

The Negative Effects of EU Directives on Cultural Heritage

BÍBOR BÁNFI-KLEKNER

Pázmány Péter Catholic University Faculty of Law and Political Sciences

It is essential to safeguard the common European cultural heritage and fundamental values, especially during the law making process of the EU. It is a specific field of EU law, where the monitoring of directives from various fields, such as international trade competition, personal and public health, safety, and conservation of the natural environment, gained significance. In a time, when almost all European countries fight with serious economic problems in a Changing World, our fundamental values and common cultural heritage is giving us strength and hope to keep going.

1. EU Background

Although the field of Culture and cultural heritage do not belong to the competencies of the EU, we find the following sentence in the Common Provisions, Article 3 of the Consolidated version of the Treaty on European Union (March 2010):

„It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”¹

It is evident, that the common desire of EU states is to protect cultural heritage even though the measures and policies are carried out within the national competencies of the member states.

In the Consolidated version of the Treaty on the Functioning of the EU, Title XIII is about Culture:

“1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: (...)

*— **conservation and safeguarding of cultural heritage of European significance.***

*4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”*²

¹ Consolidated version of the Treaty on European Union (March 2010)
<http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>

² Consolidated version of the Treaty on the Functioning of the EU
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>

As I highlighted in the quoted text, the conservation of cultural heritage of European significance is emphasized, which shows, that even though sometimes the directives carry negative effects on protected monuments, it is absolutely not due to the will or conviction of the legislators.

As we are all aware the organs of the EU have been attributed no power, no competency over cultural policies, which are therefore belong to the competency of the member states, in other words, this field is a prerogative of the member nations. It is therefore evident, in the light of the aforesaid, that the EU legislation is not produced to be applied to cultural activities as such, but to regulate other fields. However, these directives, as we will see shortly, often carry or may carry negative effects to the preservation procedures of the historic monuments. If we think about the application of the rules concerning the four freedoms and environment, it is evident, that these fields have a wide scope. Regulations concerning these areas may therefore have indirect repercussions on the cultural sector.

2. The Granada Convention

When talking about cultural heritage in this article, we are focusing on the architectural, the so-called “built” cultural heritage. For a more precise definition let me quote the provisions of Granada Convention for the Protection of Architectural Heritage of Europe:

“For the purposes of this Convention, the expression “architectural heritage” shall be considered to comprise the following permanent properties:

- 1. monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;*
- 2. groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;*
- 3. sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.”³*

3. The Problems with EU Directives

The main problem is, that the cultural heritage sector is not informed in due time about the development and implementation of these legal acts.⁴ Therefore by the time the competent cultural heritage institutions and administra-

³Text of Convention for the Protection of the Architectural Heritage of Europe, Granada <http://conventions.coe.int/Treaty/en/Treaties/html/121.htm>

⁴European Legislation and Cultural Heritage (edited by Terje M. Nypan, 2006.) p. 45.

tions normally discover the possibly detrimental effects, it is too late to intervene into the legislative process. The best solution could be to operate a legal observatory group, serving and informing all cultural heritage administrations and other players in due time. This way, the cultural heritage sector may influence the legal acts in time and on a pro-active basis, which is a much more cost-effective solution as well.

The general problem concerning the EU legislation is that it is created to meet the demands of modern industrial goals.⁵ It therefore often, implicitly or explicitly, excludes the use of traditional materials and traditional craft methods, which would be used for sound conservation practices. Obviously, for new modern buildings this legislation is not a problem at all, but for historic buildings it is a threat to authenticity –as we will see in the cases below.

To summarize the conflict: the effect of regulations on the maintenance and restoration of cultural heritage stems from directives in areas within the competencies of the EU, but they are used with national regulations without consideration for the fact that they should not apply to cultural (heritage) policies as these are not within the competencies of the EU.

Therefore the legal strife originating from the implementation of the EU Directives, on one hand, and sound heritage conservation practice, on the other hand, takes place at national, rather than at EU or international level. Unfortunately it is almost impossible to exempt the historic monuments on national level, unless it is not explicitly formulated in the original text of the directive.

As a bottom line we can say, that the regulations interfere negatively with the safeguarding of authenticity, they negatively influence the value creation chain of cultural heritage and lead to a loss of the historic, traditional or visual authenticity of the heritage.⁶

Although the number of directives creating problems for the sector is increasing, the negative impact is definitely not due to the will of legislators. However the posed threat is real and may jeopardize the preservation of cultural assets.

It is therefore important to be able to influence the Directives legislative process at an early stage and for reaching that aim, the lobbying bodies of cultural heritage decided to form a working group.

4. Working Group for EU Directives and Cultural Heritage and the European Heritage Legal Forum (EHLF)

In 2003 an initiative was taken in co-operation with the EU financed AR-RCHIP / ARIADNE project at Czech Academy of Science, at The Institute of Applied and Theoretical Mechanics. At the meeting in Prague, it was decided

⁵ European Legislation and Cultural Heritage, *ibid.*, p. 51.

⁶ European Legislation and Cultural Heritage, *ibid.*, p. 53.

to establish a permanent working group with the task to compile a list of problematic Directives and seek to find solutions to this challenge.⁷

The main aim of the *Working Group for EU Directives and Cultural Heritage* became to document and to work towards establishing a permanent observatory function to monitor the legislative processes in Brussels. The Working Group documented its findings in the book “European Legislation and Cultural Heritage” published in 2006 (used as a source of this study as well). It also proposed a clause of special consideration – which will be presented in details later – as a possible legal tool to solve the problem.

The founders and leaders of the Working Group decided to improve their observatory functions by establishing the initiative of the European Cultural Heritage Authorities (European Heritage Heads Forum, EHHF), and the **European Heritage Legal Forum (EHLF)** in 2008, therefore the Working Group was subsequently dissolved.⁸

The EHLF is not a typical organization, it is rather a network of appointed cultural heritage experts from the national competent authorities, who have the task to follow and scrutinize proposed EU legislation in the pipeline to find if it does have negative effects on a sustainable cultural heritage management. If a piece of legislation is found to be detrimental it is reported immediately to the competent national authority, who may create a specific suggestion for changing the text for its’ own bodies in the national political system working with EU legislation. It is important to note, that EHLF does not take up political sides, it has rather an observatory role, and the EHLF members, or others, may seek to influence the wording of the legislation to include exemptions or special considerations for cultural heritage.⁹



European Heritage Legal Forum¹⁰

Hungary is also a member of the Forum. It is the responsibility of the National Office of Cultural Heritage (Kulturális Örökségvédelmi Hivatal, KÖH) to get the information from EHLF and represent the cultural heritage perspective during the national legal procedures.

⁷ European Legislation and Cultural Heritage, *ibid.*, p. 27.

⁸ European Heritage Legal Forum: <http://www.riksantikvaren.no/ehlf/>

⁹ European Heritage Legal Forum
http://www.riksantikvaren.no/Norsk/Prosjekter/European_Heritage_Legal_Forum/Organisation/

¹⁰ European Heritage Legal Forum
http://www.riksantikvaren.no/Norsk/Prosjekter/European_Heritage_Legal_Forum/Organisation/

5. The Starting Point: 98/8/EC Biocidal Product Directive

At the end of 1990s the experts of Norwegian cultural heritage administration suddenly became aware of the above sketched conflict, when they realized, that the traditionally used wood tar was also on the list of prohibited materials in the Biocide Directive.

The regulations concerning wood tar made it impossible to buy traditional wood-tar, which material is used for conserving the medieval wooden buildings, such as the world-famous **Borgund Stave Church**.¹¹



Borgund Stave Church is a stave church located in Borgund, Lærdal, Norway. It is classified as a triple nave stave church of the so-called Sogn-type. This is also the best preserved of Norway's 28 extant stave churches. Borgund was built sometime between 1180 and 1250 CE with later additions and restorations. The stave churches in Norway and many wooden buildings in Scandinavia or elsewhere are maintained with traditional wood tar. Some buildings are from the middle ages. It is impossible to find a substitute for protection of the outer surfaces.

According to the Biocide Directive, the definition of prohibited materials is as quoted here:

“(2) the Council expressed concern at the lack of harmonised Community provisions for biocides, formerly known as non-agricultural pesticides, and invited the Commission to examine the situation in Member States and the possibility for action at Community level;

(3) Whereas biocidal products are necessary for the control of organisms that are harmful to human or animal health and for the control of organisms that cause damage to natural or manufactured products; whereas biocidal products can pose risks to humans, animals and the environment in a variety of ways due to their intrinsic properties and associated use patterns;”¹²

It is obvious however, that the material in question, the traditionally used wood tar does not pose any damage to humans when used for cultural heritage goals.

Since the use of traditional wood tar is essential for the conservation of the Nordic heritage: medieval stave-churches, vernacular buildings as well as numerous traditional ships depend on such wood tar for antiquarian mainte-

¹¹ http://en.wikipedia.org/wiki/Borgund_Stave_Church

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0008:EN:NOT>

nance. The cultural heritage specialists and competent authorities wanted to prove that such wood-tar in the mentioned cultural heritage use is in fact not a biocide.

However, when the specialists realized this problem, the directive was already in force. The question quickly rose: is it possible to achieve changes in a directive after it has come into force? The so-called “Nordic Initiative” was to remove wood tar from the Biocide directive.¹³

At the end and after several years of proving that the prohibition of wood tar will cause serious and gradual decay of the stave churches and eventually lead to destruction and even disappearance, the use of wood-tar for cultural heritage preservation goals was exempted. It was eventually possible to achieve changes in a directive after it had come into force, but it demanded more man-hours costs and created serious costs for scientific studies. After working to change the directive for years the solution became to scientifically demonstrate that wood tar used as a wood surface treatment does not contain biocide effects. The research project lasted for 2 years and was co-financed by the heritage authorities of Norway, Sweden and Finland. The research confirmed no biocide effects. Wood tar was removed from the directive’s list of active substances in February 2007.

As a summary we can say, that it is much cheaper to involve a clause of special considerations for cultural heritage in the original Directive text and that the conclusion is that it is much more cost-effective to be pro-active!¹⁴

6. Two More Cases for Negative Effects

Does being prepared for disasters following given mandatory prescriptions always and automatically lead to reduction of authenticity? How may we keep the authentic value of a monument, upgrade fire safety and improve safety aspects for everybody at the same time?

It seemed almost impossible to meet all the requirements of the fire safety regulations and safeguarding authenticity in the case of **Castle Schönbrunn in Vienna**. The specialists soon realized that in this case, they need a special, a tailor-made solution to save the interior design.

What was the problem?

The experts were faced with the problem of conforming with the safety regulations applicable to public buildings. The question was, amongst others if the standardised escape signs should be installed everywhere in the museum. The question was how to protect the monument, keep authenticity and at the same time protect the people within it properly, in case of fire.

¹³ European Legislation and Cultural Heritage, *ibid.*, p. 92.

¹⁴ European Legislation and Cultural Heritage, *ibid.*, p. 93.



Source:http://hu.wikipedia.org/w/index.php?title=F%C3%A1jl:Wien_Schoenbrunn_Rueckseite.jpg&filetimestamp=20050706181210

What is good and useful for new buildings and for the entire building industry usually presents a problem if we wish to keep our heritage. In order to keep the authenticity of monuments the cultural heritage specialists found out to follow a so-called “performance based approach”. This means, that in order to keep the original interior design, it is necessary to find a

solution tailor-made to the monument, and therefore the standardized signs are redesigned to fit more into the interior design. The experts created a purpose designed service column to the Castle, on which they could secretly, but visible place the fire escape signs.¹⁵

A European cooperation in the COST 17 group has made major advances in the direction of developing such performance based alternatives. The alternatives are a must when discussing how to avoid that the prescriptive standards become mandatory also for the cultural heritage field.

The other case is from Hungary, and unfortunately (but not surprisingly) it is not a success story. In the case of **Visegrád Royal Castle**, which was reconstructed in 2006, the purchase of a special building material was prohibited because of nonconformity with EU rules.

In the innermost room of the castle there was a square of approximately 1 m. x 1 m. on the floor which consisted of smaller, of a light mustard colour and clearly not new tiles, which were the remaining usable original tiles that were found during the excavations. The cultural heritage experts wanted to use tiles that looked like the original historic tiles and, if possible, produced in a similar fashion. Luckily they had found a producer in Spain who could make such tiles, still using an almost identical production process as used for the original tiles!¹⁶

However, these Spanish tiles did not conform to EU rules for building materials and they were not certified. Since the Hungarian Cultural Heritage Act gives priority to historic and visual likeness to the original materials, the lack of product certification could have not been a problem, so they ended up purchasing the Spanish tiles.

¹⁵ European Legislation and Cultural Heritage, *ibid.*, p. 62.

¹⁶ European Legislation and Cultural Heritage, *ibid.*, p. 85.

When the purchasing invoice was presented to the Finance authorities who should pay the bill, they refused. According to the Finance authorities, they could not pay for 'none authorised' or non-certified building material. Even if the national Cultural Heritage Act permitted such tiles for conservation works the rules on public purchase made the national heritage legislation impracticable.

In this case one regulation impedes on the other. The heritage act is overridden by the EU regulations. This is why the rooms in this wing are now laid with certified red industrial tiles from Italy.

Source: <http://hu.wikipedia.org/w/index.php?title=F%C3%A1jl:Visegradpalota.jpg&filetimestamp=20051016220814>



7. The Legal Instrument: “Clause of Special Considerations”

As we have seen from the cases presented above, there is a significant need for special considerations for the Cultural Heritage sector. The best way to prove that was to gather the cases and display them to the Commission. Similarly, at the national level there is a need to follow the implementation and to ensure that the necessary special considerations are incorporated into the national regulations, also on a case to case basis.

The name of the legal tool which was created to solve the problem is the clause of special considerations. Authorities and policy makers need a legal ‘instrument’ to use when problematic directives are identified, and the members, experts of EHLF believed that the “Clause of Special Considerations” is the most appropriate legal instrument.¹⁷

The ‘Clause of Special Considerations’ transfers the legal authority in a field of EU competency to the “competent national authority” for cultural heritage, when the consequences of the directive impact negatively on cultural policies. In other words, the EU recognizes that EU legislative competencies in specific

¹⁷ European Legislation and Cultural Heritage, *ibid.*, p. 52.

areas may infringe on the prerogatives of national cultural policy and states that, if such is the case, the competent national authorities (for culture / cultural heritage) may make necessary exemptions from this directive.

With cultural heritage included in the text of the treaties, and EU legislation it has now become possible to lobby for necessary changes in the legislation also during the legal procedure. It is significant to monitor ceaselessly the directives in the pipeline; however, the possibilities to insert the correct legal formulation have improved a lot during the past decade.

In theory it should be normal to secure the necessary special treatment for cultural heritage at national level, even without such statements on cultural heritage in the EU legislation. Experience however has demonstrated that it becomes much easier to get exemptions in the national legislation if such exemptions are given in the EU legislation.¹⁸

8. Some Examples of the Clause in Directives

The manner in which exemptions or special consideration for cultural heritage is written into certain directives is different in different directives. There is no standard formulation. Here are some examples of current practice.

9. 2010/31/EU Directive on the energy performance of the buildings¹⁹

Article 4, paragraph 2:

“2. Member States may decide not to set or apply the requirements referred to in paragraph 1 to the following categories of buildings:

*(a) buildings officially protected as part of a designated environment or because of their **special architectural or historical merit, in so far as compliance with certain minimum energy performance requirements would unacceptably alter their character or appearance;***

(b) buildings used as places of worship and for religious activities;”

10. Common Position EC No. 33/2006 on the assessment and management of flood risks²⁰

Article 1 states:

*“The purpose of this Directive is to establish a framework for the assessment and management of flood risks, **aiming at the reduction of the adverse consequences for***

¹⁸ European Legislation and Cultural Heritage, *ibid.*, p. 54.

¹⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:153:0013:0035:EN:PDF>

²⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:311E:0010:0020:EN:PDF>

human health, the environment, cultural heritage and economic activity associated with floods in the Community.”

In the **Paint Products Directive (2004/42/CE)**²¹ amending the directive on the Limitation of Volatile Organic Compounds 99/13/EC a clause of special considerations has been Included:

*“(11) Member States **should be able to grant individual licenses for the sale and purchase for specific purposes** of products in strictly limited quantities which do not comply with the solvent limit values established by this Directive.”*

Article 3. Requirements

*“3. **For the purposes of restoration and maintenance of buildings and vintage vehicles designated by competent authorities as being of particular historical and cultural value, Member States may grant individual licences for the sale and purchase in strictly limited quantities of products which do not meet the VOC limit values laid down in Annex II.**”*

Conclusion

There are several EU Directives which carry potential negative effects on wonderful historic monuments belonging to cultural heritage Europe-wide. In order to protect these monuments, a European Heritage Legal Forum was formed as a lobbying organization to monitor directives and warn interested bodies of the potential negative effects in this field. This Forum and the European Working Group on EU Directives and Cultural Heritage worked out the so-called „special consideration clause”. This means that to a certain extent, the monuments can be exempted from the negative effect of those EU Directives, which include this clause.

This kind of lobbying activity that EHLF carries out needs to be developed and improved to be as successful as the special bodies in the field of environment protection.

²¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0042:en:NOT>