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Via e-mail: Michael.franz@bmukk.gv.at

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Sektionschef Dr. Michael P. Franz
Leiter der Sektion IV
Bundesministerium fuur Unterricht, Kunst und Kultur
1014, Wien Minoritenplatz 5
Austria

Dear Michael,

Thank you for your letter dated March 24, 2011. I understand that you very much want to believe that the recommendation of the Beirat was "clear," "based on more than exhaustive investigations," "diligent" and "expedient."[1] I was told pretty much the same thing by your predecessor in 1999 when the Bloch-Bauer case was first decided. But what if your belief is incorrect? What then?

I start with the assumption that you and Minister Schmied really want to do the right thing and achieve the prior minister's goal of "reinen Tisch," that is, to clear Austrian museums of artworks with an improper Nazi-related provenance. The question is how best to do that.

You are correct that the Beirat has successfully handled about 250 cases, which I think is wonderful. I always mention this when I speak about my cases. Austria

[1] Please feel free to correspond with me in German to avoid any confusion. For example, although it might be accurate from my perspective, I don't think you actually meant to say "expedient," which implies that the Beirat's conduct was possibly improper or immoral.

should really be commended for tackling its problems and really doing something about them.

But the Beirat is not infallible. It makes mistakes. Bloch-Bauer is obviously a good example, as is Mahler-Werfel, where the Beirat ultimately changed its mind. But there have also been a few other mistakes, as one might expect.

For ten years now I have been begging that the two Waldmüllers of Mrs. Felsövanyi be re-considered because the early Beirat decision in that case is so obviously wrong. Have you ever even looked at it?[2] Mrs. Felsövanyi fled the country in April 1939, after being tricked into signing a general power of attorney in favor of Anna Seitle, who had offered to help take care of her property. Seitle quickly sold Mrs. Felsövanyi's paintings through Galerie Wolfrum in May 1939 to the Austrian Gallery. The museum was apparently unaware of their true provenance. After the war, the restitution courts denied restitution because the museum had bought from a gallery in good faith, one of the few exceptions to the requirements of the 3. RückstellungsG. The Beirat refused to reconsider, even though the KunstrückgabeG was designed to effect the return of items obtained by federal museums in good faith.[3] Further, the

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[2] See the provenance report and Beirat decision at http://www.bslaw.com/felsoevanyi/

[3] "Es kann nicht Aufgabe des Beirates sein, eine im Widerspruch zu einer rechtskräftigen Gerichtsentscheidung stehende Empfehlung abzugeben." The Beirat abandoned this rule in the Mahler-Werfel case, where it expressly overruled a prior restitution court decision. In the Vermeer case, the Beirat again did not consider the prior decision to be a bar to consideration of the merits of the case. The 1998 KunstrückgabeG was expressly designed to return artworks that had been purchased by federal museums in good faith, notwithstanding the exceptions provided in the civil code and the 3. RückstellungsG. The parliamentary explanation of § 1(2) of the 1998 KunstrückgabeG says "Einige Museumsdirektoren haben in der Nachkriegszeit im guten Glauben Kunstgegenstände am Kunstmarkt bei befugten Händlern erworben, wobei sich erst zu einem späteren Zeitpunkt Zweifel an der Unbedenklichkeit der Herkunft ergeben haben." There would seem to be no

Beirat held that the sale in 1939 appeared to be the result of embezzlement, rather than confiscation.[4] Do you find this result correct? Please, read the provenance report prepared by Monika Mayer of the Belvedere and tell me your opinion whether keeping these paintings in the Austrian Gallery is consistent with the goal of "reinen Tisch." I have no doubt that the current Beirat would vote unanimously to return these two paintings if the matter were reconsidered, as I have requested numerous times over the past 10 years.

Similarly, the case of the Klimt *Amalie Zuckerkandl* belonging to Ferdinand Bloch-Bauer was quite obviously incorrectly decided. The issue again is purely a legal one, since the facts are undisputed that Ferdinand Bloch-Bauer fled from Austria and left this painting behind in his bedroom. What isn't clear is how exactly the painting then went from Dr. Führer, the Nazi attorney liquidating Ferdinand's estate, to Wilhelm Müller-Hofmann, the son-in-law of Amalie Zuckerkandl, who sold it to Vita Künstler, the gallery owner who later donated it to the Austrian Gallery.[5] The

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difference in policy between artworks obtained in good faith during the war, and those obtained after. The grounds for restitution are the same.

[4] The Beirat did not explain why an embezzlement from a Jew who had fled the country should not be considered a confiscation, but merely stated in this early decision: "Eine 'Entziehungshandlung im Zuge der durch das Deutsche Reich erfolgten politischen oder wirtschaftlichen Durchdringung' ist nicht dokumentiert, vielmehr dürfte es sich nach der Urkundenlage beim Verkauf der Gemälde um eine strafgesetzlich relevante Veruntreuungs- oder Untreuhandlung gehandelt haben, die mit der nationalsozialistischen Gewaltherrschaft in keinem direktem Zusammenhang stand. Ein derart strafgesetzwidriges Verhalten hindert aber nicht den Eigentumserwerb von einem 'befugten Gewerbsmann' (Verlag Wolfrum) oder vom 'Vertrauensmann' des Eigentümers im Sinne des § 367 ABGB, bzw. des diesem nachgebildeten § 4 Abs. 1 des 3. Rückstellungsgesetzes (*Spielbüchler* in *Rummel*, Kommentar[2] Rz 9 zu § 367)."

[5] As the Beirat stated in 2005: "Der Übergang des Klimt-Gemäldes von Ferdinand Bloch-Bauer an die Familie Müller-Hofmann, von der es Dr. Künstler erwarb, um es der Österreichischen Galerie im Jahre 1988 zu schenken, ist nicht belegt." See http://www.bslaw.com/altmann/Zuckerkandl/Decisions/beirat.pdf . Under the 3. RückstellungsG the burden of proof is on the purchaser, not the Bloch-Bauer heirs,

Beirat, and later the Schiedsgericht, guessed that Ferdinand was able (from exile) to convince Dr. Führer to make a "gift" of the painting to Amalie's family. I find this unsupported conclusion quite impossible under the circumstances, but also completely irrelevant. A gift by a Jew who has fled is also a confiscation, an "Entziehung" under the Judikatur of the 3. RückstellungsG.[6] Nevertheless, in 2005, the Beirat refused to return the painting, and the Schiedsgericht agreed, finding that the KunstrückgabeG referenced the NichtigkeitsG and not the 3. RückstellunsgG, and thus required evidence of a subjective intent to confiscate ("um zu entziehen"). The OGH found this interpretation plausible, and therefore not against public policy.[7] However, as I have pointed out to you repeatedly (without the courtesy of any response), the Beirat has for the past five years expressly abandoned the requirement that there be evidence of a subjective intent to confiscate (as in the NichtigkeitsG), and has instead, contrary to the understanding of the Schiedsgericht and the OGH, applied the broader standard set forth in the 3. RückstellungsG.

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to prove that the transaction was "unabhängig der Machtergreifung des Nationalsozialismus". Since no such evidence exists, under the 3. RückstellungsG, the painting would have to be returned. No claim was ever made because the Bloch-Bauer family did not know where the painting was until the late 1970s, when the restitution laws had already expired.

[6] „Eine auch ohne die Machtergreifung des Nationalsozialismus erfolgte Vermögensübertragung ist nicht bei einer seitens des auswandernden Eigentümers erfolgten Schenkung von Einrichtungsgegenständen an seine Freundin anzunehmen. Denn wenn gleich die Gewährung einer Abfindung bei einer Lösung der Beziehungen zu einer Freundin üblich ist, ist nicht dargetan, daß der Eigentümer auch ohne die Machtergreifung, wenn er nicht durch die Verhältnisse zur Auswanderung veranlasst worden wäre, der Erwerberin gerade die in Frage stehenden (Einrichtungs-)Gegenstände geschenkt hätte." Heller/Rauscher, Die Rechtsprechung der Rückstellungskommissionen, 1949, 221, S. 445-6, Rkb Wien 817/48 v. 10.9.1948.

[7] "Dass der Gesetzgeber des KunstrückgabeG einen Verweis auf das 3. RStG bewusst vermieden haben könnte, um die Republik Österreich nicht mit der nur durch die Entziehungsvermutung zu rechtfertigenden Beweislastumkehr zu belasten, ist vor diesem Hintergrund immerhin so weit wahrscheinlich, dass die Forderung nach einer (anologen) Anwendung dieser Bestimmung keineswegs zwingend erscheint."

Indeed, in the Vermeer case, the Beirat re-stated its more recent conclusion that evidence of intent to confiscate ("um zu entziehen") is not required.[8] So, once again, can you tell me how the decision in the Amalie Zuckerkandl case can possibly be consistent with the goal of "reinen Tisch"? Clearly, if the case were reconsidered today, the Beirat would have to recommend the return of the painting.

This brings us now to the Vermeer case. I have already sent you several e-mails pointing out both factual omissions and legal errors in the Beirat's obviously rushed recommendation.[9] You responded to none of these. I understand very well your predicament, because there simply is no possible response to these arguments. The Beirat invented from thin air the concept (unknown in the Judikatur of the 3. RückstellungsG) that someone could be subject to official anti-Semitic hostility, but not politically persecuted ("zwar antisemitischen Anfeindungen durch

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[8] Vermeer decision, pages 27-28: "Da es mangels unmittelbarer Anwendbarkeit zum Nichtigkeitsgesetz keine eigene Rechtsprechung gibt, hat der Beirat bei der Auslegung des Begriffs der Entziehung in der Vergangenheit vielfach auf die Judikatur der Rückstellungskommissionen, insbesondere zum Dritten Rückstellungsgesetz, Bezug genommen. Der Beirat halt hieran fest, auch wenn der Wortlaut des § 1 Nichtigkeitsgesetz den Tatbestand der Entziehung (des nichtigen Rechtsgeschäftes bzw. der nichtigen Rechtshandlung) vor allem durch die subjecktiven Tatelemente des Erwerbers (‚…um zu entziehen . . .') zu bestimmen scheint, während der Wortlaut des § 2 Abs. 1 Drittes Rückstellungsgesetz eine Entziehung durch die objective Lage des Veräußerers (‚…wenn…politischer Verfolgung unterworfen…') definiert."

[9] All of the documents available to me are available at http://www.bslaw.com/Vermeer . I find it puzzling that you have not even shared with the parties the provenance report and underlying documents in this case. The late Prof. Bacher always transmitted these to me in the past, when he was in charge of the provenance research. The failure to make these documents available only raises the suspicion that the government has something to hide, most likely the fact that the provenance reports do not include much of the relevant evidence mentioned in my Analysis. Where, for example, is any mention in the Beirat decision of the testimony of Jaromir or Alix-May Czernin, or of Hitler's friend, and Baldur von Schirach's father-in-law, Heinrich Hoffmann, or Staatssekretär Kajetan Mühlmann? If one were making a complete factual summary, inclusion of the testimony of these eyewitnesses would seem to be obligatory.

Nationalsozialisten ausgesetzt, nicht jedoch einer politischen Verfolgung."). Even if one were to assume this distinction is possible, how could it possibly be applied in this case? Let us say that the graffiti on Alix-May's home "Die Oppenheim, das Judenschwein, muss raus aus Stein" (not quoted in the Beirat's report) qualifies as "antisemitische Anfeindungen" (although there is an implication that Julius Streicher might have been involved in the attack), what then of the other evidence? Is the 1933 attack in *Der Stürmer* (inexplicably not mentioned by the Beirat) only an anti-Semitic hostility, or is it an act of political persecution? Where is the discussion of the fact that Alix-May's prior husband Faber-Castell was found to have been subject to "political persecution" because of his marriage to Alix-May? Would it not be reasonable for Jaromir to have feared similar treatment? How is the Gestapo's interference in Alix-May's custody proceeding, specifically referencing her Jewish background in support of their conclusion that she was an unfit mother, not considered political persecution? And what of the Rassenpolitischen Amt and Gestapo declaring her in September and October 1940 to be "Jude und staatsfeindlich" and ordering that her passport be taken away? What prompted those letters, I wonder? Could they have been related to the inquiry by Martin Bormann to determine if taxes could be used to confiscate the Vermeer (another fact inexplicably omitted from the Beirat's decision)? I am sorry you want to believe in the Beirat, or whoever concocted the recommendation, but you will find no one outside of Austria who can agree with the Beirat's conclusion about Alix-May. No one.

As I always have done, I want to give Austria an opportunity to do the right thing and accomplish its stated goal of "reinen Tisch." I ask nothing more, and nothing less, than that the law be obeyed, and not ignored arbitrarily when important artworks are at issue.

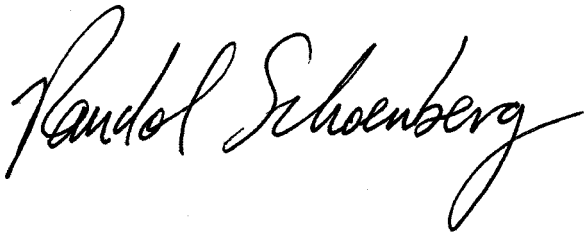
You cannot seriously maintain, after Bloch-Bauer, that the Beirat process is infallible and that no mistakes have ever been made. The question is what to do in cases

where there are serious allegations that there has been an error? My proposal, which I will make once again, is that you allow the parties to establish an independent Schiedsgericht to give an opinion on the disputed cases. The parties must participate in this process, so that all the evidence and legal argumentation can be heard properly. As we proved in Bloch-Bauer, this is a proper (and legally permitted) method for determining whether a mistake has been made.

I do not anticipate that there will be many cases that require an independent arbitration to resolve. Besides the three mentioned above, there may be only a few others that could possibly be considered. But given the hundreds of cases handled by the Beirat, reconsideration of just these few (1-2%) would hardly be unreasonable. No process, especially one that does not permit the affected parties to participate, can possibly be expected to be 100% accurate. Seeking the independent advice of a neutral tribunal in difficult cases would seem to be the wisest solution.

You owe it to your country, to the victims of Nazism, and to the future, to get these cases right and to clear Austrian museums of their Nazi taint. The alternative is that these paintings will hang around Austria's neck like an albatross, reminding everyone of its perfidy for time immemorial. In my view, there are better ways to memorialize the past.

Sincerely yours,



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