PROTECTION OF CHATTELS WITHIN A LISTED BUILDING: THE CASE OF STOCLET PALACE, BRUSSELS ‡

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The Stoclet Palace is a mansion located in Brussels, built in the early part of the twentieth century by the architect Josef Hoffmann (a founder member of the Viennese Sezession group of artists and architects). Construction of the Palace was commissioned by the banker and art lover Adolphe Stoclet and the resultant work was a modern, twentieth-century building characterised by an absence of clutter and with every detail of the building having been designed by Hoffmann. In 2009 the building was designated a World Heritage Site by UNESCO. This article discusses the decision to list, not only the building itself, but the chattels within, and the challenge to this decision on the part of the Stoclet sisters, granddaughters of Adolphe Stoclet. The case raises important questions as to the potential scope of decisions to list culturally significant buildings, the human rights implications of such decisions as well as shedding light on the intricacies and inconsistencies of Belgian law in relation to protection of cultural heritage.

The Decision to List the Palace and its Contents

In order to protect both the exterior and interior of the 'complete work of art' formed by the Stoclet Palace, the Brussels-Capital Region administrative authority took the decision to 'list' ('*classer*') 'by extension' the chattels or objects which form an integral part of the structure, which itself had been listed in 1976. These objects received an independent listing in relation to the civil law categories, based on article 206(1) of the Code Bruxellois de l'Aménagement du Territoire (hereafter CoBAT – the planning legislation for Brussels). The Palace in its entirety – immovables and chattels which form an integral part of the Palace – was therefore listed by the regional authority, even though this body *a priori* possesses powers only in relation to immovable cultural heritage, with movable cultural heritage falling within the powers of the municipalities.[1] In addition, this increased protection of the entirety further limits the rights of the owner of these objects, their free movement being restricted such that they cannot be displaced without prior authorisation. Through the legal saga generated by this protection, the question arises as to the price to be paid to protect a jewel of world heritage.

1 Translator's note: Belgium is divided into three regions, Wallonia, Flanders and the Brussels-Capital Region. There are nearly 600 municipalities.' In addition, there are two Communities, Flemish and French, which are entrusted mainly with cultural matters. The translator is grateful to Hélène Deslauriers for her assistance in clarifying aspects of Belgian administrative practice.

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Introduction

Proudly built on the edge of the avenue de Tervuren and not far from the Woluwé Park in Brussels, the house of Adolphe and Suzanne Stoclet is an exceptional structure, commonly elevated to the status of Stoclet 'Palace'. Built between 1906 and 1911 by one of the great Viennese architects of the *Wiener Werkstätte*, Josef Hoffmann, it is the archetype of the concept of a 'total artwork' and has been included on UNESCO's World Heritage List since June 2009.

Anyone from Brussels knows this masterpiece, even though it is not possible to visit. The Stoclet Palace is in fact private property, closed to the public, and there are no exceptions, even for the Austrian Chancellor or the US Ambassador. In order to protect the historic and artistic worth of this exceptional edifice, the building was listed ('*classé*') in 1976 as a monument[2] and the garden was listed as a site in 2005.[3] The building is owned by a legal entity, S.A. Compagnie Immobilière SAS, and the chattels contained within the Stoclet Palace are owned by the heirs of the Stoclet family. Seeking a means of avoiding the disappearance of these chattels from the architectural whole, both the French Community and the Brussels-Capital Region started a listing process in respect of those movable items which had been made specifically for the Stoclet Palace. The subject of this listing, and more specifically its legal nature, are controversial and in part linked to the issue of legal powers.

The Listing Procedure

The two procedures are conducted in parallel since there is some uncertainty as to the appropriate authority with power to list these chattels. By virtue of articles 4, 4° and s6, §1, I, 7° of the special law of 8th August 1980, the Communities have the power to regulate the domain of movable cultural heritage and the Regions are competent in respect of immovable cultural heritage (monuments and sites). In the territory of the bilingual Region of Brussels-Capital, the Flemish and French Communities have powers under article 127, § 2 of the Constitution only in relation to institutions whose activity is linked exclusively to one of the Communities, the Federal State being competent in all else.

The listing procedure started by the French Municipality under the Decree of 11th July 2002 concerning movable cultural objects and the intangible heritage of the French Community[4] did not result in a listing decision as proceedings were halted by the Conseil d'Etat.[5] In the view of the administrative judge, the French Community did not possess the power to list the movable cultural heritage of the Stoclet Palace as the Palace is not an institution whose activity is linked solely to the French Community.

However, the listing procedure started at the same time by the Brussels-Capital Region under CoBAT resulted in the adoption of a final decree ('*arrêté*') of listing of 9th November

2 Royal Decree of 30 March 1976.

3 Governmental Decree of the Brussels-Capital Region of 13 Oct. 2005.

4 Article 4(2)(5)of the Decree provides that the listing procedure is "initiated at the request of 500 signatories domiciled in the French language Region or in the bilingual Region of Brussels-Capital" "[*la procédure de classement est entamée*] *à la demande de cinq cents signataires domiciliés dans la région de langue française ou dans la région bilingue de Bruxelles-capitale"*.

5 Conseil d'Etat,*Consorts Stoclet*, decree n° 156.418, 15 March 2006.

2006. Both the order confirming the decision to start the listing procedure[6] and the final decree[7] were challenged[8] before the Conseil d'Etat,[9] which rejected both challenges.[10] By adopting the definition given in article 206,1(a) of CoBAT according to which the term monument refers to "any particularly noteworthy structure, including the installations or decorative features which are an integral part of the structure", this order of definitive listing circumvents the issue of the classification of movables according to civil law categories. It avoids a thorny issue whilst at the same time establishing jurisdiction in such matters for the Brussels-Capital Region.

At the same time that the administrative proceedings were being heard, on 12th July and 6th November 2006, the three Stoclet sisters started proceedings before the Brussels first instance court[11] both substantively and before a judge in chambers (*référé*)[12] with the aim of obtaining compensation for the damage caused by the adoption by the Government of the Brussels-Capital Region of the order in which it was decided to start the listing procedure and the final order of listing, On 11th April 2008 the case went before the Brussels Court of Appeal. The action claiming damages in respect of the allegedly illicit and wrongful action was based on article 1382 of the Civil Code and on article 16 of the Constitution and Article 1 of the First Protocol of the European Convention on Human Rights which protects the right to property.

Adopting in part the reasoning of the administrative judge, the Brussels Court of Appeal held the claim to be without foundation and upheld the interference with the Stoclet sisters' right of property which had been caused by the listing order of 9th November 2006, without granting compensation on the basis that the violation of the right of property had not been established. [13]

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6 Decree of 13 Oct. 2005 "initiating, by extension, the listing procedure as a monument of certain movables and objects which have become immovable by destination which were specially designed and created for the Stoclet Palace, 179-281 avenue de Tervueren in Woluwé-Saint-Pierre". (« *entamant, par extension, la procédure de classement comme monument de certains meubles et objets devenus immeubles par destination qui ont été spécialement conçus et réalisés pour le palais Stoclet…* »),

7 Governmental Decree of the Brussels-Capital Region listing, by extension, as a monument, by reason of their historical, artistic and aesthetic value, the movables and objects which form an integral part of the Stoclet Palace and which are listed in the inventory at Annex II of the Decree. ("*décidant de classer, par extension, comme monument, en raison de leur intérêt historique, artistique et esthétique, les meubles et objets qui font partie intégrante du Palais Stoclet et qui sont énumérés dans l'inventaire formant l'annexe II dudit arrêté*".

8 "*ont fait l'objet de recours en annulation devant le Conseil d'Etat*".

9 The supreme administrative court of Belgium.

10 With regard to the final Decree of listing, the administrative judge convincingly rejected one by one the factors relied on by the claimants, taking the view that the significant financial loss incurred following a measure immobilising these movables could not be attributed to the listing measure ('*mesure de classement*'); that the incalculable sentimental value that the family had for these objects is contradicted by the proposed private sale of these items by Christies; that the claimants failed to establish that the objects would be at increased risk of theft (and the judge also rejected their criticism of loopholes in Belgian law which they alleged led to certain art thieves going unpunished); that the timescale for the listing was not of itself seriously prejudicial given the age of the claimants: Conseil d'Etat, decree no. 156.420 of 15 March 2006, *Consorts Stoclet*, pp. 9-12

11 Tribunal de Première Instance de Bruxelles – first instance civil (as opposed to administrative) court.

12 On the role of the référé, see Ruth Redmond-Cooper, 'Management Deficiencies and Judicial Intervention' in *International Themes in Business Law* (2007, Sage Publications).

13 Brussels Court of Appeal (21st chamber), 14 Sept. 2011, unrep., R.G. N° 2008/AR/1015.

A further appeal to the Cour de Cassation failed on 13th June 2013, this Court following similar reasoning to that of both the Conseil d'Etat and the Court of Appeal in rejecting the appeal and confirming the decision to list. [14]

Much has been written about the saga of the Stoclet Palace, shaking legal definitions and categories, which are perhaps too rigid for the evolving world of art. The two-step between art and law dances in such a way that the second follows the first, sometimes even at two different speeds. In this melody, it is often the judge who sets the pace, defining the many legal principles which originate from differing levels of power. The legislator sometimes finds it difficult to regulate protection of cultural heritage, mainly owing to the powers available to him and also the need to balance the collective interest in the protection of cultural property with the rights of the owner.

The *Stoclet* case demonstrates that, under the influence of international conventions, both the judiciary and the legislator are moving towards a much broader protection of cultural heritage, seeking to preserve an indivisible whole (Part I).

The strengthened protection of cultural property seeks to include decorative features which form an integral part of the listed immovable structure, quite independently of the civil law classification of such elements (Part IA). The competent authority in relation to immovable heritage can thus extend its powers to movables which form an integral part of the immovable structure, even where such an extension raises issues in relation to the rules relating to distribution of powers (Part IB).

This movement towards more favourable protection of cultural heritage must nevertheless be counterbalanced by the defence of individual rights of property in relation to cultural objects (Part II). Anxious to establish a 'fair balance' between the collective interests and the individual interests involved, administrative and civil judges in this case worked together to achieve a proportionate balance, although harsh for the owners of movable objects, stressing the exceptional value of the entire work of Josef Hoffmann (Part IIA). The administrative judge favoured the preservation of the heritage ensemble and did not hesitate to restrict the free movement of these goods both at the national and the European level (Part IIB).

I. Increased Protection for Cultural Heritage

IA. The Classification of Cultural Objects for a Protection of the Cultural Heritage Ensemble

The classification of the objects inside the Stoclet Palace should normally be based on rules of civil law with a view to organising them within the categories of movables or immovables. However, the listing decree of the Brussels-Capital Region refers to the definition of 'monument' laid down in CoBAT which assimilates decorative features which form an integral part of the monument into the immovable listing, without paying regard to the civil law classification of such elements. Should the listing decree have applied civil law rules or could it be based on the listing rules in CoBAT? The question is limited to the scope of listing of the Brussels-Capital Region, since the listing order did not refer to the civil law relating to

14 For a more detailed commentary on the decision of the Cour de Cassation, see M.-S. de Clippele, 'Le palais Stoclet, une protection d'ensemble à tout prix ?', *Administration publique,* forthcoming.

goods. The independent classification of these decorative features given in the listing decree allows not only the protection of the heritage as a whole where those elements that constitute an indivisible whole are listed at the same time, but it also provides a solution to the problem of which body has the power to list movable cultural chattels in Brussels.

1. The Categories of Goods in Civil Law

According to the traditional rules of civil law, goods fall either within the category of movable goods or immovable. In the laconic drafting of article 516 of the Civil Code: "All goods are either movable or immovable", this division is clearly marked in the Belgian Civil Code and all other legal systems which emanate from the 1804 Napoleonic Civil Code.

On the one hand we have the category of property which is immovable by its nature and which should be attached to the ground, by some form of incorporation with the ground[15] with no possibility of its immediate removal. [16] This criterion of fixation is what defines property which is immovable by its nature.

With the exception of land, article 518 of the Civil Code refers to buildings, taken in their widest sense as including any construction fixed to the earth. This wide interpretation of construction is confirmed by article 523 which provides that "water-carrying pipes in a house or other heritage, are immovable and form part of the land to which they are attached" making it possible to add objects which form a whole with the building in such a way that one can consider them to form part of the building. This would be the case, for example, for staircases, doors, shutters, central heating, fireplaces, etc. Most of these objects cannot be taken from the building without causing damage, hence the necessary but sufficient criterion of 'physical incorporation'. [17]

In addition, and still on the basis of article 523 of the Civil Code, certain goods which are part of the normal fittings of a house, through which it is in fact made usable, can also be classed as immovable by nature, even if they are not physically incorporated into the edifice.[18] Thus, water storage containers, lifts, bathroom water heaters, refrigerators, etc. are also examples of immovables by nature, provided that these objects are clearly part of the building, to the extent that we can talk about 'legal incorporation'. [19]

In so far as woodwork is concerned, this is considered to be immovable by nature, provided that it "forms an indivisible whole with the construction into which it was from the outset closely and specifically incorporated" and that is cannot be "separated from the building in question without harming its integrity". [20] The criterion of material incorporation is therefore central to the classification of immovable by nature.

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15 Articles 518 and 519 Civil Code.

16 H. De Page, *Traité élémentaire de droit civil belge*, Vol. V, *Les principaux contrats usuels, les biens*, (2nd edn, Brussels, Bruylant, 1957), n° 619.

17 *Ibid.*, n° 637-641.

18 C. Renard, *Droit civil,* Vol. I, *Les biens, la propriété et les droits réels principaux,* (Liège, Presses universitaires de Liège), p. 37, n° 17.

19 F. Van Neste, *Beginselen van BelgischPrivaatrecht*, *t. V, Zakenrecht, Boek I Goederen, bezit en eigendom,* (2nd edn, Story scientia), 1990, p. 86.

20 Cour de Cassation (France) (Civil Chamber), 19 March 1963, *Sté Carlhian v. Sté Eudoxia et a. : Gaz. Pal.*, 1963, 2, 189, *J.C.P.*, 1963, II, 13190 and noted by P. Esmein; see also Conseil d'Etat, 5 April 1957, *Res et Jura Immobilia*, 1957, 497, *Arr. Conseil d'Etat,* 1957, 240.

On the other side there are those movables by nature which are characterised by their movable character. Article 528 provides that "Animals and things which can move from one place to another, whether they move by themselves, or whether they can move only as the result of an external power, are movables by their nature."[21] This category of movables does not raise any problems of classification for present purposes.

Between these two categories, we find the grey area of movables by their nature or immovables by their nature which are given, following a legal act, the classification of immovables by destination or movables by expectation/anticipation. [22] The category of 'immovable by destination' gives rise to considerable discussion and is of particular interest to our consideration of cultural objects.

According to articles 524 and 525 of the Civil Code, objects which are classed as immovable by destination are « all movable objects which the owner has attached to the land by permanent attachment". There are several conditions which must be satisfied in order for an object to fall within the definition of immovable by destination. First of all, the owner of the immovable by nature and the owner of the chattel should be the same. The indivisibility between the two owners does not therefore allow for a legal person which is the owner of an immovable to consider a chattel belonging to a physical person to be immovable by destination, even where the physical person in fact represents the legal person (in the *Stoclet* case, the sisters who were seeking the annulment of the listing decrees were not the same as the legal person which owned the building).

Next it is necessary that the owner should have intended to permanently attach the chattel to his property. This subjective element requiring intent on the part of the owner should then be evidenced by actual permanent attachment to the building.

To this subjective condition are added the objective conditions which require that the object attached by means of permanent fixing should be movable by nature, that the object to which it is attached should be immovable by nature and that the objects which are required for the use of the land should be attached to the land in a lasting fashion by the owner. [23]

From a comparative viewpoint, French law is a particularly valuable source. Not only does the Belgian Civil Code come from the Napoleonic Code of 1804 (as do all Belgian Codes), but the case law in French civil law in relation to cultural objects is far more extensive than is the case for Belgian law.

French case law has to a large extent, in relation to cultural objects, focused on the distinction between goods which are immovable by nature and those which are immovable by destination, while Belgian judges have concentrated more on questions of the distinction between an object which is immovable by destination and one which is movable by nature. The importance in French law of the distinction between two categories of immovables is explicable by the differing systems for these two categories laid down by the Heritage Code (*Code du Patrimoine*). Article L. 622-1 of the Code states that objects which are immovable by destination fall within the same protective regime as movables by nature. [24] The legislator

21 "*Sont meubles par leur nature, les corps qui peuvent se transporter d›un lieu à un autre, soit qu›ils se meuvent par eux-mêmes, comme les animaux, soit qu'ils ne puissent changer de place que par l'effet d'une force étrangère, comme les choses inanimées*".

22 De Page, above, note 16, n° 723.

23 Van Neste, above, note 19, pp. 105-108.

24 Article L. 622-1 "Movable objects, whether they be chattels in the strict sense or immovables

included immovables by destination in the category of movable cultural heritage in order to reduce the level of interference with the rights of the owner of a cultural object. Indeed, the rules relating to immovable cultural heritage are far more restrictive than those applying to movable cultural heritage as regards land registration, acquisitive or extinctive prescription, seizure, expropriation, public servitude and other obligations attached to the immovable legal regime. Moreover, the advantage of this assimilation, which could even be termed reclassification, is that it is possible to cover certain risks which are specific to the system of protection of movables, such as the prohibition on export of a national treasure which is not provided for by the system relating to immovables.

Thus the French Cour de Cassation has specified that frescoes are originally immovable by nature, but that once these frescoes have been removed from their original location, they become movables "by reason of their removal". [25] The Court quashed a decision of the Montpellier Court of Appeal which had classified such frescoes as immovable by destination. This curious case law of the Cour de Cassation at the civil law level – which can be explained by the cultural heritage context – then flowed into the second paragraph of article L. 622-1 of the Heritage Code which provides that the "effects of classification [of movable objects] applies to objects which become movable by virtue of their detachment from listed buildings".

Conversely, the situation can arise where the desire to protect a cultural object extends the interpretation of the immovable category in order to include within it the particular object in question. The French judge has thus allowed bas-reliefs to be categories as immovable by nature, thereby imposing on the owner a duty to maintain them with the building as happened with the Château de la Roche-Guyon.[26]

The scope of protection of the immovable is given a wide interpretation on the basis of a dual criterion of origin and indivisibility, the bas-reliefs forming "an indivisible whole" with the "entirety of the large lounge, with which they have been since the outset inextricably linked".[27] This 'forcing' of the category of immovable by nature has been criticised by some writers who are disappointed that the concept extends to elements which do not constitute, within the meaning of the legislator, immovables by nature, considering that this extension rides roughshod over one of the fundamental distinctions in the law of property. [28]

Unlike French law, Belgian law groups together immovables by nature and immovables by destination, on the one hand, and movables by nature on the other. If the various conditions relating to the intention to permanently attach the movable are fulfilled, the objects are classed as immovable by destination and therefore protected by the law of real property.

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by destination, whose preservation represents, from the point of view of history of art, science or technology, a public interest, may be listed as historic monuments by decision of the administrative authority". The term 'historic monument' indicates here both immovables and chattels, which is a break from the traditional legal classification in civil law.

25 French Cour de Cassation (sitting in plenary session), 15 April 1988, *Fondation Abegg et Ville de Genève v. Mme Ribes et autres*, *Rev. crit. dr. intern. pr.*, 1989, p. 100.

26 Cour Administrative d'Appel (C.A.A.) (Administrative Court of Appeal) Paris, 11 July 1997, *Min. Culture v. Sté Transurba : RFD adm.* 1998, n° 1, p. 6, concl. J.-P. Paitre.

27 C.A.A. Paris, 11 July 1997, *Min. Culture v. Sté Transurba : RFD adm.* 1998, n° 1, p. 6, conclusions, J.-P. Paitre.

28 H. Périnet-Marquet, 'Distinction des meubles et des immeubles', *JCPG*, n° 42, 20 Oct. 1999, p. 1877.

In the case of the Stoclet Palace, the condition relating to the indivisibility of ownership is not fulfilled given that the building belongs to the legal person and the chattels to the heirs. Relying on this argument, the claimants rejected any classification of immovables by destination in this case, stressing also the absence of any intention to permanently attach the chattels to the building. At the very least, they draw a distinction between movables (chairs, tables, secretaries, desks, carpets, etc.) and other objects such as silverware which should surely not be capable of being classed as immovables by destination, [29] contradicting somewhat, in the author's view, the nature of 'total artwork' of the Stoclet Palace. Notwithstanding an artificial distinction between the two owners (with the exception of one administrator, the administrators of the legal person are the Stoclet heirs themselves) put forward by the Government, the classification of these chattels as immovables by destination remains problematic, particularly in view of the breadth of the classification and the absence of indivisibility of ownership. But if the Regional Government did not have the power to list them with the building, these movable objects would not be protected and could then freely leave the Stoclet Palace and be sold on the international market. [30] Protection of movable cultural objects in the Brussels-Capital Region is inadequate, since there is no body which has the power in practice to list these objects.

Taking account of this stalemate, the Brussels Regional Government avoided classifying those objects listed as immovables by destination, even if the listing order of 13th October 2005 appeared to indicate this. The application of the listing rules in CoBAT in the regional order was confirmed by both the administrative and civil judges. [31]

29 Conseil d'Etat, *Consorts Stoclet*, n° 210.958, 2 Feb. 2011, p. 24.

30 This intention to sell the chattels which formed part of the Stoclet Palace on the international market was very clear since the inventory of the 279 items "objects and movables which had become immovable by destination" included in annex II of the listing decree of 13 Oct. 2005 had been drawn up on the basis of the inventory which had been prepared at the request of the Stoclet sisters for the sale by Christie's. The sisters confirmed their intention to sell in an even clearer fashion in their pleadings before the Conseil d'Etat in an attempt to have the listing decree lifted. The administrative judge thus subtly used this inventory in order to refuse to recognise the serious and irreparable harm that they claimed they would suffer following the listing on the basis of the sentimental value that these chattels possessed for them. The judge dismissed the sentimental link since "the very existence of this plan" to sell the objects by private treaty contradicted any claim of sentimental value by the Stoclet sisters. (Conseil d'Etat, *Consorts Stoclet* n° 156.420, 15 March 2006, p. 11).

31 Order of the Government of the Brussels-Capital Region of 13 Oct. 2005 deciding to start "by extension" the process for listing as a monument certain movables and objects which had become immovable by destination which had been specially designed and made for the Stoclet Palace. However, the judge of the Brussels Court of Appeal noted that, while it was true that, in its reasoning the listing decree stated primarily that the goods for which the listing procedure had been started were immovables by destination, it could be deduced that the regional Government intended to list "all the movable elements and items of decoration" which formed an integral part of the Stoclet Palace. The appeal judge thus confirmed that the Government had complied with the requirement of art. 206 of CoBAT "without it being necessary that the objects at issue should have been capable of being classified as immovable by destination according to the Civil Code and without it being necessary to determine whether or not the Government had committed an error in law in using the expression "immovable by destination" when this classification was not, as stated above, required for the implementation of article 206 of the CoBAT" (Brussels Court of Appeal (21st Chamber), 14 Sept. 2011, unrep. R.G. No. 2008/AR/1015, § 29).

2. *The Autonomous Classification Provided by the Rules Relating to Cultural Heritage*

In order to control the legality of the orders listing the movables of the Stoclet Palace, the administrative and civil judges both relied on article 206(1)(a) of Cobat (Brussels Land Planning Code) (CoBAT). This provision reproduces the terms of Article 1.1 of the 1985 Granada Convention for Protection of the Architectural Heritage in Europe[32] which provides that the protection of a monument extends to " all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings". The definition of 'monument' found in CoBAT is thus a wide one, similar to those laid down in the Decree of the Flemish Cultural Community of 3rd March 1976 concerning monuments and urban sites[33] (which then became a power of the Flemish Region following the 1988 transfer) and by the Walloon Code on Planning, Urbanism, Heritage and Energy[34] which also includes decorative features which form an integral part of a monument.

The central point of this discussion relates to the interpretation of article 206(1) of CoBAT, and, in particular, its relationship with civil law. Indeed, this provision allows the Brussels Regional Authority to list those objects which form an integral part of the monument, without needing to specify whether it concerns immovables by destination or movables by nature.[35] This confirmation confuses the issue somewhat in relation to civil law which traditionally makes a distinction between the different categories of objects.

The CoBAT is on the same level of the legal hierarchy of norms as the Civil Code and it is

32 Convention for the protection of the architectural heritage of Europe (Granada Convention 1985), Art. 1.1, "monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings", ratified by Belgium on 17 Sept. 1993, entry into force on 1 Jan. 1993.
This provision is also based on Art. 1.3 of the European Convention on the Protection of the Archaeological Heritage (Valletta, 1992) which provides that "The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water", ratified 8 Oct. 2010, entry into force 9 April 2011.
It should be noted that the Decree of the Flemish Cultural Community of 3 March 1976 concerning monuments and urban and rural sites is also implicitly based on the Granada Convention, given that its art. 2, 2 defines 'monument' as "an immovable, work of man, of nature, or of man and nature, and of general interest by reason of its artistic, scientific, historic, traditional, archaeological, industrial or sociocultural, including cultural goods which form an integral part of the aforementioned, in particular accessories and decorative features" (modified by art. 3 of the Flemish Decree of 8 Dec. 1998)."

33 "… in particular accessories and decorative features", art. 2, 2 of the Decree of the Flemish Cultural Community of 3 March 1976 concerning the protection of monuments and urban and rural sites, M.B. 22 April 1976.

34 Article 185 of the CWATUPE (Code Wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Énergie – Walloon Code of Town and Country Planning, Urban Development and Heritage, which includes within the term 'monuments' "fixtures and fittings which form an integral part of the protected building".

35 The judicial [as opposed to administrative] judge clarified the interpretation of the term 'decorative features' as stating that this term "targets without doubt movables and not only immovables by destination", after having interpreted the amendment of the Brussels Regional Government and the opinion of the Conseil d'Etat in favour of a more complete definition of the term 'decorative elements' rather than 'any architectural or sculptural work' (Brussels Court of Appeal (21st chamber), 14 Sept. 2011, unrep., R.G. N° 2008/AR/1015, § 24).

within its power to provide a definition of monument which includes objects which form an integral part thereof and to thereby list the entirety. The question of classification arises only within the context of the listing order and therefore applies only to the listing of these objects and does not affect the civil law regime which would apply to them. Thus the rules of civil law which apply to movable objects cannot be modified by the rules of CoBAT, as the federal legislator retains exclusive power to legislate regarding, for example, securities over or seizure of movables. However, it is also true that the definition given in CoBAT gives it very wide and sometimes debatable powers in relation to division of powers.

The judges of the Conseil d'Etat and the Court of Appeal all recognised without exception the independent scope of article 206 of CoBAT. They stated explicitly that the objects at issue were not necessarily immovables by destination, but held that the protection of the monument meant that listing should extend to these objects, with the issue of their classification in civil law and the identity of their owners being unimportant and lacking any relevance when identifying the part of the whole which should benefit from protection under the heading of historic monument.[36] It is both necessary and sufficient that such objects or decorative features possess an 'inextricable link'[37] with the monument from a historical, artistic and aesthetic point of view in order to be listed by extension under the heading of monument.[38]

If the requirement of indivisibility makes one think of the concept of an 'indivisible whole' laid down in case law for immovables by nature, such as wainscoting, it actually applies to a far wider range of objects. The criterion of incorporation is not necessary, nor that of origin, the only requirement being that the objects should 'form an integral part' of the monument. In addition, those objects are labelled as 'decorative features' by the legal text, thereby indicating not only their ornamental nature but also the subjective character of the indivisible link to the building, unlike goods which have been incorporated in the building for utilitarian reasons.The applicants challenged the legal nature of 'decorative features', arguing that this was a purely aesthetic and artistic concept.[39] The Conseil d'Etat held that the process of classification of decorative features on the basis of their cultural interest and the indivisible link which joins them to the monument is not an aesthetic judgment but a legal classification of the decorative element which forms an integral part of the protected construction.[40] The legislator wanted to include the concept within the definition of monument in order to comply with international conventions. The concept of decorative features carries with it legal effects concerning the listing of a monument and which thereby gives it a legal character, although the predictability of the legal consequences of such inclusion in the definition of monument could give rise to discussion (see below, Part II.A).

The concept is, moreover, not defined in CoBAT, but the administrative judge considered

36 Decision of the Conseil d'Etat, *Consorts Stoclet*, n° 210.958, 2 Feb. 2011, p. 30.

37 "*lien indissociable"*.

38 Decision of the Conseil d'Etat, *Consorts Stoclet*, n° 210.958, 2 Feb. 2011, p. 32.

39 According to the Stoclet sisters, the term 'decorative arts' indicates, in its common usage, "arts applied to utilitarian objects, also called applied arts, industrical arts (for example, furnishings, costume, jewellery, ceramics, tapestry, mosaics)" (*Le Grand Robert de la langue française*, under the heading 'Décoratif'). They also refer to the work of de J.-M. Pérouse de Montclos, *Architecture. Méthode et vocabulaire*, where the expression 'interior decor' ('décor intérieur') is not defined but refers, amongst other things, to immovables by destination, without giving any legal definition of the term and not referring to the definition contained in the Civil Code – decision of the Conseil d'Etat of 2 Feb. 2011, p. 28.

40 Conseil d'Etat, *Consorts Stoclet*, n° 210.958, 2 Feb. 2011, p. 32.

that it does not refer only to immovables by destination but allows for the inclusion of any movable object.[41] The civil judge made clear that the concept of decorative features "indicates those [movable objects] that are attached in such a way to a monument that they play a role in determining the historical, archaeological, artistic, aesthetic, social, technical or traditional interest of the monument, in such a way that the protection of the monument, in order to be full and complete, should extend to these objects".

In accordance with this aesthetic concept, in this instance the architecture, sculpture, furniture and decorative arts, even the garden, are all integrated together and form an indivisible whole in which the conception and the realisation of the work are co-ordinated. They form a whole which has no sense unless all the elements are in harmony one with another. Thus, simple utilitarian objects such as a teaspoon or a water jug become an *objet d'art* through its new aesthetic value and is integrated into the entirety of the total work of art.

In other words, through the autonomous interpretation which the judge has given to the rules in CoBAT, he appears to recognise implicitly a category of goods which is peculiar to the cultural heritage listing process. In this, he has introduced into domestic law a concept from international convention law[42] and is moving towards a greater protection of cultural heritage.

By way of comparison, the French Cultural Heritage Code does not have this category of goods which form an integral part of a monument and in its articl L. 621-1 speaks only of the immovable within the civil law meaning. Nonetheless, the interpretation of the concept of immovable by nature has been gradually extended in case law relating to bas-reliefs and wainscoting.

Indeed, in the *Transurba* case, the French judge applied the criteria established for wainscoting (see particularly the case of *Wainscoting of the hôtel de Beauffremont*[43] and sought to protect those objects which were essential for the functioning of the building and which possessed an intrinsic link with the building These criteria constitute the concept of indivisibility, a concept which is linked to that of 'inextricable link' employed by the Belgian judge in the *Stoclet* case. This concept is, however, far wider and allows for the inclusion of a greater number of goods than under the concept of indivisibility which is based on the dual notion of origin and incorporation and therefore qualifies goods which are immovable by nature. Notwithstanding these few differences, in both French and Belgian law there is a marked trend towards strengthening protection of cultural heritage by enlarging the protective basis.

B. The Competent Body for Heritage Listing

The key for division of powers lies in the nature of the object to be protected, movable or immovable. There is little dissent on the issue of whether a movable object which has been classified as immovable by destination under article 524 or 525 of the Civil Code should fall within the powers of the regional authorities. However, in the case of the Stoclet Palace, what is the position with regard to the movable cultural objects which 'form an integral part'

41 *Ibid*.

42 Decision of the Brussels Court of Appeal (21st chamber), 14 Sept. 2011, unrep., R.G. N° 2008/AR/1015, § 26, referring to the 1985 Granada Convention for the protection of the architectural heritage of Europe and to the 1992 Valletta Convention for the protection of the archaeological heritage (revised).

43 Decision of the French Cour de Cassation (Civil), 19 March 1963, *Sté Carlhian v. Sté Eudoxia et a. : Gaz. Pal.*, 1963, 2, 189, *J.C.P.*, 1963, II, 13190 with note by P. Esmein.

of the monument[44] such as 'decorative features'? Is it possible to find a resonance for this new category of cultural goods within constitutional law? It is clearly an achievement on the part of the judge to recognise the autonomy of the classification of rules relating to cultural heritage, but is it further necessary that the administrative body possess the power to actually list the goods?

Following the federalisation of the Belgian State, powers in relation to cultural heritage were transferred to the Communities (*Communautés*) which were then competent as a result of articles 127(1)(1) and 130(1) of the Constitution[45] to legislate, *inter alia*, within the sphere of cultural heritage. This is understood to cover a wide area[46] which "covers both movable and immovable cultural heritage" [47] including, for example, regulation of export of works of art, legal deposit,[48] conservation of monuments, sites and places with historic interest, etc. [49]

In 1988, however, powers relating to monuments and sites were transferred to the Regions,[50] thereby separating immovable cultural property from movable. This separation allows, on the one hand a more co-ordinated policy in the areas of planning, urbanism, monuments and sites responsibility for all of which are now is now in the hands of a singe regional authority, but on the other hand it gives rise to the difficulty that it causes a total separation between movable and immovable cultural heritage which is likely to be perceived as artificial and ineffective.[51] Henceforth, jurisdiction in relation to movable cultural heritage lies with the Communities, with a reservation in favour of the Federal State which has power in respect of 'federal scientific and cultural institutions' [52] which are listed in a royal decree. [53] However,

44 'Font partie intégrante' du monument.

45 Law of 21 July 1971 concerning the powers and functioning of the cultural councils for the French Cultural Community and for the Flemish Cultural Community, *M.B.*, 23 July 1971.

46 C.A., decision n° 24/94 of 10 March 1994, B.4.

47 "désigne le patrimoine culturel tant mobilier qu'immobilier": C.C., decision n°25/2010 of 17 March 2010, B.4.1. referring to *Doc. Parl.*, Sén., sess. ord. 1970-1971, n° 400,pp. 4-5.

48 Translator's note : legal deposit (*dépôt légal*) is the obligation on publishers to make available a number of copies of all publications to a designated repository.

49 Explanatory statement of the Law of 21 July 1971, *Pasin*, 1971, p. 1461 cited by M. Quintin, *La protection du patrimoine culturel*, (Brugge, Vanden Broele, 2009), p. 32.

50 Article 6, § 1er, I, 7° of the Special Legislative Act of 8 Aug. 1980 as inserted by art. 4, § 1 of the Special Legislative Act of 8 Aug. 1988, *M.B.*, 13 Aug. 1988, entry into force 1 Jan. 1989.

51 A.-M. Draye, 'De zorgvoormonumenten en landschappen in de notariëlepraktijk, juridischeaspecten', in *Het milieu – L'environnement*, 2003, p. 72 cited by M. Quintin, above, note 49, at p. 34.

52 Article 6*bis*, § 2, 4° of the Special Legislative Act of 8 Aug. 1980, replaced by art. 3, § 2, of the Special Legislative Act of 16 July 1993 on the completion of the State's federal structure, *M.B.*, 20 July 1993 ; for a more detailed analysis of the federal research and cultural institutions, see Quintin, above, noted ??, pp. 76-84.

53 A.R. of 30 Oct. 1996 identifying the federal research and cultural institutions, *M.B.*, 7 Dec. 1996, modified byA.R. of 9 April 2007, *M.B.*, 20 April 2007 including the following institutions : the general archives of the Kingdom and the archives of the State in the provinces, the Royal Library of Belgium, the Institute of Spatial Aeronomy, the Royal Institute of Natural Sciences of Belgium, the Royal Institute of Artistic Heritage, the Royal Meteorological Institute of Belgium, the Royal Museum of Central Africa, the Royal Museums of Art and History, the Royal Museums of Fine Arts, the Royal Observatory of Belgium, the Reference and Research Centre for War and Contemporary Societies, the independent centre attached to the General Archives of the Kingdom and to the Royal Library of Belgium. (les archives générales du Royaume et les archives de l'Etat dans les provinces, la Bibliothèque royale de Belgique,

the precise scope of these powers, both in terms of objects covered and geographical area, gives rise to problems.

1. Jurisdiction in Relation to Objects

In accordance with their argument that listed chattels do not constitute immovables by destination, the Stoclet claimants challenged the jurisdiction of the regional authority. Despite the wide definition of « monument » in article 206(1) of the CoBAT, this does not mean that the Region has jurisdiction to list chattels in view of the exclusive power of the municipalities in this area. However, article 10 of the special law on institutional reform of 8th August 1980 contains exceptions to the system of division into exclusive "fields of competence". [54] The question which arises is whether this provision can apply in the context of a listing "by extension" of movable objects and immovables by destination which form an integral part of the building?

The Constitutional Court addressed the issue in its decision of 17th March 2010 where it accepted regional competence on the basis of the theory of implied powers. If regulation is "necessary for the exercise of regional powers", if it "lends itself to a differentiated regulation"[55] and if the impact on the municipal subject matter is only marginal, article 10 of the Special Law of 8th August 1980 allows the Regions to take measures which are 'complementary'[56] to those of the municipalities. This decision concerned the interpretation of article 2(2) of the Decree of the (Dutch cultural municipality)Flemish Cultural of 3rd March 1976 which also included decorative features which formed an integral part of a monument. The Court gave a preliminary ruling on a question which was submitted to it in the context of a dispute between the NV Compagnie HetZoute and the Flemish Region where the latter had listed the MaegerScorre house together with two paintings which formed an integral part of the monument. Following the reply from the Constitutional Court, the administrative judge rejected the application for annulment and confirmed the complementary power of the Region. [57]

Two years earlier the Conseil d'Etat had however decided in the opposite sense when it annulled the decision to list cultural objects which formed an integral part of the convent Zusters van Maria à Izegem. The decision was made by the regional minister of monuments and should, in the view of the administrative judge, have been made by both the regional minister and the minister of the Flemish Municipality with responsibility for cultural objects.[58] Following the decision of 17th March 2010, the Constitutional Court paved the way for a breach in the division of powers and the Conseil d'Etat revised its case law in relation to listing of movables and immovables.

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l'Institut d'Aéronomie spatiale de Belgique, l'Institut royal des Sciences naturelles de Belgique, l'Institut royal du Patrimoine artistique, l'Institut royal de météorologie de Belgique, le Musée royal de l'Afrique centrale, les Musées royaux d'Art et d'Histoire, les musées royaux des Beaux-Arts, l'Observatoire royal de Belgique, le centre d'études et de documentation Guerre et sociétés contemporaines, centre autonome rattaché aux Archives générales du Royaume et à la Bibliothèque royale de Belgique).

54 G. Cerexhe, *Les compétences implicites et leur application en droit belge*», (Bruxelles, Bruylant, 1989), p. 137.

55 Conseil Constitutionnel, judgment n°25/2010, of 17 March 2010, B.6.1.

56 *Ibid.*, B.6.4.

57 Conseil d'Etat, *NV Compagnie HetZoute*, n° 208.131, 14 Oct. 2010.

58 Conseil d'Etat, *V.Z.W. Zusters van Maria*, n° 184.936, 30 June 2008.

It is true that the path adopted by the Conseil d'Etat through the mechanism of implied powers resolves the problem of jurisdiction in the Brussels-Capital Region. The method is useful as regards protection of cultural heritage, and particularly relevant for the Stoclet Palace, a 'total artwork' which presents a holistic image of architectural art. However, while the regional regulation appears necessary in the present case, it is more dubious in other listing instances. What would be the scope of this concept of decorative features forming an integral part of the monument and to what extent are these implied powers necessary for the exercise of its jurisdiction? Given the unique nature of the Stoclet Palace, it will only be through future case law that we will be able to determine the scope of the decision of the Conseil d'Etat. At present, this judicial shift in favour of strengthened protection of cultural heritage appears welcome, but it is accompanied by a cautionary note regarding the precise breadth of the powers exercised by the Region.

The *Topstukkendecreet* of the Flemish Municipality on the subject of protection of movable cultural objects[59] provides a novel solution for protection of movables and immovables. Indeed, article 3(1) of the *Topstukkendecreet* provides for a subsidiary system of protection of movables, with precedence given to the Decree of the Flemish Cultural Community of 3rd March 1976 relating to monuments and urban sites.[60] This impliedly recognises the superior powers of the head of the Flemish Region as regards the Flemish Community. The dual protection of these cultural goods is without doubt a practical solution, but it leaves much to be desired in respect of rules regarding the division of powers.

It is thus clear that both the judiciary (through case law) and the administration (through decrees and ordonnances) wishes to offer a complete protection of cultural heritage with a view to preserving the indivisible whole. In doing this, they have chosen to bring together heritage protection in the hands of the Regions which, as noted above, originally had no cultural or heritage powers. It remains to be seen what exactly remains within the remit of the communities if the Regions are deemed to be the most appropriate bodies to develop effective policies for the protection of cultural heritage.

2. Territorial jurisdiction

The Location of the Cultural Object

In respect of movable cultural objects, the first difficulty is to establish which community regime it is governed by. Since it is by definition in movement, it can easily cross a linguistic border and thereby complicate the connecting factor.[61] The criterion adopted by the decrees

59 Decree of the Flemish Community of 24 Jan. 2003 on the protection of movable cultural heritage of exceptional interest, M.B., 14 March 2003, amended 30 April 2009, M.B. 8 June 2009.

60 This inclusion aroused much debate, but the wide scope was included in the Decree for three reasons. First the Decree seeks to apply to the whole field of movable heritage. Secondly, the Decree operates merely as an incidental protection for these movable cultural objects since it can be invoked only where there is no protection under the 1976 Decree. Finally, it gives greater consistency in the case of requests for the return of an illicitly exported cultural object since the Decree frants the right to request return to the State alone, while the Decree of 1976 gives a right of action only to the owner. Moreover, this dual protection refers back to the aim of the reasonable person that the Flemish Community seeks to pursue in relation to its movable cultural objects, See *Doc. Parl*, parl. fl., sess. ord., 2002-2003, 15 Jan. 2003, n° 28, pp. 5-7.

61 The transfer of title to a movable cultural object is not however always illicit merely by virtue of its displacement, given the "principles of free movement of persons, goods, services and capital

of both the Flemish and Walloon Communities in relation to movable cultural heritage – which allows the competent public authority to continue to exercise its protective provisions even when the object is located on another part of the Federal State[62] - is that of the object's location within the territory of the competent entity at the moment when the decision was taken to list it within the cultural heritage of a Community or of the Federal State, regardless of its subsequent displacement. [63] The geographical origin of the object, the status and nationality of the owner are therefore irrelevant,[64] it is enough if the object is located within the territorial scope of one or other Community.

B. The Brussels Imbroglio

For the Brussels-Capital Region, the division of powers is a thorny question. While it is clear that the Communities are competent within their single-language region by virtue of article 127(2) of the Constitution, the bilingual region presumes a division of powers between federated entities, even between federated entities and the federal entity. The solution envisaged by article 127(2) states that the Communities have jurisdiction in respect of those institutions which "by reason of their activities, should be considered as belonging exclusively to one or other community". [65] The institutional criterion takes precedence over the personal criterion but gives rise to several pitfalls, including the question of the exclusivity of the link between the institution and the Community. [66].

In the *Stoclet* case, the petition to suspend the listing procedure started by the French Community was rejected by the Conseil d'Etat, although the latter did recognise the serious issue regarding the scope of the French Community's powers in this area. The Community claimed to be competent to make orders listing the movable heritage contained in the Stoclet Palace which it considered to be like an institution, even a museum. [67] It deduced from this that the activities of the Palace are undertaken exclusivly in French and concluded logically that the Palace belong exclusively to the French Community. This criterion did not, however, appear to the Conseil d'Etat to be relevant, and the argument of the French Community classifying the Palace with the status of a museum was rejected on the ground that it is not a museum either in the colloquial sense of the word, since it is not open to the public, nor in the legal sense since it is not included in the Decree of 17th July 2002 on the recognition and funding of museums and related institutions. Quite rightly, the Conseil d'Etat focused on

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and of free trade and industry, as well as the respect for the general normative framework of the economic union and for monetary union, as established by or under the law, et by or in virtue of international treaties", art. 6 § 1er, VI of the Special Legislative Act of 8 Aug. 1980 as amended by art. 4 of the Special Legislative Act of 8 Aug. 1988.

62 F. Rigaux, 'Le patrimoine culturel : répartition des compétences et conflits de lois', *Revue belge de droit constitutionnel*, 1994, pp. 50-51.

63 *Ibid.,* p. 51; art. 2 of the Decree of 11 July 2002 concerning movable cultural objects and the intangible heritage of the French Community.

64 B. Demarsin, '*This is our history, this is our soul.* La protection du patrimoine culturel mobilier en Belgique', in *Droit des contrats, France, Belgique*, (Brussels, Larcier, 2005), p. 284, citing in addition the example of Michaelangelo's *Virgin* which is in the church of Notre Dame in Brugge and which is part of the *Flemish* cultural heritage!

65 Article 127, § 2 of the Belgian Constitution.

66 B. Gors, 'Le Palais Stoclet ou la compétence relative à la protection des biens mobiliers culturels en Région bruxelloise'*, Revue de la faculté de droit de l'Université de Liège , 2007, liv. 1*, p. 86.

67 Conseil d'Etat, *Consorts Stoclet, n°* 156.418, 15 March 2006, p. 6.

the attachment of the objects themselves rather than on the position of the owners and their activities which do not relate to the conservation of the objects. Following this decision, the French Community had regard to its lack of jurisdiction and therefore took the decision not to pursue the listing of movable heritage.

If, as with the Stoclet Palace, the link to one particular Community is not exclusive, the institution is considered to be 'bicultural'. It then falls within the residual federal jurisdiction by virtue of article 35 of the Constitution.

Unfortunately, the only federal legislation which could govern movable cultural at the national level, a law enacted in 1960,[68] has remained a dead letter in the absence of any implementing regulations.[69]

The Brussels private owner, who is governed solely by the Communities, is therefore in an uncertain position. To which community power can he turn if he has a query relating to the protection of movable cultural heritage ? These questions are important not only in order to identify the legal system, whether at the community or regional level, which protects the chattel, but also in order to know to which administrative authority applications for export licences should be addressed, in the event, for example, that the owner might wish to sell the object to an overseas purchaser.

Prior to the adoption of the Community decrees which seek to protect movable cultural heritage, the owners of a chattel situated within the territory of the Brussels-Capital Region could request permission to export or ship the object from either the Flemish or the French community, as they chose, in accordance with Regulation 3911/92 on the export of cultural objects which came into force on 1st January 1993. However, the legislative section of the Belgian Conseil d'Etat has firmly condemned this practice which could lead to abuse where the owner would choose the more favourable regime, thereby undermining efforts to establish a "coherent policy of protection". [70] However, the situation remains the same today, notwithstanding this condemnation of the Conseil d'Etat, whose status is merely that of opinion. The Brussels property owner can apply to whichever Community he chooses in order to obtain an export request authorisation. The language in which he makes his application is indicative of which community regime he wishes to apply to his case.

For chattels which form an integral part of a monument, the *Stoclet* case opens a new avenue by acknowledging the implied power of regional authorities in this area. These goods are thus subject to the measures relating to sites and monuments laid down in the CoBAT when it comes to applications for export licences. For other movable cultural objects belonging to private owners which are not 'attached', competence remains with the Federal State, which basically means that there is, as yet, no regulation of these goods.

In short, the system of division of powers is divided between the Regions, the Communities and the Federal State.[71] Like M, Quintin, we conclude that the system of division of powers

68 Loi du 16 mai 1960 relative au patrimoine culturel mobilier de la Nation, *M. B.*, 5 août 1960.

69 Demarsin, above, note 64, p. 276.

70 Projet de décret relatif aux biens culturels mobiliers et au patrimoine immatériel de la Communauté française, exposé des motifs après avis du Conseil d'Etat, *Doc. parl.,*Comm. fr., sess. ord. 2001-2002, 15 mai 2002, n° 271/1, p. 6.

71 Demarsin, above, note 64, p. 276.

is far from being satisfying[72] and can be seen to be harmful to the individual. The imbroglio of the Belgian institutional system often goes beyond being complex to being complicated. We believe that the seven collectivities with powers in this area should come to an agreement which could dispel uncertainty and seek a coherent approach in relation to cultural heritage. For the time being, a permanent steering committee has been in place since the 16th January 2009 between the federated bodies and the Federal State with a view to implementing the 1970 Unesco Convention on the illicit traffic in (movable) cultural objects, [73] then recently ratified on the 31st March 2009. This steering committee could then be formalised in a co-operation agreement. This would allow us to envisage a cultural policy driven by openness and diversity rather than held back by community and regional borders.

II. A Disproportionate Attack on the Rights of the Private Owner ?

A. The Order Listing the Property: a Limitation on the Right or Property or a *De Facto* Expropriation

The order of the Regional Government listing the property both under the terms of CoBAT and by virtue of the implied powers to do so means that the harm to the Stoclet sisters' property rights is increased. The judge must therefore resolve the issue of where to draw the red line between a mere restriction on the right to property and *de facto* expropriation.

The Stoclet family applicants asserted, both before the Conseil d'Etat and the civil courts, that there had been a breach of their right to property which is protected both by article 16 of the Constitution and by Article 1 of the First Protocol to the European Convention on Human Rights.

The applicants contended that the listing of the chattels which formed an integral part of the Stoclet Palace deprived them from a practical point of view of the power to enjoy their right of property, as well as the right to dispose freely of their goods since, being inseparable from the building, they could not be sold separately. [74] Moreover, the applicants asserted that the listing would have the effect of causing these chattels to become the property of the company (s.a. Compagnie Immobilière SAS) which owned the building by virtue of an automatic transfer of property, without the consent of the owners of the chattels or any compensation. These measures, the applicants argued, constituted such a serious breach of the right to property that they could be considered to amount to a *de facto* expropriation without compensation.

However, both the Conseil d'Etat and the Brussels Court of Appeal took the view that this did not amount to a *de facto* expropriation, merely a regulation of the right of property.

1. The Existence of an Interference with the Right to Property

It is first necessary to establish that there has been damage to the right of property. This phase is often implied in the judgments at the national level, the damage being established by the mere denunciation of the breach of the provisions in question. [75] However, this step might

72 Quintin, above, note 49, p. 88.

73 UNESCO Convention of 14 Nov. 1970.

74 Conseil d'Etat, *Consorts Stoclet*, n° 210.985, 2 Feb. 2011, p. 34.

75 Article 16 of the Constitution et Art. 1of the First Protocol to the European Convention on

be important insofar as it allows the harm to be defined. Is it a question of a regulation of the right of property or is it a denial of the right of property? The distinction between these two is important for both the assessment of the proportionality of the harm and any potential compensation (see below, 2 and 3).

The European Court of Human Rights is conscious of this issue and has traditionally attached great importance to stating explicitly the existence of an interference. Through its case law it makes a distinction between the denial and the regulation of the right of property on the basis of two criteria: a quantitative element relating to the consequences of the interference and a qualitative element looking to the objective which the interference is seeking to achieve. [76] The "permanent and complete dispossession of a right or interest having the status of a chattel" [77] arises where there has been a denial of property, whereas the regulation of the use of chattels does not empty the right of property of its entire substance and the owner retains a legal link with the chattel in question. With regard to the objective of the intereference, this concerns the public utility or general interest, but it is difficult to differentiate between the two concepts, [78] and the Strasbourg Court itself confirms that "no fundamental distinction" can be drawn between them. [79] Regulatory measures operate as a residual norm in relation to deprivation measures which themselves form the hard kernel of the right of property. [80]

The distinction between deprivation and restriction is similar in Belgian law. [81] There is extensive case law which finds in the restrictive measure a legal servitude in the public interest, rather than an expropriation, this servitude "merely serving to limit the use that the owner can make of his chattel." [82]

However, the European Court of Human Rights is increasingly avoiding the question of the definition of the interference, preferring to base its reasoning on the first paragraph of article 1 of the First Protocol, which contains a general rule relating to any impairment of the substance of the right of property.[83]

Human Rights.

76 C.L. Rozakiset and P. Voyatzis, 'Le droit au respect des biens : une clause dérogatoire ou une 'omnibus' norme?', in H. Vandenberghe, *Propriété et droits de l'homme, Property and Human Rights*, (Bruges, La Charte, 2006), pp. 7-9.

77 *Ibid.*, p. 8.

78 F. Tulkens, « La réglementation de l'usage des biens dans l'intérêt général. La troisième norme de l'article 1er du premier Protocole de la Convention européenne des Droits de l'Homme », *in* Vandenberghe, above, note 76, p. 70.

79 European Court of Human Rights, *James and others v. United Kingdom,* judgment of 21 Feb. 1986, § 43.

80 Rozakiset and Voyatzis, above, note 76, p. 9.

81 The term 'deprivation' in the European text has a wider meaning than mere expropriation, often limited to the transfer of private property to the public domain. This independent interpretation allows the Court to go beyond appearances and catch cases of abuse or misuse of power: H. Vandenberghe, « La privation de propriété. La deuxième norme de l'article 1er du premier Protocole de la Convention européenne des Droits de l'Homme », in Vandenberghe, above, note 76, p. 59.

82 B. Pâques, *Droit public et administratif*, vol. XIV, Expropriation pour cause d'utilité publique, *Rép.not.*, 2001, liv. 8, p. 52.

83 However, some critics condemn this new evolution, considering that the Court is evading the question of the classification of the measures and instead simply relying on the general norm: S. Van Drooghenbroeck, *La Convention européenne des Droits de l'Homme. Trois années de*

Belgian constitutional case law seems to model itself on the application of this 'omnibus' norm,[84] speaking of a restriction[85] or a limitation[86] of the right of property by reference to Article 1 of the First Protocol and to article 16 of the Constitution, without clearly defining the measure. However, where the case law decides in favour of compensation, it is indirectly defining the measure.

In the Stoclet Palace case, the Conseil d'Etat did not accept the argument of the Stoclet sisters that it was a *de facto* expropriation "since it did not take away all practical meaning from the right of property". In the view of the administrative judge, it was "an interference with the claimants' right of property which could be classified as a regulation[87] of the use of the goods" which the administrative authority was entitled to adopt "in accordance with the general interest". [88] In this reasoning, the administrative judge therefore followed faithfully the distinction established by the Strasbourg Court.

2. The Conditions Justifying Interference

Réalisant un contrôle en trois étapes, tant les juges administratifs que civils conclurent au caractère justifié réalisé par l'arrêté de classement dans le droit de propriété des sœurs Stoclet.

In a three-step control, both the administrative and the civil judges reached the conclusion that the listing arreté was justified.

a. The Legality of the Interference

It is first necessary to determine whether or not the violation is provided for by law. The requirement of legality presupposes, in addition to a formal legal basis, that the provision should be accessible, precise and foreseeable. [89] The Conseil d'Etat, like the Strasbourg Court, [90] interprets the legal provisions widely. Thus, in the Stoclet case, it took the view that the text in question – article 206, 1°, a, of the CoBAT – "is not confined in its application to those decorative features which are designated as immovables by nature or by destination within the meaning of the Civil Code", thus allowing the provision to be applied in its widest sense to movables which form an integral part of the building.

The judge referred again to the Grenada Convention which directly inspired this provision, rejecting the argument of the claimants that no one "would have seriously imagined that these movables would be juridically comparable to decorative features" and that this interpretation was not foreseeable. [91]

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jurisprudence de la Cour européenne des Droits de l'Homme. 2002-2004. Volume 2. Articles 7 à 59 de la Convention. Protocoles additionnels, (Brussels, Larcier, 2006), p. 155, n° 518.

84 Rozakiset and Voyatzis, above, note 76, pp. 3-21.

85 Conseil Constitutionnel, decision n° 94/2003 of 2 July 2003, B.26.1.

86 Conseil Constitutionnel, decision n° 120/2005 of 6 July 2005, B.14.

87 Provided for in art. 232 of CoBAT.

88 Conseil d'Etat, Consorts Stoclet, n° 210.985, of 2 Feb. 2011, p. 39.

89 ECHR, *Beyeler v. Italy*, decision of 5 Jan. 2000 (noted by Marc-André Renold in (2000) V *Art Antiquity and Law* 73), § 109; ECHR, *Hentrich v. France*, decision of 22 Sept. 1994, § 42; ECHR, *Lithgow and others v. United Kingdom*, decision of 8 July 1986, § 110.

90 ECHR, *Beyeler v. Italie*, decision of 5 Jan. 2000, § 110.

91 Conseil d'Etat, *Consorts Stoclet*, n° 210.985, of 2 Feb. 2011, pp. 35 and 37-40.

It is the author's opinion that the fact that the Stoclet Palace forms a 'complete work of art' reinforces, in a way which while less legal is one which is nonetheless shared by the wider public, the foreseeability of the listing of the entirety. Previously, cases which referred to 'decorative features' had a very limited scope. The administrative judge simply stated that "the contested decision did not involve listing of chattels".[92] The object which had been listed in that case was a piece of cloth which adorned the ceiling of the dining room and was acknowledged to be a decorative element which formed an integral part of the building, [93] to the extent that it could almost be considered as an immovable by nature (see below, I A). Given the restricted application of the concept of decorative features forming an integral part of the monument, the foreseeability of listing such a large number of items (279) can lead to discussion.

b. The Objective of the Interference

The second step in the control undertaken by the judge in relation to the proportionality of the contested measure relates to the legitimate objective which should be justified by a determining general interest.

In the Stoclet case, the Conseil d'Etat recognised the legitimate objective of the listing arreté issued by the Brussels-Capital Region in the context of protection of the cultural heritage, which seeks in this particular case to "preserve the integrity of the whole, a total work of art, formed by the edifice, its garden and its chattels" [94] listed in the annex to the arreté.

The general interest is given a broad interpretation. According to the Conseil d'Etat, it is not necessary for the Stoclet Palace to be accessible to the public or open to visits as these conditions are not laid down in CoBAT. [95] The Conseil d'Etat boldly stressed that it could concern a 'museum dedicated to the love of art' without implying any intention to bestow the official status of museum. [96]

c. The Fair Balance of Interference or the Question of Proportionality

Finally, the judge was required to determine whether or not the harm was proportionate to the respect for the right of property. This step formed the keystone of any analysis, with a view to finding a 'fair balance' between the interests at issue, those of the individual owner and those of the collectivity which is the beneficiary of the protection of cultural heritage. In a manner which went well beyond an abstract control, the judge sought to determine the existence of a fair balance by a "global examination of the different interests at issue", including not only the compensation but also the behaviour of the parties to the dispute and the means employed by the State. [97]

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92 Conseil d'Etat, *Simon et Hennebicq*, n° 100.286, of 25 Oct. 2001, p. 10.

93 "*Qu'en ce qui concerne la toile ornant le plafond du salon situé au rez-de-chaussée, l'article 2, 1o, a, de l'ordonnance vise expressément les éléments décoratifs faisant partie intégrante de la réalisation; que la seule circonstance que la toile serait amovible ne suffit pas à établir qu'elle ne ferait pas partie intégrante du monument*". "As regards the cloth decorating the ceiling on the ground floor, art. 2, 1o, a, of the Order specifically targets decorative features which are an integral part of the whole; the mere fact that the cloth is detachable is not enough to establish that it does not form an integral part of the building", Conseil d'Etat, *Simon et Hennebicq*, n° 100.286, of 25 Oct. 2001, p. 10

94 Conseil d'Etat, *Consorts Stoclet*, n° 210.985, of 2 Feb. 2011, p. 40.

95 Brussels Court of Appeal (21st chamber), 14 Sept. 2011, inéd., R.G. N° 2008/AR/1015, § 33.

96 Conseil d'Etat, *Consorts Stoclet*, n° 210.985, 2 Feb. 2011, p. 40.

97 *Beyeler v. Italie*, above, note 89,. § 114.

In the analysis of proportionality, the question of the recognition of a right to compensation has generated a great deal of discussion both in legal writing and in the case law. [98] At the heart of the concerns of the individual whose right to respect of his property is affected, compensation forms a quantifiable and objective measure to assess the prejudicial effects that the owner could suffer.

Belgian case law is stricter than that of Strasbourg as regards the requirement to compensate in respect of any expropriation by virtue of article 16 of the Constitution.[99] On the other hand, the regulatory measures in the name of general interest do not take priority over the owner's right to compensation, unless the law, decree or ordonnance thus provides. [100] Indeed, the regulatory measures can be analysed as a legal servitude for the public good which encumbers the cultural chattel and falls within the definition of the right of property laid down by article 544 of the Civil Code. [101] It is, however, necessary to specify that the principle of fair and timely compensation applies where the restriction is equivalent to expropriation or where it is so strict that it can be equated to a 'quasi-expropriation' or a '*de facto* expropriation'. [102] The Belgian Constitutional Court has on numerous occasions confirmed the importance of respect for principles laid down in the Constitution and in international conventions, at the same time recognising that it is for the legislator alone to determine those cases where a regulation of the right of property should lead to compensation, under the control of the constitutional judge to determine whether the measure at issue is reasonable and proportionate. [103]

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98 See Pâques, above, note 82, p. 53; M. Pâques and C. Vercheval, 'Le droit de propriété', in N. Bonbled and M. Verdussen *Les droits constitutionnels en Belgique, Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'Etat et de la Cour de cassation*,vol. 2, (Brussels, Bruylant, 2011) pp. 789-818 ; ECHR, *Debelianovi v. Bulgarie*, decision of 29 March 2007 ; ECHR, *Kozacioglu v. Turquie*, decision of 19 Feb. 2009.

99 "L'article 16 de la Constitution dispose que nul ne peut être privé de sa propriété pour cause d'utilité publique que moyennant une juste et préalable indemnité. Cette indemnité doit comprendre tous les dommages subis par l'exproprié et qui présentent un lien de causalité avec l'expropriation" ("Article 16 of the Constitution provides that a person may be deprived of his or her property on the basis of public interest only in consideration of a just and prior indemnity. This indemnity should include all damage sustained by the person who is expropriated and which can be shown to flow from the expropriation"), (Cass., 31 Jan. 2008, C.06.0250.N/7) ; Pâques and Vercheval, above, note 98, pp. 815-816.

100 Quintin, above, note 49, p. 136 together with the bibliographical references cited by the author in the note at the bottom of page 366 ; for a contrary view, see the decision of the Conseil Constitutionnel, n° 55/2012, 19 April 2012 ; Pâques and Vercheval, above, note 98, p. 809.

101 The Conseil d'Etat has on several occasions pointed out that "Whereas the imposition of a public servitude does not deprive the owner of his property ; that he retains his rights to the extent determined by the law ; that the provisions relating to expropriation are "que les dispositions relatives à l'expropriation not applicable in thsi case ; ne sont donc pas applicables en l'espèce ; that in effect, like Art. 1 of the First Protocol … art. 11(16) of the Constitution leaves intact art. 544 of the Civil Code : that while art. 11(16) of the Constitution has enshrined as a general principle the right to compensation for any forced deprivation of property, art. 544 of the Civil Code does however allow the legislator to order or cause the appropriate authority to order restrictions on the right of enjoyment of property, without compensation, where these are necessary in the public interest; that the right to compensation which is the norm under art. 11(16) of the Constitution, becomes the exception outside the scope of this provision and should be recognised by a specific legal provision"; Conseil d'Etat, *Laureyssens*, n° 26.043, decision of 9 Jan. 1986.

102 Quintin, above note 49, pp. 137-138.

103 Conseil Constitutionnel, decision n° 120/2005 of 6 July 2005, B.14.

In the final part of their claim that they had suffered a breach of their right to property, the Stoclet claimants asserted that the violation of their right was disproportionate, insofar as it deprived them in practice of their right without any compensation. More specifically, they put forward four observations which supported the view that they had in fact been the victims of *de facto* expropriation. [104]

First, the listing meant that they lost the right to dispose of each of their chattels separately, since the effect of the listing was to make the chattels into a collection from which individual parts could not be disposed of. Next, the claimants lost the right to dispose of their chattels in that these were listed in the same way as the building and could be disposed of only with it. Thirdly, this situation was made more serious in that the loss of the right to dispose of the listed chattels without the consent of the owner of the building placed them in a dependency situation vis-à-vis the latter. Finally, the claimants argued that the listing meant that they lost their right of property insofar as the arreté, by its autonomous designation, "caused the chattels to leave their estate and that, in addition to being a listing arreté, it is also necessarily an expropriation arreté". [105] In other words, the claimants contended that it was a transfer of their property to the limited company SAS.

The Conseil d'Etat responded tersely to these observations. It distinguished the question of listing by the arretés from the question of the effective application of the right of property, implying subtly that the responsibility for the difficulties relating to the distinction between the movable and immovable aspects of the Stoclet Palace lay with the claimants themselves.[106]

With regard more particularly to the issue of proportionality, the administrative judge assessed the degree of interference with regard to the exceptional value attributed to the Stoclet Palace from the point of view of its historical, artistic and aesthetic interest, referring to the recent placing of the Palace on the UNESCO World Heritage List, [107] as well as the fact that these goods form an ensemble which cannot be separated from the monument, giving the Stoclet Palace an international reputation as a 'total work of art'. Insofar as the listing relates only to those chattels which have been an integral part of the total work of art from the outset, the judge wisely considered that the listing was not 'excessive'.[108]

With regard to the question of compensation, the Conseil d'Etat considered that the listing arretés had the aim merely of establishing a measure of protection, rather than having as their objective the regulation of compensation. Compensation issues should be decided downstream, within the context of other jurisdictional procedures, given that the arretés,

104 Conseil d'Etat, *Consorts Stoclet*, n° 210.985, du 2 février 2011, p. 37.

105 *Ibid*.

106 "*Ne peuvent être directement imputés aux arrêtés attaqués, des inconvénients qui résultent en grande partie des décisions prises par les requérantes ou leurs auteurs de démembrer la propriété du monument entre elles et une société anonyme, ou bien de leur renonciation à habiter elles-mêmes le Palais, ou encore de différends nés entre les copropriétaires quant au sort à réserver à tout ou partie des biens*", "It is not possible to attribute to the decisions which are challenged the disadvantages which arise largely from the decisions taken by the claimants or their agents to break up the ownership of the monument between themselves and a limited company, or indeed their decision not to live in the Palace, or indeed the disputes which arose between the co-owners as to what should happen to all or part of the goods", Conseil d'Etat, *Consorts Stoclet*, n° 210.985, 2 Feb. 2011, p. 39.

107 *Ibid.*, p. 41.

108 *Ibid*.

while they did not expressly provide for compensation, did not exclude it either. The Conseil d'Etat was no doubt referring to the substantive procedure before the civil courts, at the appeal level at the time of the Conseil d'Etat's decision of 2nd February 2011.

The civil judge on appeal sought to provide a more detailed response to the analysis of proportionality of the listing measure. He emphasised that the listing did not deprive the owners of their property, given that the listing "did not, of itself, lead to the transformation of these elements into immovables by destination which would mean that property in them would be acquired by the owner of the building" [109] and thereby rejected the argument which relied on a transfer of property.

Moreover, the transfer of property remains possible since the owners of listed movables do not lose the right to dispose of their goods. They can effect a transfer between co-holders, either to the SAS company which is the owner of the building, or to a third party which could acquire the listed movables after obtaining a right of occupation from the building owner in order to enjoy his/her acquisition. [110]

Finally, the civil judge rejected an additional argument which asserted that the listing arretés would make it difficult to exercise the right of use the listed goods. In the view of the judge, this difficulty already existed and arose out of the joint ownership of the chattels under which one of the joint owners may not give to himself the enjoyment of those chattels without the consent of the other joint owners and of the owner of the premises. [111]

In conclusion, these listing arretés do not involve a *de facto* expropriation, but a restriction on the right of property. This restriction or regulation is provided for in article 232 of the CoBAT, which prohibits the destruction of, damage to or displacement of listed chattels, unless displacement is necessary for their safekeeping. Referring explicitly to the decision of the Conseil d'Etat, the civil judge also held that the restriction was proportionate, "not open to criticism" and rejected the argument that there had been a breach of article 16 of the Constitution and of Article 1 of the First Protocol of the European Convention on Human Rights. The harmonious dialogue of the two judges (civil and administrative) appears to confirm the fair balance sought by the listing arreté. The decorative features inside the Stoclet Palace can retain their meaning only if they are preserved in their entirety. The whole forms a work of art in itself, an aesthetic staging of dialy life, where even Madame's comb or Monsieur's ties come from the hand of the Viennese architect. To be the owner of such a 'total' jewel carries with it, in the author's opinion, a duty of conservation and preservation of the objects which form an integral part of this jewel, by respecting their origin and the context in which they were created. Moreover, the question of the very limited access to the Stoclet Palace does not reduce the interest for the collectivité to have this historic and aesthetic heritage.

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109 Court of Appeal, Brussels (21st chamber), 14 Sept. 2011, unreported, R.G. N° 2008/AR/1015, § 32, para. 1.

110 The judge indicated that this latter possibility for transfer of ownership is "completely realistic since the appellants own a majority of the shares in the company and occupy three of the four management positions". The transfer would therefore take place with the agreement of the respective owners of the two types of property, Brussels Court of Appeal (21st chamber), 14 Sept. 2011, unreported., R.G. N° 2008/AR/1015, § 32, para. 2.

111 *Ibid.*, para. 3.

B. The Free Movement of Goods

Other than the breach of their right of property, the claimants invoked before the Conseil d'Etat a breach of the principle of free movement of goods and the provisions relating to quantitative restrictions between Member States of the European Union. This alleged second breach again relates to the invasion of the rights of the owners discussed above.

According to the claimants, the listing measures have the effect the immobilisation of their chattels, making it impossible for them to circulate either within the national territory or throughout the European Union. This, in the view of the claimants, constitutes a restriction on the free movement laid down in Article 29 of the Treaty on the Functioning of the European Union (TFEU). Such restrictions are permitted only where the cultural object is a 'national treasure' (Article 30 TFEU).

In this case it falls to the legislators of the Member States to define their "national treasures, possessing artistic, historic or archaeological value" In order to avoid an over-reliance on protectionist rules for cultural heritage, the European Court of Justice, in the 1968 *Gold Coins* decision stressed that the restrictions should be interpreted strictly and confirmed the supremacy of free movement over national protectionism. [112]

In the present proceedings, the claimants argued that the movables which had been listed in the Stoclet Palace were not 'national treasures' and that they were neither exclusive[113] nor unique[114] or even authentic in the case of those items which did not come from the *Wiener Werkstätte* workshop, but which make up a motley collection. The claimants argued that these items could not be considered to be 'national' since they had not clear link with the country or with the Brussels-Capital Region other than through their geographical location. [115]

Unfortunately, the Conseil d'Etat did not consider the question of the attribution of 'national treasure' and the factors to be taken into account when making such an attribution. The administrative judge's analysis did not go beyond the first stage where he refused to categorise the listing measures as restrictions on free movement within the meaning of Article 29 TFEU. Unlike the claimants, the administrative judge took the view that the listing decrees

112 *Commission v. Italy*, case C-7/68,p. 628, 10 Dec. 1968; see also *Fachverband der Buch-undMedienwirtschaft v. LIBRO Handelsgesellschaftmb*H, case C-531/07, 30 April 2009, where the Court noted that "a national rule which prohibits importers of books from setting a retail price which is lower than the one which has been fixed or recommended by the publisher and which, at the same time, allows the national publisher to freely fix a minimum price cannot be justified either under Arts 30 and 151 of the EC Treaty or on the basis of overriding requirements of general interest", while noting that "the protection of books as cultural goods may be considered to be an overriding requirement of public interest that might justify measures restricting the free movement of goods, on condition that those measures are appropriate to achieve the stated objective and do not go beyond what is necessary for its achievement." (§§ 32-34).

113 "*Au sens d'indissociables de l'œuvre architecturale de Josef Hoffmann ou, encore au sens de 'spécialement' conçus en fonction de l'architecture du Palais Stoclet*", Conseil d'Etat, "In the sense of being inseparable from Josef Hoffmann's architectural work or, in the sense of 'specially' designed in relation to the architecture of the Stoclet Palace", Conseil d'Etat, *Consorts Stoclet*, n° 210.985, of 2 Feb. 2011, p. 45.

114 "*Certaines pièces faisant l'objet d'une fabrication en série*", "Certain objects that were mass produced", Conseil d'Etat, *Consorts Stoclet*, n° 210.985, of 2 Feb. 2011, p. 45.

115 *Ibid.*, p. 43.

did not constitute a quantitative restriction on export or a measure with equivalent effect. Taking his reasoning from *LodewyckGysbrechts et Santurel Inter BVBA*, Case C-205/07 of 16th December 2008, he defined quantitative restrictions on export as "national measures which, while they apply to all those operating within the national territory, in fact affect to a greater extent the exit of products from the market of the exporting Member State than the commercialisation of these products within the market of the said Member State". [116] In other words, in order for there to be a quantitative restriction on export, there should be some specific advantage to domestic production or to the internal market as against products coming from outside.

In this particular case, the judge considered that the listing, to the extent that it forbade in a general sense the exit of goods from the building where those goods were an integral part of the building, was not limited to forbidding the export of those goods, but prevented in general their physical displacement within the national territory. This general prohibition, under which national products did not enjoy any particular advantage compared to products entering the country from other Member States, did not fall within the terms of Article 29 TFEU forbidding restrictive measures on export. As a result, given that the listing did not fall within the scope of Article 29 TFEU, it was not necessary to determine whether this restriction was necessary on the basis of the 'national treasure' exception in Article 3 TFEU.

While this reasoning was skilful, it failed to address in full the interesting arguments put forward by the claimants. It is this author's view that the discussion of the definition of 'national treasures' was worth pursuing, given the gaps which exist in Belgian law in this area. This would have clarified Belgian policy – both federal and federated – on protection of the movable cultural heritage. Even if most European countries do not have regulations concerning their 'national treasures' (the most noteworthy exceptions being, not surprisingly, France and Italy), it would be useful and indeed necessary to specify the criteria which allow for the inclusion of certain cultural goods as having the status of 'national treasure', and which are thus not permitted to leave the country. The claimants refer to concepts of exclusivity, unique character, authenticity, all of which are interesting elements which are worthy of detailed analysis.

The sense of regret is all the stronger as the Conseil d'Etat did not consider it worth referring these questions to the European Court of Justice for a preliminary ruling on the compatibility of the listing measures with the principle of free movement and the concept of 'national treaure'. [117] In its own words: "it is not necessary to make a reference [for a preliminary ruling]". [118] However, as the claimants state, the ECJ has not yet been called upon to pronounce on a similar case of listing and its interpretation could have been interesting in order to determine the importance of the protection of cultural heritage as against free movement.

Conclusion

The case law saga of the Stoclet Palace is born of a movement in favour of greater protection

116 *Ibid.*, p. 45.

117 Questions posed by the applicants, divided into three parts and considered on pp. 42-43 of the judgment of the Conseil d'Etat.

118 As provided by Art. 267(3) of the Treaty on the Functioning of the European Union and the *Cilfit* Case of 6 Oct. 1982, 283/81, Conseil d'Etat, *Consorts Stoclet*, n° 210.985, 2 Feb. 2011, p. 46.

of cultural heritage, sometimes at the expense of private interests of owners. This movement began with international texts, such as the 1985 Grenada Convention, which have a resonance in Belgian legislation on sites and monuments. However, the timid tenor of the legislative texts could become fully effective only thanks to judicial interpretation and creativity. Quoting each other, administrative, civil and constitutional judges have begun a harmonious dialogue seeking to protect the entirety of a monument, including decorative features which form an integral part of the monument. They have had no hesitation in going beyond the traditional categories of goods in civil law which, indirectly, blocked any protection of the entirety.

Indeed, this categorisation is taken up in constitutional law, given that immovables fall within the competence of the regions, while cultural movable goods come within the competence of the communities. It therefore follows that the signature of two ministers – regional and community, even federal as regards Brussels-Capital – is *a priori* necessary in order to list a monument and the movables within it.

The prickly situation in Brussels has nonetheless highlighted the perverse effects of this heritage division. In the absence of a community legislator with power to act and in the face of inertia on the part of the federal authorities, there was a risk that the Stoclet Palace would be emptied of its interior, leaving only the immaculate marble walls. The concept of total work of art would then be deprived of its purpose even, thereby diminishing the prestige of the Palace. The listing of those decorative features which formed an integral part of the monument, the regional intervention and the various judgments are all to be welcomed and permit the preservation of these jewels of our art which have the status of world heritage.

This wide protection has advantages and disadvantages both for the collective interest and for that of the individual owner of a historic monument.

Indeed, if the widened meaning allows the public authorities to guarantee a more effective and, above all more complete, protection of the cultural heritage, financial obligations, such as subsidies and other forms of support for protection of cultural heritage, will be correspondingly increased. The Stoclet Palace is rumoured to be in a poor condition and is likely to require assistance from the public purse for its upkeep. The increased responsibility of the public authorities will facilitate in a more effective and sustainable manner the protection and conservation of cultural heritage.

If the collective interest in the protection of the cultural heritage has been strengthened following the Stoclet decision, the individual interest of the private owner loses some of its foundation and its protection. However, the two interests should be balanced and a fair solution should be found. The control of proportionality is a delicate exercise for the judge, and it will vary according to both the legal and cultural peculiarities of each country, as well as according to the facts of the particular case. The decisions concerning the Stoclet Palace appear to sweep aside too readily the attempt at a fair balance between the protection of the entirety of the Palace and the claimants' property rights in relation to the cultural objects which form an integral part of the monument. The search for balance was all the more difficult in the present case, given that the owners of the monument itself and the owners of the decorative features were not the same. While the Brussels Court of Appeal (civil jurisdiction) was careful to justify the listing as a restriction on the right of property, rather than a *de facto* expropriation, the administrative judge failed to provide a satisfactory justification in reply to the arguments of the claimants in respect of the breach of their right to property, which is regrettable. The question of compensation is set to be the subject of

a separate procedure and it might at this stage to be possible to take better account of the interests of the parties.

To conclude, while the judicial developments in favour of protection of cultural heritage are certainly welcome, more needs to be done both by the legislator and the judiciary to achieve a fair balance between the interests of the community and individual property owners. Although it is variable, the quest for a 'fair' balance should be the foundation of the relationship between the guardian of cultural heritage and the private owner. This balance is focused on responsibility and exists not only at State level, but also implies a change of mindset so as to view art as a gift from the past which should remain for the future, rather than being reduced to an object of the present which is subject to commercialisation.