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**REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN  
PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE**

**on the implementation of Council Regulation (EEC) n° 3911/92 on the export of cultural  
goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully  
removed from the territory of a Member State**

## **REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE**

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#### **1. INTRODUCTION**

Council Regulation (EEC) n° 3911/92 of 9 December 1992 on the export of cultural goods<sup>1</sup> has been applicable since 30 March 1993. Under Article 10 of that Regulation, the Commission must report to the European Parliament, the Council and the Economic and Social Committee, every three years, on its implementation. Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State was adopted by the Council on 15 March 1993<sup>2</sup>. Article 16 of the Directive states that, every three years, Member States shall send the Commission a report on its application and that the Commission shall then send the European Parliament, the Council and the Economic and Social Committee a report reviewing the application of this Directive.

Given the complementary relationship between Regulation (EEC) n° 3911/92 and Directive 93/7/EEC, the Commission felt it appropriate to produce a single report reviewing the application of both acts.

As the Member States had not yet submitted a report, the Commission sent them a questionnaire in 1996. It was not possible to complete this exercise as most of the reports and answers received were unusable.

As soon as the Directive was transposed in all Member States, the Commission sent out questionnaires in May 1999 on its application and on that of the Regulation. The Member States' replies to this questionnaire<sup>3</sup>, and the discussion of these replies in the meeting of the Advisory Committee on Cultural Goods<sup>4</sup> of 30 November 1999, provided the Commission with sufficient information to draw up this report.

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<sup>1</sup> OJ L 395, 31.12.1992, p. 1.

<sup>2</sup> OJ L 74, 27.03.1993, p. 74.

<sup>3</sup> All replies to the questionnaire were finally available on 25 February 2000.

<sup>4</sup> This Committee was set up pursuant to the provisions of Article 8 of the Regulation. Its function is to assist the Commission in examining all matters related to the application of this text and also to the application of the Annex to the Directive (see Article 17 of the Directive).

The Committee met for the first time in 1993. It has held eight meetings and has addressed the initial problems relating to the interpretation of the two instruments, establishing common interpretations and paving the way for the requisite legislative and regulatory measures where common interpretations were not sufficient.

## 2. GENERAL BACKGROUND

### 2.1. Context

- In the context of the operation of the single market, Regulation (EEC) n° 3911/92 and Directive 97/3/EEC seek to reconcile the fundamental principle of free movement of cultural goods with that of the protection of national treasures<sup>5</sup>.

Since Member States have responsibility for the protection of national treasures, they may, in principle, maintain their national protection regimes provided that these are in accordance with the rules of the EC Treaty. However, since 1 January 1993, with the abolition of physical checks at the Community's internal borders, there is now a need for additional measures in the completion of the internal market to provide supplementary means to ensure adequate protection for cultural goods<sup>6</sup>.

It was deemed necessary to adopt measures at Community level as this protection could not be adequately guaranteed via the ratification of the UNESCO Convention of 1970 on the measures to be adopted to prohibit and prevent the import, export and transfer of unlawful ownership of cultural goods, or the Convention of the Council of Europe of 1985 on offences relating to cultural property.

The Regulation introduces uniform controls for the prevention of exports of cultural goods at the external borders of the Community, which allow the competent (Culture and Customs) authorities of the Member State from which the cultural goods are to be exported to a third country to take the interests of the other Member States into account. This is because, in the absence of such controls, abolishing checks at the physical borders within the Community would have meant that a national treasure unlawfully removed from a Member State could be presented at a customs office of another Member State and exported easily to a third country.

The Directive complements this preventive instrument by providing mechanisms and a procedure for restoring national treasures when these have been unlawfully removed from the territory of a Member State. While the aim of the Regulation is to avoid national treasures being taken out of Community territory without controls, the Directive, for its part, deals with the arrangements for restoring such treasures to the Member State of origin when they have been unlawfully removed from it.

- At international level it should be pointed out that the UNESCO Convention of 1970 was supplemented by the UNIDROIT Convention of 1995 on stolen or unlawfully exported cultural objects. This new Convention, whose scope coincides in part with that of the Directive, includes a disconnection clause which enables Member States ratifying the Convention to give precedence to the Directive in intra-Community relations.
- In view of the potential link between the matters covered by the Regulation and the Directive and organised crime, it is important to stress the strategic priorities, in the field of police and judicial cooperation provided for in the Maastricht and Amsterdam Treaties. The programme on exchanges, training and cooperation for persons responsible for action

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<sup>5</sup> See Articles 28 to 30 of the EC Treaty and the judgment of the Court of Justice of 10 December 1968, Commission V Italy (7/68, Reports. p. 617).

<sup>6</sup> See « Communication on the protection of national treasures with an artistic historical or archaeological value in the context of the removal of internal borders in 1992 », COM (89) 594 final.

to combat organised crime (Falcone programme), which has unabled the support of projects aiming to improve police and judicial cooperation, can also be mentioned in this context<sup>7</sup>.

- Lastly, as part of the IDA programme<sup>8</sup>, an Internet pilote website (ITCG - Information on Transfer of Cultural Goods) has been designed with a view to exchanging information on the protection of cultural goods. Its aims are, first, to provide general information on Community rules, the national rules of the Member States and the cultural environment (events, museums, etc.) open to the public. Secondly, it provides a working tool enabling the rapid exchange of information between the central authorities of the Member States who are responsible for implementing the Directive and the Regulation, as well as between competent authorities within the Member States.

## **2.2. Scope of the Regulation and the Directive.**

- Regulation n° 3911/92 applies to the cultural goods listed in its Annex. The goods are divided into 14 categories, including archaeological objects, paintings, engravings, books, photographs etc. The criteria for an article to qualify as a « cultural object», which vary according to the category, are age (more than 100, 75 or 50 years, depending on the case), and minimum value (from 0 euro for certain cultural goods, whether they are of negligible or nil value, up to 150.000 euro).

However, certain archaeological objects more than 100 years old, which are of limited scientific or archaeological interest and which are not the direct products of excavations and archaeological sites, may be exempted from the export licence requirement laid down in Regulation (EEC) n° 3911/92.

- As far as Directive 93/7 is concerned, it essentially covers cultural goods which, as they belong to the categories referred to in its Annex (which are the same as those listed in the Annex to the Regulation), are classified as national treasures possessing artistic, historical or archaeological value under the terms of the legislation or administrative procedures of the Member States. As for cultural goods which do not belong in one of the categories in the Annex, only public collections and the inventories of ecclesiastical institutions are covered by the Directive.

This exception apart, national treasures which are not « cultural goods » within the meaning of the Annex are excluded from the Directive and thus governed by the national legislation of the Member States in accordance with the rules of the Treaty. However, under Article 14 (1) of the Directive, Member States may extend the obligation to return cultural objects to cover categories of objects other than those listed in the Annex.

The obligation to return enshrined in the Directive applies only to cultural goods which have been unlawfully removed from the territory of a Member State. According to Article 1(2) of the Directive, "unlawfully removed" refers to three situations:

- removal from the territory of a Member State in breach of its rules of the protection of national treasures ;

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<sup>7</sup> OJ L 99 of 31.3.1998, p. 8.

<sup>8</sup> OJ L 203 of 3.8.1999, p. 1.

- removal from the territory of a Member State in breach of Regulation 3911/92/EEC on the export of cultural goods ;
- not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

In terms of the period covered, the Directive only applies to cultural goods unlawfully removed from the territory of a Member State after 1 January 1993, but it leaves the possibility open to the Member States to extend the system to cover requests relating to unlawful removals prior to that date.

### **2.3. Uniform controls introduced by Regulation n° 3911/92**

- The Regulation stipulates that any export, be it definitive or temporary, of cultural goods listed in its Annex shall be subject to the presentation of an export licence issued by the competent authorities of the Member States<sup>9</sup>.
- The export licence must be presented, together with the export declaration, to one of the customs offices authorised to complete the formalities for the export of such products<sup>10</sup>. The export licence is granted, at the request of the interested party, by the competent authority of the Member State in which the object to be exported is located, even if it originates from another Member State, provided that it was lawfully dispatched from that Member State. An export licence issued in such cases will be valid throughout the Community.

### **2.4. The procedure and conditions for restoring cultural goods within the meaning of Directive 93/7/EEC**

- Articles 5 to 12 of the Directive provide for the initiation of return proceedings and the conditions for their implementation. Such proceedings are brought before a court. Return proceedings are brought by the Member State from whose territory the cultural product has unlawfully been removed (known as the « requesting Member State ») before the competent court of the Member State in which the cultural object is located (known as « requested Member State »). The return of the object is ordered by the competent court where it is established that the object in question falls within the scope of the Directive and that it has been unlawfully removed. Furthermore, the Directive lays down the time limits for bringing return proceedings and the arrangements for compensating the possessor in cases where the object has been restored.
- Without prejudice to the return proceedings, the Directive introduces arrangements for administrative cooperation between the competent central authorities designated by the Member States<sup>11</sup>. This cooperation involves, in particular, establishing the whereabouts of the cultural objects at the request of the requesting State, notification of the discovery of cultural objects in the territory of Member States, verification by the requesting state of the nature of the object on the territory of other Member States, adoption of all measures necessary for the material conservation of the cultural object and the adoption of provisional measures to avoid the cultural object falling outside the scope of the return

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<sup>9</sup> The list of these authorities appears in OJ C 76 of 16.3.1996, p. 8.

<sup>10</sup> These offices are listed in OJ C 18 of 21.1.2000, p. 2.

<sup>11</sup> The list of these authorities is published in OJ C 61 of 3.3.2000, p. 7.

procedure. It also provides for the possibility of amicable settlements in order to avoid long and costly legal procedures wherever possible<sup>12</sup>.

### **3. IMPLEMENTATION AND APPLICATION OF REGULATION N° 3911/92**

#### **3.1. Implementation**

- Article 7 of the Regulation provides for the adoption of the measures necessary for its implementation, in particular those concerning the export licence form to be used. This form was set out in the Commission implementing Regulation n° 752/93<sup>13</sup>. As a result of technical and practical problems raised by the Advisory Committee on Cultural Goods, this Regulation was amended by Regulation 1526/98<sup>14</sup>. Since then, three types of export licence forms have been devised ; these are the standard licence and specific or general open licences, the latter types being used to cover, respectively, the repeated temporary export of a cultural object by a particular person or organisation and any temporary export of cultural objects which are part of the permanent collection of a museum.

The implementing Regulation also defined the mandatory conditions for the use and issue of licences, in particular the formalities to be completed and the documents to be supplied ; in certain cases, the object in question may have to be produced for examination.

The forms in question consist of three parts, namely : 1) the application itself, addressed to the competent issuing authority, which the authority retains, 2) the copy to be remitted to the holder/requester and 3) the copy accompanying the consignment as far as the customs office at the point of exit, from where it must then be forwarded to the issuing authority.

Each consignment of cultural goods must be accompanied by an individual licence. Nevertheless, where the consignment consists of a number of cultural goods, it is for the competent authorities to decide whether a single licence is sufficient or whether more than one licence is necessary.

The period of validity of standard licences may not exceed 12 months from the date on which they are issued ; it is for the competent authorities to determine when the reimportation of a temporarily exported object should take place. Open licences are valid for a maximum of five years. Unused licences must be returned to the competent issuing authorities.

As for the export formalities, the customs office must ensure that the details on the export declaration correspond to those on the licence; it must also take appropriate identification measures. Copy 3 of the licence form accompanies the goods to be exported as far as the customs office at the point of exit from the customs territory of the Community.

- Attention should be drawn in this connection to the work done by the Advisory Committee on Cultural Goods. It has discussed the following issues:

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<sup>12</sup> COM(91) 447 final - SYN 382 of 10 February 1992, p. 23 ; OJ C 53 of 28.2.1992.

<sup>13</sup> OJ L 77 of 31.3.1993, p. 24.

<sup>14</sup> OJ L 201 of 17.7.1998, p. 47.

- Updating, with a view to subsequent publication, of the lists of customs offices authorised to carry out export formalities and the authorities empowered to issue export licences;
  - Interpretation of the customs terms « reimport », « export » or « dispatch » ;
  - Description of the licence systems used in the Member States;
  - Competence of a Member State to issue an export licence when a cultural object has been unlawfully removed from the territory of another Member State and where the latter State has not requested its return even though it has received notification of discovery from the former State.
- Lastly, in order to prevent and detect irregular export operations which run counter to Community regulations on the export of cultural goods, mutual assistance in customs matters as laid down in Council Regulation n° 515/97 is taking place<sup>15</sup>.

### 3.2. Application

#### *Protection of cultural goods*

The opinions of the Member States, as expressed in the replies to the questionnaire sent to them concerning the application of Regulation 3911/92 and, more generally, on the operation of the system, have been almost unanimously positive as regards its effectiveness in raising the awareness of those involved in international trade; opinions were more qualified, however, on whether it has led to a genuine reduction in the number of unlawful exports.

- Most Member States take the view that the Regulation has had a positive impact on the protection of cultural goods, if only by virtue of raising awareness among the various parties (public administrations, private organisations and operators involved in various capacities in the fields of culture and art) and a growing realisation of the importance of protecting national cultural heritage.
  - Administrations responsible for protecting cultural goods: an awareness of the existence – and the need for protection and defence – of goods which are part of the cultural heritage of other Member States is beginning to take shape, even if priority is given to the protection of the national heritage at the expense of the rest.

This realisation has been translated in practice<sup>16</sup> by practical measures such as the adoption of specific laws or rules, the publication of explanatory brochures for the general public or the setting up of systems designed to draw attention to the implications of protecting cultural heritage and to the need for greater vigilance, particularly with regard to the issuing of Community export licences. In this context, and among the protection measures put in place, the competent authorities of most Member States, before issuing an export licence for a particular object, exercise a preemptive right (preferential right of purchase by the State itself) or make prior enquiries on the domestic market – with museums or other Institutions. These procedures have led in certain cases to the export licence application being rejected.

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<sup>15</sup> OJ L 82 of 22.3.1997, p. 1.

<sup>16</sup> Particularly in certain Member States which had virtually no legislation in this area (as is the case for Member States who have recently acceded to the European Union).

Another advantage of the application of the Regulation has been to draw the attention of the responsible administrations and customs authorities to the importance of the art world and, in particular, to the existence of illegal trade in cultural property. However, this interest has not really been converted into concrete results. The effectiveness of customs controls on the export of cultural goods to a third country varies according to the Member State's attitude and behaviour as regards various aspects of culture and art. It is plain, therefore, that although the Regulation has successfully standardised the formalities and documentation needed at Community level for the export of cultural goods, this has not been matched by any real change in behaviour and attitudes on the question of genuine protection for cultural goods at Community level. Indeed, for the time being the protection of cultural goods still concentrates on those goods belonging to the national heritage. However, there are exceptions to the rule. Italy and the Netherlands, for instance, are paying particular attention to the protection of cultural goods from other Member States ; the same applies to all Member States in cases where an artistic object of exceptional value has disappeared from the territory of another Member State.

- Users and operators in the art world (major museums, art galleries, transport companies, dealers in general). The Regulation has laid down clear and relatively homogeneous standards concerning the formalities governing trade in cultural goods in the Community. Consequently, when operators agree to sell or export an object, they are now required to ensure that the object in question has not been unlawfully removed from another Member State.
- However, according to certain Member States who are critical of the administrative burden involved in its implementation, the Regulation has only a marginal influence on unlawful exports.

Clearly, where goods belonging to the cultural heritage of other Member States are concerned, their export is closely linked to the legality of their removal from those Member States. If they have left the Member State unlawfully, and if this situation has not subsequently been detected and rectified, the effectiveness of the body of Community protection measures is diminished. Under the provisions of the Regulation, the authorisation for an export licence for cultural goods must be issued by the competent authorities of the Member State in which the cultural object is located. This means that, where a cultural object has been unlawfully removed from the territory of another Member State, the application has to be submitted in the Member State in which the product is located.

The problem is, however, that it is extremely rare for the Member State in question<sup>17</sup> to actually carry out checks or request information from the Member State of origin of the object. Generally speaking, the authorities confine themselves to issuing the export licence, on the basis of documentation which is incomplete or has no connection whatsoever with the object and do not carry out detailed checks as to its provenance and legality.

It should be noted that, to overcome the difficulties described above, two Member States – France and Italy – have introduced respectively the following arrangements :

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<sup>17</sup> In practice, this only occurs where no documentation has been submitted to support the licence application.



- a system of prior application to the competent authorities of the other Member States in order to ensure, before an export licence is issued, that the object was lawfully removed from another Member State ;
- the introduction of an accompanying document which allows the object in question to freely circulate, once the origin of the object and the credibility of the requester have been checked ; this also improves the national administration's ability to react when it subsequently receives an application for an export licence.

#### *Issues of administrative cooperation*

Under Article 6 of the Regulation, the provisions relating to mutual assistance between national administrations are applied with a view to preventing and curbing unlawful exports of cultural goods. Even though only half of the Member States (Germany, Belgium, Spain, France, Italy, Portugal and Sweden) have made use of this assistance, and even then on very rare occasions, the importance of this instrument in tracking down unlawful traffic in certain cultural goods should be underlined.

Similarly, in order to establish an effective system of cooperation between the responsible customs authorities on the one hand and the authorities responsible for culture on the other, the Regulation recommends that mutual relations be established between them.

Unfortunately, although the Member States acknowledge the importance of this type of cooperation, they have neither introduced nor institutionalised it. Coordination and access to the databases and files of the various departments responsible<sup>18</sup> are clearly necessary in order to monitor the movement, circulation and export of cultural goods more effectively.

Nevertheless, a degree of cooperation does seem to be taking place in certain Member States, either in the form of regular meetings – between the competent cultural and customs authorities – to discuss practical issues relating to licences and compliance with conditions, or via conferences or seminars aimed at customs services, to explain which checks are to be carried out and which objects should be checked and, where appropriate, seized.

#### *Restriction of the number of customs offices empowered to carry out export formalities for cultural goods*

Article 5 of the Regulation allows Member States to restrict the number of customs offices empowered to handle these formalities. Two-thirds of the Member States have not made use of this facility.

There are two distinct schools of thought about the rationale of Article 5.

Some Member States, such as Germany, Italy, Greece or Austria, consider that this restriction is not useful or appropriate because of the complications involved for individuals and the difficulties which this may create for administrations in terms of training (initial and further training) of staff, given the specific nature of cultural goods which require a special kind of expertise on the part of customs officers. The role of the customs in this context is, according to this view, purely secondary. They should confine themselves to checking whether the

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<sup>18</sup> Bureaux of the Ministry of Culture and stolen objects, authorities responsible for issuing export licences or, where appropriate, other types of authorisation or licence, offices combating unlawful traffic in cultural goods and customs investigation bureaux.

goods described in the licence correspond to the goods presented for export ; looked at from this viewpoint, specialisation for customs officials is not necessary.

Other Member States, such as Spain, France or Portugal, who have restricted the number of customs offices empowered to carry out export formalities, take the opposite view, namely that there are real advantages in such a measure both for art professionals and exporters, and for the public authorities.

- For professionals and exporters, this measure has the merit of establishing a relationship of mutual trust between them and the customs administration, enabling them to associate with customs more closely for their operations, or even use simplified customs clearance procedures.
- For the officials of the relevant customs offices, this measure has the advantage of allowing :
  - specialisation in the complexities of the art world,
  - a better understanding of the specific regulations applicable in this area, trade flows and operators,
  - better controls on exports.

#### *Sanctions under national law*

In general, the sanctions laid down by the national laws of the Member States to deal with acts which run counter to the Regulation may be seen as sufficiently dissuasive. The principle that infringements of the Regulation should incur penalties is generally accepted.

Where infringements are of an administrative nature, the sanctions generally consist of fines which can go up to many times the value of the cultural object concerned and, in certain countries, as far as temporary or permanent withdrawal of the administrative licence which is required in order to exercise that professional activity.

If the infringement is more serious or if it qualifies as smuggling (unlawful export of cultural goods), the penalties may involve confiscation of the object and/or the means of transport used, as well as deprivation of individual liberty.

In some Member States, the fact that cultural goods are part of the historical or archaeological treasures of the country may compound the potential penalty.

#### *Issued export licences*

Given the varied nature of data, it is difficult to compare the numbers of export licences issued<sup>19</sup>, since there are virtually no data on the permanent or temporary nature of exports, giving the origin or provenance of the goods in question or the legal basis for the licences (Community Regulation or national law).

However, on the basis of the information forwarded by the Member States, it is nonetheless possible to draw the following conclusions :

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<sup>19</sup> These are shown in a table in Annex I to this report.

- 1. First, it is very clear that there are major differences between the Member States as regards the number of licences applied for and issued. This is the case in particular in the United Kingdom (a total of 38.000 licences for all categories taken together), France (with more than 8.000 licences), Italy (2.800 licences) or Germany (1.800 licences), whereas the other Member States show a more uniform pattern but have a much smaller number of Community export licences. It is probable that these statistics are biased. This is because authorisations may have been used mistakenly to cover the transfer of cultural goods to other Member States when, in fact, under Community Regulations, such licences ought to have only been used for exports to third countries. It should also be pointed out that more than two-thirds of the export licences were issued in the United Kingdom ; even though this figure is not in any way a true reflection of the reality - since the data from this country includes all types of authorisations and licences and not only those issued pursuant to the Regulation - the commercial aspect plays an important role. The UK continues to be a major centre for the purchase and sale of art, attracting objects from other Member States. This contrasts with the situation in the Mediterranean countries, where virtually all of the objects exported are part of the cultural heritage.
- 2. While in most Member States the number of licences issued remains relatively constant, apart from a slight increase during the period under consideration, in others - particularly France, Italy and the Netherlands - the numbers are growing steadily; in some cases the number of licences has tripled. The reasons for this increase may be circumstantial, for instance an improvement in the economic situation which, in turn, stimulates the art trade, or they may be attributable to the introduction of systems leading to better information for the parties concerned on the regulations governing the export of cultural goods.
- 3. In general, the figures in the table do not distinguish whether the export of cultural goods have been exported permanently or temporarily. However, it would seem that the number of temporary export licences issued is way in excess of the number of permanent licences. These temporary licences generally cover collections intended for exhibitions or other cultural events which take place in museums abroad, and also objects for restoration, examination or valuation, or inclusion in a public collection. It should also be noted that, owing to the national bans on the export of national treasures (national artistic, historical or archaeological heritage) in force in the Member States, cultural goods of this type are rarely exported permanently.
- 4. The distinction between categories has not been applied by all Member States in every case. Nevertheless, depending on the data supplied, among the categories shown in the Annexes attached the principal works seem to be pictorial works (pictures and paintings, as well as mosaics and drawings, executed entirely by hand) from categories 3 and 4, followed by archaeological objects and pieces (category 1), engravings and lithographs, (category 5), collections in general (category 12) and other antique items not included in categories 1 to 13 (category 14) ; moreover, according to the data, hardly any export licences have been issued for certain categories of goods, which include photographs, books, geographical maps and means of transport.
- 5. There have been few cases of other Member States being consulted in order to check, prior to the issuing of an export licence, that the object presented for export has not been unlawfully removed from the territory of the Member State concerned. Only two countries, the Netherlands and the United Kingdom, maintain more or less regular contacts with other Member States or inform them about the submission of export licence applications covering cultural goods belonging to them. Any other consultations or exchanges of

information during the period of implementation of the Regulation have been extremely sporadic.

- 6. Another striking feature is that very few applications for export licences have been rejected on the grounds that no proof of the legality of their transfer from another Member State has been forthcoming ; only the Netherlands and United Kingdom have rejected export licence applications on these grounds. As mentioned earlier, this is because these two Member States have a major commercial role in this area. Other Member States, such as Spain or Denmark, have reported that the licence applications submitted related only to cultural goods originating or having belonged for some time to collections in their country.

## **4. TRANSPOSITION AND APPLICATION OF DIRECTIVE 93/7/EEC**

### **4.1. Transposition into the internal law of the Member States**

#### *Deadlines*

- As laid down in Article 18 of Directive 93/7/EEC, the Directive had to be transposed into the national law of the Member States within nine months of its adoption, except for the Kingdom of Belgium, the Federal Republic of Germany and the Kingdom of the Netherlands, who were allowed a period of 12 months. As far as the Republic of Austria, the Republic of Finland and the Kingdom of Sweden were concerned Directive 93/7/EEC was to apply as from their date of accession to the Community, i.e. from 1 January 1995. Directive 96/100/EC of the European Parliament and of the Council<sup>20</sup>, amending the Annex to Directive 93/7/EEC<sup>21</sup>, was to be transposed within six months of the date of its publication in the Official Journal of the European Communities.
- It should be pointed out that Directive 93/7/EEC is also applicable in the Member States of the European Free Trade Association who are parties to the Agreement on the European Economic Area (for Iceland and Norway since 5 January 1995, for Liechtenstein since 5 May 1995), in accordance with Annex II, Chapter 28, point 1 of that Agreement. Directive 96/100/EEC was due to apply pursuant to Decision n° 165/99 of the EEA Joint Committee of 26 November 1999, but constitutional obstacles in one of the States concerned have delayed this application<sup>22</sup>.

#### *Notification of transposition measures*

- The Commission stresses that there have been numerous delays in Member States in enacting transposition measures<sup>23</sup>. Given these delays, the Commission has initiated a number of infringement procedures against Member States for failure to communicate measures transposing Directive 93/7/EEC and Directive 96/100/EC amending the Annex to Directive 93/7/EEC. All these procedures have been closed without further action, except for one – against Austria –.

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<sup>20</sup> OJ L 60 of 1.3.1997, p. 59.

<sup>21</sup> See below under 5.

<sup>22</sup> The EFTA Surveillance Authority is shortly to produce a report on the application of the Directive in the Member States of the European Free Trade Association who are parties to the Agreement.

<sup>23</sup> Annex II to this report contains a table showing the dates and references of the national transposition measures.

- In this connection, it should be pointed out that the transposition measures communicated by certain Member States refer to other provisions in order to determine their scope. Those provisions, however, have not been notified. On this point, the Commission invited the delegations of the Member States, at the meeting of the Advisory Committee on Cultural Goods of 30 November 1999, to communicate updated versions of their regulations in force together with a note explaining current procedures.

#### *Scrutiny of the transposition measures*

- The Commission has noticed that there are certain differences between the laws in some Member States and the Directive, either because of omissions or owing to the use of legal concepts which are taken from their national legal system and which these States regard as corresponding to the concepts used in the Directive.
  - For instance, several Member States have failed, totally or in part, to transpose the obligation to provide information laid down in Article 6 of the Directive. Another omission detected is the failure to mention the general principle of cooperation between central authorities which is expressly required in the introduction to Article 4 of the Directive. It is also apparent that some national laws are ambiguous as to the person – holder or possessor – against whom legal action should be taken.
  - Some Member States have used the expression « good faith » as a precondition for compensating the possessor, whereas the Directive speaks only of « due care and attention ».
- Furthermore, the Commission has noted that some Member States have introduced conditions for implementing the order to return a cultural object on top of those provided for in the Directive. One example is where, in the event of failure to pay compensation within three months of the decision ordering the return, the requesting State is deemed to have waived its rights under that decision ; another example is the obligation to take steps to return the object within three months of receipt of the request for return made by the competent central authority.
- The Commission will open infringement proceedings in those cases where it deems them necessary for the proper application of the provisions of the Directive.

## **4.2. Application of the Directive**

### *General assessment*

- It is clear from the general tenor of the replies to the questionnaire sent to them that Member States themselves realise that the slow progress in implementing the Directive in national law delayed its application. This has meant that the actual period of application has not been long enough to make a valid assessment of its effectiveness. Nevertheless, several States have noted that the Directive has had a major impact in raising awareness among the various parties concerned about the protection of cultural goods in the various Member States<sup>24</sup>. One notable result is the fact that professional circles in certain States have organised themselves more effectively and, where appropriate, adopted codes of good practice.

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<sup>24</sup> The remarks outlined above on the awareness-raising effects of the Regulation also apply generally to the Directive.

As far as public authorities are concerned, it would appear that cooperation between authorities both at national and Community level has not taken any practical shape. This is because, according to most Member States, there is not enough information on the cultural goods leaving the territory of a Member State unlawfully. Furthermore, where such information exists, it is not passed on in the appropriate fashion. Consequently, most Member States are in favour of improving this cooperation to secure the return of cultural goods unlawfully removed from the territory of a Member State. Moreover, the message is that improving the traceability of cultural goods is useful for the application of both the Regulation and the Directive.

- The opinions of the Member States are divided when it comes to evaluating the phenomenon of unlawful transfers of cultural goods since the Directive entered into force. Germany, Finland, Ireland, Italy and the Netherlands consider that the situation is stable ; Sweden and Greece feel that transfers are increasing and Spain believes that they are diminishing. However, in general terms, all Member States found it difficult or even impossible to give a proper answer to this question, in view of the lack of specific information on the actual working of the Directive.

*Application of procedures for the return of cultural goods : statistics and analysis*

- The data on the application of Articles 4 and 5 of Directive 93/7/EEC, extracted from the answers by the Member States to the Commission's questionnaire, are summarised in the tables annexed to this report<sup>25</sup>. According to these data, Member States have sent the Commission 12 notifications of discovery of objects and one request for a search based on Article 4 of the Directive. Moreover, the Commission has been informed of only one case of proceedings to secure the return of an object under Article 5 of the Directive, brought by Finland before the High Court in London ; in this case, however, the return was not effected by a court order, as an amicable settlement was eventually reached between the *bona fide* possessor and the Finnish authorities before the British court had handed down a judgment. Other returns listed in the tables occurred within the framework of administrative cooperation between national authorities and therefore without recourse to the legal procedure provided by Directive 93/7/EEC.
- The following comments can be made after analysing the Member States' replies to the questionnaire :
  - The number of recorded cases in which Articles 4 and 5 have been applied is very small. This is partly because the Directive has only recently been implemented in national law in a number of Member States and partly because many years can elapse between the time when the cultural goods are unlawfully removed and when they are traced. It should also be added that, while there may be a significant volume of illegal trade in cultural goods, there are not overwhelming numbers of national treasures being unlawfully removed from a particular Member State, which is the condition to be met in order for the Directive to apply.
  - It is difficult to know whether the number of such removals recorded is close to the actual number of cases of application. Here, the Commission has found it difficult to match up the data provided by the Member States in their questionnaire answers. For example, there have been cases where a Member State indicates that it has never

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<sup>25</sup>

Annex III.

received notification of the discovery of an object, while another Member State asserts that it has indeed made the necessary notification.

- Moreover, several Member States have themselves drawn attention to shortcomings in the collection and transfer of information both between States and within States. It is therefore clear that improving cooperation between national authorities in this area would lend the necessary cohesion to the Community system for the protection of cultural goods and would consolidate the complementary relationship between Regulation n° 3911/92 and Directive 93/7.
- The small number of returns under Article 5 may also be explained by the fact that the mere initiation of legal proceedings has a salutary effect on efforts to find an amicable solution. It is regrettable, however, that this type of return is not systematically recorded, especially since Article 4(6) of the Directive also makes provision for amicable solutions.
- As regards notification of discoveries, it has become apparent that legal problems may arise when a Member State, following the receipt of a notification, announces that the object has been unlawfully removed from its territory but does not avail itself of the return procedure, allowing the statutory period to elapse. In such cases, it is impossible for the notifying State to grant a licence for export to a third country.

#### *Extending the framework of the Directive*

- According to the information sent to the Commission by the Member States, none of them has made use of the provision in Article 14 for extending the obligation to return cultural objects to cover categories of objects other than those listed in the Annex, and only Greece has decided to extend this obligation to cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993.
- It should be stressed that, as a general rule, judging by their replies to the questionnaires, Member States see the Directive as necessary and useful for protecting Member States' cultural heritage. Most Member States also regard the Community legal framework created by the Directive as sufficient; some, however, would have liked to move beyond this framework and actually proposed changes and modifications to the Directive.

Italy, for instance, feels that the relative requirement of one year is too short and should be extended to three years. Again, according to Italy, the burden of proof for due care and attention should always lie with the possessor, in line with the provisions of the UNIDROIT Convention. The Netherlands and France suggested making the return procedure less strict, as regards both the purely procedural aspects and those related to compensation for *bona fide* possessors. Lastly, the Netherlands proposed that the possibility for private owners to also benefit from return proceedings should be considered. However, when these suggestions were discussed at the Advisory Committee meeting of 30 November 1999, they were not endorsed by the other Member States.

## **5. IMPLEMENTATION OF THE JOINT ANNEX TO THE REGULATION AND THE DIRECTIVE**

- The Advisory Committee on Cultural Goods has been very active in connection with the interpretation of this Annex.

The issues debated by that committee include, in particular, the interpretation of categories A3 and A4 of the Annex concerning respectively pictures and paintings executed entirely by hand and mosaics and drawings by comparison with water-colour, gouache and pastel pictures which, depending on the different artistic traditions and different price levels, were considered either as paintings or as drawings. This led to an amendment to the basic Regulation (cf. Council Regulation (EEC) n ° 2469/96<sup>26</sup>) and to the Annex to the Directive (cf. Directive 96/100/EEC of the European Parliament and of the Council) ; since then, these objects have been identified separately as sub-category A3 A.

The Committee also discussed the question of how to define a « monument » or a « collection », and water-colours. Another issue debated was to what extent means of transport could be considered ancient or part of a collection and the Committee expressed a view on how to take account of the indicative nature of the tariff headings listed in the annex.

- Other aspects concerning the Annex were raised in the answers to the questionnaires sent to the Member States. Member States took differing attitudes to the question of reviewing the thresholds (minimum values) set out in the Annex for certain categories of cultural goods. France, Italy and Sweden, for instance, felt that the thresholds were quite high and therefore unlikely to guarantee a sufficient level of protection ; according to these three Member States, the thresholds should therefore be revised downwards. On the other hand, Germany and the United Kingdom felt that it was necessary to raise the thresholds in terms of value and age for the various categories of cultural objects in order to shorten the list of cultural objects referred to in Community provisions, taking the view that the current list involved too much red tape.

On the issue of thresholds, there seems to be some confusion between the 0 (zero) value applicable to certain categories. Some authorities interpret it to indicate that the cultural object in question is of no value, thus denying the object the protection provided by the Regulation and the Directive.

- Lastly, the establishment of Economic and Monetary Union (EMU) is bound to have an impact on the Annex. The footnote under point B of the Annex, which establishes the values of the categories of cultural goods covered by the Directive and the Regulation, clearly states that the date for conversion of the values expressed in ecus in the Annex into national currencies shall be 1 January 1993.

## **6. FUTURE DEVELOPMENTS**

### **6.1. Technical amendments to the Regulation and the Directive**

#### *Amendments to the amounts expressed in ecus in the joint Annex*

In accordance with the Commission's communication of 11 November 1997 on « The impact of the changeover to the euro on community policies, institutions and legislation »<sup>27</sup>, the Commission takes the view that where amounts in ecus provided for in Community acts are accompanied by clauses which, similar to that in the Directive and in the Regulation, stipulate that these amounts must be converted into national currency at a rate of exchange on a

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<sup>26</sup> OJ L 355 of 24.12.1996, p. 9.

<sup>27</sup> COM(97) 560 final, of 5.11.1997.



specified "historical" date, such clauses remain in force after 1 January 1999. Member States do not need to amend the amounts expressed in national currencies in their own national legislation.

On the other hand, this clause has to be amended by the Community text itself, by no later than the end of the transition period, i.e. applying Regulation n° 974/98/EC of 3 May 1998<sup>28</sup>, from 1 January 2002.

Consequently, the joint Annex must take into account the implications of the changeover to the euro<sup>29</sup>. In the light of the outcome of preparatory consultations on this report, the Commission is considering adapting the footnote under point B of the joint annex along the following broad lines : from 1 January 2002 Member States participating in EMU will apply the thresholds in euro laid down in Community legislation directly. The other Member States will continue to convert these thresholds into national currency on the basis of an exchange rate adopted at a convenient date before 1 January 2002. This rate would be adapted automatically and at periodic intervals so as to offset the variations in the rates of exchange between these national currencies and the euro.

#### *Amendments replacing the zero value in the joint Annex*

The Commission takes the view that, in order to avoid diverging interpretations of the Annex<sup>30</sup>, which may hamper the proper implementation of the Directive and the Regulation and, consequently, the protection of cultural goods, the « zero » value must be replaced by a clearer expression, such as « irrespective of the value ». The Commission will therefore propose to the Council and the European Parliament an amendment to point B of the Annex along these lines.

### **6.2. Updating the amounts in the joint Annex**

Under the terms of the Regulation and the Directive, the Council, acting on a proposal from the Commission, shall examine and, where appropriate, update the amounts indicated in the Annex, on the basis of economic and monetary indicators in the Community. At this stage and in the light of the results of preparatory consultations for this report<sup>31</sup>, the Commission does not in principle intend to propose such an update.

### **6.3. Improving the operation of the Directive**

As the Commission has already stressed, insufficient time has passed for it to make a valid assessment of the real effectiveness of the Directive's operation. Consequently, it would be premature for the Commission to propose at this stage amendments to the material provisions of this instrument.

Nevertheless, the Commission considers that, on the basis of the general trend emerging from the information supplied by the Member States, the Directive has made Member States and private operators aware of the need to support improved protection for cultural goods at European level, something which did not exist before. This positive development should be

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<sup>28</sup> Council Regulation n° 974/98/EC of 3 May 1998 on the introduction of the euro ; OJ L 139, of 11.05.1998, p. 1.

<sup>29</sup> Cf above under 5.

<sup>30</sup> Cf. above under 5.

<sup>31</sup> Cf. above under 5.

reinforced in future by further improvements to the systems set up by the Directive and to its operation, namely imparting a structure to administrative cooperation and to the information to be exchanged.

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- **The Commission invites the European Parliament, the Council and the Economic and Social Committee to take note of this report.**
- **In the light of this report, the Commission will make proposals for the technical adaptation of Regulation n° 3911/92 and Directive 93/7.**

## ANNEX I

This table shows, by Member State, the number of export licences applied for and issued since the entry into force of Regulation 3911/92 (period 1993-1998).

Member State	Total and average number of authorisations	Permanent or temporary	Refused	Information or consultation
Belgium	301 (50 per year)	113 permanent 188 temporary		6
Denmark	168 (28 per year)			
Germany	1.778 (300 per year)			2
Greece	51 (8 per year)		1	
Spain	203 (34 per year)			
Finland	8			
France	8.338 (1.390 per year)	3.190 permanent 5.148 temporary		Several
Ireland	24 <sup>32</sup>			
Italy	2.876 (479 per year)			2
Luxembourg	1			
Austria	462 (115 per year)	79 permanent 383 temporary	1	
Netherlands	693 (139 per year)		1	Several
Portugal	86 (14 per year)	34 permanent 52 temporary		3
United Kindom	38.445 <sup>33</sup> (6.408 per year)		4	10
Sweden	165 (33 per year)			

Source / Answers to questionnaire

<sup>32</sup> Only for 1997 and 1998.

<sup>33</sup> This overall figure covers all licences issued, without distinguishing between those issued under the Regulation and those issued under national law.

## ANNEXE II

### Transposition of Directive 93/7/EEC into the national laws of the Member States

<u>Member States</u>	<u>References of national transposition measures</u>
GERMANY	Gesetz zur Umsetzung von Richtlinien der Europäischen Gemeinschaften über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaats verbrachten Kulturgütern und zur Änderung des Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung (Kulturgutsicherungsgesetz - KultgutSiG) vom 15/10/1998, Bundesgesetzblatt Teil I vom 21/10/1998 Seite 3162
AUSTRIA	Bundesgesetz zur Umsetzung der Richtlinie 93/7/EWG über die Rückgabe von unrechtmäßig aus dem Hoheitsgebieteines Mitgliedstaates der Europäischen Gemeinschaft verbrachten Kulturgütern, Bundesgesetzblatt für die Republik Österreich, Nr. 67/1998 ausgegeben am 15/05/1998
BELGIUM	- 01 . Loi du 13/04/1995, Moniteur belge  - 02 . Loi du 28/10/1996 relative à la restitution de biens culturels ayant quitté illicitement le territoire de certains Etats étrangers- Wet van 28/10/1996 betreffende de teruggave van cultuurgoederen die op onrechtmatige wijze buiten het grondgebied van bepaalde buitenlandse Staten zijn gebracht, Moniteur belge du 21/12/1996 Page 31865  - 03 . Loi du 15/12/1997 modifiant la loi du 28/10/1996 relative à la restitution de biens culturels ayant quitté illicitement le territoire de certains Etats étrangers - Wet van 15/12/1997 tot wijziging van de wet van 28/10/1996 betreffende de teruggavevan cultuurgoederen die op onrechtmatige wijze buiten het grondgebied van bepaalde buitenlandse Staten zijn gebracht, Moniteur belge
DENMARK	Lov nr. 1104 af 22/12/1993 om tilbagelevering af kulturgoder, som ulovligt er fjernet fra et EU-medlemslands område m.v.. Kulturmin., j.nr. 92:001.1/0007-1. Lovtidende A hæfte 192 udgivet den 23/12/1993 s. 6135. KLOV.
SPAIN	Ley número 36/94 de 23/12/1994, de incorporación al ordenamiento jurídico español de la Directiva 93/7/CEE del Consejo, de 15 de marzo, relativa a la restitución de los bienes culturales que hayan salido de forma ilegal del territorio de un Estado miembro de la Unión Europea, Boletín Oficial del Estado número 307 de 24/12/1994 Página 38672 (Marginal 28512)
FINLAND	Laki Euroopan talousalueen valtion alueelta laittomasti vietyjen kulttuurisineiden palauttamisesta/Lag om återlämnande av kulturföremål som olagligt förts bort från en stat inom Europeiska ekonomiska samarbetsområdet (1276/94) 16/12/1994
FRANCE	Loi Numéro 95-877 du 03/08/1995 portant transposition de la directive 93-7 du 15/03/1993 du Conseil des Communautés européennes relative à la restitution des biens culturels ayant quitté illicitement le territoire d'un Etat membre, Journal Officiel du 04/08/1995 Page 11664.

GREECE	Νόμος υπ' αριθμ. 133 της 6ης Μαΐου 1998 για την εφαρμογή της Οδηγίας 93/7/ΕΟΚ, όπως τροποποιήθηκε, ΕτΚ, αρ. 106
IRELAND	Europa Communities (return of cultural objects) Regulations, of 24 June 1994, SI, n° 182, modified by Regulations of 28 January 1998, SI, n° 24.
ITALY	Legge del 30/03/1998 n. 88, norme sulla circolazione dei beni culturali, Gazzetta Ufficiale - Serie generale – del 10/04/1998 n. 84 pag. 9
LUXEMBOURG	Loi du 9 janvier 1998 portant transposition de la directive 93/7/CEE
NETHERLANDS	Wet van 09/03/1995 tot wijziging van enige wetten in verband met de verplichting tot teruggave van cultuurgoederen die op onrechtmatige wijze buiten het grondgebied van een lid-staat van de Europese Unie of van een andere staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte zijn gebracht en in verband met de uitvoer van cultuurgoederen (Implementatiewet bescherming cultuurgoederen tegen illegale uitvoer), Staatsblad 1995, nr. 145
PORTUGAL	Lei n.º 90-C/95 de 01/09/1995. Autoriza o Governo a aprovar a nova lei do património cultural português, Diário da República I Série A n.º 202 de 01/09/1995 Página 5508-(5)  Lei do patrimonio cultural português de 1985
UNITED KINGDOM	The Return of Cultural Objects Regulations 1994, Statutory Instruments number 501 of 1994
SWEDEN	- 01 . Lag om ändring i lagen (1988:950) om kulturminnen m.m., Svensk författningssamling (SFS) 1994:1523  - 02 . Förordning om ändring i förordningen (1988:1188) om kulturminnen m.m., Svensk författningssamling (SFS) 1994:1524

Source / Measures notified to the European Commission

### **ANNEXE III**

Tables showing returns and instances of administrative cooperation between Member States  
1993-1999

- List of returns between 1993 and 1999 (all amicable settlements outside the legal return procedure)

<b>Year</b>	<b>Returning State</b>	<b>Requesting State</b>	<b>Object returned</b>
1993	Italy	Portugal	6 parts of a XV century sculpted wooden altar piece
1996	Portugal	Spain	3 early XVII century oil paintings by Juan de Landa
1996	Italy	Greece	?
1997	Italy	Portugal	6 oil paintings including a Delacroix and a Miguel Angel Lupi
1999	United Kingdom (possessor)	Finland	Collection of old medals. Action for return brought before the High Court in London, under Article 5 of the Directive, but return was carried out before the Court's ruling, under an amicable settlement by the <i>bona fide</i> possessor in the UK..

- Summary of ongoing requests for return

<b>Year</b>	<b>Requesting State</b>	<b>Requested State</b>	<b>Object</b>
1999	Portugal	Italy	Religious sculpture in wood by Sao Liborio
1999	Spain	Portugal	?

- Notifications of discoveries (Article 4 of Directive 93/7/EEC)

Year	Notifying State	Notified State	Outcome
?	France	United Kingdom	Lawful export under UK law
?	Italy	United Kingdom	Unlawful export, but retrospective licences
?	Italy	Greece	Return under the 1970 UNESCO Convention
?	United Kingdom	Denmark	Retrospective licence issued by Danish authorities
?	United Kingdom	Spain	Unlawful export, but the Spanish authorities did not use the return procedure
?	United Kingdom	Portugal	Portugal did not have enough information to give a view, so no export licence
?	United Kingdom	Portugal	No licence required
?	United Kingdom	Portugal	No licence required
?	United Kingdom	Portugal	No licence required
?	United Kingdom	France	Licence issued retrospectively by French authorities
?	United Kinddom	France	Licence issued retrospectively by French authorities
?	United Kingdom	Italy	Unlawful export, but the Italian authorities did not use the return procedure
1996 (informal) and 1997 (formal)	Netherlands	France	Authorities did not use return procedure

- Request for search (Article 4 of Directive 93/7/EEC)

Year	Requesting State	Requested State	Outcome
?	Italy	United Kingdom	The object was not on UK customs territory (Island of Jersey)

Source/Answers to questionnaire