



WARWICK
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Implementing Recommendation 3 of the 2017 London Conference Action Plan

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INTRODUCTION

1. This report was commissioned by the UK's Department for Digital Culture Media and Sport and the Spoliation Advisory Panel. It sets out findings relevant to Recommendation 3 of the Agreed Action Plan from the 2017 London Conference. It provides the starting point for discussions regarding the three primary inconsistencies that were identified as being:
 - (a) 'inconsistencies in the process applied,
 - (b) inconsistencies in information provided (from both public and private institutions), and
 - (c) inconsistencies in the criteria used to determine claims.'

2. Recommendation 3 then went on to ask the Panels to consider what can be done to:
 - (a) 'unify processes,
 - (b) improve access to information,
 - (c) develop common criteria, and
 - (d) inform the best practice guidance.'

3. Some differences that exist between the different committees are due to the *cultural, historical or legal differences* that exist between the countries. These include the nature of some collections as state-owned, or specific collections that are comprised of objects that are known to have question marks over their provenance and where they are under the stewardship of a country, such as the MNR collection in France¹ and the NK collection in the Netherlands.² When dealing with claims for these objects, considerations may be, or have been in the past, different from claims in respect of objects in other collections. In Austria there is the additional category of objects that were transferred to the Federal State in exchange for export permits for other cultural objects, or in transactions closely connected to these, which raise specific issues. A particular issue faced in the Netherlands is the treatment of claims relating to art dealerships since the Dutch art market flourished during the occupation.³ All of these varied circumstances mean that the approaches taken by the committees may differ in some way, to deal with the distinct issues that these different historical situations raise.

4. Furthermore, the circumstances in which the modern-day restitution processes were established may also affect the way in which claims are dealt with, both procedurally and substantively. In some cases the nature of the legal process that was established has the potential to lead to differences in approaches between countries as well as the scope of the committee (whether it deals solely with cultural objects or with other claims for restitution or compensation).

¹ Musées Nationaux Récupération: <http://www2.culture.gouv.fr/documentation/mnr/MnR-pres.htm>

² Nederlands Kunstbezit collection: <http://www.herkomstgezocht.nl/en/nk-collection>

³ E. Campfens, 'Nazi-Looted Art: A note in favour of clear standards and neutral procedures' (2017) 22 *Art Antiquity and Law* 315, 326.

5. Whilst some differences may be unproblematic, others have the potential to impede justice for claimants and there is then an argument in favour of unification to ensure justice across the board. Confusion has been caused to some claimants as to why their claims were successful in one country, but unsuccessful in another when based on the same circumstances of loss. At times, although there is a difference in the outcome and approach these can be justified, but should be done in an open and transparent manner to explain to the public and potential claimants the different reasons for these.

A word on terminology and assumptions that are made

6. Different terminology is used to describe the institutions that were established to hear claims from those who lost possession during the Nazi Era.⁴ When referring to the institutions collectively, the term **committees** will be used.
7. **Return**, which may be described as a more neutral term,⁵ is used in preference to restitution given the fact that the act of return will not necessarily be restitution properly so-called under the national laws in force in each of the five different countries.⁶ Terminology can differ within languages and in Austria the terminology of *Rückstellung* is used whereas in Germany *Rückgabe* is used.
8. Representatives of one of the committees recommended the use of ‘differences’ rather than ‘inconsistencies’ in the Action Plan. This document also adopts the framework of ‘differences’. I make no assumption that differences in processes, provision of information or the application of different criteria are inherently problematic. Some differences are unproblematic; those that have the potential either to impede justice by claimants or have the perception of impeding justice in some way would be worth addressing.

⁴ Commission (France and Germany), Committee (Netherlands), Panel (UK) and Advisory Board (Austria).

⁵ J. Ulph and I. Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Oxford, 2012), p. 7.

⁶ E.g. in the UK restitution as a response to unjust enrichment has a technical legal meaning which would not strictly apply in the circumstances. In some of the recommendations of the UK SAP as well as working translations of recommendations relating to the German Commission published online, the terminology of return and restitution is used interchangeably. It is acknowledged, however, that for some claimants the notion of restitution (incorporating with it notions of justice) can be of great importance in this context.

SECTION I - PROCESSES

Nature and scope of the committees

9. The legal nature of the committees established in the five countries under consideration are all different. These differences include: (a) the types of instruments (legal or otherwise) that brought them into existence;⁷ (b) the specific legal or *quasi*-legal structure that was used; and (c) the composition of the membership of the committees.

10. The differences between the **ways in which the committees were established** are not, in themselves, problematic and usually reflect the different nature of the legal systems and the circumstances in which the committees were established. Unless the committees in the respective countries have experienced specific consequences of the legal structure, there are no specific proposals set out here to harmonise the legal structures. The effect that the chosen legal or non-legal structures have on the enforceability of the committees' decisions as well as the process by which these can be subject to judicial review are discussed below.

11. The **structure** of the process has the potential to affect the way in which the work of the committee is perceived both publically and specifically by claimants. Whether a committee exercises an adjudicatory or a mediatory role may affect the way in which the process is perceived.

12. In **Germany** the Commission acts as mediator regardless of whether the holding institution is public or private or whether the possessor is a private individual.⁸ The Commission's process is engaged only where the parties have already tried to come to an agreement but have failed to do so. The Rules of Procedure clearly emphasise

⁷ In Austria specific legislation was used to establish the Advisory Board (Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum, BGBl. Nr. 181/1998, amended in 2009 by Gesamte Rechtsvorschrift für Kunstrückgabegesetz, Fassung vom 16.11.2010, BGBl. Nr. 117/2009); in France a décret was used to establish the CIVS and there is clear statement that the CIVS is an administrative process (Décret no. 99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation); in the Netherlands the Restitution Committee was established by a Decree and supporting Regulations (Besluit adviescommissie restitutieverzoeken cultuurgoederen en Tweede Wereldoorlog, 16 November 2001) and Reglement inzake adviesprocedure in het kader van artikel 2, tweede lid, en artikel 4, tweede lid, Besluit adviescommissie restitutieverzoeken cultuurgoederen en Tweede Wereldoorlog (updated 28 January 2019); Germany has Rules of Procedure that were drafted by the Commission in consultation with the Federal Government Commissioner for Culture and the Media, the Federal States and national associations of local authorities (Verfahrensordnung der Beratenden Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz vom 02.11.2016 (German Rules of Procedure of the Advisory Committee on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, as of 2 November 2016)) and the UK Terms of Reference drafted by the Spoliation Advisory Panel were laid before Parliament (Hansard vol 348 col 255W (13 April 2000) (and later amended)).

⁸ German Rules of Procedure, *ibid.*, s.1(1).

the expectation that at all stages of the process the parties should seek to reach an amicable settlement.⁹

13. The CIVS in **France**, instituted by the Prime Minister, is an administrative process rather than a jurisdiction and is independent; it is recognised as having a *quasi*-legal nature.¹⁰ It is tasked with researching and proposing appropriate reparation, restitution or indemnisation¹¹ in respect of claims made regarding spoliated goods that occurred because of the anti-Semitic legislation of the Occupiers or the Vichy authorities.¹² Its function is thus not limited to spoliated cultural objects. In addition, the CIVS can act as conciliator between interested parties¹³ and in the event of a failure to agree the Commission can make any recommendations that appears to it to be useful.¹⁴
14. The Terms of Reference of the **UK's** Spoliation Advisory Panel explicitly state that the Panel is not a process of litigation¹⁵ but could be considered as *quasi*-legal in nature given that it has expressly stated that it performs its work within the context of English law principles and procedures.¹⁶ It has been described as a 'neutral third-party facilitator' – at best an 'innominate category'.¹⁷ A Panel is convened by the Secretary of State (from the group of independent experts known as the Spoliation Advisory Panel). Where national collections or other museums or galleries established for the public benefit are the holders of cultural objects, the Panel may issue a recommendation which is presented to the Secretary of State and laid before Parliament in its report. The parties are free to accept the recommendation, but where a claimant does act on the recommendation this is expected to be in full and final settlement of the dispute.¹⁸ Where a claim is made relating to a cultural object in one of the national museums listed in section 1 of the Holocaust (Return of Cultural Objects) Act 2009, then the Panel is designated as the Advisory Panel for the purposes of section 3(1) of the Act which means that in the event that the Panel recommends return of the object the Secretary of State would then need to approve this and then

⁹ *ibid.*, s. 1(2).

¹⁰ "Certes, la Commission - il faut le répéter - n'est pas une juridiction, mais il lui a été donné d'adopter le « style d'une juridiction », dans sa démarche pour découvrir, autant que faire se peut, la vérité, souvent vieille de soixante années et faire apparaître les éléments de conviction et de détermination, au travers de documents épars et souvent peu fiables." CIVS, Activity Report of the Commission, 1st Report, 20 November 2001, p.34.

¹¹ French Décret (n 7), art. 1.

¹² *ibid.*, art. 1.

¹³ *ibid.*, art. 2. An example of this would be the involvement of the CIVS mediation which resulted in return of Constable's *Valley of the Stour* from the Musée des Beaux-Arts La Chaux-de-Fonds, Switzerland: <http://www.civs.gouv.fr/news/a-mediation-of-the-civs-allows-the-restitution-by-switzerland-of-a-stolen-work-of-art/>

¹⁴ French Décret (n 7), art. 2.

¹⁵ Spoliation Advisory Panel, *Constitution and Terms of Reference* (updated 2016), para. 9.

¹⁶ *Goldschmidt/Ashmolean claim* (2006 HC 890), para. 25.

¹⁷ N. Palmer, 'The Best We Can Do? Exploring a Collegiate Approach to Holocaust-related Claims' in E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments* (Eleven Publishing 2015), p. 183.

¹⁸ SAP Constitution and ToR, (n 15) para. 11. Norman Palmer suggested that this acceptance would act as an estoppel against any further legal claim being brought: Palmer 2015 (n 17), p. 179.

the governing body of the collection would have the power to effect the transfer of the object.¹⁹

15. Where a private collection holds a disputed cultural object the UK Panel may also be called upon to advise on the appropriate action to take²⁰ (although the facility has so far not been used). In such circumstances the Panel is, in effect, acting as a form of alternative dispute resolution such as expert determination and presumably the parties would enter into a contractual agreement.
16. Where applications have been made for restitution of an object of cultural value, the **Dutch Committee**²¹ plays an advisory role in providing recommendations to the Minister for Education, Culture and Science regarding objects in the possession of the State.²² Both the NK collection and cultural objects in state collections fall into this category. Where objects are in the possession of non-state museums or private individuals then the parties may request a binding opinion. The Minister may then request the Committee to issue a binding opinion to the parties.²³ Since this would be classified as a 'settlement agreement' under Article 7:900 of the Dutch Civil Code, it can be open to judicial review and may be considered 'voidable if its binding force, in view of its content or the way in which it was made, would in the given circumstances be unacceptable according to standards of reasonableness and fairness'.²⁴
17. In **Austria** section 3(1) of the 1998 Act (as amended in 2009) makes provision for the Advisory Board to advise the Minister in accordance with his/her power to transfer artworks and other cultural objects from Austrian Federal Museums and Collections.²⁵
18. Given the fact that the 1998 Act relates to the power to transfer objects in Federal Museums and Collections, the Advisory Board's scope does not extend over non-Federal collections. However, other initiatives complement the work of the Advisory Board and address what might otherwise be a gap in coverage of claims by enabling just and fair solutions in respect of claims involving non-federal museums. The first example is Vienna City Council, which has adopted a Resolution of 29 April 1999.²⁶
19. The Leopold Museum, legally established as a private foundation, does not fall within the scope of the 1998 Restitution Act. However, an advisory board was established

¹⁹ Holocaust (Return of Cultural Objects) Act 2009, s. 2(1).

²⁰ SAP Constitution and ToR, (n 15), para. 6.

²¹ Adviescommissie Restitutieverzoeken Cultuurgooederen en Tweede Wereldoorlog.

²² Dutch Decree (n 7), art. 2(1).

²³ Dutch Decree (n 7), art. 2(2).

²⁴ See the *Semmel* decision, C-08-141384 Court of Overijssel, 11 June 2014 and see generally Tabitha I. Oost, 'Restitution policies on Nazi-looted art in the Netherlands and the United Kingdom: a change from a legal to a moral paradigm?' (2018) 25 *International Journal of Cultural Property* 139, 170.

²⁵ The Minister's power exists under Section 1(1) of the 1998 Act (n 7) as amended.

²⁶ Annemarie Marck and Eelke Muller, 'National Panels Advising on Nazi-looted Art in Austria, France, the United Kingdom, the Netherlands and Germany - A Brief Overview' in Campfens 2015 (n 17), p. 50 mentioned other initiatives in other municipalities.

to consider the provenance dossiers and these are considered according to the conditions which apply to Federal Museums and collections – that is to say in the same way as if the 1998 Act (as amended) applied. The advisory board for the Leopold Private Foundation is chaired by the former Federal Justice Minister, Mikolaus Michalek and its decisions²⁷ are published online.²⁸

20. In summary, UK non-national collections are not required to agree to submit to the jurisdiction of the Panel, but private collectors would need to agree, whereas in the Netherlands whilst state-collections (including the NK collections) would be subject to the committee's process, non-state collections would only be subject to the restitution committee's jurisdiction where they are in agreement. In Germany whether the possessor is a public or private institution or a private person, agreement is required before the Commission can consider the matter.²⁹
21. The UK, France and the Netherlands have a dual approach; on the first part to make recommendations based on claims in respect of certain museums and on the other part they act in a capacity more akin to alternative dispute resolution process, as conciliator, or expert determination (with the effect of the Dutch committee's recommendations being formal settlements and therefore subject to judicial review).
22. The scope of the CIVS differs from the committees in the other four countries in that it extends beyond art and other cultural objects³⁰ to all good that were spoliated as a result of the laws of the Occupiers and the Vichy authorities. Specialist teams within the pool of Rapporteurs were developed at an early stage of the CIVS's existence.³¹ Recent changes have introduced a mission for research on, and restitution, of spoliated cultural property within the Ministry of Culture.

Proposals and points to consider

23. In light of these differences it appears beneficial to undertake further research to understand the public perceptions of the committees and whether the particular structure adopted by each of the five countries affects the public's and claimants' perspectives of the committees' roles and also the effectiveness of the committees in providing just and fair solutions.
24. Where different committees exist within a country exist to consider different types of museums (for example state museums, municipal museums and private foundations) would there be scope for bringing these committees under one umbrella to enable claimants to make use of the offices of one organisation when bringing claims?

²⁷ Beschluss.

²⁸ <https://www.kunstkultur.bka.gv.at/leopold-museum-privatstiftung>

²⁹ NB the recent announcement by the Minister at the Berlin conference in 2018.

³⁰ UK: cultural objects, Austria: art and other movable cultural goods, Germany: cultural goods and the Netherlands: items of cultural value.

³¹ CIVS, 1st Report (n 10).

25. Have any of the committees encountered difficulties in practice with the implementation of any of their recommendations?

Composition of membership and secretariat

26. The Federal Government set up the **German** Advisory Commission which comprises 10 members³² The Chairman is elected from amongst the Commission's members.³³ The specific membership is not prescribed, but the current membership is reflective of former judges, lawyers, academics and historians, art historians and philosophy. The Commission is quorate if a majority of the members is present.³⁴ 'The discussions and votes of the Commission (particularly individual votes and voting results) shall not be conducted in public and shall be strictly confidential'³⁵ Provision is made for the Federal Commissioner for Culture and the Media of the relevant federal state in which the institution is situated to participate in the hearing.³⁶
27. In respect of the **Dutch** Restitution Committee article 3(1) of the Decree establishing the committee stipulates that there are no more than 7 members, including a chair and a deputy (both of whom should be a qualified lawyer.³⁷ Appointments are made for period not exceeding 3 years³⁸ (but members may be reappointed³⁹). At least one member should have expertise in World War II⁴⁰ and another in art history and museology.⁴¹ Advice shall be considered by a group of at least 3 members⁴² with the proviso that at least the chairman or deputy shall be involved in the considerations.⁴³ The committee is assisted in its work by the Committee Secretariat and a Secretary who is a qualified lawyer.⁴⁴
28. The **French** CIVS usually comprises 10 members. These include judges outside the hierarchy of the Cours de cassation (either current or emeritus) 2 members of the Council of State, 2 master advisers of the Court of Auditors (either current or emeritus), 2 university professors and 2 other qualified persons.⁴⁵ The president of the Commission is chosen from amongst the judges and the vice-president is chosen from amongst all the members.⁴⁶ In addition, when the CIVS is constituted with regards

³² German Rules of Procedure (n 7), s. 2(1).

³³ *ibid.*, s. 2(2).

³⁴ *ibid.*, s. 2(4).

³⁵ *ibid.*, s. 5(4).

³⁶ *ibid.*, s. 5(1).

³⁷ Dutch Decree (n 7), art. 3(2).

³⁸ *ibid.*, art. 3(5),

³⁹ *ibid.*, art. 3(6).

⁴⁰ *ibid.*, art. 3(3).

⁴¹ *ibid.*, art. 3(4).

⁴² *ibid.*, art. 4(1).

⁴³ *ibid.*, art. 4(1).

⁴⁴ *ibid.*, art. 5(2).

⁴⁵ French Décret (n 7), art. 3.

⁴⁶ *ibid.*, art. 3.

to spoliation of cultural objects, the commission comprises of four additional members qualified in art history, the art market, Second World War history and heritage law.⁴⁷ Furthermore, when the CIVS is formed in this manner a representative of the Minister of Foreign Affairs and a representative of the Minister charged with culture can attend in an advisory capacity if they wish.⁴⁸ All members are appointed by Prime ministerial decree for a period of 3 years.⁴⁹ The CIVS can act as a whole committee,⁵⁰ or a subcommittee⁵¹ and indeed in some situations the Chairman can act alone where the rapporteur makes a recommendation and either there is a need for speedy consideration of the claim, or the claim raises no particular difficulties.⁵² A decision is made by majority decision of the committee who are present.⁵³

29. The CIVS is assisted by a director and a general rapporteur as well as rapporteurs. A government commissioner is put at the disposal of the CIVS.⁵⁴
30. The **Austrian** Advisory Board comprises 8 members. These include: one representative from each of the Federal Ministry of Finance, the Federal Ministry for Business, Family and Youth, the Federal Ministry of justice; the Federal Ministry for Education, Art and Culture and the Federal Ministry of Defence and Sport;⁵⁵ one representative from financial procuratorate (in an advisory capacity); and experts nominated by the University Conference – experts in History and History of Art. (plus substitute members). The deliberations of the board are not subject to freedom of information requests; this is clear from the *Sachs* litigation where the court refused to allow access by the original claimant to the case files held by the Advisory Board on the basis that to do so would also reveal the internal deliberations of the Board including the weighing up of the ethical considerations and that the publication of these may negatively affect the future work of the Board and its individual members.⁵⁶ Such a safeguard was said to protect the openness of deliberations which require freedom of expression, particularly as they concern difficult ethical and moral issues.⁵⁷ For a resolution of the Advisory Board at least half of the members must be present.⁵⁸

⁴⁷ *ibid.*, art. 3-1.

⁴⁸ *ibid.*, art. 3-1.

⁴⁹ *ibid.*, art. 3.

⁵⁰ Where at least six members should be present: *ibid.*, art. 8.

⁵¹ *ibid.*, art. 8. Where at least three members must be present: art. 8.

⁵² *ibid.*, art. 5.

⁵³ *ibid.*, art. 8-1. In the event of non-agreement the president has casting vote) art. 8-1.

⁵⁴ *ibid.*, art. 3(1).

⁵⁵ Where the object is from the competences of another federal ministry, then a representative from that ministry would attend.

⁵⁶ *Information claim against the Advisory Commission in connection with the return of Nazi cultural property, in particular Jewish property, which has been withdrawn as a result of persecution*, Higher Administrative Court of Saxony-Anhalt 3rd Senate, 3 April 2017, para. 78.

⁵⁷ *ibid.*, para. 79.

⁵⁸ Austrian Restitution Act (n 7), art. 3(7).

31. The current Terms of Reference for the **UK** Panel establishes a group of expert advisers and does not prescribe any particular membership profile. The Panel has broadly six areas of expertise (identified in the Jenkins Review) and Sir Paul Jenkins recommended an expansion of the pool of experts from 11 to 20.⁵⁹ Prior to that the Panel had sat *en banc* (something that had been identified as providing a degree of consistency⁶⁰). The current membership is 10 with two chairs and two deputy chairs with an additional 6 other members.
32. In summary, Germany, France, UK and Netherlands have either judges or lawyers as chairs. Appointments tend to be made for 3 years (Netherlands, Austria and France) with no specific mention of the length of the appointments in the case of the UK and Germany. In some instances the committees are made up predominantly of lawyers or judges.

Proposals and points to consider

33. It would be worth considering the relationship between the committees and government and the perception that this may give - specifically, where Ministers or government representatives act as (a) participants in the decisions; (b) representatives on the committee; and (c) where they provide the Secretariat facilities. In the context of (c) the *Jenkins Review*⁶¹ of the work of the UK Panel addressed some concerns that had been expressed about the perception that having the Secretariat provided by DCMS may have had, particularly where claims are made against national museums or where there was a possibility that the government may be called upon to make an *ex gratia* payment.⁶²
34. Does the presence of representatives from the ministries, as members of the board, affect the way in which the committees are perceived? Does this affect the way in which the independency of the committee is viewed?
35. More work could be undertaken to consider how the overall make up of each committee and the spread of experts affects the decision-making processes of the committee and the public perception of it.
36. Where committees have membership that is predominantly from the legal profession or the judiciary, does this affect the way in which decisions are reached?

⁵⁹ Sir Paul Jenkins KCB, QC, *Independent Review of the Spoliation Advisory Panel*, 2015.

⁶⁰ C. Woodhead, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 *Art Antiquity and Law* 167.

⁶¹ *Jenkins Review* (n 59).

⁶² *ibid.*, p. 10.

37. Where appointments are made for 3 years, do these tend to be renewed? Where there is no maximum term of appointments, has this led to a consistency of practice, or the practical effect (or perception) of case hardness?
38. Are there advantages to having prescribed majorities for voting?
39. In what situations are claims considered by a sub-group of the committee? Is it appropriate to make provision for more complicated cases should be considered in a full hearing with the committee *en banc*?

Hearings or decided on paper?

40. In the **German** Rules of Procedure section 5 makes provision for a hearing to take place and gives the applicant the opportunity to present his/her position. The possessor can then present their position. There is then an opportunity for discussion between the Commission and the Parties.⁶³
41. In **France** the CIVS attaches great importance to the conversations that take place between the rapporteur and claimants. Some matters are dealt with by the Chairman. Hearings are then conducted using the ‘principle of cross-examination’.⁶⁴
42. According to the **UK** Spoliation Advisory Panel’s Rules of Procedure claims will usually be dealt with on paper⁶⁵ but at the request of either party the matter can be determined by an oral hearing.⁶⁶ Where there is a hearing there is a quorum of 5 members including the Chairman.⁶⁷
43. In **Austria** hearings of the Advisory Commission do not take place as part of the standard procedure.⁶⁸
44. The **Dutch** Restitution Committee does conduct hearings and has also conducted video conferences with the claimants which may be shown at the hearings.⁶⁹

Points to consider

45. Is the experience of the committees that claimants and respondents are more content with recommendations where there has been an opportunity to make oral representations and to be listened to?

⁶³ German Rules of Procedure (n 7), s. 5(1).

⁶⁴ CIVS, *Activity Report for the Commission Presented to the Prime Minister for 2002*, 2nd report, 31 December 2002, p. 14.

⁶⁵ SAP Rules of Procedure, <https://www.gov.uk/government/groups/spoliation-advisory-panel> para. 11.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ Marck and Muller (n 26), p. 52.

⁶⁹ E.g. Binding opinion regarding the dispute about the return of the painting Madonna and Child with Wild Roses by Jan van Scorel from the collection of Richard Semmel, currently in the possession of Utrecht City Council, RC 3.131.

46. How important is an oral hearing to the claimants and the perception that justice is being done? If oral hearings do not take place, do claimants have other opportunities to engage in direct dialogue, for example with rapporteurs?

Who initiates the claim and must there be agreement between the parties?

47. How a given committee's process is initiated may affect the way in which it is perceived by the public or, more specifically, by potential claimants. For example, in some countries cases are referred directly by another organisation (such as a provenance research committee) whilst in others a claimant can approach the committee directly through its Secretariat.
48. In **Germany** whilst the Rules of Procedure in section I(1) talk in terms of the holding institution initiating the procedure and referring the matter to the Committee, in section 3(3) the wording presupposes that a claim can be brought *either* by the claimant or the holding institution.⁷⁰ However, given the nature of the process as one of mediation, in all situations the agreement of both parties is required.⁷¹ Clearly this process, as one premised on the agreement of the parties, attempts to resolve a dispute that has not yet been resolved and an ongoing one in which attempts should be made to resolve it in an amicable way that involves both parties.
49. In the **Netherlands** the committee is tasked (in respect of the NK collection or the property of the State) with advising the Minister 'at his request, on decisions to be taken concerning applications for the restitution of items of cultural value....'⁷² In this regard, the process is therefore initiated by claimants, by applying for the return of objects. Where the current possessor is not the State, the process is one of the committee issuing a binding opinion at the request of the Minister in respect of 'disputes concerning the restitution of items of cultural value'.⁷³ This is a joint request by the current possessor and the original owner and his heirs, rather than a direct claim from the original owner/heirs on their own account.⁷⁴
50. In **France** victims or their 'ayant droits' (heirs and successors) can initiate the proceedings by making a written request accompanied by all useful docs.⁷⁵ In the past, where an object has been designated as part of the MNR collection, 'the claimant must apply to the Archives Department of the Ministry for Foreign Affairs' (but can also contact the CIVS directly).⁷⁶ Under the new structure referrals for investigation to the

⁷⁰ This is also the approach reflected in the answers to queries for the 2017 London Conference.

⁷¹ Although note the comments of the Minister, Monika Grütters at the Berlin Conference in November 2018.

⁷² Dutch Decree (n 7), art 2(1) (as amended).

⁷³ *ibid.*, art. 2(2).

⁷⁴ *ibid.*, art. 2(3).

⁷⁵ French Décret (n 7), art. 4.

⁷⁶ CIVS, *Report to the Public on the Work of the Commission in 2007*, 7th report, 31 December 2007, p. 18.

Mission for Research and restitution can also be referred by the Ministry of Culture and by CIVS. The CIVS then makes a recommendation to the Prime Minister.

51. In **Austria** the Commission's process appears on paper to only be engaged following a referral from the Kommission für Provenienzforschung. Whilst an original owner or heir can bring a potential claim to the attention of Advisory Board, it is then referred to the Kommission für Provenienzforschung. It is clear from the 1998 Act (as amended in 2009) that 'the provisions of the Federal Law do not create any claim to transfer'.⁷⁷
52. In the **UK** in situations involving a national museum or other museum or gallery established for the public benefit,⁷⁸ the claimants arguably have a *de facto* claim because once the SAP is convened by the Secretary of State in response to a claim by the person (or their heirs) who claim that they lost possession of a cultural object between 1933 and 1945. The holding institution has no choice but to submit to its jurisdiction. However, where a private collector is in possession of a contested cultural object the process is consensual and is arguably a form of ADR since it is dependent on the agreement of both parties.⁷⁹

Proposals and points to consider

53. It would be beneficial to carry out further research to investigate how the process of initiating a claim can affect the way in which the committee is perceived as a process of providing just and fair solutions. There may be an advantage to claimants feeling that they are bringing a claim (that this is listened to and responded to), or it may be that a process framed within the concept of mediation (e.g. in Germany) provides a way of overcoming this.
54. In circumstances where the agreement of both parties is needed (Germany) have claimants encountered problems where the institution does not wish to refer the matter to the Commission?

⁷⁷ Oost explains that the nature of the legislation used means that it governs the work of ministers rather than creating any independent cause of action for a claimant; T. Oost, *In an effort to do Justice? Restitution Policies and the Washington Conference Principles* (University of Amsterdam, 2012), p. 114.

⁷⁸ UK SAP Constitution and ToR (n 15), para. 1.

⁷⁹ *ibid.*, para. 6.

Nature of Recommendation

55. In the **UK** the recommendations of the Panel are not legally binding on either the parties or the Secretary of State. So far recommendations have tended to be adopted by the parties⁸⁰ (other than where the institution had received legal advice that a transfer was not possible,⁸¹ or where the parties agreed to a return and buy-back in a situation where return was recommended⁸²).
56. In **Germany** the nature of the process is one of mediation which means that there is 'no enforceable entitlement to restitution of cultural goods' under the Joint Statement of the Federal Government and Länder on the Washington Principles. Therefore, the decision in each individual case lies with the discretion of the institution concerned or its funding body and will be taken in accordance with the applicable budgetary law provisions where appropriate'.⁸³
57. In the **Netherlands**, the binding opinion procedure is subject to judicial review given its status as a settlement agreement.⁸⁴
58. In **Austria**, if a Minister refused for any reason to follow the recommendation of the Advisory Board, would this be judicially reviewable?

Approach to anonymity

59. It appears that the **Austrian** decisions of the Advisory Board do refer to the claims by the names of the original owners. In **Germany** all claims are identified by the names of the original owners. In some reports the names of the heirs are mentioned, but in others they are referred to as 'the heirs'; it is unclear from the case whether the issue of anonymity has been raised.
60. The recommendations of the Restitution Committee in the **Netherlands** demonstrate a mix of references to the names of the original owners and the names of the cultural objects; in some situations the original owner is identified, but the claimants are anonymous and referred to by initials.
61. In its first Recommendation the **UK** Spoliation Advisory Panel established that where the claimants request it, they may retain anonymity and in order to protect this the Panel may refrain from referring to the original owner who lost possession as well as

⁸⁰ See Charlotte Woodhead, 'Putting into place solutions for Nazi Era dispossessions of cultural objects: the UK experience' (2016) 23 *International Journal of Cultural Property* 385.

⁸¹ *Glasgow City Council claim* (2004 HC 10).

⁸² *British Library/Biccherna Panel claim* (2014 HC 209).

⁸³ *Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999*, February 2001 (revised November 2007), p. 27.

⁸⁴ As to which see p. 16 below.

the claimants.⁸⁵ The justification for this was legal advice received by the Panel which advised that the claimants enjoyed such a right under Article 8 of the European Convention on Human Rights.⁸⁶

62. In **France** the CIVS does not appear to publicise the information relating to the specific names of the claimants.

Proposals and points to consider

63. How often does someone come forward with further information following the publication of the recommendation?⁸⁷ If this is a frequent occurrence then it may be worth considering more fully whether anonymity of the original owner can prevent people bringing forward information that is critical to establishing either ownership or the circumstances in which the object was lost. This may be less of a problem where committees have access to researchers (either in-house or as part of a provenance research commission).

‘Appeals’/reconsideration by the committees and legal challenges

64. Another difference is the way in which committees deal with situations where new evidence comes to light and is presented to the committee after it has made its recommendation or decision.

65. In **France** there is a process through which the claimant may challenge decisions.⁸⁸ Where they challenge a decision of the sub-commission they can ask the Chair of the Commission for an examination by the full commission, but will need to provide new pieces of information or facts.⁸⁹ Where they challenge the decision of the full-commission they can ask the full commission again to re-examine it. Where the matter had been considered by the chair of Commission on his/her own the claimant can ask for the full commission or a sub-commission to hear the claim.⁹⁰

66. In the absence of any formal appeal routes,⁹¹ the **UK**, the **Netherlands** and **Austria**, have nevertheless been prepared to reconsider claims where supplemental evidence becomes available after the publication of their recommendations or where the

⁸⁵ *Tate/Griffier* (2001 HC 111), para. 1.

⁸⁶ *ibid.*

⁸⁷ The recent decision of the **German Committee** in the matter of the Dr and Mrs Max Stern Foundation and Bayerische Staatsgemaeldesammlung (19 August 2019) was to return an object subject to the condition that the heirs should not sell it for ten years; this was on the basis that another person may come forward with a valid claim or that further information might come to light which spoke against restitution and justified return to the museum (see discussion below at p. 37).

⁸⁸ French Décret, art. 8.

⁸⁹ *ibid.*, art. 8-1-1.

⁹⁰ *ibid.*, art. 8-1-1.

⁹¹ Although note that in the case of Dutch binding opinion, there are settlement agreement for the purposes of the Civil Code and subject to judicial review.

applicable law has changed. These principles appear to have developed out of the approaches of the committees to specific cases in Austria and the UK.⁹²

67. In the **Netherlands**, until 2007 the Committee could assess an earlier recommendation in two situations:

“(a) new facts that, had they been known at the time the earlier recommendation was formulated, would have led to a different conclusion, and/or (b) errors during the earlier procedure that resulted in harm to the applicants’ fundamental interests.”⁹³

68. Since 2017 the Committee can only assess an earlier recommendation where new facts are now available (a) above. Errors in procedure (b) are no longer grounds for reassessment.⁹⁴ The rationale for this change is that recourse to the civil courts for ‘alleged or proven formal errors’ was considered more appropriate.⁹⁵

Legal challenges

69. In the **Netherlands** the binding opinion procedure is subject to the exclusive competence of the Dutch Courts.⁹⁶ Parties have two months within which to submit the matter to the ordinary courts to review a binding opinion of the Committee.⁹⁷

70. Across the five countries there are several claims in respect of which legal proceedings have been brought and which relate directly to the subject matter of a committee’s decision. The first involves the **Austrian** procedure and is the well-known *Altmann* litigation concerning the paintings originally owned by Ferdinand Bloch Bauer in the possession of the Bevedere in Vienna, which was commenced in the USA. The second, is the **Dutch** *Semmel* claim which successfully sought to set aside the binding opinion (settlement under the Civil Code)⁹⁸ on the grounds of reasonableness and fairness. More recent legal challenges have been brought regarding binding opinions. One was commenced in the Dutch courts by the heirs of Hedwig Lewenstein-Weijermann for a painting by Kadinsky in the Stedelijk museum following the binding opinion of the Committee which concluded that Amsterdam City Council was not obliged to reconstitute the painting.⁹⁹ A second claim was filed in the US District Court in

⁹² E.g. UK: *Tate/Constable claim* (2014 HC 1016); Austria: Feldmann recommendations of 14 December 2005 and 3 October 2008).

⁹³ Revised recommendation regarding *Bachstitz* (RC 4.138), para. 1.

⁹⁴ Adviescommissie Restitutieverzoeken Cultuurgoederen en Tweede Wereldoorlog, Verslag 2017, p. 6.

⁹⁵ Ministerie van Onderwijs, Cultuur en Wetenschap, October 4 2016, Policy on Restitution of Items of Cultural Value and the Second World War.

⁹⁶ Regulations for the Binding Opinion Procedure (n 7), art. 18(1).

⁹⁷ *ibid.*, art. 18(2). This is under Title 15 of Book 7 of the Dutch Civil Code.

⁹⁸ See Oost 2018 (n 24), p. 170.

⁹⁹ Binding opinion regarding *Painting with Houses* by Wassily Kandinsky (RC 3.141).

Charleston, South Carolina in respect of the claim made by the heirs of Benjamin Katz.¹⁰⁰

71. There were two further legal claims in **Germany** relating to the *Sachs* claim for the collection of posters. The substantive *Sachs* claim was successful.¹⁰¹ A second *Sachs* claim related to a freedom of information request which was unsuccessful (discussed above).

Proposals and points to consider

72. It would be helpful to make clear on each committee's website what process, if any, exists for the committee to reconsider a claim where additional information or evidence becomes available.
73. It would be advisable to have a policy in place which sets out how to deal with situations where return has already been made but information then becomes available which casts doubt on the original claimant's entitlement to the object. This would indicate whether in such circumstances the museum (which has already processed the transfer to the successful claimant) would have the opportunity to have the claim reheard by the committee.
74. It would be advisable to have in place a policy to deal with situations where another person makes a claim for an object which has already been returned following a recommendation of the committee but to another person.

Ability to export objects following return/restitution and tax implications

75. In **Austria** section 4(1) of the 1998 Act (as amended) dis-applies the relevant export provisions under BGBl No 533/1923 for a period of 25 years after the transfer of ownership effected under s 1(1) of the 1998 Act (as amended).¹⁰² The dis-application of the export provisions appears to apply equally to the transferees as well as the successful claimants. Therefore the original owners or their heirs would be free to export the work even if it would otherwise fall within the scope of the export provisions. However, it would also appear to benefit subsequent transferees. This could include not only the immediate purchasers who bought the cultural object directly from the successful claimant, but in theory any subsequent purchasers too. Objects returned under section 1 of the Austrian Restitution Act are also free of all taxes.¹⁰³

¹⁰⁰ <https://www.nytimes.com/2018/11/20/arts/nazi-art-lawsuit-dutch-museum.html>

¹⁰¹ Higher Administrative Court of Saxony-Anhalt 3rd Senate 24th March 2017 <http://www.landesrecht.sachsen-anhalt.de/jportal/portal/t/buq/page/bssahprod.psm1?doc.hl=1&doc.id=MVRE170005851&showdoccase=1&doc.part=L¶mfromHL=true>

¹⁰² See also Marck and Muller (n 26), p. 49.

¹⁰³ Austrian Restitution Act, (n 7), s. 5.

76. In 2015 the **UK** Secretary of State granted an Open General Export Licence (OGEL)¹⁰⁴ in respect of ‘any article that the Secretary of State has approved for return to the claimant following a recommendation to that effect by the Spoliation Advisory Panel’.¹⁰⁵ In contrast to the Austrian enactment, there appears to be no time-restriction following the transfer in which to export the object freely. However, the nature of the OGEL is that it can be updated and it may be that in the future this paragraph is removed. On a literal reading of the OGEL it might be interpreted as indicating that a later transferee or purchaser of a returned cultural object could export it under the OGEL; this much is suggested by the reference in paragraph 2(4) of the OGEL to the need for the exported object to be accompanied by a copy of the Spoliation Advisory Panel’s report(which must be presented to the proper officer of HM Revenue and Customs/UK Border Agency) together with a letter from the claimant indicating permission for it to be exported. Nothing suggests that the ownership of the object must remain with the claimant at the time of export, nor that the OGEL only applies to an immediate purchaser from the claimant (assuming that the claimant gave his/her permission for the export).

Points to consider

77. Are there specific policy reasons (in the two countries discussed) to facilitate export by subsequent purchasers as well as export by claimants? If the policy is to facilitate the claimant in selling the object, if they wish to, is this based on a recognition that the risk of an export licence being refused (or deferred in the case of the UK to allow time for purchasers) might affect the price that the claimant would receive? If so, then might there be merit in restricting the UK OGEL and dis-applying the Austrian export prohibitions to situations involving the immediate purchaser (rather than also to subsequent purchasers)?

¹⁰⁴ Open General Export Licence (Objects of Cultural Interest) of 12 March 2015.

¹⁰⁵ *ibid.*, para. 1(o).

SECTION 2 CRITERIA USED TO DETERMINE CLAIMS

Status of parties: differential treatment of claims involving art dealerships

78. Tony Baumgartner's separate paper considers the question of whether lineage and genealogy of the claimants remain relevant to the committees. Here, consideration is given to the differing treatment of presumptions regarding evidence in the context of claims relating to art dealerships and those relating to private parties.
79. One additional point to consider may be the way in which claims relating to art dealerships are treated. In the **Netherlands** the restitution committee made a distinction between the art trade and private parties when it came to a presumption in favour of a forced sale.¹⁰⁶ Campfens has explored the relevance of a transaction being made by an art dealer and identified various Dutch claims where claims have been upheld, despite this distinction.¹⁰⁷
80. In the **UK** no obvious distinction has been made between objects owned by private individuals and gallery stock and successful claims have been made by them (but also unsuccessful ones).¹⁰⁸ I have not found any particular distinction being made in **Austria**. In **France** a claim could not be brought by an art dealership as a legal entity.
81. In the 2016 **German** Advisory Commission recommendation regarding *Flechtheim v Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf* the Commission highlighted one of the primary difficulties with assessing claims that involve art dealerships: 'it is almost impossible to distinguish between his private property and the property of this galleries without specific information in the individual case'.¹⁰⁹

Proposals and points to consider

82. Is the difference in acceptance of claims by art dealerships and the different considerations that are made something that could, or should be reconciled?

Circumstances of loss

83. The work of the CIVS in **France** relates specifically to individual demands for spoliation of goods resulting from the anti-Semitic laws of the Occupiers or Vichy authorities during the Occupation. The recently published *Vadémecum* identifies the principal forms of spoliation as seizures, forced sales¹¹⁰ and exchanges organised by

¹⁰⁶ Recommendation *Stodel II* (RC I.49). See also Oost 2012 (n 77) p. 62.

¹⁰⁷ 'Le Traitement des Biens culturels Spoliés' *Vadémecum*, Juin 2017. See further Campfens 2017 (n 3), 326.

¹⁰⁸ E.g. the successful claim by shareholders of a Munich art gallery in *Glasgow City Council claim* (n 81) and *British Library/Biccherna Panel claim* (2014 HC 209).

¹⁰⁹ 21 March 2016.

¹¹⁰ The definition of forced sale is adopted from art 1 of l'ordonnance du 21 avril 1945 (cited in *Vadémecum*, *ibid.*, p 5) and discussed by Tony Baumgartner in his note.

the Occupiers.¹¹¹ No application will be successful where spoliation occurred abroad.¹¹²

84. In the **Netherlands** the relevant circumstances of loss are that the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime.¹¹³ The restitution committee makes use of three sets of general considerations which derive from the Ekkart Committee 2001, 2003 and 2004.¹¹⁴ The 'Ekkart Committee's third recommendation of 26 April 2001, which stipulates that sales of artworks by private Jewish individuals in Germany from 1933 onwards must be considered to be involuntary, unless the facts expressly show otherwise'.¹¹⁵ These criteria apply to claims relating to the NK collection and artworks in state collections; however, these may be taken into consideration by the committee when considering applications under the binding opinion procedure.

85. In **Germany** the Commission's processes relate to cultural property of which the owners were deprived, especially Jewish citizens, as a result of persecution during the Nazi regime from 30 January 1933 until 8 May 1945.¹¹⁶

86. The **UK's** Spoliation Advisory Panel has a wide scope and covers all losses of possession of cultural objects during the Nazi era (1933-1945); there is no specific requirement that these losses are directly or indirectly as a result of the Nazis.¹¹⁷

87. The **Austrian** Restitution Act of 1998 (as amended in 2009) states the list of potential circumstances:

- a) 'Were the subject of restitution proceedings (or those which ought to have been subject to those proceedings) but which became the property of the Federal State without compensation under the export prohibition Act relating to objects of historical, artistic or cultural value;¹¹⁸
- b) Which became the lawful property of the Federal State (which were transactions which were legal transactions or legal acts under section I of the Federal Act of 15 May 1946 on annulled transactions;¹¹⁹
- c) Although legally transferred to the Federal State, but which were the subject of a legal act or legal transaction in a dominion of the German Reich pursuant to section I of the Federal annulment Act of 1946.¹²⁰
- d) Could not be returned after the conclusion of restitution proceedings and became as abandoned goods and thus the property of the Federal State.'¹²¹

¹¹¹ Vadémecum (n 107), p. 3.

¹¹² CIVS, 1st report, (n 10), p. 25.

¹¹³ Dutch Decree (n 7), arts. 1 and 2.

¹¹⁴ These are in addition to considerations discussed below at p. 24.

¹¹⁵ *Berolzheimer* claim of 2017 (RC 1.166) at para. 15.

¹¹⁶ German Rules of Procedure (n 7).

¹¹⁷ See Tony Baumgartner's separate paper for more details on the *Beneventan Missal* claim.

¹¹⁸ Austrian Restitution Act (as amended) (n 7), s 1(1)1.

¹¹⁹ *ibid.*, s 1(1)2.

¹²⁰ *ibid.*, s 1(1)2a.

¹²¹ 1998 Restitution Act (as amended) (n 7), s 1(1)3.

Fluchtgut (refugee goods)

88. A particular difficulty arises with the category of goods which were sold in neutral third countries either during or after the war. Evelien Campfens has recently undertaken a useful comparison of the approaches of the committees which identifies the recent differences in approach across the committees in the UK, Netherlands and Germany;¹²² she argues that bringing such sales under the definition of “Nazi-loot’ over-stretches the definition’.¹²³
89. There appear to be only two claims (the *Freund* claim in Germany¹²⁴ and the recent *Emden* claim¹²⁵) where return has been recommended for *Fluchtgut*. When a similar claim from the *Freund* heirs was heard in Austria this was rejected because the sale fell outside the sphere of NS control at the time and so did not fall within section I of the 1998 Act. It is doubtful that claims involving *Fluchtgut* would be considered by the CIVS in France on the basis that the sales in neutral third countries would not be attributable to the laws of the Occupiers or the Vichy government.
90. In the second *Flechtheim* claim heard in Germany, the Commission rejected the claim where *Fluchtgut* were sold in London and where the seller was able to freely use the proceeds of sale and made the following statement about the approach to be taken in *Fluchtgut* cases:
- ‘If an art dealer and collector persecuted by the Nazis sold a painting on the regular art market or at auction in a safe country abroad, there would have to be very specific reasons to recognize such a sale as a loss of property as the result of Nazi persecution.’¹²⁶
91. Both the UK¹²⁷ and Netherlands¹²⁸ have made use of the remedy of the display of an account of the object’s history in response to claims where objects were *Fluchtgut*.

Proposals and recommendations

92. Where there are either territorial limits to the scope of the claims or restrictions on the direct involvement of the laws of a particular country, might there be scope for

¹²² Campfens 2017 (n 3),

¹²³ *ibid.*, p. 331.

¹²⁴ 12 January 2005.

¹²⁵ 26 March 2019.

¹²⁶ 21 March 2016.

¹²⁷ *Koch claim* (2012 HC 1839).

¹²⁸ *Semmel* (Binding opinion in the dispute on restitution of the painting entitled *Christ and the Samaritan Woman at the Well* by Bernardo Strozzi from the estate of Richard Semmel, currently owned by Museum de Fundatie, RC 3.128 and Binding opinion regarding the dispute about the return of the painting *Madonna and Child with Wild Roses* by Jan van Scorel from the collection of Richard Semmel, currently in the possession of Utrecht City Council RC 3.131. Note though the subsequent litigation involving the Semmel binding opinions (n 24).

harmonising those with other countries if there are circumstances in which similar claims might be treated differently across the committees (but where there is a general consensus that a remedy may be appropriate)?

93. Where different presumptions are used, particularly in respect of forced sales, it would be helpful if these could be set out clearly for potential claimants in formats other than the original legal instruments or the previous recommendations of the committees or the annual reports.
94. It would be beneficial for the committees, either individually or through a joint statement, to indicate their overall approach to Fluchtgut.
95. In the context of Fluchtgut, where remedies other than return or compensation may (or are likely to) be awarded, this information could be usefully placed online to forewarn potential claimants of this possible outcome.

Primary considerations of the committee

96. In **France** three conditions need to be established before the CIVS. First, that the loss was related to anti-Semitic laws, secondly that there was material loss or damage and thirdly that the loss must be attributable to French authorities or the occupying powers.¹²⁹ The CIVS has a presumption of good faith because of the lapse of time since losses suffered and difficulties of evidence.¹³⁰
97. In **Germany** the Rules of Procedure make it clear that the Commission can base its decisions on moral-ethical considerations.¹³¹ Section 6 states that the criteria for the Commission's discussions and recommendations shall be:
- (a) 'internationally recognised principles, such as the 1998 Washington Conference Principles and the 2009 Terezin Declaration, and
 - (b) the German Joint Declaration of 1999 and the 'Guidelines' of 2001 for its implementation in their current versions'.¹³²
98. Specific provision is then made for consideration by the Commission of:
- (a) 'the circumstances resulting in the loss of cultural property;
 - (b) the circumstances in which the cultural property was acquired and the research conducted concerning its provenance'.¹³³
99. The German Guidelines (which are also applicable to institutions) indicate that the following should be considered:

¹²⁹ CIVS 1st report (n 8).

¹³⁰ 'D'autre part, eu égard à l'ancienneté des causes de préjudice, la Commission tient compte de la difficulté de fournir des preuves et présume la bonne foi des requérants pour les préjudices courants et vraisemblables (avec, cependant, une limite en cas de préjudice exceptionnel).' CIVS, 1st report, (n 8), p. 25.

¹³¹ German Rules of Procedure (n 7), s. 1(2).

¹³² *ibid.*, s. 6(3).

¹³³ *ibid.*

- (1) 'Were the claimant or his/her legal predecessor persecuted on racial, political, religious or ideological grounds between 30 January 1933 and 8 May 1945?
- (2) Did the claimant or his/her legal predecessor sustain a loss of property through forced sales, expropriation or in any other form? Who has to bear the onus of proof, i.e. who has to provide evidence showing that the loss was due to persecution by the Nazi regime?
- (3) Can the statutory presumption according to which losses that resulted from legal transactions should basically be considered cases of Nazi-confiscated property, be disproved by showing
 - that the seller received a fair purchase price
 - and
 - that he was free to dispose of the purchase price as he pleased;
 - and (for sales from 15 Sept 1935 onwards)
 - that the legal transaction would have taken place even if there had been no National Socialist rule
 - or that 'the victim's financial interests were safeguarded in a special manner and with substantial success, e.g. by helping him/her to transfer his asset abroad?
- (4) Any reasons precluding restitution (priority, principle, abuse)?
- (5) Compensation payments by the Federation, other compensation, considerations'.¹³⁴

100. In respect of the aim of achieving just and fair solutions, the Guidelines indicate the following considerations as being relevant on a case-by-case basis:

- 'the fact that an object has been preserved with considerable effort on the part of the museum over an extended period of time and been made accessible to the public;
- the need to give the institution concerned a certain amount of time to raise the necessary funds if, in the negotiations with the heirs, the institution declares its desire purchase the object;
- the difficulties facing the parties when it comes to providing evidence also need to be taken into account when striving for a just and fair solution.'¹³⁵

101. In the **Netherlands**, since 2015, all recommendations (state collections and NK collections) and binding opinions are assessed on the basis of the test of reasonableness and fairness. In the answers to the questions posed in advance of the 2017 London Conference, the response by the Netherlands indicated that the recommendations made since the change in the policy indicate that a successful claim depends on the following:

- (a) 'Ownership of the painting has been established to a particular degree
- (b) The claimant has to be entitled to the estate of the original owner
- (c) The original owner's loss of possession was as a result of circumstances caused by the Nazi regime.'

Once these are met then the balance of interest test takes place.

¹³⁴ German Guidelines (n 83), p. 29.

¹³⁵ *ibid.*, p. 31.

102. In assessing the balance of interest, the Dutch Regulations for the procedure relating to binding opinions indicate that the committee can take the following into account
- (a) internationally and nationally accepted principles such as the Washington Principles and the government's policy guidelines concerning the restitution of looted art in so far as they are applicable;
 - (b) the circumstances in which possession of the work was lost;
 - (c) the extent to which the applicant has endeavoured to recover the work;
 - (d) the circumstances in which the owner acquired the work and the inquiries the owner made prior to acquiring it;
 - (e) the significance of the work to the applicant;
 - (f) the significance of the work to the owner;
 - (g) the significance of the work to public art collections.¹³⁶
103. According to Article 19 of the Binding opinion Regulations the Dutch Committee 'decides in all cases not provided for in these regulations on the basis of the yardsticks of reasonableness and fairness.'¹³⁷
104. The Advisory Board in **Austria** makes use of the 1946 Nullification Act as its starting point (this was adopted in the post-war restitution committees) and has adapted these in 2009 to include more situations (see for example the 2013 *Rothberger* claim) and also to acts that took place elsewhere than the German Reich. The presumption is that transactions by persecuted groups are considered as void.¹³⁸
105. The **UK** Panel's Terms of Reference provide for the Panel to consider 'non-legal obligations and its paramount purpose is 'to achieve a solution which is fair and just both to the claimant and to the institution'¹³⁹
106. The Panel shall 'examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise'¹⁴⁰ and 'give due weight to the moral strength of the claimant's case'.¹⁴¹ Since revisions were made to the Panel's Terms of Reference (on the recommendation of the *Jenkins* Review) 'the Panel will only consider whether any particular moral obligation rests on the institution if it finds it is necessary to do so to enable it to arrive at a fair and just recommendation.'¹⁴² For that purpose, the Panel

¹³⁶ Regulations for opinion procedure under Article 2, para. 2 and Article 4, para. 4 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications for items of Cultural Value and the Second World War (as amended 28 January 2019), art. 3.

¹³⁷ *ibid.*, art. 19.

¹³⁸ Marck and Muller (n 26), p. 51

¹³⁹ UK SAP Constitution and ToR (n 15), para. 14.

¹⁴⁰ *ibid.*, para. 15(c).

¹⁴¹ *ibid.*, para. 15(e).

¹⁴² *Jenkins Review* (n 59).

shall take into account any relevant consideration (including the circumstances of its acquisition of the object and its knowledge at that time of the object's provenance)'.¹⁴³

107. In summary, the Washington Conference principles themselves are considered by the UK, Dutch and German committees. In the case of the Netherlands and Germany these are expressly mentioned in the Regulations for the binding opinion¹⁴⁴ and the Rules of Procedure respectively,¹⁴⁵ whereas the UK's Panel has referred to them in its reports.

108. One of the principal difficulties encountered by the committees is the absence of critical evidence which pinpoints whether the cultural object was definitely in the ownership of the alleged owner at the time of the alleged dispossession and also the specific evidence of the circumstances of loss (e.g. the price at which a forced sale was made and whether the proceeds of that sale were made freely available to him/her. Germany, Austria, the Netherlands and have presumptions regarding sales by persecuted groups being void unless there is evidence to the contrary, and France has a presumption of good faith. No such presumptions exist in the work of the UK Panel.

Circumstances of acquisition

109. Whilst frequently committees focus on the circumstances in which the original owner lost possession of the cultural object, in some circumstances consideration is also given to the circumstances in which the current possessor acquired the object, in particular the relevant provenance research that was undertaken at the time.

110. The circumstances of acquisition are clearly important in both Germany and the Netherlands. In **Germany** explicit reference is made in the Rules of Procedure to the 'circumstances in which the cultural property was acquired and the research conducted concerning its provenance' being taken into consideration in s6(3)(b). By way of example, this can be seen in practice in the *Westheim-Neuss* recommendation¹⁴⁶ where the starting statement was that there was an impression that there had been no bad faith on the part of the former director the museum.

111. In the **Netherlands** 'In its advisory role, referred to in the first paragraph, the committee attaches great importance to the circumstances of the acquisition by the possessor and the possibility of knowledge of the suspicious origin at the time of the acquisition of the cultural object in question.'¹⁴⁷ Provision is made for consideration of this in the binding opinion procedure;¹⁴⁸ an application of this can be seen in the

¹⁴³ UK SAP Constitution and ToR (n 13), para. 16.

¹⁴⁴ Which are now presumably also relevant to the recommendations that the restitution committee might make in respect of State collections or the NK collection.

¹⁴⁵ German Rules of Procedure (n 7).

¹⁴⁶ 28/03/13.

¹⁴⁷ Dutch decree (n 7) art. 2(6).

¹⁴⁸ *ibid.*, art. 3(d).

committee's opinion regarding the painting *Road to Calvary* where they assessed the circumstances in which it was acquired - there a painting with no striking features was purchased at a jumble sale for a very low price.¹⁴⁹

112. Since implementing a change to the Terms of Reference following recommendations of the *Jenkins Review* the **UK's** Panel now gives less weight to whether a moral obligation rests on the respondent than it used to.¹⁵⁰ The primary consideration is the moral strength of the claimant's claim surrounding the circumstances of loss and it is only considered 'if it finds it is necessary to do so to enable it to arrive at a fair and just recommendation. For that purpose, the Panel shall take into account any relevant consideration (including the circumstances of its acquisition of the object and its knowledge at that time of the object's provenance)'.¹⁵¹

Relevance of importance of object to museum/public interest

113. No reference has been found in the work of the **German, Austrian** or **French** committees that they explicitly consider the importance of the object to the museum when assessing the appropriate response in the circumstances. In the case of Austria this may be in part because of the application of the process to Federal museums and collections and the use of restitution as the sole remedy. In France if the object is part of the MNR collection then restitution is the appropriate remedy, it appears that compensation would only tend to be used as an alternative when the object cannot be found or returned (perhaps because it is in the hands of a private owner who is not prepared to voluntarily return it to the claimants¹⁵² and presumably if it is inalienable as part of a state collection, but which is not part of the MNR.¹⁵³
114. In the claim before the **UK** Panel concerning the Benevento Missal the British Library argued that its careful stewardship of the manuscript, together with the easier public access to the object in a major national collection were relevant issues to consider where the public interest lay. However, the Panel refused to treat this as a decisive factor given the fact that otherwise this would 'almost certainly defeat any claim for restitution against any of the national collections within our remit, and thus frustrate the Panel's primary role as laid down in our terms of reference.'¹⁵⁴
115. In the UK's *Tate/Constable* claim, in response to arguments by the claimants that the painting was important emotionally and sentimentally to them, the Tate advanced arguments relating to the importance of the painting to the Tate.¹⁵⁵ In particular they stressed that the Tate is 'the major national repository of Constable's

¹⁴⁹ *Binding opinion on dispute over the painting Road to Calvary*, RC 3.95 (3 May 2010), para. 5.6.

¹⁵⁰ *Jenkins Review* (n 59).

¹⁵¹ UK SAP Constitution and ToR (n 15), para. 16.

¹⁵² See response from the CIVS in 2017.

¹⁵³ Although see para. 125 below.

¹⁵⁴ *British Library/Benevento* claim (2005 HC 406), para 71.

¹⁵⁵ *Tate Gallery/Constable* claim (n 92), paras. 31 and 34.

work’ and because the painting was a preparatory sketch for another work in the Tate’s collection.¹⁵⁶ The Panel’s view was that the importance of the object was not a ‘paramount consideration’ when making its recommendation, because otherwise ‘the very principle of restitution of important works would be called into question.’¹⁵⁷ This same approach has been adopted more recently in 2014.¹⁵⁸

116. In the **Netherlands** the importance of the object to the possessor and the importance of the object for the public art collection can be taken into consideration (in many cases the importance of the object to the possessor museum and the importance to the public art collection will conflate). In two of the claims involving the *Semmel* claimants as part of the consideration of the reasonableness and fairness test (there under the binding opinion procedure because the object was in a non-state museum) the committee considered the importance of the object to ‘the Museum’s collection and museum-going members of the public’ and decided to recommend the account of the object’s history rather than return;¹⁵⁹ this was challenged in the Dutch courts.¹⁶⁰ This is a matter that has been considered in other cases as well. Now that the same test of fairness and reasonableness applies also to state collections and the NK collection the importance of the object to the museum can be a factor in the committee’s deliberations.¹⁶¹ It should be noted that the status of an object under the Dutch Heritage Act 2016, and whether ‘it can reasonably be assumed that the cultural object or collection is of particular cultural-historical or scholarly significance and irreplaceable and indispensable as part of the Dutch cultural heritage’¹⁶² may also be relevant to the decision-making process.

Proposals and points to consider

117. Certainly in circumstances where there is direct reference to the applicability of the Washington Conference Principles, there might be more overt reference in the instrument establishing the committee to the notion of just and fair solutions as the guiding principle.

118. It would be helpful to have a common approach to considering the circumstances in which the current possessor acquired the object and the effect that this has on the committee’s recommendation.

Use of precedents/reference back to previous recommendations

¹⁵⁶ *ibid.*, para. 35.

¹⁵⁷ *ibid.*, para. 46.

¹⁵⁸ *British Museum/Biccherna Panel* (2014 HC 209) para. 32.

¹⁵⁹ RC3.131 *Madonna and Child with Wild Roses*.

¹⁶⁰ n 24.

¹⁶¹ See, for example, Recommendation regarding a pastel drawing by Philippus Endlich (RC I.167); and Recommendation regarding *Berolzheimer* (RC I. 166); and Recommendation regarding Witmond: ice boat Sperwer (RC I.146). With thanks to Eric Idema for highlighting these as well as providing other points of clarification on the Dutch system.

¹⁶² Dutch Heritage Act 2016, s. 4.18(a).

119. It is useful to consider the extent to which precedents are used in the decision-making processes of the committees and the effect, if any, that this has on the procedures and substantive principles that the committees apply.
120. In the press releases of the **German** Commission, no reference is made to the fact that former recommendations have been taken into account by the Commission. It may, however, be that in the decision-making process consideration of previous recommendations has been made. Again, in respect of **France** I have not found any specific reference in the annual CIVS reports to application of principles from former cases, although in practice such references may be made to previous claims.
121. In its reports the **UK's Panel** makes some limited references to the sorts of circumstances that have occurred in earlier claims and the recommendations then made and compared these with the claim under consideration.¹⁶³
122. The **Austrian** Advisory Board appears to make some use of precedent.¹⁶⁴
123. In the **Netherlands** the committee has referred back to earlier recommendations (e.g. approach to dealing with requests for revised advice, the *Revised recommendation regarding Bachstitz*¹⁶⁵ referred to two or more earlier recommendations of the Committee. These references dealt with procedural or administrative issues, rather than dealing with substantive consideration of the claim itself. It seems references to earlier decisions may be made when the applicants have pointed to these and the Committee thus responds to them.¹⁶⁶

Points to consider

124. How far, if at all, are previous approaches relevant in the decision-making process? Is this something that happens in deliberations but not in the final reported recommendations? How might this contribute to appropriate (yet comparable) just and fair solutions? If precedents are used, it would be helpful for information about this (specifically applicable principles) to be published on the websites.

¹⁶³ E.g. the *Koch claim* (n 127) where the use of the account of an object's history was used in preference to return or an *ex gratia* payment to reflect the lower moral gravity of the situation.

¹⁶⁴ E.g. in the *Budge claim* (20/2013) the Advisory Panel referred to the earlier Recommendation of the Advisory Council June 26, 2000 on Valerie Eisler.

¹⁶⁵ 1 December 2015 (RC 4.138), para. 1

¹⁶⁶ A comment by Eric Idema, Secretary of the Restitution Committee.

Approaches to remedies

125. **Austria** is the only country for which return is the sole remedy available to the Advisory Board. Previously in **France** return was recommended in respect of the MNR collections; for objects in other collections compensation would be recommended. The recent amendments to the decree seem to indicate that the CIVS can recommend all necessary measures for restitution, or in default of that compensation when they are either in a public collection¹⁶⁷ or part of the MNR collection.¹⁶⁸ Compensation is appropriate where the object is no longer available. Where the CIVS is called upon to act as conciliator it may make any recommendations that appear to it useful.¹⁶⁹
126. In the **Netherlands**, whilst return will be the chief remedy for successful claims,¹⁷⁰ nevertheless now in respect of all claims, including those relating to objects in the State museums or NK collection, other remedies may be recommended.¹⁷¹ Under the binding opinion procedure possible recommendations include: return, return on the payment of a sum of money by the claimant, return subject to further provisions, retention by the possessor and payment of money by the possessor to the claimant, exhibition of the object with details of its provenance and the part played by the heirs of the original owner, and rejection of the claim.¹⁷²
127. In **Germany** the Commission may recommend return, return ‘against the payment of compensation’, return subject to conditions, that the object remain with the possessor and compensation should be paid, that the object ‘should be publicly exhibited including information on its origin and provenance’ or that the claim be rejected.¹⁷³
128. In the **UK** the Panel can recommend return, the payment of compensation, the making of an *ex gratia* payment or the display of an account of the object’s history.¹⁷⁴ The latter remedy was initially only available with the payment of money, but since 2009 has been available as a standalone remedy.¹⁷⁵ Where *ex gratia* payments have been recommended allowances have been made to reflect the public benefit derived from the museum’s possession of the object¹⁷⁶ and deductions have been made

¹⁶⁷ Although such collections are currently inalienable under French law.

¹⁶⁸ French Décret (n 7), art. 1-1.

¹⁶⁹ French Décret (n 7), art. 2.

¹⁷⁰ Answer to questions at London Conference, 2017.

¹⁷¹ Statement by State Secretary. See also Regulations on Binding Opinion (n 7), art. 11.

¹⁷² Article 12 of Regulations for opinion procedure under Article 2, paragraph 2 and Article 4, paragraph 2 of the Decree.

¹⁷³ German Rules of Procedure (n 7), section 6(4).

¹⁷⁴ UK SAP Constitution and ToR (n 15), para. 17.

¹⁷⁵ Since the amended Terms of Reference appended to the Panel’s recommendation (2007 HC 63).

¹⁷⁶ *Tate Gallery/Griffier* (n 85), para. 64.

to reflect the insurance costs, sellers' commission and costs for conservation work that the claimant would have otherwise had to cover.¹⁷⁷

129. The Panel has used the remedy of an account of the object's history to reflect a lower moral strength to a claim (such as the *Glaser*¹⁷⁸ and *Koch* claims¹⁷⁹). More recently it has extended the use of this device to situations where the substantive moral claim is not upheld, but the Panel invited the institution to display an account of fate of the object's former owner.¹⁸⁰

Return on payment of compensation

130. No express provision is made in the 1998 **Austrian** Act (as amended) for the payment of any compensation in the event that the Minister uses his/her power to transfer an object from one of the Federal Museums or collections.

131. No provision is made in the **UK** Panel's Terms of Reference for return on the payment of compensation to the museum. However, more recently the Panel has recommended return of the cultural object on condition that the claimant repays the compensation which the claimant received from the German government (which would amount to the value of that object as at 1 April 1956).¹⁸¹

132. The **German** Rules of Procedure provide that return can be made 'against payment of compensation'. Does this mean on the payment of compensation from the claimant to the museum or the repayment of compensation that has previously been paid to the claimants or the original owner? In *Salomon v Gelsenkirchen*¹⁸² returned was recommended with compensation of 65,000€ to be paid by the heirs to the museum. This reflected the purchase price that it had paid and the costs that it had incurred to preserve, maintain and publicly display the painting since 1957. But there was no compensation recommended to reflect a share of the increase in value of the painting since then. This sum of 65,000€ had previously been suggested by the heirs as an amount that they would be willing to pay to the museum on the object's return.

133. In the **Netherlands** return can be made subject to the payment of compensation. Where compensation was paid after the war to reimburse a person who had a fine imposed on them and where some of the proceeds from the forced sale had been used to pay that fine, the sum that was received from the state after the war should be returned. Therefore the committee would recommend return subject to the repayment of that previous compensation.¹⁸³ However in situations where the

¹⁷⁷ *ibid.*, para. 62.

¹⁷⁸ (2009 HC 757).

¹⁷⁹ n 127.

¹⁸⁰ *Oppenheimer* (2015 HC 440) and *Silberberg* (2016 HC 777).

¹⁸¹ *Tate/Constable* claim (n 92).

¹⁸² 29/04/2016.

¹⁸³ Still life with fruit and fowl by J Fyt (RCI.34).

German Government had paid compensation to the original owner after the war, the Restitution committee has taken the approach that this is a matter for the claimant and the German Government.¹⁸⁴

134. When considering cases involving sales by the original owners and where they conclude that the original owners did not have the free disposal of the proceeds of sale the Dutch committee does not require any repayment of those proceeds when the object is returned.

Creative remedies

135. Particularly creative remedies can be noted in **Germany**. In the *Salomon v Gelsenkirchen* claim¹⁸⁵ return of the object and payment of compensation by the heirs to the possessor institution were recommended and in addition it was recommended that a high quality copy be reproduced. This would then be displayed together with information about the object's history and fate of former owner and family. The costs of this were to be borne equally by the parties. In the *Hildesheimer v Hagemann Fdn* claim¹⁸⁶ the disputed violin was to remain with the possessor (there a music Foundation) and compensation was to be paid to the heirs, but it was recommended that when the violin was loaned to musicians the Foundation would require them to play in concerts in Speyer with an 'appropriate programme commemorating the history of the Hildesheimer family'.

136. More recently in the committee's recommendation in the *Stern* claim return was made subject to a commitment on the part of the heirs not to sell the object for a period of ten years.¹⁸⁷

Proposals and points to consider

137. In practice, do some claimants in Austria and France (where the CIVS is not acting a conciliator¹⁸⁸) wish for the availability of a wider range of remedies? If there is demand, could this be facilitated under the current legal structures?
138. Given the difference in approaches by the Panels to the repayment of previous compensation (specifically whether German compensation should be paid as a prerequisite of return, versus leaving it as a matter between the claimant and the German Government), it would be worth exploring whether there is a desire to harmonise the approaches across the committees.

¹⁸⁴ E.g. Oppenheimer III (RCI.133) and Mathiason (RCI.108).

¹⁸⁵ Recommendation of 29/04/2016.

¹⁸⁶ Recommendation of 07/12/2016.

¹⁸⁷ Stern recommendation (n 87).

¹⁸⁸ For in such circumstances the CIVS may recommend any response that appears to it to be useful.

139. There is scope for further work to be done to harmonise the approaches regarding the relevance, if any, of insurance; buyers' premium and recognition of the public benefit derived from having displayed it in public for many years when making financial assessments rather than recommending return.

Comparison of claims across the Committees

140. This section considers claims which have been heard by different committees in the five countries but which involve the same claimants. The aim is to demonstrate the slightly different approaches adopted by the committees, but also the points of similarity. Please refer to the table set out in the following pages.

141. Broadly the same recommendations were reached in respect of five of the ten recommendations that involved the same claimants (*Koenigs, Budge, Feldmann, Rothberger Berolzheimer*); note that in the Rothberger claim the circumstances of loss differed slightly. The UK *Feldmann* and *Rothberger* claims were successful; in the claims involving Feldmann and the Courtauld and Rothberger and the Fitzwilliam Museum, return could be recommended. However, in the claims involving both of these claimants and the British Museum an *ex gratia* payment was recommended; return would have been recommended had it been possible, but at that time the British Museum, as a national museum governed by statute, could not transfer objects from its collection. Now that statutory impediment can be overcome in the context of transfers following a recommendation by the Spoliation Panel (and approval by the Secretary of State) under section 2 of the Holocaust (Return of Cultural Objects) Act 2009. Were such claims to be heard now then return would be possible in the circumstances.

142. The different results between the committees can, in most cases be explained on the basis that although the committee in the two countries heard claims from the same people, nevertheless, the claims involved different circumstances in which the cultural objects were lost: e.g. *Behrens* and *Flechtheim*. In one situation further evidence was available for consideration by the second committee who heard the claim and therefore this may, in part, explain the difference in recommended outcomes (*Oppenheimer*). In the *Glaser* claims the different approaches proved controversial; specific weight was given by the UK Panel to evidence which indicated the possible mixed motives for the sale and also on the reasonableness of the price which was received at the auction (specifically an annotated auction catalogue). The *Freund* claim demonstrates the clearest example of different results and is set in the context of *Fluchtgut* which were discussed above. In the German claim return was recommended, but in the Austrian claim, because the sale took place in a neutral third country, the sale did not fall with the scope of transactions for which the Austrian Advisory Board could make a decision about. It may well have been that had the claim been heard in either the UK or the Netherlands the relevant committees may well have considered

that an account of the object's history be displayed should be awarded (rather than either return or an outright rejection of the claim).

SAME CLAIMANTS - HEARD BY DIFFERENT PANELS

	NL	D	UK	A	F	Possible reasons for difference
George Eduard Behrens	Return 2008	Rejected 2015				<p>Although both claims involved the same claimant, there were different circumstances of loss in each. In the Netherlands, where return was recommended, there was a later loss that could be more clearly attributable to the National Socialists. Although the object was not part of the NK collection it was part of the national collection, therefore in 2008 there was a more liberal approach to restitution.</p> <p>The German Commission rejected the claim; an appropriate price had been paid and the sale was before the Nuremburg laws; there is no doubt that Behrens was freely able to use the proceeds of the sale. Nothing suggested that the gallery failed to pay the purchase price; at that time legal action would have been taken against a gallery who failed to pay.</p>
Jakob & Rosa Oppenheimer	Return 2008, 2010, 2011, 2013		Rejected 2015			<p>Four different claims were heard in the Netherlands concerning these claimants (two related to the Dutch National collection, one to the NK collection and a fourth to a claim against a private individual under the binding opinion procedure). In the first three Dutch claims return was recommended; in the binding opinion the committee recommended that when the painting is sold the current owner relinquish a 1/3 share to the heirs and the Oppenheimer family would do all they could to effect the sale and to remove the entry from the Art Loss Register. In the UK claim the Panel had access then to files in the archives of the German Federal Office for Central Service and Unresolved Property Issues (BADV) which indicated that the painting was one of a number which were used to repay a significant debt that had arisen for commercial reasons; the Panel concluded that the sale was one forced by commercial reasons rather than attributable to persecution.</p>
Franz Koenigs	Rejected 2003, 2013		Rejected 2007			<p>Same result in both countries. The UK Panel considered that the deprivation of the paintings was due to a bank calling in a loan and realising its security, rather than it resulting from any act of theft, forced sale or sale at an undervalue.</p>

	NL	D	UK	A	F	Possible reasons for difference
Arthur Feldmann	Return 2006		Return 2007 Ex gratia payment 2006	2005: no return but in 2008: return		<p>The same result where possible. In the UK claim the circumstances of loss were the seizure by the Gestapo in 1939. At the time of the UK recommendation involving the British Museum, national museums were unable to transfer NS Era objects out of their collections (pre-Holocaust (Return of Cultural Objects) Act 2009). However, in the case of claims made against the Courtauld Gallery, return was recommended by the Panel (even though actually the parties preferred an <i>ex gratia</i> payment). The 2005 unsuccessful claim in Austria was later reconsidered together with a claim for another object after more information became available which clarified that the object was likely still to be in Feldmann's collection at the relevant time. Return was recommended. In the Dutch claim the committee recommended return on the basis that the drawings were likely to have been seized in 1939.</p> <p><i>NB the making of ex gratia payments by the British Museum in respect of further objects from Dr Feldmann's collections.</i>¹⁸⁹</p>
Curt Glaser	Return 2010		Upheld, but recommended display of account of object's history 2009			<p>Different result. The painting was in a Dutch state collection and consequently the process under which the Dutch panel assessed the claim was the reversed burden of proof; restitution was the only remedy available. The Dutch claim related to a painting sold at the first of two auctions – the assumption was that sales in Germany from 1933 onwards were involuntary unless express proof to contrary.</p> <p>When the UK Panel heard the claim they considered that a letter to Munch demonstrated the mixed motives for the sale. In the UK the previous compensation was seen as potential double compensation and this had been coupled with the fair price received at auction – (there was an indication that fair prices were received at the first auction, and an annotated auction catalogue of the 2nd suggested the prices were close to the guide price).</p> <p><i>NB the successful German settlement with the Stiftung Preussischer Kulturbesitz – noted in Campfens 2017 (n 1).</i></p>

¹⁸⁹ British Museum, 'Spoliation case settled' 2013 https://www.britishmuseum.org/about_us/news_and_press/press_releases/2013/spoliation_case_settled.aspx

	NL	D	UK	A	F	Possible reasons for difference
Julius Freund		Return 2005		Rejected 2016		In both claims the sale took place in Switzerland, following exile from London. In Germany the claim was successful on the basis that Julius Freund's wife was compelled to sell the objects following her exile. In Austria the Advisory Board could not rule out the possibility that she would have sold them in the absence of persecution. Divestment occurred outside the NS sphere of control; it was a legal transaction which clearly took place outside the NS and was not null and void within the meaning of § 1 of the Invalidity Act.
Emma Budge	Return 2018		Return 4 claims in 2014,	Return 2013		Loss in the same circumstances; the claims were upheld in all cases.
Heinrich Rothberger			Return/ <i>ex gratia</i> payment with account of history 2008	Return 2000, 2003, 2005, 2013		In the UK claims (involving the Fitzwilliam Museum and British Museum) the circumstances of loss were direct seizure. The remedies differed because, at that time, the British Museum trustees were unable to transfer an object from their collection and consequently the Panel recommended the payment of an <i>ex gratia</i> sum in lieu of return. Return from the Fitzwilliam to the claimants was possible. Three claims involving the cultural objects claimed by Heinrich Rothberger's heirs were heard by the Austrian Advisory Board. In the first claim in 2000 some objects were returned on the basis that they had been restituted but then transferred to a museum in order to secure export licences for other objects (at that time two porcelain bowls were not returned - but were eventually returned in the 2013 claim). The latest claim in 2013 arose in circumstances under which Rothberger had obtained export licences for some other objects but the two porcelain bowls in question had been exchanged for other works, but in circumstances closely connected with the export licence agreement. Return was thus recommended.

	NL	D	UK	A	F	Possible reasons for difference
Alfred Flechtheim		2013 claim: Return 2016 claim: Rejected		Rejected 2013		In the Austrian claim the Advisory Board concluded that the painting by George Grosz was sold at auction in 1938 in Amsterdam; whilst the Board accepted that both Grosz and Flechtheim were persecuted and that this led them to flee/emigrate, the sale took place in the Netherlands before it was under occupation. The 2013 German claim involved a sale of a painting in 1934 from the manager of Flechtheim's Dusseldorf gallery to a Cologne Art collector. The German Commission recommended return. In the later 2016 claim, which was rejected, the relevant sale took place in London and Flechtheim was freely able to dispose of the proceeds in London.
Berolzheimer	Return 2017			2001: Return 2018: Return		Same outcomes; all the objects were sold at the same auction which was involuntarily undertaken. <i>NB the British Museum made an ex gratia payment to the heirs (2014 British Museum Press Release¹⁹⁰)</i>
Max Stern	Return 2008	Return 2019 subject to two conditions				In the successful Dutch claim the object was from the NK collection. There was no clear evidence of exactly when the object was sold by Stern, but based on the circumstances in which Stern found himself ultimately the committee found that Stern lost possession involuntarily and as a direct result of the Nazi regime. In the German claim the committee recommended return, subject to conditions. The heirs agreed not to sell the painting for ten years and (1) if a third party were proved to be the primary victim the object would be returned to them [if a primary victim were found after 10 years it was assumed that the Stern Foundation would provide compensation by way of a just and fair solution (2) if as a result of further research and findings spoke against restitution – e.g. if there was evidence that the sale of the painting, or sales of similar paintings on those terms would have come about even without the NS government it would be returned to the museum.

¹⁹⁰ British Museum, 'Spoliation case settled' Press Release, September 2014 https://www.britishmuseum.org/pdf/Press_release_Berolzheimer_sept2014_020316.pdf

SECTION 3 - ACCESS TO INFORMATION

144. This section considers the current provision of information regarding provenance research and the accessibility of that information.

Use of rapporteurs/research commissions

145. The committees in several countries make use of rapporteurs or research commissions to great effect.

146. In **France** the rapporteur (who is not a member of the Commission) is central to researching the claim and engaging directly with the claimants. Since 2018 the Mission for research and restitution is tasked with investigating potentially spoliated cultural objects.

147. In **Germany** the rapporteur is a member of the Commission; furthermore, the Rules of Procedure for the Commission enable it to engage expert opinions, the costs of which are borne by the Federal Commissioner for Culture and Media.¹⁹¹

148. The **Austrian** Advisory Board receives a report from the Kommission für Provenienzforschung¹⁹² and makes its recommendations on this basis.¹⁹³ Under s 3(4) the Advisory Board can commission further experts.

149. Until 2018 researchers were part of the Secretariat to the **Dutch** Restitution Committee. From 2018 researchers work at the Centre of Expertise for Looted Art from the Second World War.¹⁹⁴

150. The **UK** Panel does not have direct access to provenance researchers. However, it makes use of its membership to undertake additional research to supplement the research undertaken by the parties if necessary. The recent *Jenkins Review* suggested that the National Museum Directors Council might consider funding a research post to assist with the research.¹⁹⁵ Sir Paul Jenkins did not feel able to recommend that the Government should fund additional research in the current climate.¹⁹⁶

Germany – provenance research information

151. The German Lost Art Foundation¹⁹⁷ was established in 2015 by the Federal Government, the state government and municipal associations¹⁹⁸ with the purpose of

¹⁹¹ German Rules of Procedure (n 7), s. 8.

¹⁹² Austrian Restitution Act (n 7), s. 4a.

¹⁹³ *ibid.*, s. 3(4).

¹⁹⁴ Expertisecentrum Oorlogskunst Tweede Wereldoorlog. This is discussed further below at p.41.

¹⁹⁵ *Jenkins Review* (n 55), recommendation 28.

¹⁹⁶ *ibid.*, para. 2.63.

¹⁹⁷ Deutsches Zentrum Kulturgutverluste" - established as a Civil law foundation.

¹⁹⁸ <http://www.lostart.de/Webs/EN/Datenbank/Index.html>

‘support[ing] art and culture, science and research with regard to lost cultural assets as well as providing corresponding support for international exchange, tolerance and the idea of facilitating understanding between peoples.’¹⁹⁹ Its purpose is set out as follows:

- ‘1. Initiation, accompaniment, strengthening and support of provenance research by public institutions at national, state and municipal level in Germany, above all within the context of claim-related project funding,
2. Advising public institutions in Germany on questions pertaining to the formation of just and fair solutions under possible consideration of restitutions and material compensation,
3. Assessing and forwarding inquiries to the competent authorities within the Federal Government, the Länder and the municipalities,
4. Offering privately funded institutions and private persons support in their own searches for Nazi-stolen art and with questions regarding a just and fair solution, if they follow the Washington Principles and the Common Statement and if there is a public interest in supporting the individual case,
5. Supporting national and international networking in the realisation of the foundation's purpose,
6. Cooperating with the university-based and non-university-based research landscapes and in particular with the relevant professorships, as well as striving to develop and expand the corresponding research associations with the involvement of the institutions concerned,
7. Collaborating with non-profit associations of provenance researchers in Germany acting in accordance with the purpose of the foundation and for which there is a public interest in supporting,
8. Measures for further education and continued education, conferences and events,
9. Press work and public relations work, documentation and scientific publication.’

152. It provides databases available at: <https://www.kulturgutverluste.de/Webs/EN/Databases/Index.html> These are accessible online, but with access restricted to those who have a legitimate interest.²⁰⁰

153. The German Commission can request expert opinions.²⁰¹

154. The Guidelines make it clear that public collections have the responsibility ‘to help track down Nazi-confiscated art...Where information is found...make available to public and further information to those with a legitimate interest’. Where they identify cultural property brought from abroad they should give information to the funding body and then to the Coordination Office for the Return of Cultural property, Magdeburg.²⁰²

155. Examples of good practice include the German-American exchange program PREP between the Stiftung Preußischer Kulturbesitz and the Smithsonian Institution.

¹⁹⁹ Section 2(1).

²⁰⁰ Based on data protection considerations.

²⁰¹ German Rules of procedures (n 7), s. 8.

²⁰² German Guidelines (n 83), p. 9.

Secondly, a transparent approach to provenance research and the uncertainty surrounding some objects within museum collections can be seen in the Zeppelin Museum which colour codes its artworks using green, yellow, orange and red stickers on the museum labels to indicate the provenance status of the object.²⁰³

156. Provision in s 9 of Rules of Procedure that the Rules of Procedure should be published on the website of the German Lost Art Foundation. Section 6(6) prescribes that the Secretariat shall publish recommendation & explanation on website. Furthermore, the Commission shall ensure that recommendation are translated into English in a timely manner and published on the website.²⁰⁴

157. The 2015 decision of the Federal Administrative Court clarified the position of the Lost Art Database and recognised that an entry on the Lostart database does not need to be deleted once the object is located where there is still an outstanding uncertainty about its fate.²⁰⁵

158. A further database is the CCP Munich which includes catalogues of what passed through the Munich Collecting Point.²⁰⁶

France - provenance research information

159. A specific working group was established in 2013 to undertake further provenance research on the MNR collection. It is clear from its 2014 report that:

"MNR works can be divided into three categories: those that have been certainly (or almost certainly) spoliated, those for which the provenance could not be established and those that were not spoliated."

"Research operations were sequenced in several stages according to the type of archive:

- The consultation, in situ, of reference archives: the archives of the Mattéoli Mission concerning works of art (available at the Archives Nationales), dossiers of individual works (solely in Paris museums), the archives of the CRA and OBIP (available at the Ministry of Foreign Affairs office in La Courneuve) and the archives of the BRÜG Act in Berlin.
- Research in reference databases: Rose Valland-MNR, ERRproject, Lostart and databases of other organisations, such as the United States Holocaust Memorial Museum in Washington.
- Research in the CIVS database, carried out by its researchers.
- Examination of other possible sources: auction catalogues, catalogues raisonnés, exhibition catalogues, records of donations, customs records, etc."

²⁰³ <https://www.economist.com/prospero/2018/05/25/a-german-museum-puts-the-questionable-provenance-of-its-art-on-display>

²⁰⁴ German Rules of Procedure (n 7), s. 6(7).

²⁰⁵ Bundesverwaltungsgericht, Press Release No. 12/2015 of 19 February 2015.

²⁰⁶ Hosted by the Deutsches Historisches Museum https://www.dhm.de/datenbank/ccp/dhm_ccp.php?lang=en

160. A statement in the *Vadémecum*²⁰⁷ (published by the Council of Sales and the CIVS) provides a useful resource setting out might be classed as a ‘doubtful origin’. An object would have a doubtful origin if there is a gap in the provenance, particularly in respect of the period of the occupation; in such cases one should alert the Society of Sales. It also gives details of the fact that an inscription on the reverse of the painting HG ‘Herman Goering’ - or the three first letters of a name would [which indicate the name of the family from which an object originated] need checking. Also, there may be a doubt if there is an entry in the catalogue raisonnés of ‘work lost’ or ‘work destroyed’.²⁰⁸
161. The collection of the ERR includes the catalogue of spoliated works which passed through the Jeu De Paume; this is searchable by the name of the spoliated person and also by artist.²⁰⁹ Site Rose Valland is an online database which provides access to the MNR collection.²¹⁰
162. From 2018 the Mission for research on and restitution of spoliated cultural property, established by the Ministry of Culture, directs research regarding identifying and restituting cultural objects spoliated during the Nazi Era.²¹¹

Austria - provenance research information

163. In Austria the Provenance Research Commission creates dossiers and submits them to the Advisory Board.²¹² Sources of information include: ‘Austrian sources are in the Austrian State Archive, the Vienna City and Provincial Archive, and the archives of the Austrian Federal Monuments Office and the federal museums.’
164. By way of example, the Belvedere²¹³ provides clear information about decisions made and the status of objects and categorises its works as follows: ‘uncritical,’ ‘questionable,’ or ‘unresolved.’
- ‘Questionable
 - had been restituted to their original owners or legal heirs but could not be exported because of the 1919 Export Prohibition Law and subsequently became the property of the state legally,
 - had been the object of a transaction deemed invalid according to the Nichtigkeitsgesetz of 1946

²⁰⁷ n 107.

²⁰⁸ *Vadémecum*, 2017 (n 107), p. 8.

²⁰⁹ <https://www.errproject.org/jeudepaume/>

²¹⁰ <http://www2.culture.gouv.fr/documentation/mnr/>

²¹¹ <http://www.culture.gouv.fr/Presse/Communiqués-de-presse/Creation-au-ministère-de-la-Culture-d-une-mission-consacrée-a-la-recherche-et-a-la-restitution-des-biens-culturels-spoliés-pendant-la-Deuxième-Guerre-mondiale>

²¹² Austrian Restitution Act (as amended) (n 7), s. 4a.

<http://www.provenienzforschung.gv.at/en/kommission/leitfaden/>

²¹³ https://www.belvedere.at/bel_en/research/projects/provenance_research

- had not been returned to their original owners or their legal heirs after conclusion of restitution proceedings and were thus still held by the state as “property without heirs”.

There is an intermediate category

Probably uncritical refers to works of art that can be plausibly assumed to have been legally acquired and that are not from confiscated Jewish estates, even if this cannot be determined with complete certainty.

Suspicious refers to acquisitions for which there is some evidence that they were from confiscated assets, without the possibility of determining the provenance definitively

The Leopold Museum, although a Private Foundation rather than a Federal or municipal museum, makes available its provenance dossiers.²¹⁴

Netherlands - provenance research information

165. Origins Unknown, Herkomst Gezocht²¹⁵ researched the provenance of the NK collection.

166. In a letter from the Minister on 4 October 2016²¹⁶ it was announced that the Centre of Expertise for Looted Art from the Second World War would be established.²¹⁷ This centre, established on 1 September 2018, has both information and research functions and can now undertake an investigation at the joint request of parties rather than just directly from the committee.

UK - provenance research information

167. In the UK the main repository for information relating to provenance research is found on the Cultural Property Advice section of the Collections Trust website and it sets out the provenance reports that were undertaken by UK museums (which are updated).²¹⁸

168. Other databases include the Entartete Kunst list which is held at the V&A museum²¹⁹ and the Records of the National Archives UK Relating to Nazi-Era Cultural Property

Other sites

169. The following other sites: www.Fold3.com and www.lootedart.com provide additional sources of information.

²¹⁴ Discussed above at pp.6-7.

²¹⁵ <http://herkomstgezocht.nl/en>

²¹⁶ Ministerie van Onderwijs, Cultuur en Wetenschap, October 4 2016, *Policy on Restitution of Items of Cultural Value and the Second World War*.

²¹⁷ <https://www.niod.nl/en/press-media> Expertisecentrum Oorlogskunst Tweede Wereldoorlog.

²¹⁸ <http://records.collectionstrust.org.uk/>

²¹⁹ <http://www.vam.ac.uk/content/articles/e/entartete-kunst/>

SECTION 4 GOOD PRACTICE

170. In this section attention is drawn to several specific areas in which the committees demonstrate good practice. They are separated into good practice which:
- (a) Facilitates claims and the provision of information (including making visible the work of the committee;
 - (b) Demonstrates empathy for the claimants and the circumstances of loss and the broader context of claims; and
 - (c) Maintains the historical record.

Facilitating claims/the provision of information

171. Clear statements about the applicable principles which will govern claims can facilitate these. These may be in the rules of procedure or other documents (discussed above in Section 3) or in a more user-friendly way on websites. The recently revamped website of the Dutch restitution committee sets out the methodology used to determine claims (relevance of different factors) and talks claimants through the various elements of a claim. The UK's Panel has produced a useful document which gives information for potential claimants on how to frame a claim and deals with elements of the procedure and way in which arguments are made.²²⁰
172. An important element of facilitating claims is making every effort to reach amicable settlements. In Germany s 1(2) of the Rules of Procedure focuses on trying to mediate and to reach an amicable settlement at each stage of the process. Furthermore, the Guidelines published in Germany are aimed at facilitating the decisions that institutions can make, rather than just focusing on the resolution of claims by the Commission. Specifically, statements regarding compliance with the Washington Conference Principles (e.g. in the German handbook) and advice for museums are useful in facilitating claims.
173. A major element of good practice is the consistent provision of information in multiple languages. On some websites one or two documents are omitted from translation, however on both the UK and the Austrian website all documents are provided in one language only.²²¹
174. In Germany there is a clear statement in the Rules of Procedure about how costs should be borne which manages claimants' expectations. There is also a page explaining the concept of Just and Fair solutions with relevant examples.²²²

²²⁰ This was a direct response to the Independent Review of the Panel, *the Jenkins review* (n 55), recommendation 26.

²²¹ The German Rules of Procedure (n 7) have quite extensive provisions regarding the availability of information: Provision in s. 9 of Rules of Procedure that they should be published on the website of the German Lost Art Foundation; under s. 6(6) Secretariat shall publish recommendation and explanation on the website; under s. 6(7) the Commission shall ensure that recommendation is translated into English in a timely manner and published on the website.

²²² <https://www.kulturgutverluste.de/Webs/EN/Research/Loesungen/Index.html>

175. In Austria the yearly culture report includes updated provenance reports institution-by-institution Austria and includes details of the methodology used.
176. Useful handbooks and guidelines also contribute to the information available for claimants. These include the Handbook relating to ‘Le Traitement des Biens culturels Spoliés’ Vadémecum, Juin 2017 and the German Guidelines which combines approaches to both provenance and the claims process and considerations.
177. The newly created Network of European Restitution Committees provides an opportunity to present information and resources applicable to all jurisdictions which can be accessed by claimants and those advising them.

Demonstrating empathy with claims and the context

178. One particular example of good practice in the work of the CIVS outside the strict claims procedure is the way in which the CIVS make public how they engage with issues to do with the Holocaust and include details of trip to concentration camps and also visits to other restitution committees. For example, their partnership with German authorities.²²³ In the report of the third decision of the German Commission (the matter of *Baumann*) there is a note that the meeting was combined with a visit from the CIVS.
179. The use of hearings demonstrates an opportunity for claimants to be heard and to make representations. In France the use of rapporteurs and the detailed explanation in the annual CIVS reports the way in which they listen to claimants and engage in conversation demonstrate empathy with claimants and careful treatment of the context.

Maintaining the historical record

180. The CIVS has in place a project for maintaining the historical record relating to its work over the years. Provision is also made in respect of the Dutch Restitution committee that following its dissolution its records shall be transferred to the archives of the Ministry’s Cultural Heritage Department.²²⁴

Making visible the work of the committees

181. The use of annual reports presents an opportunity to make visible the work of the committees in the public consciousness as well as to set out the circumstances of the claims. Several countries make provision for such annual reports. In France the

²²³ CIVS, 6th report, p 4.

²²⁴ Dutch Decree (n 7), art. 9.

CIVS makes a report to the Prime Minister.²²⁵ In Austria there is provision for the Federal Minister, who has the power to reconstitute works of art and cultural objects, to report annually to the National Council (the annual Culture report includes details of restitution) and the Netherlands makes provision for an annual report.²²⁶

CONCLUSIONS

Unifying the processes and developing common criteria

182. Possible ways of unifying the processes could focus on the way in which claims are initiated as well encouraging similar breadth of membership of committees. More work could be undertaken to consider the effect that the make-up of a committee has on the decisions it reaches and how the presence of representatives from the ministries affects the perception of the committees' work.
183. Adopting a common approach (and making this visible) on how far committees draw on the decisions of their earlier recommendations can aid unification of processes.
184. A further way of unifying the processes might be to make available a similarly wide breadth of remedies to all the committees and to give scope for particularly creative remedies which are appropriate in the individual circumstances of a claim.
185. More detailed presentation of cases involving the same claimants and how these were dealt with in each country could contribute to a deeper understanding of the work of the committees across the five countries and the broadly similar approach that is being taken by them.
186. Where there is a specific difference in the process adopted by an individual committee (who wishes to keep it in place) and which other committees may not wish to adopt, it may be advisable for the individual committee to highlight this difference and make clear to potential claimants the policy reasons behind it. That way, claimants are clear about any potential different outcomes which may result because of it.

Improved access to information

187. There is clearly a significant body of information available to assist with provenance research and claims processes. Regular updating of the provenance research that has taken place on national websites is critical. A single point of access to this information (which is kept up-to-date) would facilitate this; it is hoped that the newly formed Network of European Restitution Committees would contribute to this.

²²⁵ French Décret (n 7), art. 9-1.

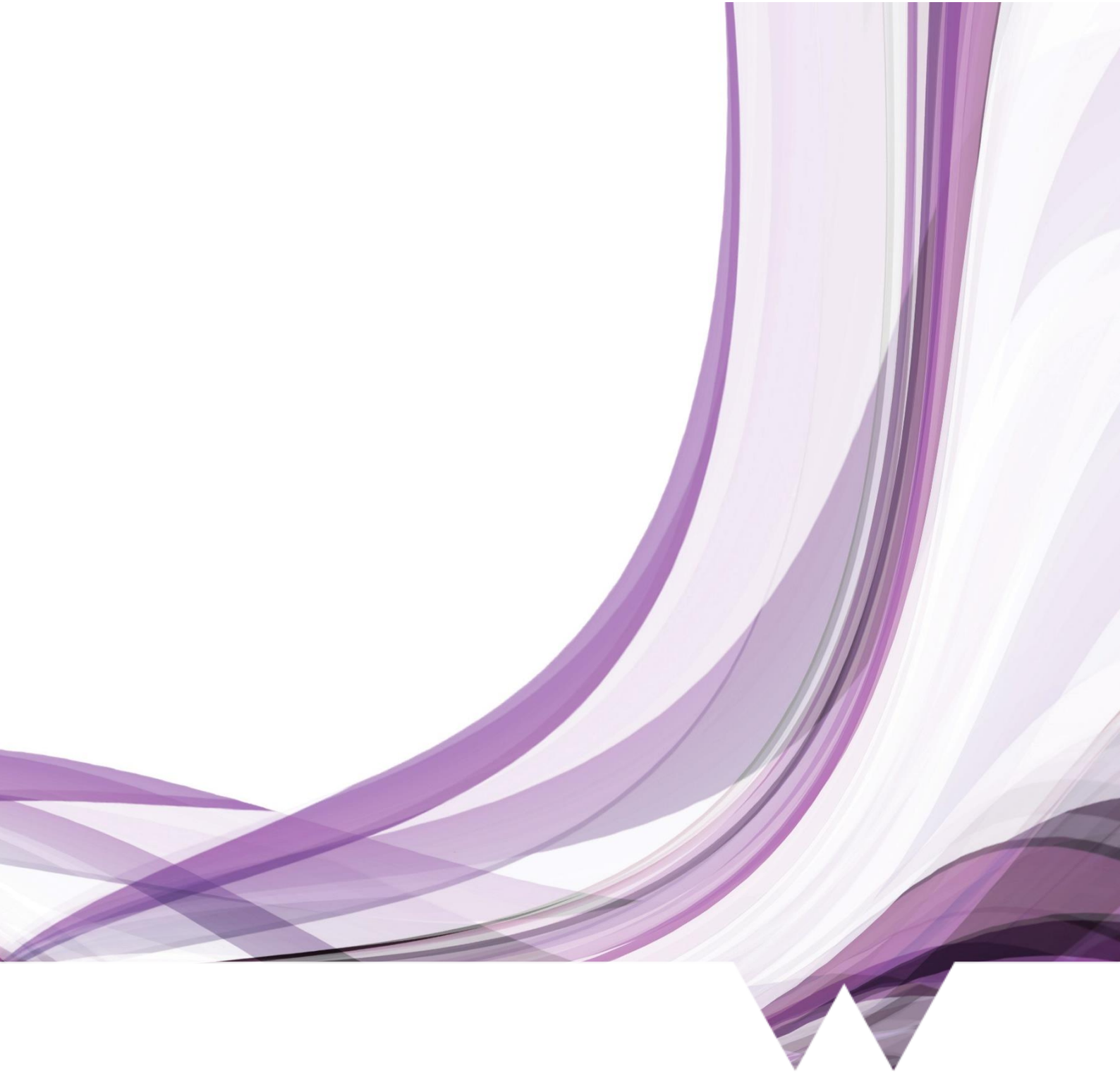
²²⁶ Dutch Decree (n 7), art. 7(1).

Inform the best practice guidance

188. Clear examples of best practice have been identified in the preceding section and revolve around: active involvement or engagement of claimants in the claims process; facilitating claims through the provision of information (including making visible the work of the committees) through the publication of annual reports and regular updates on museums' progress with provenance research; and maintaining the historical record by ensuring that the recognition of the work of the committees is recorded for historical purposes.

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