



Federal Government Commissioner
for Culture and the Media

Key aspects of the new Act on the Protection of Cultural Property in Germany



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“With the reform of the cultural property protection law Germany takes its responsibility to protect the cultural heritage of mankind – both on national and international level. With the new act we make a decisive contribution to combat illicit trafficking in cultural property.”

Minister of State Prof. Monika Grütters, MP,
Federal Government Commissioner for Culture and the Media

Overview

In 2016, Germany carried out a comprehensive reform to modernize its cultural property protection law and bring it in line with EU and international standards such as the UNESCO 1970 Convention. The new Act on the Protection of Cultural Property entered into force on 6 August 2016 after it had been adopted by the German parliament (*Bundestag*) without any dissenting vote and with the broad support of the Federal Assembly (*Bundesrat*) in early July 2016. What was previously regulated in three different acts is now regulated in one single piece of legislation. Furthermore, numerous new and simplified provisions were added.

The reform of Germany's cultural property protection law is not limited to the protection of Germany's national cultural property but includes the protection of national cultural property of other States Parties to the UNESCO 1970 Convention when such cultural property is unlawfully removed from the territory of these States Parties. With this reform, the new Act helps protect Germany's cultural property and that of other States more effectively against clandestine excavations and illicit trafficking. This applies especially to crisis-ridden or war-torn countries, such as Syria and Iraq, but also to many other States. The new German Act therefore contains rules that make it possible to return unlawfully exported cultural property more effectively. It includes stronger return mechanisms for unlawfully exported cultural property and due diligence requirements related to placing cultural property on the market. With this reform, Germany assumes its responsibility in the joint fight against the illegal trafficking in cultural property. Only if we join forces and work together we will be able to protect the cultural heritage of mankind against destruction, clandestine excavation and illicit trafficking.

Main goals of the reform of Germany's cultural property protection law

1. Fighting clandestine excavation and illicit trafficking in cultural property

Clandestine excavation and cross-border trafficking in illegally excavated cultural property have become growing problems. Many cultural sites of highly developed ancient civilizations are recklessly looted and thus irretrievably lost for the cultural heritage of mankind and for future research. Not only does this represent an escalating attack on the cultural heritage of mankind, it also seems to be an increasingly important source of funding for belligerent and terrorist activities in conflict areas. Having adopted the new Act, Germany fulfils the requirements that the UN Security Council unanimously imposed on its Member States in 2015 in view of the destruction of world cultural heritage in Syria and Iraq and illicit trafficking in cultural property to fund terrorist activities [7379th meeting, Resolution 2199 (2015), no. 15 to 17; see also Resolution 2253 (2015) of 17 December 2015, 7587th meeting]. By establishing provisions prohibiting imports of unlawfully exported cultural property from other States and introducing licensing procedures for cultural property to be exported from Germany, the Act contributes to make sure that cultural property unlawfully exported is not imported to and traded in Germany.

2. Strengthening the implementation of the UNESCO 1970 Convention

With the ratification of the UNESCO 1970 Convention by Germany in 2007, Germany adopted the Act on the Return of Cultural Property of 2007 to implement the UNESCO 1970 Convention. A comprehensive evaluation conducted between 2008 and 2013 revealed the ineffectiveness of this Act. In a report on the protection of cultural property in Germany, published in 2013, the Federal German Government therefore considered it important to amend its legislation. Most provisions of the Act of 2007 had proven to be inapplicable in practice. Especially the requirement to individually register protected cultural property of foreign States in lists (“list principle”), which is part of Germany's legal tradition for national cultural property, was identified as being without practical scope. The same was true concerning the provisions on import licences for cultural property. Due to the abolition of the list principle by the new Act they also cease to apply.

The new Act replaces the one adopted in 2007 and newly implements the UNESCO 1970 Convention in Germany while respecting the new Operational Guidelines for the implementation of the UNESCO 1970 Convention adopted in Paris in July 2014 at the same time. Import and export rules for cultural property have therefore been thoroughly revised.

a) Import rules

In order to make sure that unlawfully exported cultural property is not imported into Germany, the new Act provides clear conditions on the import. The new Act stipulates that cultural property that was unlawfully exported from another States Party to the UNESCO 1970 Convention before the Convention entered into force in Germany, i.e. 2007, is considered to have been unlawfully imported into Germany if, upon import, no documents are presented that prove that the cultural property has been lawfully exported from the respective State. If it is not possible to present a valid export licence or any other document proving that the cultural property has been lawfully exported from its respective State, although such a licence or document is required pursuant to this State's legislation because the cultural property has been defined or classified as national cultural property by that State, the cultural property concerned is considered to have been unlawfully removed. Such a provision takes account of the fact that most States require a licence to export cultural property. The licence requirement particularly helps protect archaeological cultural property, which in many States is subject to export bans. This shows that Germany recognizes foreign export and protection provisions for national cultural property in its own legislation.

To ensure the practical effectiveness of these comprehensive import rules, it is absolutely necessary that the German customs and law enforcement authorities, but also the German public including art and antiquities dealers and tourists, are informed about the categories of cultural property that are protected in other States, that are subject to an export licence or must not be exported under any circumstances. UNESCO's database of national cultural heritage laws offers an overview on national legislation, but predominantly contains relevant legal texts only. Germany is therefore setting up a website providing further information on the protection and export provisions applicable in foreign States.

b) Export rules

So far, Germany has not sufficiently utilized the cultural property protection mechanisms existing under EU and international law and provided for in the UNESCO 1970 Convention. The new Act provides cultural property in Germany with an increased level of protection because, depending on the relevant age and financial value thresholds, cultural property falling into certain categories (“category principle”) now also requires an export licence when being exported to EU Member States (e.g. paintings that are older than 75 years and have a financial value exceeding 300,000 Euro). The application for such an export licence must be filed with the competent regional authority (*Land*) where the cultural property is located in Germany. For the first time ever, German authorities are now able to decide whether cultural property may be exported or whether it is of such outstanding importance and significance for Germany’s cultural heritage and cultural identity that it must be listed as being of national cultural significance. An option to acquire the respective cultural property by the German State is now provided for in the new Act as well.

National export licences are required in almost all EU Member States. Article 36 of the Treaty on the Functioning of the European Union (TFEU) explicitly states that this approach is permitted. Exports of cultural property outside the Single European Market are subject to an export licence in Germany – as is the case in all other EU Member States – due to directly applicable EU law (Regulation No. 116/2009; referring to the abovementioned example of paintings the EU Regulation provides minimum thresholds of 50 years and a financial value exceeding 150,000 Euro). With the new provisions on exports of cultural property from Germany to States within or outside the Single European Market, Germany is now also enabled to meet the obligation laid down in Article 6 of the UNESCO 1970 Convention which is to introduce an appropriate certificate confirming that cultural property may be exported. However, the new Act significantly raises the age and financial value thresholds for exports within the Single European Market (cf. the above-mentioned painting example) to reduce paperwork.

c) Return of unlawfully exported cultural property

Under the new Act, all States Parties to the UNESCO 1970 Convention may claim the return of cultural property protected as such in the relevant State (“category principle” pursuant to Article 1 of the UNESCO 1970 Convention) and exported from the respective State after 26 April 2007. This means that, unlike the previous German legislation, the new Act no longer requires the relevant foreign State to individually enter cultural property in lists (“list principle”). Bilateral agreements with Germany are not required. All of the currently 131 States Parties to the UNESCO 1970 Convention are allowed to bring claims for the return of unlawfully exported cultural property.

In accordance with the UNESCO 1970 Convention, the relevant date is 26 April 2007, i.e. the day when the provisions of the UNESCO 1970 Convention became binding for Germany. As also provided by customary international law, the UNESCO 1970 Convention has no retroactive effect. However, since the requesting State is often unable to provide information when the cultural property in question was unlawfully exported from its State territory (due to the unlawful nature of the illicit trafficking), the new Act introduces a new rule. This new rule provides that cultural property is presumed to have been unlawfully exported from the respective State Party after 26 April 2007, if the possessor of the cultural property in Germany does not present evidence proving that he or she already possessed the cultural property prior to this date.

3. Transposing new EU law

The new German Act was also adopted to implement new EU law, namely Directive 2014/60/EU of 15 May 2014 amending the previous Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of an EU Member State. Already in 1993, the EU introduced binding EU rules on the return of cultural property illegally exported within the EU in order to make up for export controls of cultural property that had been abolished as a result of the creation of the Single European Market without national borders and customs. On the basis of the new EU law of 2014 some binding requirements for German law arose. These include the extension of the limitation period for claims for return (three years instead of one year), the new provisions on the compensation for return, and due diligence requirements related to the acquisition of cultural property. Under the new German

Act, these EU standards also apply to the States Parties of the UNESCO 1970 Convention.

Previously, Germany considered cultural property within the meaning of the EU Directive protected only if it had been entered in a register of cultural property of national significance. Since 1955 (the previous provision dates back to 1919) it has been common practice in Germany – and some other States – to register protected cultural property in lists to make sure that such cultural property is not exported without a licence. About 2,700 entries have been registered in Germany so far. However, the vast majority of Germany's national cultural property, especially in public museums and similar institutions, was previously not protected by law. To take advantage of the extended scope of the protection provided by the new EU Directive and to close legal gaps that existed in Germany up to now, public collections as a whole are now protected as "national cultural property". This means that claims for the return of such property are now subject to longer limitation periods (75 years) under EU law.

4. Legislative simplification and modernization

Previously, the provisions on Germany's cultural property protection were found in various laws. The new Act harmonizes the previous provisions and brings them together in a single piece of legislation, thereby making the law easier to apply. The new Act also made it possible to modernize the respective procedures and definitions. For example, legal adjustments were made and a new specific legal basis for data protection and data transmission was created. For historical reasons, Germany used to differentiate between cultural property and archival materials. Since this differentiation has become obsolete, it has been replaced by the generic term "cultural property" in the new Act to avoid repetition of parallel provisions. The term of "national cultural property" was newly introduced and its definition, inter alia, includes public collections in general. This new definition is thus much broader than the definition based on the registration of cultural property of national significance. This form of registration will be maintained, as it is an integral part of Germany's historical tradition, but it is no longer required for publicly owned property. This is another measure substantially simplifying the legislation protecting cultural property.

5. Due diligence requirements related to placing cultural property on the market

The fact that due diligence requirements for trade in cultural property were introduced in the new Act is not only due to the implementation of the new Directive 2014/60/EU. It also strengthens trust in Germany as an art market. Buyers of cultural property must be able to trust that the seller has checked the provenance of the property in an adequate and reasonable manner and that he is not subject to claims for return brought by another State on the basis of an unlawful export. The new Act strengthens the position of legitimate art dealers which are, due to their special qualification and the self-imposed codes of conduct of their associations, the adequate mediators between buyer and seller. This is intended to make sure that the trade in art and antiquities is limited to objects of legal and unambiguous origin. The new legal due diligence requirements are based on the codes of conduct of the national and international art trade associations. Selling stolen, illegally excavated or unlawfully imported cultural property is prohibited in Germany. Under the new Act, this ban applies not only to the professional art market but to everyone selling art and antiquities (also via the internet). In addition, art and antiquities dealers are required to keep and retain records of their transactions. The retention period is now – like in Austria and Switzerland – 30 instead of 10 years.

Cultural property indicated on one of the International Council of Museums' Red Lists of cultural property at risk (ICOM) is now subject to strict due diligence requirements. Art and antiquities dealers must comply with these requirements. The same applies to cultural property that is known or thought to have been taken from its owners due to National Socialist persecution (Nazi looted art).

6. Simplified rules on international lending

Germany strongly promotes international cultural exchange, especially within the context of international lending between museums, also by making it possible to issue legally binding guarantees on the return of cultural property (immunity from seizure). The new Act preserves this legal instrument, which has proven effective in the past and can also be found in the legal systems of numerous other States, strengthens it and defines it more clearly. Museums are given general open export licences for their collections to make it easier for them to participate in international lending.

The German version of the Act is available under www.gesetze-im-internet.de/kgsg.

An English version of the Act will be available shortly under the given link. A French and Spanish version will be made available as soon as possible.

Furthermore, all translations of the Act will be published in UNESCO's database of national cultural heritage laws (www.unesco.org/culture/natlaws).

Further information on Germany's cultural property protection law is available under www.kulturgutschutz-deutschland.de.

www.kulturstaatsministerin.de

