

EXPLANATORY MEMORANDUM

Disclaimer

This is the English translation of the explanatory memorandum to the *Act of 9 December 2015, Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (Heritage Act)*.

Please note that not the entire explanatory memorandum has been translated, only sections that might be internationally useful. The act itself is in its entirety available in English.

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I. GENERAL PART

1. Introduction

The Netherlands has a rich cultural heritage. It can be found throughout Dutch society: in the country's numerous museums and historic town centres, in the countryside, in the soil, and – as intangible heritage – in traditions, rituals, and stories. Cultural heritage also manifests itself in many different ways. It comprises the entirety of tangible and intangible resources, created in the course of time by people, that give expression to continuously evolving values, convictions, knowledge and traditions, and that offer a frame of reference to present and future generations.¹

1.1 Importance of cultural heritage

Cultural heritage is important for the social and physical environment in which we live. It is the source for the narrative of the country's history, making the past visible and therefore strengthening our cultural and historical awareness. Through our cultural heritage, we feel connected with one another and with the past, in that way deriving a significant part of our identity. Cultural heritage provides anchor points for understanding the present and thinking about the future. It generates memories and tells stories, and makes them tangible.

Cultural heritage is also an important source of inspiration for innovation in design and spatial development. Attention to our cultural heritage has become an essential part of discussion of the quality of the living environment. It is also important in science and scholarship, and can form the basis for research.

But that is not all. Cultural heritage is also of major economic value. Our museums, our historic town centres, and our monuments on UNESCO's World Heritage List attract countless tourists from home and abroad each year, thus forming a source of income for the national and local economy. Moreover, investors are drawn by an environment that is attractive from the perspective of cultural heritage and where employees are happy to come to live. People enjoy the beauties of art and an attractive living environment.

Care for Dutch cultural heritage began in the nineteenth century. In an important article "Holland at its narrowest" [*Holland op zijn smalst*] in *De Gids* (1873), Victor de Stuers denounced the neglect of the national cultural heritage and the poor design of Dutch museums. The government responded by taking action, so that the ancestral "monuments of history and art" could contribute to the pride of the new Dutch state and society. The numerous initiatives by individuals to preserve our cultural heritage and make it accessible were also very important in the development of heritage conservation.

In the past one hundred and fifty years, care for cultural heritage expressed itself primarily in great concern about what was being lost through modernisation,

¹ The definition of cultural heritage in this legislative proposal is inspired by the broad approach to cultural heritage in the Council of Europe's Faro Convention. That approach applies not only to immovable heritage but also to moveable and intangible cultural heritage. This legislative proposal takes cultural heritage to be the following: "tangible and intangible resources inherited from the past, created in the course of time by people or arising from the interaction between man and the environment, that people, irrespective of the ownership thereof, identify as a reflection and expression of continuously evolving values, beliefs, knowledge and traditions, and that offer a frame of reference to them and to future generations".

industrialisation, and urban expansion and renewal. Much that was of value was found to be defenceless. This is no longer the case. Commitment through the years and the dedication of many people mean that caring for Dutch cultural heritage has become an established and broadly supported interest, whose value is widely recognised and acknowledged. Many tens of thousands of volunteers work at museums and for heritage organisations, National Heritage Day [*open monumentendag*] attracts nearly a million visitors annually, and the number of visitors to museums is increasing year on year.

There is widespread awareness that our cultural heritage represents an important social value that demands our attention. That involves not only maintaining it but also making it accessible, learning about it, and utilising it in the further development of our country. One highly influential development in this context is digitisation, i.e. technological developments such as the growing use of (mobile) Internet, the construction and accessibility of large databases, and a whole range of innovative developments. The same applies to the management and preservation of cultural heritage. In addition to the efforts of the professionals, owners and users of cultural heritage, and the many volunteers, this requires an active supporting and protecting role on the part of government.

1.2 Reasons for a single Heritage Act

Conservation and management of Dutch heritage is governed by various specific acts and sets of regulations. These are the Regulations on Material Management of Museum Objects [*Regeling materieel beheer museale voorwerpen*], the National Museum Services (Privatisation) Act [*Wet verzelfstandiging rijksmuseumse diensten*], the Monuments and Historic Buildings Act 1988 [*Monumentenwet 1988*], the Heritage Preservation Act [*Wet tot behoud van cultuurbeziel*], the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act [*Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuuroederen*], and the Cultural Property Originating from Occupied Territory (Return) Act [*Wet tot teruggave cultuuroederen afkomstig uit bezet gebied*]. These sectoral statutory regimes have been established over the course of time, with each type of heritage having its own specific definitions, procedures, and protection measures.

For all types of heritage, the current statutory provisions need to be amended or expanded. The museum memorandum “Strength through Cooperation” [*Samen werken, samen sterker*] of 10 June 2013² announced, for example, that a public-law arrangement would be introduced for careful decision-making on the disposal of cultural objects and collections by public authorities, that the current private-law management agreements between the State (as owner of the collections) and the museums (as the administrator) would be replaced by a public-law arrangement, and that supervision of management of the national collection would be structured in an integrated manner.

Most of the statutory provisions applying to monuments (including archaeological monuments) will also be gradually transferred from the Monuments and Historic Buildings Act 1988 to the Environmental and Planning Act [*Omgevingswet*] (in preparation), resulting in a greatly slimmed-down Historic Buildings Act. Finally, there are reasons to amend various parts of the current arrangements in addition to the above, most importantly through the introduction of self-regulation in archaeology and a supplement to the protection regime of the Heritage Preservation Act.

² Parliamentary Documents II 2012/13, 32 820, No. 77.

The current sectoral fragmentation of heritage legislation and amendments to the various statutory regimes that are considered desirable or necessary are the reasons to establish a single integrated Heritage Act integrating the various specific acts and regulations listed above. Where appropriate, the various protection regimes can be harmonised, and procedures with little or no added value can be scrapped so as to reduce red tape and administrative burdens. In a single Heritage Act – already announced in the aforementioned museum memorandum and which was also explicitly recommended by the Council for Culture [*Raad voor cultuur*]³ – the government sets out clearly and understandably how our heritage is dealt with, which parties have what responsibilities, and how supervision is to take place. In this way, central government also expresses how very important it is to society for our heritage to be dealt with carefully.

1.3 General principles of the legislative proposal

A number of general principles applied when the present legislative proposal was drawn up. First, merging the existing legislation and regulations will ensure that the levels of protection applying in the current arrangements are at least maintained. Second, where possible private organisations should also be involved in preserving cultural heritage. A reasonable balance should also be pursued between the rights of the owner of cultural heritage and protection of the public interest that his property represents, with regulations and procedures with no longer any clear added value being abolished. Finally, the international obligations which the Netherlands has undertaken in the field of cultural heritage should be included in the legislative proposal in full.

1.4 Main points of the legislative proposal

Besides bringing together the various regulations in a single Heritage Act, this legislative proposal contains a number of substantive new provisions in relation to the current statutory regulations on cultural heritage.

- There will be regulations on the disposal of cultural objects and collections that are owned by central government or by municipal or provincial authorities; these regulations are intended to ensure that decisions on such disposal are taken in a diligent manner. Before an authority can proceed to dispose of a high-quality cultural object or collection to a party other than the State, a province or a municipality, it must first seek expert advice.
- Care for the national collection will be laid down in law in a uniform manner. In the case of the museums for which the Minister of Education, Culture and Science is responsible, that legal basis will replace the existing management agreements under private law. This will create a basis for structured arrangements for financing the cost of managing the national collection.
- The Minister of Education, Culture and Science will be made subject to the obligation to accept cultural objects and collections (or parts of collections) that are of high quality for the national collection if the owner is no longer able to manage those objects and wishes to transfer them to the State unencumbered and at no charge. This will prevent the loss of important cultural heritage for which no one assumes management.
- In integrating the provisions of the Heritage Preservation Act, a provision will be added that will give parties other than the State – for example museums – the opportunity to register as the potential purchaser of a protected cultural object that is

³ Council for Culture, *Ontgrenzen en verbinden: naar een nieuw museaal bestel*, 2013 The Hague, p. 45 et seq.

- at risk of disappearing abroad. This will extend the options for retaining such objects for the Netherlands.
- The system of permits for carrying out archaeological excavations will be replaced by a system of statute-based certification. Giving self-regulation a more prominent position in archaeology is intended to bring about more effective policy regarding quality in this field.
 - To prevent disturbance of valuable shipwrecks and in general to ensure better protection for maritime heritage, the prohibition on carrying out excavations will be extended and the definitions will be made clearer.
 - The procedure in the Monuments and Historic Buildings Act 1988 for designating national monuments will be replaced by the simpler Uniform Public Preparatory Procedure [*uniforme openbare voorbereidingsprocedure*] provided for in the General Administrative Law Act [*Algemene wet bestuursrecht*].
 - Finally, enforcement and supervision will be harmonised and, in that context, supervision will be made the same for anyone who manages a national collection, with administrative coercion [*last onder bestuursdwang*] and the penalty for non-compliance [*last onder dwangsom*] being declared generally applicable.

1.5 Relationship to other legislation

In addition to the present legislative proposal a legislative proposal has been drawn up for an Environment and Planning Act.⁴ In that proposal, the existing legislation and regulations regarding the physical living environment are integrated into a single coherent act which – in addition to securing a safe and healthy living environment and good environmental quality – also makes possible the effective management, use, and development of the physical environment in which we live in order to fulfil societal functions. The Environment and Planning Act will be of great importance to cultural heritage because it also provides for a scrupulous approach to cultural heritage within the physical living environment. The protection of monuments (including archaeological monuments), urban and village conservation areas, and man-made landscapes will also be given an important place in that Act. The provisions of the existing Monuments and Historic Buildings Act 1988 which relate directly to decision-making regarding the physical living environment are also included in the proposal for the Environment and Planning Act (or will be included in the implementation regulations based on that Act), and are not repeated in the present legislative proposal. Transfer of the provisions to the Environment and Planning Act will lead to changes in the terminology and system. The zoning plan [*bestemmingsplan*] will be replaced, for example, by the environment plan [*omgevingsplan*]. The level of actual protection afforded to cultural heritage will remain at least the same. Implementing legislation will be utilised to ensure transitional law so that existing zoning plans, for example, do not cease to be applicable.

The sections of the Monuments and Historic Buildings Act 1988 relating to other matters that must be arranged for monuments (including archaeological monuments) are included in the present legislative proposal. The Heritage Act and the Environment and Planning Act therefore complement one another. The basic principle is that the level of actual protection of cultural heritage afforded by those two pieces of legislation is at least the same as in the current system. The Heritage Act is expected to enter into force sooner than the Environment and Planning Act. So as to leave no gaps in the protection of cultural heritage in the meantime, all the provisions that are transferred to the Environment and Planning Act will remain in force until the point when the Environment and Planning Act enters into force.

⁴ The legislative proposal for the Environment and Planning Act was submitted on 16 June 2014, Parliamentary Documents II 2013/14, 33 962.

Parallel to the present legislative proposal, the Government Accounts Act [*Comptabiliteitswet*] will be modernised,⁵ with the basis for material management of the national collection in Section 38(3) of that Act no longer applying. The rules for Ministers and State Institutions [*colleges van staaf*] regarding management of the national collection have been included in the present legislative proposal and will therefore no longer be covered by the regime of the Government Accounts Act.

The legislation on archives will continue, given its nature, to apply independently, and has not been incorporated into the present legislative proposal. The Public Records Act 1995 [*Archiefwet 1995*] stipulates that the archives of the various public authorities are to be stored carefully and made available, so that everyone has the opportunity to understand how the authorities operated in the past. Given its focus on information and accessibility, that Act is not exclusively a heritage act and is therefore unsuitable for integration into the present legislative proposal. Government archives will therefore continue to be subject to the Public Records Act 1995, which sufficiently guarantees the preservation of those archives. Where archives are concerned, that Act must be seen as a *lex specialis* if there is a case of overlap.

1.6 Role of other authorities and of the Council for Culture

Preserving and managing cultural heritage is a responsibility for all levels of government with a general management task. The present legislative proposal focuses on the protection of cultural heritage that is considered at national level to be of public interest. Central government plays an important role in this, but other public authorities are also relevant. One clear example is care for national monuments. It is the State that is responsible for designating such monuments and for funding the maintenance costs, whereas the funds for restoration are provided via the provinces. In addition, the provinces have their core task and statutory powers in the field of spatial planning development and environmental policy. The province plays a connecting role in the area of its core tasks and can act as the area-specific coordinator. The provinces, for example, look after national heritage interests in the context of provincial spatial planning and deal with area-specific conservation of monuments. The municipalities are responsible for advising on the designation of national monuments by the State, for the safeguarding of cultural heritage in zoning plans, for issuing permits for the restoration or alteration of monuments, and for supervision. This legislative proposal does not entail any changes in this division of responsibilities, which has shown itself to be effective. Nor does the legislative proposal bring about changes in the responsibility of local and provincial authorities for protecting municipal and provincial monuments and collections of local or regional importance. The rules that the legislative proposal introduces regarding management of the national collection do not apply to museums that only manage collections belonging to other authorities, and the rules regarding supervision do not apply to those museums. The other authorities are responsible for their own collections; they can find inspiration in the legislative proposal for structuring that responsibility.

This legislative proposal does, however, impose rules regarding cases in which authorities wish to dispose of cultural objects or collections (or parts of collections) that are of particular cultural-historical or scholarly significance and that are irreplaceable and indispensable as part of the Dutch cultural heritage. Those rules comprise a duty of care (mandatory seeking of expert advice), and do not otherwise affect the autonomy of the authorities to arrive at a decision independently.

⁵ Parliamentary Documents II 2012/13, 33 670, No. 1.

This legislative proposal does provide for a change in the role of the Council for Culture. The current advisory role of the Council regarding individual designations of national monuments (including national archaeological monuments) and protected cultural objects is not included in the legislative proposal. The Minister of Education, Culture and Science, acting ex officio, will take the relevant decisions on the basis of proposals from the Cultural Heritage Agency country's cultural heritage [*Rijksdienst voor het Cultureel Erfgoed, RCE*]. As has been shown in practice, the added value of advice from the Council is to be found not so much in its advice on individual cases as in a strategic context. The Council will continue, for example, to render advice (both solicited and unsolicited) on the designation programmes for monuments on which individual designations are based. The Council may also, of course, make suggestions to the Minister of Education, Culture and Science for ex officio designation if it identifies a cultural object that must not be lost to the Dutch cultural heritage.

1.7 International obligations

The Netherlands has entered into various international agreements on the protection of cultural heritage. This involves ratification by the Netherlands of conventions of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Council of Europe, and of EU legislation. In some cases, these international agreements led to the drawing up of national legislation for the protection of cultural heritage. The international agreements are of great importance in protecting our cultural heritage, and have also served as important basic principles for the present legislative proposal. A list is given below of the international agreements that the Netherlands has entered into.

National legislation is not in all cases necessary for the country to carry out its international obligations. If legislation is in fact required, that requirement is met with the present legislative proposal in conjunction with, *inter alia*, the legislation in the field of the physical living environment⁶ and the civil law rules set out in the Civil Code [*Burgerlijk Wetboek*] and the Code of Civil Procedure [*Wetboek van burgerlijke rechtsvordering*]. The other obligations arising from international agreements – such as the surveying, management, preservation, and accessibility of the heritage concerned, monitoring, supervision, and the provision of information – are met by, *inter alia*, policy and communication. A good example of this is how intangible cultural heritage is dealt with, mainly by keeping it alive by giving heritage associations the opportunity to pass it on to future generations. This involves surveying it, disseminating knowledge of it, and by implementing model practices for its protection.

List of conventions and EU regulations

UNESCO

- Convention for the Protection of Cultural Property in the Event of Armed Conflict, together with the associated (First) Protocol, 1954 (1954 Hague Convention);
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention);

⁶ These rules are still included in various pieces of legislation but are combined in the proposal for the Environment and Planning Act. For the international obligations relating to the physical living environment, see Sections 2.3 and 7.3 of the Explanatory Memorandum to the legislative proposal for the Environment and Planning Act, Parliamentary Documents II 2013/14, 33 962, No. 3.

- Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 (World Heritage Convention);
- Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1999 (Second Protocol);
- UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003 UNESCO Convention).

Council of Europe

- Convention for the Protection of the Architectural Heritage of Europe, Granada 1985 (Granada Convention);
- European Convention on the Protection of the Archaeological Heritage (Revised), Valletta 1992 (Valletta Convention);
- European Landscape Convention, Florence 2000.

European Union

- Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State;
- Regulation (EC) No. 116/2009 on the export of cultural goods;
- Regulation (EC) No. 1210/2003 concerning certain specific restrictions on economic and financial relations with Iraq (Article 3);
- Implementation of Regulation (EU) No. 1332/2013 of the Council of the European Union of 13 December 2013 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria (OJEU L 335) and implementing Decision 2013/760/CFSP of the Council of the European Union of 13 December 2013 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJEU 335).

1.8 Dutch Caribbean

Since 10 October 2010, the islands of Bonaire, St. Eustatius, and Saba (the “Dutch Caribbean”) have had the status of public authority [*openbaar lichaam*]. This legislative proposal will not apply in the Caribbean Netherlands, meaning that there will not be any change in the current situation. The acts that have been integrated into this legislative proposal also do not apply in the Caribbean Netherlands. For monuments and archaeology, there is a separate act, namely the Monuments and Historic Buildings (BES Islands) Act [*Monumentenwet BES*]. Based on that Act and the regulations applying to the BES Islands, the island governments can assign protected status to monuments. The Monuments and Historic Buildings (BES Islands) Act comprises a different system of protection to that in the legislation applying to the European part of the Netherlands. In the European part, the protection of monuments and archaeology is safeguarded above all in the legislation on spatial planning, and the Caribbean Netherlands has a different regime for that legislation also.

The chapter on the management of collections does not apply to the Caribbean Netherlands either. Management of the national collection is not allocated to any of the public authorities, and a locally based institution will not be charged by the Minister of Education, Culture and Science with the management of collections.

The implementing legislation for the First Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act also do not apply to the Caribbean Netherlands. The conventions can

only come into force for this part of the Netherlands if the Civil Code and Code of Civil Procedure applying there have also been amended. That has not yet commenced due to the policy of legislative restraint. Other conventions in the area of cultural heritage do apply in the Caribbean Netherlands, however, including the World Heritage Convention, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, the Granada Convention, and the Valletta Convention. In so far as necessary, these conventions have been implemented in specific BES Islands legislation.

1.9 Structure of the legislative proposal

The legislative proposal is structured as follows:

Chapter 2: Management of collections

Chapter 3: Designation as protected heritage

Chapter 4: Protection of heritage

Chapter 5: Special rules for the preservation of archaeological monuments

Chapter 6: The international return of cultural objects

Chapter 7: Financial provisions

Chapter 8: Enforcement and supervision

The general part of this Explanatory Memorandum follows that structure. The section-by-section part indicates how the provisions included related to the existing legislation. Concordance tables for the integrated acts are also included at the end.

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2. Management of collections

2.2.4 Supervision of management of the national collection

As already pointed out, the rules regarding the management of the national collection are directly intended for anyone who carries out such management. This means that supervision of the museums that manage museological cultural objects of the State is no longer based on management agreements and funding decisions, but is enshrined in law. Furthermore, the system of the Government Accounts Act 2001 no longer forms a limitation as regards the supervision of institutions that are funded by Ministers other than the Minister of Education, Culture and Science. In that system it is only the relevant Minister who can be addressed and not the institution that actually manages the national collection. This means that the responsibility that the Minister of Education, Culture and Science has for supervision and enforcement is complex. This legislative proposal puts an end to that complex situation as regards the management and supervision thereof.

Because of the personal responsibility of anyone who manages a national collection, inspectors supervising the national collection will report their findings directly to the relevant manager. In doing so, they can also make recommendations. Only if the inspectors discover that the recommendations are not being complied with and preservation of the cultural objects is endangered will the Minister of Education, Culture and Science proceed to issue instructions or take over management.

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4. Protection of heritage

4.1 Introduction

The public interest served by the entire Dutch cultural heritage justifies its protection and thus a certain restriction on how the private or individual owner can deal with his property. It goes without saying, of course, that careful consideration needs to be given, on the one hand, to the interest served by protection and, on the other, to the interest of the owner and the free movement of goods.

This chapter successively covers the rules imposed on owners of protected cultural objects, on authorities that wish to dispose of cultural objects, on the export of cultural objects abroad, and on the owners of national monuments.

4.2 Privately owned cultural objects

For owners of protected cultural objects, the restriction provisions of the Heritage Preservation Act have been incorporated into the legislative proposal. These mean that it is prohibited without the permission of the inspector (of the Cultural Heritage Inspectorate [*Erfgoedinspectie*]) or the Minister of Education, Culture and Science to carry out certain actions concerning a protected cultural object, including offering it for auction, disposing of it, or encumbering it. If an action entails the possibility of a cultural object being lost to the Netherlands, the Minister of Education, Culture and Science can state objections, which can ultimately lead to the Minister entering into negotiations with the owner about purchasing the object.

This legislative proposal adds a new method to the existing range of instruments for preserving protected cultural object for the Netherlands. Partly because the State's fund for such purchases is only limited, this legislative proposal offers private initiatives greater scope for contributing to the preservation of important cultural heritage for the country. Contributing in this way is not in fact exceptional; works that were at risk of being exported have in the past been purchased by individuals. More often, individuals make a significant financial contribution for the purchase of a cultural object by the State, for example through funds of a private nature. This is an important development that deserves long-term support and that reflects a valuable social commitment to, and responsibility for, the country's cultural heritage.

So as to improve the position of individuals, including professional managers such as museums, that wish to contribute to the preservation of important cultural objects for the Netherlands, the objections stated by the Minister of Education, Culture and Science will be published if there is the risk of a protected cultural object being lost to the Netherlands. After publication, there will be a six-week period during which potential purchasers can make themselves known to the Minister. This period is deemed reasonable for an individual to come forward, while not being disproportionately disadvantageous for the owner. At this stage, it does not already need to be clear whether it will be possible to finance the proposed purchase of the protected cultural object.

The Minister of Education, Culture and Science notifies the owner of the potential purchasers without delay, and the owner can then contact them. The Minister of

Education, Culture and Science has only a limited role during this phase. He publishes his objections and notifies the owner of the potential purchasers. He emphatically does not act as an intermediary. The owner is at liberty as to whether or not it will accept the potential purchasers. It is only six weeks after their publication in the Government Gazette [*Staatscourant*] that the Minister's objections are deemed to constitute a bid to purchase by the State. In this way, parties other than the State are more emphatically involved in the preservation of cultural heritage. At the same time, in view of the interests of the owner, the procedure is basically not extended. Extension of the procedure is only possible at the owner's own request.

The more prominent role of third parties in this procedure does not affect the State's authority to purchase a protected cultural object itself so as to retain it for the Dutch cultural heritage. This instrument remains important; its use requires there to be a balance between the public interest of the cultural heritage, the interests of the owner, the importance of freedom of movement, and the available public funds.

4.3 Cultural goods owned by public authorities

Much of the cultural heritage in the Netherlands is in public ownership. Central government, provinces, and municipalities are the owners of extensive and valuable collections, often managed by museums and other heritage institutions such as archives, libraries, and archaeological depots. Some of these collections have been acquired with public funds, are managed by publicly funded institutions, and are generally accessible to all.

In recent years, there have been a number of cases of the sale (or potential sale) of some cultural objects and collections in municipal ownership. It is important for public authorities to deal carefully with the cultural objects with which they are entrusted, with it being necessary to prevent interesting cultural objects disappearing from the public context. It is also important for the museums that manage their collections for the authorities to show that they are reliable owners; after all, donations, bequests, and legacies are an important resource for expanding collections. If a public authority sells off cultural heritage objects from museums, doing so can deter potential donors.

The legislative proposal includes a guarantee for careful decision-making regarding the disposal of a cultural object or collection by central government, a province, or a municipality. That guarantee entails the obligation to seek expert advice on the proposed disposal.

That obligation arises when there is a reasonable assumption that the planned disposal concerns a cultural object or collection of particular cultural-historical or scholarly significance and that is irreplaceable and indispensable as part of the Dutch cultural heritage. This corresponds to the criterion applying to the designation of a cultural object or collection as protected. In order to facilitate this system of evaluation and advice, the Cultural Heritage Agency has been assigned the task of operationalising a valuation system (*Op de museale weegschaal*, RCE, 2013). One needs to remember that the background to this is that cultural objects or collections in public ownership have never been designated as protected cultural objects or collections pursuant to the Heritage Preservation Act.

The procedure regarding disposal has only been prescribed for central government, provinces and municipalities, and not for other authorities. The obligation to seek advice has thus been imposed on clearly defined parties, partly in view of the balance between the extent of the obligation and the expected effect. Seeking advice is

mandatory only in a case of proposed disposal to a party other than central government, a municipality, or province. That may be a foreign party, but it may also be a private person within the Netherlands. The responsibility that the various authorities have to decide on the disposal of cultural heritage therefore remains unaffected.

The obligation to seek advice is intended to guarantee careful decision-making regarding the disposal of a cultural object or collection owned by central government, a province, or a municipality. Section 4.19 of the Heritage Act imposes a few minimum requirements regarding the independence and expertise of the advisory committee. The Heritage Act does not establish any permanent advisory committees. It leaves the final decision on disposal of a cultural object and the composition and working methods of the advisory committee to the relevant public authority. The competent authority of that public authority is therefore responsible itself for ensuring that the advisory committee has all the necessary knowledge and competencies to deliver meaningful advice.

The committee is required to be independent and expert. A committee that can meet the preconditions is the “protection assessment committee” [*beschermingswaardigheidscommissie*] in the context of the Museum Objects Deaccession Guidelines [*Leidraad Afstoting Museale Objecten, LAMO*] drawn up by the Netherlands Museums Association. During the deaccession procedure, their public responsibility generally requires municipalities to act carefully in the spirit of the professional standards as laid down in the LAMO, in the guidelines for deaccession of cultural heritage adopted by the Association of Netherlands Municipalities (VNG), or in other accepted professional guidelines.

It can be expected that if the committee considers that the cultural object or collection is in fact of particular cultural-historical or scholarly significance, and is irreplaceable and indispensable as part of the Dutch cultural heritage, the municipality concerned will not easily decide to continue with the proposed disposal. If it does continue, and the proposed sale is to a private party, the advice provided by the committee means that the Minister of Education, Culture and Science can proceed to designate the cultural object or the collection as a protected cultural object or a protected collection. If the owner perseveres with disposal, the possible annulment of the disposal decision by the Crown can be substantiated on the basis of the advice. Such annulment of a decision to dispose does not, of course, apply to decisions taken by the Minister of Education, Culture and Science himself. Given the Minister's policy responsibility for cultural heritage, such decisions will naturally need to be taken with the greatest possible care.

4.4 Export of cultural objects

Besides cultural objects that have been specifically designated as protected, there are general restrictions on certain categories of cultural objects. These restrictions derive from EU regulations and relate to the export of cultural objects. They are intended to prevent illegal trading in cultural objects and to register trade in important cultural objects. These restrictions have been taken over directly from Sections 14a and 14b of the Heritage Preservation Act.

Firstly, there is the requirement that certain cultural objects are only permitted to leave the Netherlands with the consent of the owner. These include objects that are part of a public collection owned by a public authority, church collections, and collections designated by the Minister of Education, Culture and Science belonging to private institutions that receive funding to a predominant extent. The owner's consent may be

replaced, at the request of an interested party, by a permit from the Minister of Education, Culture and Science. The prohibition on removal from the Netherlands without the consent of the owner also applies to national monuments or parts thereof, to archive material, and to illegally excavated objects.

Secondly, there is the requirement that certain cultural objects are only permitted to be taken outside the European Union if a permit has been issued by the Minister of Education, Culture and Science or the Cultural Heritage Inspectorate. This concerns cultural objects that fall into one of the categories listed in Annex I to Regulation 116/2009, and that meet the financial threshold value corresponding to the relevant category. The permit requirement also applies to relevant cultural objects from other EU Member States that leave the EU via the Netherlands.

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6. International return of cultural property

6.1 Introduction

In this legislative proposal, two acts regarding the international return of cultural property have been integrated. These are the Cultural Property Originating from Occupied Territory (Return) Act [*Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied*]⁷ (referred to as the Occupied Territory (Return) Act [*Wet bezet gebied*]), and the 1970 UNESCO Convention (Implementation) Act [*Uitvoeringswet UNESCO-verdrag 1970*].⁸

Both these acts involve implementation by the Netherlands of ratified UNESCO Conventions, namely the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the (First) Protocol to that convention,⁹ (usually referred to as the “Hague Convention” or the “1954 UNESCO Convention”) and the 1970 Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁰

Integration of those acts into this legislative proposal does not affect their purpose and effect. Importing and possessing cultural property from occupied territory continue to be prohibited, as does importing illegally exported or stolen cultural property that is protected by states that are parties to the 1970 UNESCO Convention. The tasks and powers of the Minister of Education, Culture and Science and others as provided in the existing legislation remain in force in this legislative proposal. The legislative proposal does clarify, however, (in Chapter 3) what is deemed to be protected cultural property for the Netherlands in the context of these conventions. The fact that the purpose and purport of the two acts remain unchanged means that the parliamentary history of the original acts retains its significance, with those documents being referred to for a detailed explanation.¹¹

In addition to the 1954 UNESCO Convention and the 1970 UNESCO Convention, an EU Directive on the return of cultural objects is also relevant for the Netherlands.¹² As regards the return of cultural objects within the European Union, it is this directive that is the most relevant. Implementation of this directive has been effectuated by means of the Protection of Cultural Property against Illegal Export (Implementation) Act [*Implementatiewet bescherming cultuurgoederen tegen illegale uitvoer*] and has led to amendments to the Civil Code and the Code of Civil Procedure. The Heritage Preservation Act has also been amended, with conditions being imposed on the export of certain cultural objects and with various matters being regulated regarding investigation. Those provisions of the Heritage Preservation Act are to be found in Chapters 4 and 8 of this legislative proposal. Those provisions do not directly concern recovery and are therefore not dealt with in this chapter. The Minister of Education, Culture and Science plays no part in the return process beyond the fact that he establishes the central authority which acts as a point of contact for cooperation, information, and investigation. That authority can play a mediating role in the return.

⁷ Bulletin of Acts, Orders, and Decrees [*Staatsblad*], 2007, 123.

⁸ Bulletin of Acts, Orders, and Decrees, 2009, 255.

⁹ Treaty Series of the Kingdom of the Netherlands [*Tractatenblad*], 1955, 47.

¹⁰ Treaty Series of the Kingdom of the Netherlands, 1972, 50 and Dutch translation in Treaty Series of the Kingdom of the Netherlands. 1983, 66.

¹¹ See Parliamentary Documents numbers 30 165 and 31 255.

¹² Directive 2014/60/EU has now replaced Directive 93/7/EEC.

In addition, there are other international legal means relating to the return of cultural property in the case of (national) conflicts when the current international agreements prove to be insufficient. The UN and the EU have established sanctions for Iraq.¹³ In December 2013, the EU also adopted a similar arrangement for Syria.¹⁴

6.2 Importance of international return

Dutch participation in conventions protecting cultural property is important because objects of cultural, historical, and scientific importance that belong to the protected cultural heritage of a state require effective international protection. Internationally, the importance of cultural heritage for a state's own culture and the respect and recognition it deserves from other states are now generally accepted. However, the trade in nationally protected cultural property can be so profitable that national protection rules are contravened. Because this illegal trade can cause great damage to a country's cultural heritage, UNESCO has established conventions in this field.

It is of great importance that protected cultural property that has left the country of origin illegally can be recovered by the state of origin or by the original party that is legally entitled to it. The rules applying in the state where the cultural property has been sold or found must make it possible to cooperate in the return of that property to the country of origin from which it disappeared illegally.

The conventions operate on the basis of reciprocity: the Netherlands can also reclaim protected heritage from other states that are parties to the relevant convention if it has been removed from the Netherlands without the consent of the Minister of Education, Culture and Science or the owner.

Since the introduction of the Dutch legislation implementing the 1954 and 2007 UNESCO Conventions, in 2007 and 2009 respectively, the global situation in this regard has not become any calmer. Trouble spots and uprisings in various places, for example the Middle East and Africa, show the importance of international agreements to protect cultural property. Wars or conflicts involve a greater likelihood of the illegal export of cultural property. Not only may the situation be chaotic but in some parts of the country and at border crossings there may be a lack of control by the legal authorities. But archaeological sites are still looted even in countries that are relatively peaceful. Whether in wartime or peacetime, the illegal trade in cultural property impoverishes the cultural heritage of the country of origin and thus the heritage of humanity in general.

6.3 Combination in a single act

Combining the Occupied Territory (Return) Act and the Act implementing the 1970 UNESCO Convention in the present legislative proposal increases the accessibility and visibility of the rules regarding the return of cultural property. That applies all the more because the 1970 UNESCO Convention and the Protocol to the

¹³ Regulation (EC) No. 1210/2003 concerning certain specific restrictions on economic and financial relations with Iraq (Article 3). Implemented in the Netherlands by means of the Sanctions Order Iraq 2004 [*Sanctieregeling Irak 2004*].

¹⁴ Regulation (EU) No. 1332/2013 of the Council of the European Union of 13 December 2013 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria (Art. 11 *quater*).

1954 UNESCO Convention complement one another and have a priority arrangement as regards application when two parties claim the same cultural property.¹⁵

Combining the two pieces of legislation also makes clear that implementation of the two conventions forms an integral part of Dutch heritage policy.

6.4 Different procedures

In the present legislative proposal, the procedures regarding return set out in the Occupied Territory (Return) Act and the Act implementing the 1970 UNESCO Convention have not been harmonised. The conventions on which the two Acts are based differ regarding this point, and the procedures also differ for good reasons. Where the return of cultural property from occupied territories is concerned, the Minister of Education, Culture and Science plays a major role, whereas in the case of cultural property that has left a country illegally in some other manner, it is the party that is legally entitled to it or the relevant state that plays a leading role in the recovery proceedings. The reason for these different procedures is to be found in the special responsibility that the Netherlands has regarding cultural property from an occupied territory. This involves both the vulnerability of those cultural goods and the circumstances of the relevant authorities, which often make it difficult, if not impossible, to take effective action.

Both procedures do, however, involve return being achieved by means of private law. In order for return to take place, a claim must be submitted before a civil court against the possessor or holder. This is subject to different rules regarding good faith and time barring. One consequence is that part of implementation of the rules regarding return is to be found in Book 3 of the Civil Code and in the Code of Civil Procedure and that this legislative proposal must also be read in conjunction with those two codes.

In the case of cultural property that has unlawfully left a state that is a party to the convention, it is up to the party legally entitled to it or that state to institute proceedings before the Dutch courts. The Minister of Education, Culture and Science plays only a supporting role in this. For example, when a claim is to be instituted by a state that is a party to a convention, the Minister can take the cultural property into temporary custody. In the case of cultural property from an occupied territory, it is the duty of the Minister to take that property into custody. The Minister must then submit a claim for return and must ultimately actually transfer the property as soon as the conditions in the former occupied territory allow that to be done. In both situations – depending on the circumstances under which the possessor or holder obtained the cultural property – the owner or holder in good faith can be granted compensation at the expense of the State (in the case of cultural property from an occupied territory) or the party legally entitled to it or the state that is party to the convention (in the case of cultural property that has left such state illegally).

The above procedures relate to the options for instituting legal proceedings. In addition to such legal remedy, there is always the possibility of an amicable settlement.

¹⁵ For a further explanation, see Section 13 of the Explanatory Memorandum to the Implementing Act 1970 UNESCO Convention, Parliamentary Documents II 2007/08, 31 255, No. 3.

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8. Enforcement and supervision

8.1 Introduction

The provisions regarding enforcement and supervision in this legislative proposal largely correspond to which is regulated by the legislation and regulations that are combined within it. For example, the inspectors and public officials charged with supervision retain the same powers. The range of available sanctions is also taken on a one-to-one basis from the original legislation and regulations; it has, however, been expanded. The power to impose administrative coercion and a penalty for non-compliance will also apply, except for archaeology and historic buildings, to collections. This expansion adds to the ability to enforce compliance, effectively and proportionately, with the statutory provisions. The range of sanctions includes measures of increasing severity. The Minister of Education, Culture and Science does not need to follow this hierarchy, however, but can apply the sanction that he considers most appropriate in the specific situation concerned.

There are also no changes in the administrative relationships. As under the existing legislation and regulations, the Minister of Education, Culture and Science ensures administrative enforcement and appoints inspectors for that purpose. That does not alter the fact that the supervision of monuments is a matter to be dealt with by the municipalities and inter-administrative supervision by the provinces. No new specific system of supervision is introduced. The provisions in Chapter 8 regarding enforcement and supervision are also not related to the implementation of co-administration tasks by other public authorities. Other public authorities are only the subject of supervision if they are the party to which a certain standard applies [*normadressaat*], as in the case of a municipal excavation company or if they hold a national collection on loan. This does not constitute a change compared to the existing legislation and regulations.

8.2 Management of the national collection

Enforcement of the rules regarding management of collections has been expanded and made clearer. This legislative proposal makes direct supervision possible of any party that manages the national collection. Based on the system of the Government Accounts Act 2001, supervision is only possible of other Ministers and State Institutions and not of institutions that actually manage cultural objects for those Ministers or State Institutions. In the case of the museums for which the Minister of Education, Culture and Science is responsible, supervision is currently complex due to the combination of management contracts and funding relationships. Directly imposing the standards on those who manage cultural objects also clarifies the situation regarding enforcement and supervision. For a further explanation, reference is made to Section 2.2.4, which deals in greater detail with the management of collections and the supervision of that management.

8.3 Preservation of archaeological monuments

The change from a permits system for excavations to a certification system means that enforcement and supervision will operate differently. It is no longer the Minister of

Education, Culture and Science who issues the permit for carrying out excavations but a certification institution, which assesses whether a party is in fact suitable to carry out excavations. It is therefore basically the certification institution that checks whether the holder of a certificate then complies with the requirements. Currently, the Minister of Education, Culture and Science can withdraw a permit but in the new system, it is the certification institute that will do so if the requirements are not met. Where enforcement and supervision are concerned, the Minister of Education, Culture and Science is thus in fact placed at a greater distance as regards the quality of excavations. The Minister specifically ensures supervision of the certification institutions and the system as a whole. For a further explanation, reference is made to Section 5.3.3.

8.4 Illegal trade in cultural objects

The inspectors have a number of specific tasks regarding the detection of illegal trading in cultural objects. In that context, it is also relevant to mention the sanction arrangements implemented by the Minister of Foreign Affairs, for example those relating to Iraq and Syria.¹⁶ These involve the investigation of illegally exported cultural heritage from countries that are in a conflict situation and where a vulnerable situation has arisen for cultural heritage. For this purpose, the inspectors have special powers under the Sanctions Act 1977 [*Sanctiewet 1977*] and underlying regulations. Supervision and enforcement therefore take place pursuant to that legislation and those regulations and not pursuant to the provisions of the present legislative proposal. The sanctions to be imposed in a given case are always of a temporary nature.

¹⁶ Sanctions Order Iraq 2004 II and Sanctions Order Syria 2012.

<<<Artikelsgewijs deel 2.2.4>>>

II. ARTICLE BY SECTION

Section 8.1. Enforcement duty

Former: Section 63 Monuments and Historic Buildings Act 1988 in conjunction with Section 5.2 Environmental Law (General Provisions) Act

Amendment: clarification of what falls within the enforcement duty of the Minister of Education, Culture and Science

This section specifies who is responsible for enforcement of this legislative proposal and what that enforcement duty entails. Enforcement entails (1) the supervision of compliance with the statutory provisions (supervision) and (2) imposition of administrative sanctions in the event of non-compliance with those provisions. As regards supervision, it is explicitly stated that this includes collecting and recording information to the extent that such information is relevant to supervision.

Section 8.2. Administrative coercion

Former: Section 63 Monuments and Historic Buildings Act 1988 and Sections 5.14 and 5.15 Environmental Law (General Provisions) Act

Amendment: power to impose administrative coercion is of general application

As an administrative sanction, the Minister of Education, Culture and Science can impose administrative coercion. For the purpose of enforcement regarding monuments and archaeology, the Minister already has the power to impose administrative coercion. That means of enforcement is formulated in this legislative proposal as a general power for the purpose of enforcement under administrative law. That expansion is mainly relevant to the rules regarding management of collections. Now that the management of collections has been regulated by law, both Ministers and State Institutions require an effective range of instruments for the Minister to enforce the standards regarding management. Depending on the particular situation, the Minister may impose administrative coercion or a penalty for non-compliance. After all, under Section 5:32 of the General Administrative Law Act, the Minister's power to impose administrative coercion, means that he in fact already also has the power to impose a penalty for non-compliance. It should be noted that there are a number of steps that precede the imposition of these instruments in the case of collections. The inspector will first make recommendations for management. Subsequently, the Minister, pursuant to Section 2.6, may issue instructions regarding the management and it will basically only be if those instructions are not complied with that a (remedial) sanction will be imposed. In urgent cases this escalation of interventions can, of course, be applied differently.

Sections 8.3 to 8.5

Former: Sections 15 and 16(1) and (4) Heritage Preservation Act, Section 8 of Occupied Territory (Return) Act, Section 8 Implementation Act 1970 UNESCO Convention, Section 11(1) Regulations on Material Management of Museum Objects 2013, and Section 63(3) Monuments and Historic Buildings Act 1988, in conjunction with Sections 5.1, 5.10 and 5.12 Environmental Law (General Provisions) Act

Amendment: no amendment

The way in which inspectors are appointed and announced has been taken over unchanged from the existing legislation in the field of cultural heritage. The officials of the Cultural Heritage Inspectorate who have been designated, pursuant to the Heritage Preservation Act, as inspectors are also charged – pursuant to the Occupied Territory (Return) Act, the Act implementing the 1970 UNESCO Convention, and the Regulations on Material Management of Museum Objects 2013 – with supervision of compliance with those pieces of legislation. The inspectors are in general already charged with the supervision of compliance with all sectoral legislation in the field of cultural heritage. This provision simplifies that designation decision.

Section 8.6. Special powers

Former: Sections 17 and 18 Heritage Preservation Act, Section 9 Occupied Territory (Return) Act, Section 9 Implementation Act 1970 UNESCO Convention,

and Section 63(3) Monuments and Historic Buildings Act 1988, in conjunction with Section 5.13 Environmental Law (General Provisions) Act

Amendment: no amendment

In addition to their general powers under the General Administrative Law Act, the inspectors have a number of special powers under the present legislative proposal. Those special powers are taken from the existing legislation and are intended to make it possible to determine whether certain protected heritage is present. This may involve entering dwellings to check whether designated cultural objects have not been relocated or to check that protected cultural property from other countries is not present contrary to the prohibitions in Chapter 6. Where the latter cultural property is concerned, the inspectors also have the power to seal rooms or objects and to call in the police.

The power to enter a dwelling exists in all the legislation regarding cultural heritage that is incorporated into this legislative proposal. However, it is again emphasised that the application of this power also requires the inspectors, pursuant to the General Act on Entry into Dwellings [*Algemene wet op het binnentreden*], to have prior authorisation (except in urgent cases).

Section 8.7. Special provisions regarding supervision of management of collections

Former: Section 11(2) to (5) Regulations on Material Management of Museum Objects 2013

Amendment: directly applicable to institutions which manage national collection

A separate provision has been included regarding supervision of the management of museological cultural objects of the State. That provision has been taken from the Regulations on Material Management of Museum Objects 2013. Given the relationships under constitutional law, supervision of the management of the national collection has been regulated separately. The Minister of Education, Culture and Science can, after all, in fact supervise other Ministers and State Institutions. This legislative proposal makes that provision also directly applicable to all institutions that manage museological cultural objects of the State. Pursuant to Chapter 2, these are, after all, directly bound by the rules governing the management of these cultural objects.

Subsections 1 and 2. The manager of the cultural objects must provide the inspectors with all the information that they request in order to exercise their supervision. The manager must also allow the inspectors access to the cultural objects and allow them to inspect the management documents.

Subsection 3. Because the Ministers and State Institutions have primary responsibility for management of the cultural objects, it has been stipulated that the inspectors will report their findings regarding the management of the museological cultural objects to those Ministers and State Institutions. In doing so, the inspectors can make recommendations.

Subsection 4. The Minister of Education, Culture and Science must be informed of the inspectors' findings.

Subsection 5. It has been stipulated that the provisions also apply to an institution that manages cultural objects or collections of other collections if that institution has been assigned a statutory duty, pursuant to Section 2.8, to take care of the management of those cultural objects or collections. Under Section 2.9(4), such

institutions are namely subject to the same rules as those that apply to the national collection.

Section 8.8. Investigation of protected cultural objects of EU Member States

Former: Section 10(2) and (3) Heritage Preservation Act

Amendment: no amendment

Subsection 1. In the context of Directive 2014/60/EU, the special investigating officers [*bijzondere opsporingsambtenaren*] have a specific task when it comes to investigating cultural objects that have been unlawfully removed from the territory of another Member State of the European Union. That task has been taken over unamended from the Heritage Preservation Act.

Subsection 2. In the light of the power to trace cultural objects, an amendment to Directive No. 2014/60/EU will apply from the day when the amendment concerned must be implemented. In advance of that date, a ministerial order can declare that the power to investigate pursuant to the amended directive already applies.