State immunity and cultural objects on loan
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Chapter 6  Situation in the European Union

“The mobility of museum collections is a decisive factor in the dissemination of knowledge, experience, mutual inspiration and cooperation in the cultural sector.”

6.1  The genesis of mobility of collections

The cooperation within the European Union in the field of culture is based on Article 167 of the Treaty on the functioning of the European Union, previously Article 151 of the Treaty establishing the European Community. Article 167 states that the “Union shall contribute to the flowering of the cultures of the Member States” and that action by the Union “shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action” in the area of non-commercial cultural exchanges.

The notion of the mobility of collections, of which immunity from seizure is considered an element, is a key issue within the European Union since 2003. The Netherlands has been one of the driving forces in putting the issue on the agenda. This mobility (exchange of cultural and historical objects from museum’s collections in the European Union) should enable the public everywhere in Europe to enjoy the common cultural heritage.

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1 In this chapter, I address the European Union as institution. Different EU Member States shall be addressed infra, Ch. 7, 8 and 9.
2 Tanja Saarela, Finnish Minister of Culture, during the European Conference Encouraging the mobility of collections, Helsinki, 20 and 21 July 2006.
3 See supra, Ch. 1.8, for the relevant paragraphs 1 and 2 of Article 167. Paragraphs 3, 4 and 5 read: “3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe. 4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. 5. In order to contribute to the achievement of the objectives referred to in this Article: - the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, - the Council, on a proposal from the Commission, shall adopt recommendations.”
5 It has been considered that the mobility of collections fits in with the fundamental principles of the European Union, such as the free movement of persons, goods, services and capital. See: Lending to Europe, Recommendations on collection mobility for European Museums, A report produced by an independent group of experts, set up by Council resolution 13839/04, April 2005, p. 8.
In the years 2003-2004, an extensive study was carried out on State indemnity systems\(^6\) at the request of the European Commission. On the subject of immunity from seizure, the study group stated that “it is better for both borrowers and lenders to be protected from any third party action. It therefore seems wise for each country to introduce a law ensuring immunity from seizure.”\(^7\)

During the Dutch Presidency of the EU in the second half of 2004, the Netherlands hosted two relevant conferences. First, from 27 till 29 October 2004, the conference Museum Collections on the Move, followed, on 8 and 9 November 2004, by a conference called Illicit Trade: Fighting illicit traffic in cultural goods within the European Union. That latter conference identified that an area for a discussion on possible action at the EU level could be “anti-seizure law, being the provisions through which countries guarantee that their courts have no jurisdiction in cases involving a seizure of certain cultural goods that have entered those countries on loan […]”.\(^8\)

Building on this last conference, Norman Palmer was asked to identify and, where necessary, develop the main areas in which the European Union might successfully adopt concerted action to counteract the illicit cross-border removal of cultural objects.\(^9\) In doing so, Palmer identified legal concepts, principles or mechanisms on which States might constructively evolve a common Community-wide policy, while retaining national jurisdiction over the resulting solutions. One of the areas Palmer identified concerned ‘anti-seizure statutes for the safeguarding of in-loans’.

Also during its Presidency, the Netherlands proposed the issue of mobility of collections to be taken up in the Work Plan for Culture for 2005-2006. Consequently, the EU Council of Ministers adopted Resolution 13839/04 on the ‘Work Plan for Culture 2005-2006’, which focused on five priority areas.\(^10\) One of these areas was the mobility of works of art and

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\(^6\) Whereby the national State provides financial compensation directly to the lender should a borrowed object be damaged or destroyed.

\(^7\) Study No. 2003-4879: An inventory of national systems of public guarantees in 31 European countries, Réunion des Musées Nationaux, Etablissement Public à Caractère Industriel et Commercial (EPIC) Paris (France) in collaboration with Staatliche Museen zu Berlin Preussischer Kulturbesitz Berlin (Germany), June 2004.

\(^8\) Recommendation No. 4 on European Action.

\(^9\) Norman Palmer, Cultural Objects; Countering Illicit Movement within the European Community; Initiatives and Avenues of Progress, November 2004, on file with the author.

\(^10\) These priorities areas are: Lisbon strategy (Contribution of creativity and cultural industries to European growth and cohesion); coordination of digitisation (provide citizens with unrestricted, sustainable and reliable
collections and exhibitions. The aims and measures set out in these areas were intended to improve cultural cooperation and to remove the main obstacles to such cooperation.¹¹

Within this context, the EU Council Presidency set up a working group of museum experts, under chairmanship of Ronald de Leeuw, at that moment Director General of the Rijksmuseum, Amsterdam, the Netherlands. “The mandate of the group was to prepare practical recommendations for improving the mobility of museum collections, with a special emphasis on questions related to insurance and indemnity, standards and guidelines and the role of the registrar.”¹² The working group produced Lending to Europe, Recommendations on collection mobility for European Museums in the spring of 2005. The report has been presented to the Council by De Leeuw on 23 May 2005. The aim of the European Union was once more expressed, to encourage museums to exchange their treasures on the basis of reciprocity and to enhance the preparation of exhibitions.

As well as the initial mandate, other subjects related to collection mobility were discussed in the working group, including immunity from seizure. The problems around the issue of immunity from seizure were considered by the group to be a major obstacle to the mobility of museum collections on a wider scale.¹³

In the view of the group, the complexity of the subject made it necessary to carry out a detailed comparative study of the various systems of immunity from seizure currently applied. The study would take into account the wishes of those European countries that do not yet have anti-seizure laws, and would furthermore analyse the American system, which – as the oldest system of that kind – would offer the greatest number of practical examples. The study should conclude by making precise recommendations as to the relevant law. The group stressed the importance of establishing a good policy on immunity from seizure. A Europe-wide legal system of immunity from seizure should be based on the outcome of the study.¹⁴

¹² Ibid.
¹³ However, because of the problematic nature of the subject, the group was not in a position to recommend a detailed proposal for immunity from seizure.
¹⁴ Op. cit. n. 5, p. 16. It should be kept in mind, however, that in line with Article 151 of the Treaty establishing the European Community [Article 167 of the Treaty on the functioning of the European Union] any measures to
The group further recommended that Member States of the European Union that do not have an immunity from seizure system should develop one.\textsuperscript{15}

During the Austrian Presidency, in the first half of 2006, a team representing six successive presidencies (2004-2007)\textsuperscript{16} met in Vienna to draw up an action plan concerning loans for exhibitions between museums in the European Union. The draft Action Plan for the EU Promotion of Museum Collections’ Mobility and Loan Standards was discussed in the conference titled Encouraging the Mobility of Collections, in Helsinki on 21 July 2006 and endorsed by the EU Cultural Affairs Committee on 17 October 2006.\textsuperscript{17} The aim of the Action Plan was “to facilitate the access to Europe’s cultural heritage, make it available for all citizens and find new ways to improve co-operation, trust and good practice for lending between museums.”\textsuperscript{18} Furthermore, six working groups were established to encourage the implementation of the Action Plan.\textsuperscript{19} One of the working groups regarded the issue of immunity from seizure.\textsuperscript{20} One of the aims was to prepare a compendium of relevant international treaty obligations and related international and European background, as well as to prepare recommendations on the possibility of introducing immunity from seizure legislation.\textsuperscript{21}

\textsuperscript{15} ibid., p. 23.
\textsuperscript{16} The Netherlands, the United Kingdom, Luxembourg, Austria, Finland and Germany. During the UK Presidency, in the second half of 2005, the Department for Culture, Media and Sport of the United Kingdom hosted the museum conference Increasing the mobility of collections. The conference was held on 27 and 28 November 2005 and was organised by the UK Museums Association.
\textsuperscript{17} The action plan can be found at: http://www.ne-mo.org/index.php?id=104\&STIL=0\&C_PID=&C_UID=7. [Last visited 8 March 2011.]
\textsuperscript{18} Action Plan, p. 4.
\textsuperscript{19} These working groups were: loan administration and loan standards; State indemnity schemes; valuation, self-insurance and non insurance of cultural objects; immunity from seizure; loan fees and long term loans; building up trust and networking. There was a 7th theme, being digitisation. That area was promoted by the National Representatives Group for the EU coordination of the digitisation of cultural and scientific content.
\textsuperscript{20} This working group was led by Hillary Bauer, Head of the Cultural Property Unit of the Department for Culture, Media and Sports of the United Kingdom.
\textsuperscript{21} Th.M. de Boer advocates enacting immunity regulations not on European (thus regional) level, but on a global level. Competent bodies which should take the initiative could be the UN (specifically UNESCO) or the Hague Conference on Private International Law. Such an agreement should not only guarantee immunity from measures of constraint, but also immunity from jurisdiction (suit). The agreement should also contain a provision, stating that lending cultural objects may never be regarded or used as an act of the lender which creates jurisdiction. See: Th.M. de Boer, ‘Internationale kunstuitleen: een hachelijke onderneming?’ [International art loans: a perilous undertaking?], Nederlands Juristenblad [Dutch Lawyers Journal], 19 May 2006, No. 20, pp. 1097-1107, at p. 1102.
6.2 The OMC Expert Working Group and the subgroup ‘Immunity from Seizure’

The working group on immunity from seizure did not finalise its work at the time the Council of the European Union adopted Resolution 2007/C 287/01\textsuperscript{22} on a European Agenda for Culture or when the Work Plan for Culture 2008-2010\textsuperscript{23} had been concluded.\textsuperscript{24} The Council Resolution endorsed the promotion of cultural diversity and intercultural dialogue\textsuperscript{25}, to be specified \textit{inter alia} by “promoting cultural heritage, namely by facilitating the mobility of collections and fostering the process of digitisation, with a view to improving public access to different forms of cultural and linguistic expressions\textsuperscript{,}”\textsuperscript{26} The Annex to the Council Resolution identified the five priority areas for action for the period 2008-2010. The second mentioned priority was promoting access to culture, in particular through the promotion of cultural heritage, multilingualism, digitalisation, cultural tourism, synergies with education, especially art education, and greater mobility of collections.\textsuperscript{27}

The Work Plan for Culture 2008-2010 set out the activities to be pursued under these five priority areas of action defined in the Council Resolution, by describing the initiatives, time frame and objectives. An OMC\textsuperscript{28} Expert Working Group ‘Mobility of Collections’ had been set up for the mobility of collections and activities of museums, comprising of experts of EU Member States.\textsuperscript{29} This OMC Expert Working Group\textsuperscript{30} built on the work of the six working

\textsuperscript{22} Dated 16 November 2007, to be found in the \textit{Official Journal} C 287 of 29 November 2007.
\textsuperscript{23} To be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42008X0610(01):EN:NOT. [Last visited 8 March 2011.]
\textsuperscript{24} 10 June 2008 (2008/C 143/06).
\textsuperscript{25} Op. para. 2(a) of the Council Resolution.
\textsuperscript{26} Op. para. 3A, second dash.
\textsuperscript{27} The other four were:
- Improving the conditions for the mobility of artists and other professionals in the cultural field;
- Developing data, statistics and methodologies in the cultural sector and improve their comparability;
- Maximising the potential of cultural and creative industries, in particular that of SMEs [Small and Medium Enterprises];
- Promoting and implementing the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
\textsuperscript{29} This was one of the four OMC groups which had been set up. The other OMC groups addressed the links between culture and education; the mobility of artists and other cultural professionals; and the potential of cultural and creative industries and museum activities.
groups established in the framework of the Action Plan agreed under the Finnish Presidency and followed one of the central objectives of the Culture Programme 2007-2013 of the European Commission, namely to encourage the circulation of cultural and artistic works and products. Within the Expert Working Group, this time five subgroups were established, one of them being the ‘Immunity from Seizure’ subgroup. The objectives of the subgroup were:

“- To collect, compare and summarize the present state of action and developments in legislation concerning Immunity from Seizure
- To stress the importance of relevant international treaty obligations and the related international and European background when considering the introduction of immunity from seizure legislation
- To collate all the existing regulations applied by museums in the EU
- To share and exchange information and best practices.”

The subgroup on ‘Immunity from Seizure’ met seven times between November 2008 and May 2010 and consisted of thirteen Member States. Between autumn 2008 and spring 2009 the subgroup prepared an enquiry and circulated it to all EU Member States. The enquiry consisted of ten questions. The aim of the enquiry was to get an insight into the existing regulations regarding immunity from seizure for foreign cultural objects temporarily borrowed for a public exhibition, possible foreseen amendments and approaches and to investigate whether immunity from seizure legislation is planned in those Member States where such immunity legislation is not yet existent.

The 8th question of this enquiry had a direct link with the topic of this study and read:


The first meeting took place on 12 November 2008 in Brussels.


Co-chaired by Poland (Dorota Folga Januszewska) and Germany (Günther Schauerte). The other subgroups were: State indemnity and shared liability agreements, long-term loans, prevention of theft and illicit trafficking, and mobility of museum professionals/exchange of expertise.


Austria, Belgium, Finland, France, Germany, Greece, Hungary, the Netherlands, Poland, Portugal, Romania, Spain, and the United Kingdom. All the EU Member States were represented in the overall OMC Expert Working Group ‘Mobility of Collections’. However, it was deliberately agreed that not all the Member States would take actively part in all the five subgroups.

“Does your country, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use, and as meaning that those goods are considered to be non-commercial?”

Thirteen of the twenty-seven EU Member States answered this question explicitly in a positive way, and this led to the following text in the final report of the subgroup ‘Immunity from Seizure’: 37

“Several States are of the opinion that the above mentioned provision [Article 21(1)(e) of the 2004 UN Convention] can be considered a rule of customary international law, or that this rule is emerging. That would imply that the content of the provisions of the Convention are applicable, without the necessity of becoming a Party to the Convention. Based on the questionnaire, the following States were explicit in stating that a rule of customary international law exists: Belgium, Cyprus, Denmark, Estonia, Finland, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain and the United Kingdom. 38

However, certain States, for instance Germany, expressed in their answers doubts as to whether sufficient State practice had been developed so far, whereas also a few States were of the opinion that a rule of customary international law had not (yet) been developed. 39 It can therefore be concluded that the answers were not uniform.

Although some States answered the aforementioned question with “yes”, they still established immunity from seizure legislation. 40 The latest of these States is Finland, which enacted legislation in the year 2011. One reason for this legislation may be that it does not only protect cultural property of foreign States from seizure, but also cultural property of private individuals, temporary on loan in Finland. What I stated about the Finnish approach also counts for Belgium and the United Kingdom: those States answered this 8th question with “yes” as well, but nonetheless, they did develop legislation.

March 2011.]
36 Belgium, Cyprus, Denmark, Estonia, Finland, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom. Although Poland answered the question with “yes”, outside of the framework of the enquiry, Poland made clear that Polish cultural property taken out of Poland as war trophies during World War II can never be considered as foreign cultural property and consequently immune from seizure. For that reason, Poland refrained from being put in this listing of States in para. 2.1.3 of the final report of the subgroup ‘Immunity from Seizure’, so that the report only lists 12 States.
38 Answers also on file with the author.
39 Austria and Sweden. Furthermore, several States had not developed an explicit opinion with regard to this question.
40 See infra, Ch. 7 and 9.
6.3 Conclusions of the subgroup ‘Immunity from Seizure’

One of the main conclusions which the ‘Immunity from Seizure’ subgroup drew in the course of its work in 2010 is that “there is no best or preferred way to address immunity from seizure”. The following approaches have been adopted by EU Member States (sometimes in combination):

1. immunity from seizure legislation, specifically addressing cultural objects;
   1.1 specifically addressing cultural objects of foreign States;[43]
   1.2 specifically addressing cultural objects of both foreign States and private individuals;[44]
2. general immunity from seizure legislation, not specifically addressing cultural objects, but focusing on property of foreign States, intended for official/public use;[45]
3. considering cultural objects of foreign States, temporarily on loan, immune from seizure on the basis of customary international law;
4. the issue of immunity from seizure guarantees in the form of ‘letters of comfort’. [46]

The subgroup concluded therefore that different States followed different approaches, which may work best for them, depending “on their respective legal tradition and system, and also on the amount of international art loans they are conducting, temporary exhibitions they are hosting, or the demands of lending States or museums. When considering immunity from seizure guarantees (including legislations) States should assess which approach would fit them best.” The subgroup therefore stated that “it is not recommended that the European Commission, or an expert group falling under the auspices of the EC, should attempt to prepare model legislation”, or to determine the content of possible immunity from seizure

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41 The report of the subgroup Immunity from Seizure has been drafted by co-chair Dorota Folga Januszewska, in cooperation, among others, with the author. See: op. cit. n. 37, Section 7. Conclusions and Recommendations, p. 31. See also: Conclusions and Recommendations subgroup ‘Immunity from Seizure’, Expert Group ‘Mobility of Collections’, p. 2, Recommendation 1A, to be found at: http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/conclusions/immunity_seizure.pdf.
43 France, Belgium.
44 Germany, Austria, the United Kingdom.
45 The Netherlands.
46 14 EU Member States (Cyprus, Estonia, Finland, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom) were able of issuing letters of comfort. A ‘letter of comfort’ has been described by the subgroup ‘Immunity of Seizure’ as a written confirmation from a representative of the government that the borrower of the cultural object or the borrowing State will do everything within its power to safeguard the item from seizure. As a rule, such a ‘letter of comfort’ cannot be considered as ‘hard law’, contrary to immunity from seizure legislation, according to the subgroup. See: op. cit. n. 37, p. 26, para 4.5.
legislation. It was recommended, however, that the European Commission would provide a platform for sharing and exchanging best practices.  

The subgroup also stressed that as the granting of an immunity from seizure guarantee could be in conflict with other obligations under international law, caution is required when providing such guarantees. It stated rightly that careful research into such obligations will be necessary to identify any possible conflicts with such obligations, in order to reduce the chance of any such conflict.

In June 2010, the recommendations of all the subgroups were bundled in the ‘Final Report and Recommendations to the Cultural Affairs Committee on Improving the Means of Increasing the Mobility of Collections’ by the OMC Expert Working Group on the Mobility of Collections. The Group recommended that

“the European Council (Cultural Affairs Committee - CAC) and the European Commission now pursue and develop, in the near future, their efforts in these areas, for example through a standing committee of experts on Mobility of collections.”

The Group also recommended that the issue of collections mobility should be included in the future Council Work Plan for Culture 2010-2012.

With regard to immunity from seizure, a key recommendation of the OMC Expert Working Group was to explore possibilities of overcoming problems related to introducing immunity from seizure.

On 19 July 2010, the European Commission stated that the OMC Expert Working Group on Mobility of Collections had made a thorough comparison of practices in several fields,

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50 As most important ones the subgroup mentioned the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects and the 1993 European Council Directive on the Return of Cultural Objects Illegally Removed from the Territory of a Member State. They all include return obligations to third States of origin within their provisions (that is another State than the lending or borrowing State), whereby also seizure may sometimes be necessary in order to secure the return to such a third State.
52 Ibid., p. 4.
53 Ibid., p. 37. Meant is the Work Plan for Culture 2011-2014, as there is no Work Plan for Culture 2010-2012.
54 Ibid., p. 12.
55 Commission Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the European Agenda for Culture, Doc. COM
including incentives and obstacles to lending. In September 2010, the European Council discussed the Final Report of the OMC Expert Working Group, but no definite conclusions were drawn.

6.4 Future work

The Work Plan for Culture 2011-2014 refers to mobility of collections as well. The Work Plan as adopted by the European Council during its meeting on 18-19 November 2010 states in paragraph 6 of the preamble:

"Taking note of the results of the work carried out in the framework of the Council Work Plan for Culture 2008-2010 and notably the identification and sharing of good practices by all the working groups established by the Member States as well as the recommendations of these groups."

The Council then states that the Work Plan 2011-2014 should draw on this work and the resulting recommendations. It thus adopted the Work Plan 2011-2014 as well as the principles relating to the setting up and functioning of the working group established by the Member States.

The Work Plan 2011-2014 has six priority areas. Priority area D is called ‘Cultural heritage, including mobility of collections’. Within that priority area, immunity from seizure is no longer explicitly mentioned. The reason for that is - as already stated - that the OMC Expert Working Group and the ‘Immunity from Seizure’ subgroup were of the opinion that besides providing a platform for sharing and exchanging best practices, there was not a concrete role for the EU to fulfil. Therefore, now the Work Plan solely states: “Experts will identify good practices on all relevant issues in the context of mobility of collections”.

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57 The other priority areas are:
Priority area A: Cultural Diversity, Intercultural Dialogue and Accessible and Inclusive Culture.
Priority area B: Cultural and Creative Industries.
Priority area C: Skills and Mobility.
Priority area E: Culture in External Relations.
Priority area F: Culture Statistics.

6.5 Concluding

The notion of the mobility of collections, of which immunity from seizure is considered an element, is a key issue within the European Union since 2003. It is fair to conclude that States, also under auspices of the EU, want to protect cultural objects belonging to foreign States against immunity from seizure for the sake of the mobility of collections and in order to learn from and understand each other’s culture, history and development. There are different ways to fulfil that aim. Therefore, one of the main conclusions which the ‘Immunity from Seizure’ subgroup drew in the course of its work in 2010, was that there is no best or preferred way to address immunity from seizure. In the next chapters, the different approaches followed by European States will be addressed.