

REGULACE OBCHODU S PŘEDMĚTY KULTURNÍ HODNOTY V KOMUNITÁRNÍM PRÁVU

COMMUNITY LAW AND TRADE IN CULTURAL OBJECTS

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Abstrakt

Regulace obchodu s předměty kulturní hodnoty existuje na národní, evropské i mezinárodní úrovni. Tento příspěvek je věnován komunitární úpravě v této oblasti a jejímu dopadu na české právo. Komunitární právo disponuje dvěma nástroji, které se týkají regulace obchodu s předměty kulturní hodnoty. Je to jednak směrnice Rady č. 93/7/EHS o navrácení kulturních statků nezákonně vyvezených z území členského státu a jednak nařízení Rady (EHS) č. 3911/92 o vývozu kulturních statků.

Klíčová slova

vnější obchodní vztahy, společná obchodní politika, ochrana předmětů kulturní hodnoty, volný pohyb zboží, článek 30 SES, jednotný vnitřní trh, směrnice Rady č. 93/7/EHS, nařízení Rady (EHS) č. 3911/92

Abstract

The regulation of trade in cultural objects exists at national, European as well as international level. This contribution is devoted to the Community regulation of this area and to the influence of it on Czech national regulation. There are two EC instruments concerning this area: the Council Directive 93/7/EEC on return of cultural objects unlawfully removed from the territory of a Member State and the Council Regulation (EEC) No. 3911/92 on the export of cultural goods.

Key words

external economic relations, common commercial policy, protection of cultural objects, free movement of goods, Article 30 of the EC Treaty, single internal market, Council Directive 93/7/EEC, Council Regulation (EEC) No. 3911/92

1. Introduction

A state always interferes with the area of external economic relations. The interferences vary in the scope, objective, forms and instruments of regulation. Czech Republic has undergone several changes in this area since the end of the Second World War. The monopoly of state in the field of external economic relations was replaced by the intervention of state only by rules of law. The regulation of external economic relations has changed substantially after the entry of the Czech Republic to the European Union. The regulation of external economic relations constitutes the content of common commercial policy as one of the common policies provided for in the Treaty establishing European Community (“EC Treaty”).

Even if the liberalization of the area of external economic relations exists, the states retain the influence on the movement of some kind of goods over borders. One kind of such goods is represented by cultural objects.

Cultural property functions as a tangible record of mankind’s effort to create and express himself. Historical, ethnological and archaeological objects, architecture and work of arts inform us of our past, define our identity and enhance the quality of our existence. As a result, a wide spread desire to preserve and protect these cultural products exist.¹

Most of the legislations of European states protect cultural objects. The regulation of trade in cultural objects exists even at European as well as international level. This contribution is devoted to the community regulation of this area and to the influence of it on Czech national regulation.

¹ Roberts, E.L.: Cultural Policy in the European Community: A Case Against Extensive National Retention, 28 Texas International Law Journal, 1993, p. 192, accessible from Hein Online

2. European regulation of trade in cultural objects

Many European states have restricted exports of art and other cultural property since 15th century.² European states have enacted laws restricting the export of art, historical artefacts and other types of cultural property. Today all Member states of the EC place some restrictions on the export of cultural property. The restrictions vary both in the scope of objects protected and in the methods of regulation. However, the member states of the EC have also committed themselves to the free movement of goods within the Community.

1.1 Article 30 of the EC Treaty

Cultural objects fall within the category of goods in the sense of the EC Treaty. Thus, cultural goods are dealt with according to the rule for the free movement of goods. The interest of Member States in keeping cultural objects on their own territories contradicts the idea of free trade. The EC Treaty takes these competing interests into account. Articles 28 – 29 of the EC Treaty make quantitative restrictions on exports and imports among Member States and all measures having equivalent effect prohibited. Article 30 exempts from this prohibition measures designed to protect national treasures possessing artistic, historic or archaeological value. Article 30 accepts to a certain extent national laws for the protection of cultural heritage and allows national regulations restricting the free movement of goods.

The term national treasures should be interpreted autonomously, according to its specific context and independent of its connotations in any national law. Article 30 must be interpreted in a restrictive manner as an exception to the general rule.³ A state claiming an Article 30 exemption must show that the restrictive measures in question satisfy three tests. First, the measures must be necessary to achieve an Article 30 goal (“necessity test”). Second, the measures must be no more disruptive of trade than required to achieve the goal (“proportionality test”). Third, the measures cannot constitute a means of arbitrary

² Putnam, J.E.: *Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community*, 1992 *The University of Chicago Legal Forum*, p. 457, accessible from Hein Online

³ Fechner, F.G.: *Strategies for the Preservation of Cultural Heritage in a Single European Market*, 13 *Tel Aviv University Studies in Law*, 1997, p. 172, accessible from HeinOnline

discrimination or a disguised restriction on trade between Member States (“discrimination test”).⁴

The language of Article 30 itself suggests that the term national treasures should not receive too broad interpretation. This term should include only those items which are most important to a country’s heritage. There is a requirement of the existence of some bond between an object and the life of the nation. Such a bond can be traced if an object is closely tied to an artist or the history of the nation or has long been accessible and important to the public. The purpose of the Article 30 is to protect only the key elements of national culture from permanent loss.⁵

There is a case of the European Court of Justice (“ECJ”) discussing art export laws in light of the national treasures clause of Article 30. It is the case *Re Export Tax on Art Treasures: EC Commission v Italy*.⁶ In this case, the Commission sued the Italian Government for imposing an eight to thirty percent duty on exported artworks. The Commission alleged that such duties violated Article 16 of then EEC Treaty. The Italian Government argued that cultural property differs from the types of goods to which the EC Treaty generally applies. Italy also argued that Article 30 exempts cultural property from the general prohibition against limiting the free movement of goods. The ECJ refused to distinguish export of cultural property from other types of Community trade subject to the EC Treaty. The ECJ said: “*Under Article 9 of the Treaty the Community is based on customs union which shall cover all trade in goods. By goods there must be understood products which can be valued in money and which are capable, as such, forming the subject of commercial transactions. The articles covered by the Italian law resemble the latter inasmuch as they can be valued in money and so be the subject of commercial transactions. The rules of the common market apply to them subject only to the exceptions expressly provided by the Treaty.*” The ECJ also confirmed the rule that exceptions to the free movement of goods, such as Article 30, should be narrowly construed.

⁴ Putnam, J.E.: Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community, 1992 The University of Chicago Legal Forum, p. 468 – 470, accessible from HeinOnline

⁵ Putnam, J.E.: Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community, 1992 The University of Chicago Legal Forum, p. 470 - 472, accessible from HeinOnline

⁶ Case 7/68

1.2. Council Directive and Regulation

With the birth of a single European market without borders between Member States did the preservation of cultural heritage become among the considerations in the context of European unification. The elimination of borders prompted fears that national laws for the preservation of cultural heritage may no longer be enforceable. This changing situation made it necessary to take steps on the European level in order to regulate this matter. Standardization of the national systems in this area was not seen as a possible solution, because the Member States have always had very different ideas regarding both the method for the preservation of national cultural heritage as well as the intensity of such an effort.⁷

In November 1989 the Commission sent a communication to the Council of the EC (“Council”), which expressed the Commission’s concern that the establishment of an internal market would lead to the depletion of the Member States’ cultural treasures.⁸ The Commission recognised that the abolition of border controls would inhibit the ability of each state to control the export of its cultural objects and asserted two objectives to be reconciled: the realization of the internal market and the Member States’ ability to protect their national treasures.⁹

After the emotionally charged debate between Member States the Commission authored the Proposal for a Council Regulation on the Export of Cultural Goods and the Proposal for a Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State on 10th February 1992. The Regulation¹⁰ became effective on 1st January 1993 and on 15th March 1993 the Council formally adopted the Directive.¹¹

⁷ Fechner, F.G.: Strategies for the Preservation of Cultural Heritage in a Single European Market, 13 Tel Aviv University Studies in Law, 1997, p. 172, accessible from HeinOnline

⁸ Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992, COM(89)594

⁹ Roberts, E.L.: Cultural Policy in the European Community: A Case Against Extensive National Retention, 28 Texas International Law Journal, 1993, p. 195 - 199, accessible from HeinOnline

¹⁰ Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the Export of Cultural Goods, OJEC of 31 December 1992, No L 395

¹¹ Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, OJEC of 27 March 1993, No. L 74

1.2.1. The Directive

The Directive establishes the legal procedure for the return of cultural objects that are unlawfully removed from one Member State and resurface in another. The Directive confirms the exception to the principle of free movement of goods with regard to cultural objects.

According to Article 1 of the Directive, an object qualifies as a cultural object if it is classified among the national treasures possessing artistic, historic or archaeological value under national legislation within the meaning of Article 30 of the EC Treaty and belongs to one of the categories listed in the Annex of the Directive. If the object does not belong to one these categories it suffices if it forms an integral part of public collections listed in the inventories of museums, archives or libraries'conservation collection or of the inventories of ecclesiastical institutions. Member States may classify objects as national treasures even after they have already been removed. The Directive protects only those items included in one of the indicated common European categories and that, at the same time, fall within the scope of the national law for protecting cultural treasures.

The term unlawfully removed is defined as the removal of cultural objects from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation No 3911/92. Unlawfully removed is also an object which was not returned at the end of a period of lawful temporary removal.

The Directive obliges every Member State to return unlawfully removed cultural objects to the requesting Member State of origin. The requesting Member State¹² may initiate before the competent court in the requested Member State proceedings with the aim of securing the return of the object. The action must be brought against the possessor of the cultural object. When the possessor cannot be identified the proceedings may be initiated against a holder. Only the court of the requested Member State can order the return of the object. A document describing the object and stating that it is a cultural object must accompany the initiation of the proceedings. The requesting Member State must also furnish a declaration supporting the fact that the object was unlawfully removed. Where the unlawful removal is proved, the court

¹² The Member State from whose territory the cultural object has been unlawfully removed.

shall order the return of the object provided that the object was removed on or after 1st January 1993. The Directive does not work retroactively.

The court shall award the possessor compensation in its discretion provided that the possessor exercised due care and attention in acquiring the object. The burden of proof regarding the possessor's due care is governed by the legislation of the requested Member State. The requesting Member State must pay the compensation but then may recover the amount from the person responsible for the unlawful removal.

A Member State may initiate return proceedings up to one year from the time it knows the location of the cultural object and the identity of the possessor or holder. The proceedings may not be brought more than 30 years after the object was unlawfully removed. For objects forming part public collections and ecclesiastical goods the statute of limitations is 75 years. This provision does not apply in Member States where time limits do not govern the proceedings or where bilateral agreements exist between Member States laying down period exceeding 75 years. A change in the law of the requesting Member State which makes the removal of the object no longer unlawful precludes return proceedings.

Penal or civil consequences for the illicit removal of cultural objects are not provided for in the Directive. The ownership of the cultural object after it has been returned will be governed by the national law of the requesting Member State.

1.2.2. The Regulation

The Regulation relates to trade with third parties who are not Member States. Its objective is to guarantee uniform controls over the export of cultural goods at the external borders of the Community.

Cultural goods are defined as all goods listed in the annex of the Regulation. The scope of the terms included in the list is broad, but some of them are restricted by a requirement for a minimum age or for a minimum monetary value. The Regulation in no way affects freedom of Member States to define which specific objects they wish to consider national treasures for the purpose of Article 30 of the EC Treaty.

The Regulation establishes a procedure for monitoring the export of cultural goods from the EC by an export certification system. A cultural object cannot travel outside of the EC without an export certificate. The export licence is issued by the competent authorities of the Member State in whose territory the cultural object is lawfully and definitively located. The export licence is valid throughout the Community. The export licence may be refused where the cultural object is covered by national legislation protecting national treasures. The Regulation became effective on 1st January 1993. Thus, if a potential buyer finds cultural object outside EC without an export certificate, a potential buyer should assume that the object has been unlawfully taken from the Member State or that it was exported prior to 1st January 1993.

3. Czech regulation

The Council Directive was implemented by Act No. 101/2001 Coll., on return of unlawfully removed cultural objects. The Act became effective on 1st May 2004. The term national treasures covers objects which are classified by specific acts as cultural monuments or national cultural monuments, collections of museum nature or their individual parts, archival documents or other cultural object if they satisfy the prerequisites of cultural monument. The central authority which carries out the tasks concerning the return is the Ministry of Culture. If the Czech Republic is the requested state the proceedings shall be initiated before the court in which jurisdiction the possessor (or the holder) lives. The initiation of return proceedings before Czech court is subject to the limitation of actions. The Czech court award the possessor the compensation provided that he exercised due care. The Ministry of Culture may initiate the return proceedings before the competent court of another Member State. The Czech Republic is obliged to pay the compensation awarded by the court of another Member State and the costs of return proceedings. The Ministry of Culture shall take an action to recover these amounts against the person responsible for unlawful removal. The action shall be taken without undue delay.

The Regulation caused the issuing the Act No. 214/2003 Coll., on the export of some cultural goods outside the customs territory of EC. The Act regulates further conditions of export of cultural goods as provided by the Regulation. The export licence is granted by the Ministry of

Culture or by Ministry of the Interior.¹³ The competent authority issues the licence only if the consent, permission or certificate according to specific acts is granted. The licence is issued for the period which is stated in the consent, permission or certificate.

The export of cultural monuments and national cultural monuments is subject to the Act No 20/1987 Coll., on state monument preservation. Cultural monuments are immovable or movable things which are either important evidences of historical development and life style of society or which have relation to the important personalities and historical events. Only the Ministry of Culture can declare a thing to be a cultural monument. National cultural monuments are cultural monuments which are parts of cultural treasures of the nation and they are declared by the Government. Cultural monuments can be exported only with consent of the Ministry of Culture. Export of national cultural monuments is subject to the consent of the Government.

The archival documents are specially protected by the Act No. 499/2004 Coll., on archival documents. The archival documents can be exported only with the permission of the Ministry of Culture and only for the purpose of exhibition, preservation, restoration or scientific examination.

The Act No. 122/2000 Coll., on the protection of collections of museum nature regulates the export of museum collections. The collections can leave the territory of the Czech Republic only for the certain period of time and with the permission of the Ministry of Culture. They can be exported for the purpose of exhibition, preservation, restoration or scientific research.

Except for these specific regulations there is the Act No. 71/1994 Coll., on the sale and export of cultural objects. The Act covers natural objects¹⁴ and human products which are important for history, literature, art or science and which are not cultural monuments, national cultural monuments, archival documents, museum collections or their parts or original artworks of living artists. These cultural objects can travel outside the Czech Republic only with the export certificate. The export can be temporal or permanent.

¹³ In the case of archival documents

¹⁴ Object of mineralogical, paleontological, botanical, zoological or entomological nature

4. Conclusion

The regime for cultural objects in European Union does not consist of Community instruments defining and enforcing EC policies for the protection of national and European treasures. The EC confirms national policies and seeks to co-ordinate their different approaches with respect to the preservation of national treasures within national boundaries.¹⁵

The preservation of cultural heritage provides an example of an area in which the European legal system does not replace national laws but, instead, simply adds common regulations. The Member States are left to retain their own definitions of national treasures.

The regulation of this area in the Czech law has not undergone fundamental changes after the entry of the Czech Republic to the EC. The system of protection is very similar like before 1st May 2004. Only the regulation of return proceedings and “European” export licences were introduced.

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