
Treaties and EC Matters

European Community
Free Movement of Cultural Goods and
European Community Law
Part IV: Progress of Legislative Proposals

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1 Introduction

The European Commission's two legislative proposals discussed in the previous issue of this Journal have taken longer to adopt than had been hoped. However, the brief press release issued by the Council of Internal Market ministers after their meeting on 22 September 1992 indicated that this dossier had been sent back to the ministers' permanent representatives for further work 'with a view to adoption of the Regulation and of a common position on the Directive at [the] meeting on 10 November 1992'.

The Regulation is based on Article 113 of the Treaty of Rome which provides for the implementation by the Community of a common commercial policy. The European Parliament is not, strictly legally speaking, involved in such legislation, but in practice its opinion is sought. This has been done, and the Council may adopt the Regulation by qualified majority at its next meeting.

The Directive on the other hand is an internal market measure and is based on Article 100a, and the 'cooperation procedure' with the European Parliament therefore applies.¹ This is a very complex procedure, but it essentially means that, although the Council acts by qualified majority, the proposal must also be submitted twice to the Parliament. After the Parliament's First Reading, the Council adopts a 'Common Position' by qualified majority. The Common Position is then subject to a Second Reading by the Parliament, after which the Council's power to adopt the proposal in a form not approved by the Parliament is limited. If a Common Position is reached by the Council at its 10 November meeting the Directive cannot be definitively adopted by the Council until after the Parliament has completed its Second Reading. The Council apparently now contemplates that the Directive should come into force in Member States by 1 July 1993, six months later than originally intended.

2 Individual Member State Positions

The main sticking point remaining is the matter of limitation periods provided in the proposed Directive for claims for return of cultural

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goods. A number of possible compromises were put forward by the Portuguese Council Presidency during the first half of 1992, but none proved immediately acceptable.

The southern 'art-rich' Member States took the position that publicly owned treasures and church property, being essentially inalienable, should not have any limitation period applied to them at all. The northern, 'art trading' Member States such as the United Kingdom and the Netherlands, could not accept this, considering that it imposes an unacceptable burden on the art trade.

Until the October Council meeting Italy, together with Greece, had been refusing to agree to a suggested compromise of a 75 year limitation period for publicly owned objects, still insisting that these should be subject to no time limit at all. It is believed that by the end of the October Council meeting, Italy had agreed to a 75 year limitation period for items from publicly owned collections, on condition that Member States currently applying no limitation period at all may retain this rule. Greece, Belgium, Germany and the United Kingdom however still apparently have reservations on this subject, though it is hoped that these should not prove so insurmountable as to prevent agreement on a Common Position by 10 November.

Another area that has caused particular concern is the scope of the obligation of cooperation between the Member States' designated 'central authorities' in seeking out illegally exported items on their territory. The northern countries preferred the scope of the obligation to be precisely and restrictively defined, and limited to preservation measures pending legal proceedings, whereas the southern Member States preferred a wider, more general obligation to help recover cultural objects. This was certainly the aspect of the proposals that caused most concern to the United Kingdom's House of Lords Select Committee when it examined them (see below). However, an acceptable compromise now appears to have been reached on this point (see below).

2.1 United Kingdom House of Lords Select Committee Report

In the United Kingdom a House of Lords Select Committee looked in detail at these two proposals and produced a Report.² The Report points out that the position of the United Kingdom is special, in that it has a very large proportion of the Community art export market (possibly as much as 75%), and a large proportion of the country's cultural heritage is in private hands.

They were satisfied by the proposed export control Regulation and by the scope of the Annex defining the categories of cultural objects in that proposal, and that the difficulties of enforcement by United Kingdom customs authorities would be no greater than they are under the existing rules.

The Directive, on the other hand, caused them more concern, especially regarding the requirement that, in certain circumstances,

Member States' authorities should enter and search private property for illegally exported items. They pointed out that it was almost unprecedented under English law to grant such powers to national authorities in a case in which no criminal offence (under English law) was alleged to have been committed.³

The Committee also expressed concern regarding the risks under the Directive of objects being seized and subjected to prolonged litigation, which could be damaging to the art trade.

3 Amended Proposals

The European Parliament approved both proposals, with a number of amendments, on 8 June. The Commissioner Jean Dondelinger stated during the debate that he could accept about half the amendments suggested, including one to lengthen the general limitation period laid down in the Directive from 30 to 50 years.⁴

3.1 Amendments to the Proposed Directive

The Commission, which is entitled to adopt an amended proposal at any time before the Council has taken a position on a proposal,⁵ submitted to the Council an amended proposed Directive on 17 June.⁶ The principle amendments to the Commission's original proposal are the following:

3.1.1 Scope of the Directive

The definition of 'cultural object' given in Article 1(1) has been expanded in order to make it clear that, in order to be considered a 'national treasure' (within the meaning of Article 36 of the EEC Treaty) under national legislation, an item must be so designated by a national administrative procedure. Moreover, it is expressly contemplated that such designation may validly take place either before *or after* illegal export has taken place. This means that a Member State such as the United Kingdom, which has no list of 'national treasures' and does not wish to draw one up,⁷ will not be barred from designating an item a national treasure after its removal from the jurisdiction. It will also be important in the case of illegal export of archaeological finds whose existence may not come to light in time for their inclusion in a register before they are exported.

Also, following agreement on this point by the Council of Ministers for Culture on 18 May, the proposal has been extended to embrace, in addition to the categories of items listed in the Annex, any 'national treasure' which:

'[d]oes not belong to one of these categories but forms an integral part of:

- public collections listed in the inventories of museums, archives or libraries' conservation collections,
- the inventories of ecclesiastical institutions'.

It is to be noted that in respect of these additional categories no minimum age or value is specified.

Furthermore, audiovisual material by deceased authors and mosaics have been added to the categories of items in the Annex to the proposal (Annex A7 and A3). Negotiations in the Council have produced more extensive amendments to the Annex:⁸ numerous minor changes have apparently been made to the categories listed in the Annex, as well as to the financial limits.

3.1.2 Scope of central authorities' obligation of cooperation

Despite the considerable controversy over the desirable extent to which Member States' central authorities should be required actively to assist in seeking and recovering items illegally removed from other Member States, only one minor amendment is made to Article 4 of the proposal by the Commission.

Under Article 4(2) as revised central authorities are required to:

'[i]nform the Member States presumed to be concerned, where a cultural object is found on their territory, *of its location and the identity of the holder* [this was not specified previously], where there is *evidence* [as opposed to reasonable grounds] for believing that it has been unlawfully removed from the territory of another Member State' (my underlining).

In the Council, however, Article 4 has been more substantially altered. Article 4(1) has apparently⁹ been narrowed down, as requested by the United Kingdom, so as to apply only to a request to search for a specific object. The obligation is now to:

'[u]pon application by the requesting Member State, seek a specified cultural object which has been unlawfully removed from its territory, identifying the possessor and/or holder. The application must include all information needed to facilitate this search, with particular reference to the actual or presumed location of the object'.

According to the Council text, Article 4(3) now provides that if the requesting Member State does not check that the object sought is a cultural object within two months of being informed about it, the requested Member State is released from the obligations to protect and preserve the object.

Further, the Council text provides expressly for the possibility of arbitration proceedings, and for payment of the costs of physical preservation of the object by the requesting Member State.

3.1.3 Participation by central authorities in judicial return proceedings

Article 7 of the proposal, which permitted the central authorities of the Member States concerned to take part in judicial return proceedings has been removed both in the Commission's new proposal and in the Council's text.

3.1.4 Limitation periods

In the Commission's revised proposal, the 5 year limitation period, previously applicable where a Member State had actual *or constructive* knowledge of the location of the cultural object *or* the identity of its holder now only applies to *actual* knowledge of both location *and* holder. Furthermore, the 30 year limit is stated not to apply 'in the case of objects forming part of public collections recognized as not being subject to a time limit' (Article 8).

As described above, in the Council this matter is still at large.

3.1.5 Burden of proof on bona fide acquirer

The definition of the burden of proof to be discharged by a dispossessed acquirer claiming to be entitled to 'fair compensation' has been slightly changed by the Commission. Instead of requiring proof:

'[t]hat he could not have known, or could not have been expected to know, that the object had been unlawfully removed from the territory of the requesting Member State',

he is required to prove 'that he exercised all due care at the time of acquisition'.

The Council's text on the other hand does not put the burden of proof on one side or the other: the court is to award fair compensation 'provided that it is satisfied that the possessor exercised due care and attention in acquiring the object'.

3.2 Amended Proposed Regulation

The proposed export control Regulation has proved less controversial than the proposed Directive, and as a result has been subject only to minor amendments. The same changes to the Annex described above in connection with the proposed Directive apply to the Annex to the proposed Regulation.

Notes

- 1 Article 149(2) EEC Treaty.
- 2 'Control of National Treasures' Session 1992–93 6th Report (HL Paper 17) ordered to be printed 14 July 1992.
- 3 The European Commission takes the view that United Kingdom legislation would have to be changed in this respect: see letter from Mr. J. F. Mogg, Deputy Director-General, Directorate-General III for Internal Market and Industrial Affairs, Commission of the European Communities included in written evidence submitted to the House of Lords Select Committee (see note 2).
- 4 Though this change has not in fact been incorporated in the Commission's revised proposal.
- 5 Article 149(3) EEC Treaty.
- 6 1992 OJ C 172/7.

- 7 In the United Kingdom the view is taken that such a list is undesirable since it would reduce the market value of the items and therefore amount to a form of wealth tax. See Report of the Reviewing Committee on the Export of Works of Art, October 1991, para.35, cited in the House of Lords Select Committee Report (see note 2).
- 8 According to Appendix 4 to the Select Committee Report referred to at note 2.
- 9 Ibid.