



EUROPEAN COMMISSION

Brussels, 14.1.2014

C(2013) 9 final

*Mr Pietro Grasso
Presidente
Senato della Repubblica
Palazzo Madama
IT-00100 ROMA*

Dear President,

The Commission would like to thank the Senato della Repubblica for its Opinion on the proposal for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (Recast) {COM (2013) 311 final}¹ and apologises for the delay in replying.

The Commission welcomes the Italian authorities' particularly active role taken during the preparation of the above mentioned proposal, especially for their commitment to make the new Directive more effective for the return of cultural objects unlawfully removed from a Member State and found in the territory of another Member State.

In particular, the Commission would like to stress that the proposal responds to strong calls from a majority of Member States to enhance the effectiveness of the current Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State². This proposal, which is currently under discussion in the European Parliament and the Council, is the result of a thorough analysis of the national contributions and conclusions of a working-group of national authorities, and takes into account reports on Directive 93/7/EEC and the outcome of public consultations.

The Commission is pleased to note that in the opinion of the Senato della Repubblica, the proposal respects the principles of subsidiarity and proportionality and that the Senato della Repubblica expresses a support to the amendments of the proposal.

The Opinion raises some concerns on two specific aspects and finds that the appropriation of archaeological discoveries through clandestine excavation should be considered as theft perpetrated against the State, where the domestic legislation in the country of origin so provides. It also calls for the establishment of the action for restitution as a special action, in

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0311:FIN:EN:PDF>

² 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.

which the court of the requested Member State is limited to verifying the nature of the cultural object, as well as the illegal removal from the requesting Member State.

Regarding the request related to archaeological finds from clandestine excavations, the Commission recognises the gravity of this phenomenon and the consequences in terms of loss of cultural heritage for many Member States.

The Opinion calls for introducing in the proposal a specific rule inspired by the UNIDROIT Convention of 1995³, which establishes in Article 3(2), that a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

The Commission is aware that many Member States have vested the ownership of cultural heritage of undiscovered objects in unknown archaeological sites in the State itself. In this case, the court of the requested Member State is more likely to consider the unlawful removal as theft. However, to consider the removal as theft requires a prior property acquired in conformity with the legislation of the requesting Member State. That said, for the purpose of Directive 93/7/EEC and the Commission's proposal, the unlawful removal of the cultural object from the territory is a condition for initiating return proceedings independent of whether or not the removal was preceded by a theft.

Furthermore, in this context, the Commission would like to point out that the Union could act only within the limits of the competences conferred upon it in the Treaties to attain the objectives set out therein. In particular, the Treaty on the functioning of the European Union shall in no way prejudice the rules in Member States governing the system of property ownership (Article 345). Moreover, at this stage, the Treaty does not allow the adoption of Union rules regarding criminal offences and sanctions related to the illicit trafficking in cultural objects (Article 83(1)). Therefore, such competencies related to the property or to criminal matters in illicit trafficking of cultural objects remain with the Member States.

It could also be questioned whether the inclusion of such a rule in the proposal for a Directive on the return of cultural objects would be in conformity with the principle of subsidiarity enshrined in Article 5 of the Treaty on the European Union.

With regard to the establishing of the return proceedings as a special action, which limits the power of the court to verify that the object is a cultural object and of its illegal removal, it should be noted that Directive 93/7/EEC introduces return proceedings, but Member States retain the competence to decide which are the competent courts to deal with, in particular to order the return of a cultural object where it is found to be one covered by the Directive and that it was removed unlawfully from national territory. The requesting Member State bears the burden of proof of the two conditions.

In the Commission's view, Article 1(2) of the Directive 93/7/EEC defines the meaning of the term "unlawfully removed from the territory of a Member State" and thus provides for the framework within which the court of the requested Member State may verify whether the removal was illegal.

The Commission would like to emphasize that, in areas which do not fall within the exclusive competence of the Union, as is the case here, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. Therefore, the decision related to the type of return proceedings should be governed by national law.

³ <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>

The Commission hopes that these clarifications address the concerns raised by the Senato della Repubblica and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*