

Protecting national heritage or stifling the German art market?



A bill designed to reform controls over the export of artworks, currently making its way through the German Parliament, has provoked uproar throughout German cultural circles. Pierre Valentin and Till Vere-Hodge examine its proposals and implications.

Since 1955, it has been possible for Germany's 16 states to register on a list of objects of national cultural importance artworks that are considered of particular cultural significance to the German nation. Once registered, the artwork cannot be permanently exported from Germany. Thus far, some 2,700 artworks have been registered by Germany's 16 states. Most of these artworks are held in private collections. It has only been possible to register artworks held in public collections since 2007. Naturally, once an artwork is on the list, its fair market value plummets because it can no longer be sold on the international art market.

In theory, the listing system provides a degree of certainty: a listed artwork cannot be exported (at least without special authorisation), whereas an artwork that is not listed is free to travel (subject to EU rules – see below). However, as noted in the German Government's Report on the Protection of Cultural Property (2013), despite the fact that the law requires the 16 German states to list objects of national cultural importance, in practice this does not happen: '[...] often a listing only occurs, where – mostly on an ad hoc or random basis – the relevant authorities happen to hear about the prospect of an important cultural object leaving Germany.' Only then can the state spring into action and list the artwork, thus preventing it from leaving the country.

The difficulty with the current system is that, in line with the principle of free movement of goods, one of the fundamental principles enshrined in the EU treaties, no export licence is required to remove cultural property from Germany to another EU country. This means that an artwork can leave

Germany for London or Paris without any export control. Thus, German states are often unaware that an artwork is about to leave Germany, and when they find out, it is often too late.

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If, however, the artwork is destined to a non-EU country, the exporter must obtain an EU export licence if the artwork meets certain conditions of age and value. This, in turn, acts as notice

that export is contemplated and allows the German state to list the artwork on the list of objects of national cultural importance, thereby preventing export.

A bill designed to reform the current regime is making its way through the German Parliament. The bill stipulates that cultural objects above certain age and value thresholds (e.g. paintings created more than 70 years ago and valued at more than EUR 300,000) will require an export licence prior to being removed to another EU country. This does not seem such a dramatic development. In the UK, cultural objects above certain age and value thresholds also require an export licence prior to being removed to another EU country (e.g. paintings created more than 50 years ago and valued at more than £180,000 require a UK export licence). So why is it that



almost the entire German cultural establishment, including art dealers, auction houses, collectors and artists, appears to be running riot in collective opposition against the bill?

The reason for such vehement opposition is partly that the bill substantially widens the definition of object of national cultural importance. The bill refers to 'national cultural good'. Paragraph 6 of the Bill provides that national cultural goods are:

- Objects listed on the register;
- Objects owned by the public and held by a public institution holding cultural property (e.g. a national museum);
- Objects owned and held by an institution holding cultural objects that is financed predominantly by public funds (e.g. a museum primarily funded by the German taxpayer); or
- Objects forming part of a collection owned by the Federal Republic or a German state.

In addition, paragraph 6(2) of the bill stipulates that objects owned by private collectors that are loaned to public institutions or institutions financed predominantly by public funds are also to be treated as national cultural goods, if the private collector consents.

The narrative put forward by the bill's most ardent critics is the following: the bill introduces far-reaching categories of national cultural goods allowing the German state to block the export of many more artworks than had been possible hitherto. This, combined with the need to obtain an export licence prior to removing higher-value art, antiques and collectibles to other EU countries, will deprive owners of the value of their art collection on the international art market, without any right to financial compensation. That, in turn, will facilitate the acquisition of artworks by German museums at artificially deflated prices.

According to a number of commentators, the German government should consider reforming the German system along the lines of the British system instead. In other words, Germany should retain pre-emption rights at fair market value, rather than being able to clean up artworks on the cheap, having designated them as national cultural

goods. Conversely, Monika Grütters, the German Culture Minister, has observed that the British system is not particularly effective because the UK cannot afford to pay for the most expensive artworks which often end up abroad.

The fact that Germany can list artworks as 'national treasure' without compensating the owner, is perceived as significant. Comparisons have been drawn with the Italian system, where a law, originally enacted under Mussolini (1939), allows the Italian state to arbitrarily list artworks as 'national treasure' at the point of export without compensation. Critics argue that these restrictions have severely undermined the Italian art market. There are also question marks over their compatibility with the EU treaties, especially when relatively minor objects, or artworks with few connections with Italy, are subject to an export ban.

In France, the state can also list an artwork as an 'historical monument', thereby preventing its export from France and leading to significant loss in value for its owner. However, the listing of an artwork as a 'historical monument' exposes the French state to the risk of having to indemnify the owner for the difference between the value of the artwork on the international art market, and its value on the French art market. In the Walter litigation, the French courts ordered the French state to pay the Walter family the sum of French Francs 145 million after the state had listed a painting by Van Gogh known as 'Jardin à Auvers' as a historical monument, thereby thwarting Mr Walter's efforts to export it to Switzerland where he lived. Mr Walter proceeded to auction the painting in France for a price of French Francs 55 million. He sued the French state for the difference between the international market value, and the auction price achieved in France. The dispute went all the way to the Supreme Court who, in 1996, confirmed the decision awarding the family the sum of French Francs 145 million (approx. €22,105,000). This

outcome led to severe criticism of the system which left French taxpayers footing a large bill for a painting that remained in private hands. The Walter decision was followed months later by another decision awarding the liquidators of the assets of the Schlumpf brothers the sum of French Francs 25 million following the listing by the French state of their collection of classic cars. Since then, the French state has been careful to avoid listing artworks as 'historical monuments'.

The bill is currently undergoing its first reading in the German Bundestag, the Lower House of Germany's Parliament. It is anticipated that the bill will become law in the first half of 2016. The bill has already had a dramatic impact:

- Some artists, most notably Georg Baselitz and Gerhard Richter, have either withdrawn some of their works from German museums, or threatened to do so.
- German collectors, such as Mayen Beckmann and Hasso Plattner, are reported to have asked for artworks loaned to German museums to be returned.
- There have been numerous reports of artworks being removed from Germany.

German-owned art appears to be flowing into London as a result of the panic caused by Commissioner Grütters' reforms. It seems ironic that at least initially, the bill is having precisely the effect that she wanted to avoid, namely art being removed from Germany and sold on the London art market.

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