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Trafficking-in-illicit-goods-and-counterfeiting> [accessed: 21.12.2016].

Thus, like the EU other regional organizations (the Latin American Integration Association with the Montevideo Treaty of 1980<sup>17</sup> (Article 50), or the NAFTA Agreement between the USA, Canada and Mexico (Article 2101)<sup>18</sup>) also have to take into account the existence of this plurality of regimes. Therefore, one cannot analyse the EU rules as standing alone *per se*, but must put them in the broader context, in which a cross-fertilization between different sets of rules is continuously taking place.

Among these various sets of rules,<sup>19</sup> those that most impact the EU legal regime – as the essays gathered in this issue show – are comprised of the international law layer. This layer has contributed to the global spread of a fundamental principle, according to which illicitly exported cultural property must be returned to its state of origin. This principle was codified initially by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: 1970 UNESCO Convention),<sup>20</sup> and later reaffirmed by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: 1995 UNIDROIT Convention).<sup>21</sup>

These two international law instruments complement each other and form almost a single regime addressing the trade in illicit cultural property at the international level, although they adopt different means for doing so. The chief goal of the UNESCO 1970 Convention was to ensure compliance with national protective regimes for cultural property between state-nations in their bi-lateral relationships (public international law), regulating a state action/procedure to claim the return of a cultural object.

The key objective of the 1995 UNIDROIT Convention (uniform substantive law) was to restrict the applicability of the private law rule that, “as far as movable property is concerned, *possession vaut titre*” (Article 2276 of the French Civil Code, ex Article 2279).<sup>22</sup> This approach is based on the assumption that such a rule makes it more difficult for states to protect their cultural movables, and impedes the efficiency of return mechanisms. As is well-known, the rule “*possession vaut titre*” is ac-

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<sup>17</sup> Instrument Establishing the Latin American Integration Association (ALADI), 12 August 1980, 1329 UNTS 255.

<sup>18</sup> North American Free Trade Agreement, 8, 11, 14 and 17 December 1992, 32 ILM 605.

<sup>19</sup> The WTO – GATT system, with its “cultural exception” in Article XX (f), must also be included in the supra-national layers of regulation (General Agreement on Tariffs and Trade, 15 April 1994, 1867 UNTS 187; Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3). For instance, see S. Cahn, D. Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or is Affected by the Agreement on TRIPS?*, “Cardozo Arts & Entertainment Law Journal” 1997, Vol. 15, pp. 281-314; M. Burri *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, “Diversity” 2010, Vol. 2, pp. 1059-1084.

<sup>20</sup> 14 November 1970, 823 UNTS 231.

<sup>21</sup> 24 June 1995, 34 ILM 1322.

<sup>22</sup> Code civil français [French Civil Code] (consolidated version), <https://www.legifrance.gouv.fr/af-fichCode.do?cidTexte=LEGITEXT000006070721> [accessed: 28.12.2016].

knowledge in most civil law countries worldwide, though with various nuances.<sup>23</sup> For example, some states, such as Italy, protect an acquisition made in good faith from a person who is not the owner, even in the case of stolen or involuntarily lost goods (Article 1153 of the Italian Civil Code). Other countries, such as France (Article 2276, ex 2279 of the French Civil Code) and Germany (para. 935 BGB), protect an acquisition made in good faith only if the goods are not stolen or involuntarily lost. The approach of common law jurisdictions is different. The true owner (in principle) prevails over all other purchasers, including those who do so in good faith (that is without notice of the illegal provenance of the goods).

At the international level, these differences have created inconsistencies which have been exploited by those engaged in practices such as “artwork laundering”, a practice which occurs when a piece of art is stolen in a country where the rule of good faith acquisition does not apply to stolen goods, and is then subsequently brought into a country, such as Italy, in order to “clean” the title by way of the principle upholding good faith acquisition of stolen movables (Article 1153 of the Italian Civil Code, mentioned above).<sup>24</sup>

In light of the above, the 1995 UNIDROIT Convention seeks to reach its objectives by setting up return mechanisms for stolen and illegally exported cultural objects, at the same time impacting on national substantive laws concerning the good faith acquisition of cultural goods. The provisions and application of the 1995 UNIDROIT Convention are illustrated and explained in detail by various essays in this issue. The contributions gathered here also show that, despite the difficulties surrounding the implementation of the international instruments,<sup>25</sup> the 1995 UNIDROIT Convention has been an engine for the successful transplant of efficient regulatory models in the EU. Indeed, it directly influenced – and/or cross-fertilized – the texts of some important pieces of EU legislation, in particular Directive 2014/60/EU.

<sup>23</sup> This rule derives from the development of Germanic customary law applied in the French territories during the *Ancien Régime* and was first codified by the French Civil Code in Article 2279 (now 2276 following the 2008 reform of prescription). From this starting point it has been adopted by most civil law countries in Europe and around the world, for instance in Germany (para. 932 of the German Civil Code (BGB) (consolidated version, available at [https://www.gesetze-im-internet.de/englisch\\_bgb](https://www.gesetze-im-internet.de/englisch_bgb) [accessed: 17.12.2016]) and Italy (Article 1153 of the Italian Civil Code (consolidated version, available at [http://www.normattiva.it/static/codici\\_civile.html](http://www.normattiva.it/static/codici_civile.html) [accessed: 16.12.2016]), although with some variations in its scope from one country to the other. See K. Siehr, *The Protection of Cultural Heritage and International Commerce*, “International Journal of Cultural Property” 1997, Vol. 6, p. 304.

<sup>24</sup> In the famous case of *Winkworth v. Christie Manson & Woods Ltd* [1980] Ch. 496, [1980] 1 All E.R. 1121, cultural goods stolen in England had been brought to Italy and acquired under Article 1153 of the Italian Civil Code by an art collector (who was unaware of the fact that they were stolen goods). They were then moved back to England and sold on auction. The original owner claimed ownership, but the court refused the claim, stating that there had been a good faith acquisition by the art collector according to the law of the country where the acquisition took place (Italy).

<sup>25</sup> The UNESCO Convention has been ratified by 131 states, including many market states, whereas the UNIDROIT Convention has only been ratified by 37 states (mostly source nations already equipped with advanced protective regimes). This somewhat slow development is partially due to the (wise) choice on the part of many states to adopt adequate internal legislation before ratifying the Convention(s).

## The EU rules on the art market

Under EU law, the free movement of goods principle is one of the fundamental pillars of the internal “common” market (Articles 26, 34 and 35 of the Treaty on the Functioning of the European Union (TFEU)<sup>26</sup>). The traditional core of EU policy on the free movement of goods – including cultural objects – is embedded in several articles of the TFEU. In particular, although Articles 34 and 35 prohibit quantitative restrictions on the import and export of goods between Member States, including measures having an equivalent effect, Article 36 exempts “national treasures possessing artistic, historic or archaeological value”.

According to Article 36 TFEU, import/export restrictions on the free tradability of “national treasures” are permissible, although they cannot constitute a means of “arbitrary discrimination” or a “disguised restriction” on trade between Member States.

In order to understand the meaning of Article 36 and its application in practice, it must be stressed that, firstly, there is no general EU definition of what constitutes a “national treasure possessing artistic, historic or archaeological value”. Therefore Member States are free to select the objects they wish to include. Second, under the EU system, it is up to the Court of Justice of the EU (CJEU) to determine what measures are permitted under Article 36 and which are not. To date, there are no precedents in the CJEU’s jurisprudence on the meaning of the terms “arbitrary discrimination” or “disguised restriction on trade between Member States” contained in the wording of Article 36.

It must also be borne in mind that, despite the lack of a general EU competence to legislate substantive cultural property law (Article 345 TFEU),<sup>27</sup> the EU system has nevertheless already produced important pieces of “harmonizing legislation” in the form of – basically – a Regulation and a Directive. This was possible because EU “secondary legislation” addresses only specific issues of cultural property that are related to the functioning of the internal market.

In briefly sketching the content of EU secondary legislation concerning cultural property, we may observe that Regulation No. 3911/1992<sup>28</sup> (elaborated in the absence of an internal market and now substituted by Regulation No. 116/2009 on the export of cultural goods)<sup>29</sup> establishes a common export policy for cultural goods exported outside EU borders subjecting them to an export license. It must be stressed that the definition of “cultural goods” in the Regulation (set out in

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<sup>26</sup> Consolidated version, OJ C 326, 26.10.2012, p. 47.

<sup>27</sup> “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”.

<sup>28</sup> Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1.

<sup>29</sup> Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1.

an Annex to the Regulation which refers to chronological and economic value criteria) is not identical to the definition of “national treasures” referred to in Article 36 of the TFEU. Therefore, there may be cultural objects that do not fall under the scope of the Regulation, but do fall within national categories of cultural objects, i.e. “national treasures” to which national export controls apply.

Shortly after the adoption of the 1992 Regulation, Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State<sup>30</sup> was issued, modified by Directive 2001/38/EC (today recast by Directive 2014/60/EU adopted on 15 May 2014).<sup>31</sup>

The 1993 Directive was enacted within the Internal Market policy and entered into force with the abolition of internal frontiers on 1 January 1993. It was intended to form a complementary regime to that of the 1992 Regulation, which is now Regulation No. 116/2009. The Directive’s purpose was to balance the principle of free movements of goods set out in Article 34 TFEU with the principle of protection of national treasures set out in Art. 36 TFEU. In order to do so, it set up mechanisms to secure the return to the Member States’ territory of cultural objects that had been removed from their domain in breach of national or EU law (cf. Article 2). Basically it contained a system of extraterritorial enforcement of national protection measures between Member States, but did not change national laws on movable property, in accordance with the prohibition contained in Article 345 of the TFEU, as mentioned above.

As the essays in this issue show, the Directive provided for a definition of “cultural objects” (Article 1) that partially overlapped with that set forth in the Regulation, but was broader. According to the Directive (Article 1), cultural objects are (i) objects classified among the ‘national treasures’ under national legislation, and (ii) belonging to one of the categories listed in the Annex to the Directive (which also referred to chronological and economic value criteria and constituted a similar, but not identical, list as that of the Regulation).

The 1993 Directive regulated the conditions under which a Member State (but not an individual) could bring an action for the return of cultural objects unlawfully removed from its territory on or after the 1<sup>st</sup> of January 1993, against its possessor or holder (Article 5). Due to its short limitation period (one year after the requesting Member State became aware of the location of the object and of the identity of its possessor/holder), its lack of retroactivity and other drawbacks (related, e.g., to the different definitions of cultural goods in the Directive and the Regulation), the Directive was not widely applied and case law on Article 5 was extremely scarce

<sup>30</sup> 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, 27.03.1993, p. 74.

<sup>31</sup> Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 amending Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 187, 10.07.2001, p. 43.

(from 1993 to 2013 only 15 claims were filed under the Directive, of which only seven were successful).

It was with the precise aim of improving the functioning of the 1993 Directive that the EU Institutions proceeded with its recasting through Directive 2014/60/EU. The underlying reasons for this new 2014 Directive, as well as its drafting process, together with its content and the way in which it has been implemented into EU Member States' national law, constitute the specific focus and subject matter of this issue.

This issue thus dives straight into the *raison d'être* of the new Directive 2014/60/EU, replacing Council Directive 93/7/EEC, in the introductory article by Maciej Górka, Head of Unit at the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, European Commission. In his paper he discusses the key shortcomings of the previous Directive, including its scope, and the various steps taken towards the adoption of the new Directive. He also introduces the use of the Internal Market Information System (IMI), which was established by the new Directive to strengthen administrative cooperation and information-sharing among national authorities.

Górka's paper is followed by a series of articles presenting the implementation of Directive 2014/60/EU in selected Member States, each highlighting the specific national challenges faced in the process. In presenting the French situation, Sophie Vigneron considers the concept of "national treasure", which is key to this legislation, by highlighting the interesting case of a ring that allegedly belonged to Joan of Arc and was sold in England to a Frenchman. Next Irini A. Stamatoudi details the amendments made in Greek law as a result of the Directive and explains why Greece is a typical example of a country that has been very protective with respect to its cultural heritage. The Italian context, described by Manlio Frigo, focuses on the legislative decree which implements the new EU Directive and considers the consistency of the Italian legislation applicable to cultural objects in relation not only to EU law, but to international law in general as well. Next, Robert Peters examines the implementation of the EU Directive in Germany from the perspective of the wider impact of EU law on the development of national cultural property law. His article also analyses the different notions of "national treasures" and "national patrimony", as well as the need for the creation of a general EU import regulation for cultural property. His article also analyses the different notions of "national treasures" and "national patrimony", as well as the possible lack of a general EU restriction on the import of cultural property. Marja van Heese, in her paper presenting the situation in the Netherlands, affirms the consistency of Dutch law with EU legislation and examines some of the key return cases, while also underlining the importance of raising awareness with respect to the due diligence and provenance research required as part of combating the illicit trafficking in cultural objects. Bernard Łukańko describes how the interest of Austria in combating illegal imports of cultural objects has grown, and takes a positive view of the new longer periods

put in place for pursuing restitution claims. The last national context presented in this issue concerns Poland, with Piotr Stec offering a critical view of the freedom Member States have been given with regard to their definition of the concept of “national treasure”, which at present is interpreted in Poland in both an expansive and a restrictive manner, resulting in uncertainty in practice.

While the situation in the United Kingdom (UK) is not reviewed in this series of articles on the national implementation of Directive 2014/60/EU, it is worth mentioning a few words about its specific context in light of the vote on the referendum on the UK’s “Brexit” from the EU, which took place on 24 June 2016 and resulted in 51.9% of voters choosing to leave the EU. Article 50 of the TFEU, which needs to be triggered in order for the exit process to be initiated, has not yet been activated by the UK. If it were to do so, the implementation of this Directive, which was transposed in the UK with the Return of Cultural Objects Regulations 2015 (Amendment), would be called into question. The UK had only been involved in a few cases under Council Directive 93/7/EEC, which was implemented in the UK with the Return of Cultural Objects Regulations 1994. These included, for example, cases which resulted in the return of six icons to Greece and the return of two 14<sup>th</sup> and 15<sup>th</sup> century manuscripts and a 14<sup>th</sup> century missal to Italy, both of which took place in 2011 through amicable out-of-court settlements.<sup>32</sup> While the 1993 Directive was the object of various criticisms, the UK had noted in particular that it did not generate sufficient cooperation and information-sharing with the authorities of other Member States.<sup>33</sup> Although the new Directive may not lead to more return processes or strengthen cooperation, if the UK it is no longer part of the EU it would not be able to benefit from the system and facilities put in place under it as this Directive applies strictly with regard to EU Member States. That is, of course, unless the UK manages to negotiate a separate agreement with the EU on the matter covered under this Directive.

The series of articles presenting the implementation of the new EU Directive at the national level is followed by papers which consider the impact of international treaties, in particular the 1995 UNIDROIT Convention and the 1970 UNESCO Convention, on this body of EU law. Marina Schneider (UNIDROIT, Rome) first presents the 1995 UNIDROIT Convention as an indispensable complement to the 1970 UNESCO Convention, as well as the basis for the further development of EU law in this area. Wojciech W. Kowalski then follows by discussing Poland’s expected ratification of the 1995 UNIDROIT Convention in light of Directive 2014/60, raising doubts as to the future execution of the international treaty. A transcription of the keynote address delivered by James A.R. Nafziger at the 2016 HEURIGHT Warsaw Conference on the implementation of Directive 2014/60/EU offers a wider view

<sup>32</sup> See Fourth Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, Bruxelles, 30 May 2013, COM (2013) final, Annex.

<sup>33</sup> *Ibidem*, p. 7.

on the trade and return of cultural objects under international law in general. His presentation, delivered from an “outsider’s” point of view i.e. American, focused on analysis of the international influence on the movement of cultural goods within the EU, and on EU law, by considering GATT (1994).

The next article looks at the possible impact of Directive 2014/60/EU on the European art market. Geo Magri, after analysing the latest reports of the TEFAF, the European Fine Art Fair, poses the question whether the new EU law might not become an economic burden or prejudice the art market. The issue then follows with pieces by two younger researchers. Richard Mackenzie-Gray Scott first considers whether the EU’s approach to trade restrictions concerning cultural property could serve as a model for the protection of cultural property in other regions, focusing in particular on the legal frameworks of the Organization of American States and of the African Union. In turn, Paul Fabel addresses the question of the increased due diligence obligations placed on individuals and businesses dealing with cultural property, as enshrined in the new German Cultural Property Protection Act.

The next section of our issue is devoted to cultural heritage law in Poland. In this section, Olgierd Jakubowski offers an analysis of criminal threats to cultural heritage. He examines the various types of crimes committed against cultural objects, including theft or destruction, and presents some examples in the Polish context based on analysis of statistics from both the Polish police forces and its borders and customs services.

This is followed by a section containing reports of conferences devoted to the topic of cultural heritage which took place around the globe over the past year, including the Seventh Annual Conference of the Lawyers’ Committee for Cultural Heritage Preservation (New York City, 25 March 2016), the Third Biennial Conference of the Association of Critical Heritage Studies (Montreal, 2-8 June 2016), and the Second All Art and Cultural Heritage Law Conference (Geneva, 24-25 June 2016). This section also contains a short piece summarising a conference organised by the Ministry of Foreign Affairs of Poland in 2014, wherein the ratification of the 1995 UNIDROIT Convention was discussed, followed by announcements regarding the call for papers for the next issue of the SAACLR concerning the safeguarding of intangible cultural heritage, as well as the forthcoming conference of the project HEURIGHT to be held in Warsaw on 20-21 April 2017.

Last but not least, this issue also contains book reviews and the first extensive study on the use of the IMI for the purpose of the return of unlawfully exported cultural goods, with particular focus on the Polish example.

We hope that you will enjoy this new issue of the “Santander Art and Culture Law Review”. We encourage you to contact us (at: [saacldr@ukw.edu.pl](mailto:saacldr@ukw.edu.pl)) if you wish to reply to the call for papers, or just to express your opinion regarding the content of our volumes.

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