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The Advisory Board, pursuant to § 3 of the Federal Law on the Restitution of Works of Art from Austrian Federal Museums and Collections, Federal Law Gazette I, No. 181/1998, as amended by Federal Law Gazette I, No. 117/2009, (Art Restitution Law) has, at its meeting on 18 March 2011, unanimously adopted the following

RESOLUTION

It is recommended to the Federal Ministry for Education, the Arts and Culture that the painting cited in the attached dossier of the Commission for Provenance Research, “Czernin Collection and Jaromir Czernin-Morzin”:

Jan Vermeer van Delft
The Art of Painting (The Art of Painting)
Kunsthistorisches Museum, with the Museum of Ethnology and the Austrian Theatre
Museum, Art Gallery
Inventory no. GG 9128

is **not** to be transferred mortis causa to the heirs of Jaromir Czernin (and/or any third parties to come into consideration).

RATIONALE

[For the merits of the case see original, pages 1 – 25]

The Advisory Board has considered:

I.

As a preliminary, it should be noted that the restitution claims of Jaromir Czernin were legally dismissed by the finding of the Supreme Commission for Restitution of 14 May 1949, the decision of the Supreme Commission for Restitution of 18 December 1953, and the finding of the Supreme Administrative Court of 30 June 1960, where in the respective proceedings it was examined in substance whether the sale of 4 October 1940 to Adolf Hitler had constituted a deprivation, i.e. whether the sale came about under duress and persecution.

The Advisory Board has previously taken the view that the binding effect of earlier final regulatory or legal decisions (particularly those of the Restitution Commissions) is to be differentiated in the evaluation of the factual elements of a case according to the Art Restitution Act (cf.

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Recommendation of the Advisory Council of 7 December 2007, Franz and Helene Erlach, and Recommendation of the Advisory Council of 20 November 2009, Hermann Eissler).

Notwithstanding the fact that the legal decisions under consideration here are based on the Second and Third Restitution Act, while the Art Restitution Act currently in force is directly related to the Annulment Act, it is nevertheless not to be overlooked that the legal decisions were clearly based on the assumption that Jaromir Czernin had completed the sale to Adolf Hitler of his own free will and without any coercion or persecution.

The Advisory Board, however, is not limited to the – formal – consideration of those legal decisions, but rather deals in what follows with the substance of the case.

II.

According to the available documents, it is established that the subject painting was sold by Jaromir Czernin from the assets of the Czernin entitled estate, lapsed on 1 January 1939 (in accordance with the German Reich Law on the lapse of family entitled estates), through the acceptance of the purchase offer from Hans Posse for Adolf Hitler on 4 October 1940 at a price of RM 1.65 million, and was transferred as a result of this.

Furthermore, it follows that the subject painting was handed over from the U.S. Armed Forces to the Austrian government on 28 November 1945, and by the decision of the People's Court (*Volksgerecht*) of 31 March 1952, fell to the federal government as an asset of Adolf Hitler.

The Advisory Board has decided its recommendation pursuant to the Art Restitution Act, Federal Law Gazette I, 181/1998, as amended by Federal Law Gazette I, 117/2009. § 1, Paragraph 1 of the Art Restitution Law reads as follows:

§ 1 (1) The Federal Minister of Finance is empowered to transfer free of charge any works of art and other movable cultural assets from Austrian federal museums and collections, including the collections held by the Federal Furniture Administration, and from other direct federal holdings to the original owners or their legal successors mortis causa, which

1. were the object of restitution to the original owners or their legal successors mortis causa or should have been restituted in accordance with the prevailing legal provisions at the time and had been transferred to the ownership of and were still owned by the Austrian federal government after 8 May 1945, in close connection with resulting proceedings pursuant to the Federal Law on the Prohibition of Export of Objects of Historical, Artistic or Cultural Significance, State Legal Gazette No. 90/1918;

2. had legally been transferred to the ownership of the Austrian federal government, but had previously been the object of a legal transaction or a legal action pursuant to § 1 of the Federal law on the nullity of all legal transactions and other legal actions taken during the German occupation

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of Austria, Federal Law Gazette No. 106/1946, and were still owned by the Austrian federal government;

2a. had legally been transferred to the ownership of the Austrian federal government, but had been the object of a legal transactions are a legal action between 30 January 1933, and 8 May 1945, in the sovereign territory of the German Reich outside of the territory of what today constitutes the Republic of Austria, which are comparable to legal transactions or legal actions pursuant to § 1 of the Federal law on the nullity of all legal transactions and other legal actions taken during the German occupation of Austria, Federal Law Gazette No. 106/1946, and were still owned by the Austrian federal government;

3. could not be returned to their original owners or their legal successors mortis causa upon the completion of restitution proceedings and were transferred free of charge as unclaimed assets to the ownership of and were still owned by the Austrian federal government.

The present facts and circumstances are concrete to assess in consideration of § 1, Paragraph 1, Line 2 (and/or Line 2a) of the Art Restitution Act; there is no evidence for an examination of the other elements.

Pursuant to § 1 of the Nullification Act, cited in the Art Restitution Act, *“paid or unpaid legal transactions and other legal proceedings that occurred during the German occupation of Austria will be considered null and void if they took place as a consequence of any political and economic pressure exerted by the German Reich in order to deprive natural or legal persons of their assets.”* According to § 2 of the Nullification Act, *“the nature of the assertion and the scope of the claims arising under § 1”* may be governed by their own federal laws. § 1 of the Nullification Act therefore contains no basis for restitution, but rather requires an implementation law. These implementation laws include the Restitution Acts enacted in the proceedings mentioned, namely the Second Restitution Act and the Third Restitution Act. The Advisory Board furthermore views the – here applicable – Art Restitution Act as an implementation law (cf. OGH 1.4.2008, 5 Ob 272/07x).

Because there is no specific case law in the absence of the immediate application of the Nullification Act, the Advisory Board has often in the past referred to the judicature of the Reparations Commissions, in particular the Third Restitution Act, in the interpretation of the concept of deprivation. In light of this, the Advisory Board maintains that, while the wording of § 1 of the Nullification Act appears to determine the elements of the deprivation (the void legal transaction or the void legal proceeding) mainly on the basis of the subjective facts of the deprivor (*“... in order to deprive ...”*), the wording of § 2, Paragraph 1 of the Third Restitution Act defines deprivation according to the objective position of the transferor (*“... when ... subjected to political persecution ...”*).

III.

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The Advisory Board therefore first examined whether Jaromir Czernin was counted among the group of persecuted persons for the purposes of the ruling of the Restitution Commissions according to § 2, Paragraph 1 of the Third Restitution Act, so as to suggest that the that the sale is to be regarded as deprivation.

According to the adjudication of the Restitution Commissions, this group primarily includes persons who were persecuted by the Nazi authorities as Jews. There is no indication that Jaromir Czernin was ever persecuted from this perspective, nor that he belonged to another systematically persecuted group of Nazi victims.

The group of persecuted persons also includes the spouses of persons who were persecuted as Jews, however. During the census of 1939, on the so-called “supplemental card” (*Ergänzungskarte*) for Alix Czernin, a Jewish grandparent was reported, which apparently meant her grandfather Edward Oppenheim. In Nazi terminology, Alix Czernin was thus considered a “second-degree *Mischling*”.

According to the ruling of the Restitution Commissions, however, “second-degree *Mischlinge*” are not counted among the group of persecuted persons in the sense of § 2, Paragraph 1, of the Third Restitution Act. According to the current state of research, “second-degree *Mischlinge*” were not in fact subject to any systematic persecution or discrimination comparable to that of the people who were classified as “full Jews” (*Volljuden*) or “first-degree *Mischlinge*”. The Advisory Board, therefore, sees no reason to expand the jurisdiction of the Restitution Commissions by assuming that the legal transactions concluded by these persons qualify as deprivations. Moreover, the legal transactions of Alix Czernin are not at issue, but rather those of her husband, Jaromir Czernin.

In addition it should be noted here that Alix Czernin was not apparently or actually considered a Jew or a “first-degree *Mischling*”, but rather was classified as a “second-degree *Mischling*” according to the “supplementary card”, as she could not have otherwise married Jaromir Czernin on 7 May 1938 and again on 27 November 1944. In their divorce proceedings of 1943, Jaromir Czernin also asserted the lineage of Alix Czernin only as a “second-degree *Mischling*”. Moreover, custody of their child was transferred after the divorce, which – had she actually been persecuted – would not have been possible. Alix Czernin was indeed exposed to anti-Semitic hostility by the Nazis, but not political prosecution.

The political persecution claimed by Jaromir Czernin after 1945, immediately following the onset of the occupation of Czechoslovakia, is not traceable. The fact that he on 9 April 1940 submitted an application to join the Nazi Party to an *Ortsgruppenleiter*, in which he pointed to his existing membership in the Sudeten German Party since 11 May 1938 as well as his memberships in the

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local *Opferring* of the NSDAP, the NSFK (National Socialist Flying Corps), and the DAF (German Labor Front) since 1 March 1939, speaks clearly against persecution. It should require no further explanation that the rejection of this application (twice after a further examination in 1943) cannot be considered as an act of persecution.

Neither can evidence be found that Jaromir Czernin received a *Gau* reprimand (*Gauverweis*) or that his Marschendorf estate had been seized by the Nazi regime. On the contrary, while the documents show that the appointment of a temporary administrator was requested in 1943 by the Reichenau State Forestry Office because of (alleged) economic grievances, ultimately a gift from the estate to his children from his first marriage was planned in the granting of an annual apanage to be financed by the income from the estate. The guardianship proceedings that had been ongoing since 1943 came to no conclusion, so the gift was not carried out.

It is certain that Jaromir Czernin was detained in the Linz police prison from 22 August to 26 September 1944. The reasons for this could not be determined. The timing of the arrest and the release suggest that the imprisonment was part of *Aktion Gewitter*. This operation detained as a consequence of the assassination attempt of 20 July 1944 a broad, undifferentiated group of people who were suspected of having close relationships with political elites or actually had such relationships. Even if Jaromir Czernin was then involved in a resistance group – one named by him as “resistance group Krassa” after 1945 could not be identified – no connection between this arrest and the sale concluded almost four years earlier can be seen.

IV.

Thus, since it appears that neither Jaromir Czernin nor Alix Czernin belonged to the group of systematically or individually persecuted persons, is to be examined whether the sale should be judged a null and void transaction for other reasons under § 1 of the Nullification Act.

The existing documentation currently indicates that Jaromir Czernin had at least since the settlement with Eugen Czernin of 23 February 1933 intended the sale of the subject painting that had been listed as part of the Czernin art gallery since 1924. So far as it can be seen from the documents, the sales negotiations with the Duveen Brothers art dealership working for Andrew Mellon in 1936 were the most concrete. The negotiated purchase price would have amounted to approximately US\$ 1 million, but a contract of sale was not completed. Since this purchase price would have required an export license, the potential buyer Andrew Mellon died in 1937, and no further concrete foreign offer is documented, it appears that the question of the amount of this purchase price is only conditionally relevant.

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The 1937-38 reflections of the former director of the Art Gallery of the Kunsthistorisches Museum, Alfred Stix, who obtained an export license in the amount of ATS 500,000, dedicated to the fees in the anticipated purchase of Wiltener chalice, need not be pursued further because the purchase of the Wiltener chalice through the Kunsthistorisches Museum in February 1938 was apparently financed from other sources.

Therefore, at the time of the *Anschluss*, no export permit was granted, nor was such a prospect sought. Additionally, none of the documents show that any concrete foreign offer had been made since Andrew Mellon died in 1937. Rather, it appears that, after the *Anschluss*, a sale in the German Reich was envisaged, whereby (also) a sale to (or within the circle of) Adolf Hitler through the contacts of Eugen Czernin with Karl Haberstock, and of Jaromir Czernin with Hildegard Gussenbauer was actively being considered.

A sale to Adolf Hitler became concrete for the first time in August 1939, when Jaromir Czernin sent the subject painting to Munich. Although Adolf Hitler had direct access to the picture, it was returned to Vienna after Adolf Hitler's inspection in the presence of the legal representatives of Jaromir Czernin and Eugen Czernin, because Adolf Hitler at the time considered the proposed purchase price of RM 1.7 million to be too high.

In the subsequently proposed sale to Philipp Reemtsma for RM 2.0 million, Jaromir Czernin's lawyers Ernst Egger and Fritz Lerche attempted to use the "authorization" given by Hermann Goering to obtain the necessary monument regulatory approvals. The available records indeed indicate that that this sale did not take place because of the intervention of Adolf Hitler, but this was clearly due to the instigation of the (Vienna) Ministry for the Interior and Cultural Affairs and the Central Office for Monument Protection. The intention of these offices to receive the painting in the gallery and to prevent its migration corresponds to the position taken before 1938 and is consistent with the objectives of the – still in force – Monument Protection Act and the Export Prohibition Act, while the "authorization" granted by Hermann Goering was apparently an arbitrary act taken to favor the sale to Philipp Reemtsma.

The intervention of Adolf Hitler against Jaromir Czernin's use of Hermann Goering's "authorization" can therefore not be seen as an act of persecution directed against Jaromir Czernin. Furthermore, the subsequent activities of the (Vienna) Ministry for the Interior and Cultural Affairs and the Central Office for Monument Protection show that Adolf Hitler's approval only had to be obtained for a purchase in which it was assumed that the net income to be achieved by Jaromir Czernin should correspond to that of the abortive sale to Philipp Reemtsma. Here it should be further noted that Jaromir Czernin, et al., through his lawyers Ernst Egger and Fritz Lerche, also attempted the (substitute) government purchase that had been advocated by the Vienna offices by approaching

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the (Vienna) Ministry of Interior and Cultural Affairs on 5 January 1940 as well as the Reich Ministry of Science, Education and Culture on 10 January 1940, immediately after the collapse of the sale to Philipp Reemtsma.

In the subsequent deliberations over the financing of the purchase, a reduction in the inheritance fees incurred in relation to the resolution of the entailed estate also played a role, along with a planned compensation of Jaromir Czernin with land holdings in what was then the Protectorate of Bohemia and Moravia. These considerations also contradict the assumption that the sale took place by coercion or force.

In his contract to purchase “The Art of Painting” for Adolf Hitler issued to Hans Posse on 26 September 1940, Martin Bormann states explicitly that Jaromir Czernin asked a purchase price for the subject painting of RM 1.4 million plus a reduction of inheritance fees of RM 250,000 – that is, half of the expected total of RM 500,000 – thus RM 1.65 million. When Martin Bormann speaks explicitly of Jaromir Czernin’s asking purchase price in this internal letter to Hans Posse, it clearly shows that the price has not been determined against the will of Jaromir Czernin.

In addition, a comparison with the price asked of Philipp Reemtsma shows that Jaromir Czernin achieved a substantially similar result. From purchase price asked of Philipp Reemtsma of RM 2 million, a commission in the amount of RM 200,000 would have been paid, which after deducting the then-expected inheritance taxes of RM 500,000, would have yielded a net profit of RM 1.3 million. (The amount of the purchase price asked of Philipp Reemtsma has been properly assessed as a domestic sale in a report written by Eugene Primavesi.) With the offer made to Adolf Hitler – because no commissions were incurred – a net of RM 1.15 million would have resulted after deducting the expected inheritance fees. In actuality, the inheritance fees were assessed by the tax office on 14 November 1940 not at the previously expected level, but – in consideration of an “offer” made by Jaromir Czernin – at only RM 380,000, resulting in a net profit of RM 1.27 million. In addition, it should be noted that immediately after the sale, contrary to the previous agreement, Jaromir Czernin not only conceded no share in the sale proceeds to Eugen Czernin, but demanded RM 280,000 from him for the cessation of the remaining gallery.

Furthermore, Jaromir Czernin, through his lawyers, insisted upon the payment of the purchase amount, as this had not yet arrived by 29 October 1940. Since Jaromir Czernin awarded this contract solely with reference to the “loss of interest” incurred by the late receipt of payment, it is possible that he was afraid he would not receive the purchase price. This urgent letter also indicates a sale contract brought about not by coercion or force.

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Furthermore, it should be noted that after receiving the purchase amount, Jaromir Czernin thanked Adolf Hitler personally in a letter from 20 November 1940. The subsequent representation of this letter – that it had been dictated by Hans Posse, and written under this pressure – seems rather incomprehensible, since Hans Posse had not been personally present for about six weeks. Moreover, since Jaromir Czernin had already established the essential terms of the sale – a temporary purchase option for Adolf Hitler valid until 15 March 1941, delivered via Hermann Habermann on 13 September 1940 at the Munich Regina Palast Hotel – the representation given by him after 1945, that the sale came about primarily through the pressure exerted by Hans Posse, is also unconvincing.

V.

The Advisory Board therefore reaches the following conclusion:

Jaromir Czernin wanted to sell the subject painting, which since 1924 was listed under a preservation order as part of the Czernin art gallery, at least since the settlement with his uncle Eugen Czernin of 23 February 1933. A sale abroad that might have brought US\$ 1 million required export approval from the relevant monument authorities, which was not granted before the *Anschluss*.

After the *Anschluss*, at the beginning of August 1939, the painting was offered to Adolf Hitler, who did not purchase it because of the price of RM 1.7 million asked by Jaromir Czernin. As a result it was offered to Philipp Reemtsma at the (net) price of RM 1.8 million, whereby Jaromir Czernin referred to an “authorization” issued by Hermann Goering to obtain the necessary authorization from the monument regulatory officials. The sale was not concluded due to the intervention of Adolf Hitler, initiated by the Vienna monument offices, at which time the purchase intentions of Adolf Hitler were not apparent. Subsequently, through the participation of Jaromir Czernin’s lawyers, a state purchase at the price to be obtained by Philipp Reemtsma was carried out. This was finally concluded on 4 October 1940 at a sale price at which the profits essentially corresponded to the income that would have been obtained from the abortive sale to Philipp Reemtsma. From the proceedings described in detail above, it is to be concluded that Adolf Hitler had not actively pursued the acquisition of the subject painting, but the sale was actively pursued by Jaromir Czernin’s lawyers. Therefore, it appears that that Jaromir Czernin wanted to sell the subject painting, essentially received the price that was negotiated for it with Philipp Reemtsma, and was not under pressure to complete the sale.

Furthermore, it follows that the account of Jaromir Czernin, that he was subject to political persecution, cannot be substantiated. In particular his application to join the Nazi Party of 9 April 1940, in which he additionally referred to existing memberships in other organizations within the

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orbit of the Nazi Party, does not point to a distanced attitude with relation to the Nazi regime. The Advisory Board does not overlook the fact that Alix Czernin was exposed to anti-Semitic hostility, but any causality with the sale of the picture by her husband cannot be seen.

There are therefore no grounds to assume that the sale of "The Art of Painting" by Jaromir Czernin to Adolf Hitler was a null and void transaction under § 1 of the Nullification Act. The elements of § 1, Paragraph 1, Line 2 (or 2a) of the Art Restitution Act were not fulfilled.

It is therefore recommended that the Federal Minister for Education, the Arts and Culture not transfer the subject painting.

Vienna, 18 March 2011

University Professor Dr. Dr.h.c. Clemens Jabloner
(Chairman)

Members:

Undersecretary
Dr. Ilsebill BARTA

University Lecturer
Dr. Bertrand PERZ

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Dr. Artur ROSENAUER

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Alternate Members:

Dr. Christoph HATSCHEK

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