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INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Communication from the Commission of the European Communities  
to the Council on the protection of national treasures  
possessing artistic, historic or archaeological value :  
needs arising from the abolition of frontiers in 1992

Rome, December 1989

# COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL  
ON THE PROTECTION OF NATIONAL TREASURES  
POSSESSING ARTISTIC, HISTORIC OR ARCHAEOLOGICAL VALUE:  
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1. Under the Single European Act, the European Community must, by 31 December 1992, establish the internal market, which will comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. For some time now, as progress is made towards that objective, fears are also being voiced that such a leap forward for the Community might lead to impoverishment of the artistic, historic and archaeological heritage of the Member States. Whether or not such fears are justified, careful consideration must be given to the matter by all concerned.

Two equally important objectives have to be reconciled: on the one hand, completion of the internal market clearly has to be achieved in full, since it is an aim that the Member States have set for the Community by common agreement; on the other hand, Member States legitimately expect to be able actively to pursue their cultural policy, since it falls under their responsibility, particularly as regards the protection of national treasures possessing artistic, historic or archaeological value.

2. The ideal long-term solution would be to develop the idea of a common European heritage. As far as the immediate future is concerned, however, completion of the internal market has to be reconciled with the Member States' desire to protect their national treasures, the legitimacy of which is recognized by the EEC Treaty. It would be inconceivable to apply unrestrictedly the logic of the internal market and the principle of the free movement of goods in respect of objects that constitute national treasures: account must be taken of the special nature of cultural items, which cannot be treated as mere goods. The fact remains, however, that completion of the internal market could be rendered difficult by the implementation of national measures aimed at protecting national treasures. The Coordinators' Group, set up by the European Council in order to coordinate and stimulate work in progress within different bodies with a view to removing physical barriers, mentioned in its report to the European Council held in Madrid in June 1989 (the "Palma document") that measures in the area are desirable.

3. The Commission wishes to initiate a dialogue with the Member States; it should not be expected to anticipate on its own all the problems regarding the protection of national treasures that could possibly derive from completion of the internal market or, less still, to put forward a single ready-made solution for each potential problem.

The starting-point for this communication is the simple fact that all Member States are applying - as part of their policy for protecting their artistic, historic or archaeological heritage - laws that prohibit the export of certain cultural objects from their territory or make the latter conditional on the completion of certain formalities. This communication focuses on the repercussions of completion of the internal market for the implementation of such laws.

It is for the Member States in the first instance to look at the repercussions completion of the internal market will have on the implementation of their cultural policies and examine whether new measures in the area are necessary or desirable. Nevertheless, although such matters need to be examined at national level in each Member State, they must also be discussed at Community level.

The Commission wishes in this communication to put forward some points for discussion and open the debate.

It first describes the legal framework within which discussions should be conducted. It then goes on to set out some approaches that could be adopted to tackle the problems raised in the first part. The Commission does not indicate its preference for any of the ideas put forward, but wishes, by presenting the possible approaches to make a constructive contribution to the dialogue that should unfold between the Member States and the Commission.

## 1. THE LEGAL FRAMEWORK

### A. Articles 30 to 36 of the EEC Treaty

4. As the Court of Justice stated in its judgment of 10 December 1968 (Case 7/68 Commission v Italy), the provisions relating to the free movement of goods within the common market (in particular, Articles 30 and 34 of the EEC Treaty) apply to all goods, including items such as works of art. Nevertheless, under Article 36 of the EEC Treaty, Articles 30 to 34 do not preclude prohibitions or restrictions on imports or exports that are justified, in particular, on grounds of the "protection of national treasures possessing artistic, historic or archaeological value". In practice, all Member States have legislation which, through specific procedures governing the issue of licences and permits, prohibits or restricts to a greater or lesser extent the export of national treasures.

5. The Commission, to which the Treaty has assigned the task of ensuring that Community law is applied, has to examine whether current national rules are compatible with Community law, and in particular Articles 30 to 36 of the EEC Treaty. Rather than proceeding on a case-by-case basis, the Commission considered it necessary to act more systematically here by publicizing its interpretation of the relevant Community provisions. It therefore intends to publish in a few months time, after consulting the Member States on a draft text, a communication on the interpretation of Community law as it relates to the free movement of works of art within the Community. In that communication, the Commission intends - subject to the consultations mentioned - to interpret Article 36 of the EEC Treaty as follows. In line with decisions of the Court of Justice concerning other exceptions to the principle of the free movement of goods, it is for each Member State to determine its own criteria for identifying cultural objects that can be regarded as "national treasures"; nevertheless, the concept of "national treasures possessing artistic, historic or archaeological value" cannot be defined unilaterally by the Member States without verification by the Community institutions. The Commission is proposing certain criteria that in a way constitute the framework within which Member States can apply their laws. Moreover, Article 36 of the EEC Treaty - which should be interpreted restrictively since it derogates from the fundamental rules of the free movement of goods - cannot be relied upon to justify laws, procedures or practices that lead to discrimination or restrictions which are disproportionate with respect to the aim in view.

6. It is open to question whether all those provisions fully comply with the limits laid down by Community law, but it cannot be denied that they are at least partly justified under Community law as it now stands. In other words, irrespective of completion of the internal market, current

Community law authorizes national measures prohibiting or restricting the export of cultural objects, provided that they comply with the limits it lays down.

7. Admittedly, the Community is endeavouring to limit recourse to Article 36 of the EEC Treaty in other areas, particularly by adopting Community provisions harmonizing the Member States' requirements. There is nevertheless a major difference between the protection of national treasures and the other grounds adduced (in the context of Article 36 of the EEC Treaty or the principles developed in Cassis de Dijon and subsequent judgments) for restricting the movement of goods. Most such grounds (protection of health, the environment, consumers, industrial property, etc.) are put forward as a justification for restricting imports and can therefore be removed as barriers to free movement by harmonizing the standards and rules in question. The problem of the protection of national treasures would, on the other hand, continue to exist even if the Member States all had identical legislation (which is, moreover, far from being the case). Whereas for other goods it is necessary merely to determine a Community standard of protection of health, the environment, etc., when it comes to the protection of national treasures, on the other hand, the Member States tend to reason in terms of safeguarding "their" heritage.

Harmonization of national laws would result in exports of national treasures being prohibited or restricted according to the same criteria in each Member State. It is to be feared, however, that mere harmonization would not solve the problem: what is regarded as a blow to the national heritage is removal from national territory; knowledge that the object in question will be protected in the same way in another Member State is not enough. In other words, harmonization - assuming that it were possible - would not eliminate recourse to Article 36 of the EEC Treaty in this area.

#### **B. The Internal market**

8. The Single European Act added Article 8a to the EEC Treaty, which provides that "the Community shall adopt measures with the aim of progressively establishing the internal market [... which] shall comprise an area without internal frontiers in which the free movement of goods, persons [...] is ensured".

It should be borne in mind that when the Single European Act was signed, a General Declaration was adopted whereby "nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary [...] to combat [...] illicit trading in works of art and antiques".

9. As the Commission explained in its White Paper on completion of the internal market (COM(85) 310 final), the internal market process involves dismantling the following barriers in particular:

- physical frontiers: all checks on goods and persons currently carried out at the Community's internal frontiers should be abolished;
- tax barriers: the checks and formalities currently applied in intra-Community trade for tax reasons (VAT) should also disappear.

10. The abolition of checks at internal frontiers will not automatically put an end to the procedures, prohibitions and restrictions currently applied by Member States with regard to exports of national treasures. In principle, Article 36 will continue to apply.

Member States will therefore be able to continue applying national laws after 1992, provided that they comply with the limits laid down by Article 36 of the EEC Treaty.

11. Completion of the internal market will nevertheless have repercussions on the ways in which such laws are applied, since Member States will no longer be able to carry out checks on goods and persons as they pass through internal frontiers or to base export formalities and controls on tax checks, as they do at present.

In other words, Member States will be able to continue applying their laws, but will lose some of the means of verification hitherto available to them.

#### C. Common rules on exports

12. The Community, which is a customs union, has since 1970 been applying common rules for exports to non-member countries, in pursuance of Council Regulation (EEC) No 2603/69 of 20 December 1969 (OJ No L 324, 27.12.1969, p.25). In principle, exports are unrestricted (Article 1 of Regulation (EEC) No 2603/69). In addition, Community law has harmonized the procedures for the export of Community goods (Directive 82/117/EEC of 24 February 1981, OJ No L 83, 30.3.1981, p.40 and Directive 82/347/EEC of 23 April 1982, OJ No L 156, 7.6.1982, p.1): any such export is conditional on the lodging at a customs office of an export declaration accompanied by "all the documents required for the correct application of [...] provisions governing the export of the goods" (Article 3 of Directive 81/177/EEC).

Nevertheless, Article 11 of Regulation (EEC) No 2603/69 provides that the common rules do not preclude the application by Member States of quantitative restrictions on exports, in particular on grounds of the "protection of national treasures possessing artistic, historic or archaeological value". Moreover, Article XX of the GATT, which also bans export restrictions, provides that the Agreement does not preclude measures "(f) imposed for the protection of national treasures of artistic, historic or archaeological value". The exception provided for by Article 36 of the EEC Treaty as far as intra-Community trade is concerned therefore also exists as regards exports to non-member countries, which is, moreover, perfectly logical.

Clearly, however, each Member State uses the possibility open to it under Article 11 of Regulation (EEC) No 2603/89 in order to apply its own national law. In this area, the Community therefore has twelve different sets of rules at its external frontiers.

13. In principle, completion of the internal market will not alter the situation. The export rules will, however, be applied in a completely different legal context. The fact that there will no longer be any checks at internal frontiers and that the tax administration will no longer be involved in checking objects dispatched within the Community will in practice make it much easier for someone to present a national treasure that has been unlawfully dispatched from the country of origin at a customs office in the Member State of his choice, for export to a non-member country.

In the absence of measures enabling the customs administration of the Member State in which an object is presented for export to a non-member country to take account of the interests of the other Member States, it could apply only its own rules, as is the case today; however, a greater number of objects could be involved than at present.

#### D. International conventions

Of the international instruments that relate directly or indirectly to the protection of cultural property, two conventions are particularly important:

15. The Unesco Convention of 14 November 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. This Convention lays down a broad definition of cultural property. For the purposes of this communication, the relevant provisions are as follows: the States Parties undertake to introduce an export certificate and prohibit the export of cultural property unless accompanied by such a certificate (Article 6); to take measures to prevent museums from acquiring illegally exported cultural property and, at the request of the State Party of origin, return any cultural property stolen from a museum, in return for just compensation to an innocent purchaser (Article 7); and to oblige antique dealers to maintain a register recording the origin of each item of cultural property, the supplier and the price and to inform the purchaser of any export prohibition to which the property may be subject (Article 10).

The Convention has been ratified by Greece, Spain, Italy and Portugal and 59 non-member countries (the United States, Canada, Turkey, Cyprus and seven East European, seventeen African, sixteen Asian and fifteen American states).

16. The European Convention of 23 June 1985 on offences relating to cultural property (Council of Europe No 119). The Convention relates mainly to mutual assistance in the judicial field: Article 8 provides for the enforcement of judgments delivered by any Party for the purpose of seizure and restitution of cultural property found in the territory of the requested Party to the person designated by the judgment; the Parties may nevertheless specify the conditions under which such judgments are enforced. The Convention lays down a list of categories of cultural



property to which it applies, some of which are optional; the offences concerned are theft, appropriation with violence and receiving. The Contracting States may nevertheless declare that it also applies to other offences relating to cultural property, in particular illegal exports.

The Convention has not yet come into force, since it has not so far been ratified by any country (Greece, Italy and Portugal have signed it, as have Cyprus, Turkey and Liechtenstein).

E. Definition of the scope of any measures

17. If certain measures were to be envisaged to protect the heritage of the Member States, the question of the types of object covered would clearly be a crucial one.

It should be stressed that the task is to determine the objects in respect of which monitoring procedures and controls may be established, and not the objects in respect of which Member States actually take measures for the "protection of national treasures" (export prohibitions and requests for return). Monitoring measures necessarily relate to categories or types of object, so that action can be taken in a limited number of cases.

18. As regards "unilateral" measures taken at national level solely with a view to protecting national treasures, Member States are in principle free to determine the categories of property concerned, subject to the restrictions imposed by Community law.

19. As far as any measures to be taken at Community level are concerned, on the other hand, the situation is different. Clearly, monitoring procedures and controls can function at Community level only if they have uniform scope. The latter will naturally be proposed by the Commission, but due account of the wishes of the Member States will clearly have to be taken, since we are, after all, dealing with a matter (protection of the national heritage) which is their responsibility.

20. The scope should not be determined merely by adding together all the categories and groups of objects that are currently subject to controls in at least one Member State. There are two limits: first, the number of objects concerned should be proportional to the severity of the measures envisaged. An extremely strict system requiring a large number of authorizations and frequent involvement of the authorities, etc. can be applied only in respect of a limited number of objects; otherwise, it would either fail to operate effectively in practice or unduly restrict lawful trading. Such an observation holds true even more so in the case of a Europe-wide market. Secondly, the number of objects covered by a given measure should be commensurate with the aim of that measure.

21. It is furthermore necessary to differentiate between the scope of measures envisaged for application at the Community's external frontiers and that of any rules applicable within the Community: the introduction, at Community level, of a measure relating to the export of national treasures would be covered by Article XXIV of the GATT, which concerns customs unions. Such export measures would have to be no more restrictive than existing rules, but would not prevent the maintenance of provisions governing relations between members of the Customs Union.

22. An alternative to defining scope by referring to categories and groups comprising an unknown and indefinite number of objects could be to refer to registers listing specific objects that should be subject to monitoring procedures and controls.

It should be examined carefully to what extent such lists would make it possible to define the scope of any measures by reference to specific objects (lists of national treasures) rather than abstract categories.

23. In any event, although the question of scope in relation to subject matter should logically be tackled first, it can be discussed in detail only after the content of any measures has been decided.

#### F. Bona fide purchasers

24. It should be stressed that this communication focuses on the measures that should enable the Member States to continue after 1992 to protect their cultural heritage. A clear distinction should be drawn between the general problem and the specific questions that arise in connection with the restitution of stolen objects. The question of stolen property (and of whether or not there is a right to demand its return) is governed by the normal rules laid down by civil law in respect of all movable property, which may vary from one Member State to another. The crux of the problem concerns the bona fide purchaser.

25. Similar, although not identical, problems can arise in the case of the bona fide purchaser of a national treasure that has previously been unlawfully dispatched from the country of origin. The authorities (and courts) of one country have hitherto not usually taken into account the export prohibitions of another, and the purchaser can therefore feel relatively secure with regard to a claim for restitution from the country of origin. With completion of the internal market, the question arises of the rights and duties of a person who purchases in good faith an object in Member State B that later proves to have been unlawfully exported from Member State A: his situation is comparable - but not necessarily identical - to that of the bona fide purchaser of a stolen object.

## II. POSSIBLE APPROACHES

26. It is clear from the analysis made in the first part of this communication that completion of the internal market will have the following consequences for protection of the artistic, historic and archaeological heritage of the Member States: the latter may continue to apply, within the limits laid down by Article 36 of the EEC Treaty, their laws prohibiting or restricting the dispatch of national treasures from their territory. They may no longer carry out checks at internal frontiers for the purposes of enforcing their laws, and the fact that the tax administration will no longer monitor intra-Community trade for tax purposes will deprive Member States of a simple method of verification. At the Community's external frontiers, Member States may continue to carry out checks and apply their laws; however, the abolition of frontiers may give rise to problems of unlawful export.

27. The question that has to be addressed is whether such a situation calls for new measures to be adopted to offset the repercussions of completion of the internal market. The Commission wishes to stress that Community law, and in particular Article 36 of the EEC Treaty, already takes account of the specific nature of national treasures and that it intends (see point 5 above) to draw up an interpretative communication setting out the framework within which Member States can apply their laws. It is therefore necessary in the first place to examine whether additional measures are really called for. As already stressed, the approach or approaches taken (or any other ideas followed up) will depend entirely on the outcome of the dialogue with the Member States.

28. The Commission has examined the possible measures, which can be classified according to whether they are to be taken at national level alone (see Section A below) or by the Community. Among the latter, a further distinction should be drawn between rules that could be applied at the external frontiers (Section B below) and those relating instead to the movement of cultural objects within the Community (Section C). For the sake of clarity, the different measures that can be considered are presented according to the degree of involvement of the public authorities in trade in cultural objects.

### A. Measures taken solely at national level

29. As far as the implementation of national laws is concerned, it is for the national legislator in the first instance to decide on the ways and means of enforcing them. What such laws have in common is that they make dispatch of certain cultural objects from national territory subject to

authorization by the public authorities. The question that arises is how the national legislator can induce persons wishing to export a national treasure to follow the procedures it has laid down, in a situation where there are no longer any checks at the Community's internal frontiers.

30. The dissuasive effect of criminal law can be considerable. If unlawful dispatch of a cultural object from national territory were actually sanctioned by fines exceeding the value of the object itself, many people would prefer to follow the established procedures rather than running the risk of being so fined. In the case of dealers, sanctions including temporary suspension or permanent exclusion from the profession could constitute effective "incentives" to compliance.

31. Furthermore, abolition of checks at the Community's internal frontiers does not prevent Member States from carrying out checks elsewhere. Closer monitoring of the art market could be one of the ways in which the national cultural heritage could be afforded greater protection.

#### B. Measures at the external frontiers

32. Consideration should be given in the first place to measures that could be taken by the Community at its external frontiers. The abolition of checks at internal frontiers strips each Member State of its de facto powers physically to retain an object in its territory (although the effectiveness of present checks can be questioned); on the other hand, the presence of an object in the territory of another Member State can still prevent it being lost for ever, since as long as it has not been exported to a non-member country, it remains within the internal market and subject to Community law.

33. Once customs checks on intra-Community trade have been abolished, it will be possible to present an item for export to the authorities of any Member State without its origin in the Community normally being of any importance. Consequently, unless the Community legislates in the matter, a Member State will be able to apply only its legislation and its criteria to cultural property presented for export to a non-member country, and will be unable to take account of the wishes of another Member State or take action on its behalf. The common rules on exports could consequently be supplemented with a requirement that the export declaration for any item of cultural property be accompanied by an export authorization issued by the Member State of origin. Such a measure would presuppose that clear rules be drawn up on the objects concerned (see point 34 below) and the method of determining the Member State of origin, responsible for issuing the authorization (see points 35-36 below).

34. The definition of the objects that could be exported only on production of an authorization issued by the Member State of origin should, since it involves applying customs legislation, take account of the Combined Nomenclature (e.g. Chapter 97: "Works of art, collectors' pieces and antiques"). It will be for the Member States to make their wishes known in this connection.

The definition of the objects concerned should therefore be uniform and could include types of object that are not subject to protective measures in certain Member States (those which apply a less restrictive policy). The authorities of those Member States would, when objects were presented for export from their territory, consequently have to check that they were accompanied by an authorization from the Member State of origin, even if they were not subject to controls under their own national law.

Another consequence would be that the authorities of those Member States would have to make arrangements for issuing authorizations in respect of objects they did not subject to any national protective measure, so that they could be exported from the Community.

35. A more complex problem is that of determining the "Member State of origin", i.e. the Member State responsible for issuing (or, where appropriate, refusing to issue) an export authorization. Certain criteria could be laid down enabling the customs administration to check whether the object presented for export is accompanied by an authorization from the Member State of origin. Of all the possible criteria, the most simple but also the most arbitrary one would be to lay down a reference date. If such a solution were adopted, the exporter would therefore have to request authorization from the Member State in which the object was located on the reference date, unless it had subsequently been lawfully dispatched to another Member State, which would then become the Member State responsible. The Member State responsible would have to examine whether, under its legislation, the object could be exported to a non-member country. If so, it would issue an authorization; if the latter were assigned a certain period of validity (five years, for example), the object could be shipped to and sold at (and finally exported from) the place in the Community that best suited the owner, who would not be inconvenienced during that period by the rule whereby once an object is dispatched lawfully to another Member State, the latter becomes the "Member State of origin".

36. If, in the case of a given object, the exporter is unable to indicate the Member State responsible, e.g. through lack of information, a possible solution could be either to require the exporter to request all twelve Member States to issue a declaration that they are not concerned by the planned export, or to send the request for authorization to the administrations of the other Member States, which would have a set period (e.g. three months) within which to take any action.

37. Such a system would enable the customs administration of each Member State to take account of the interests of the Member State of origin of each object presented for export, since the individual decision (on whether or not to allow export) would already have been taken by the competent authorities of the Member State to whose legislation the object in question is subject. Any national treasure unlawfully dispatched to another Member State after the reference date could not therefore be

exported to a non-member country, since the exporter would have an authorization from neither the Member State of origin nor the second Member State; the latter could not issue an authorization since the object was not located in its territory on the reference date and could be presumed not to have been lawfully dispatched to its territory after that date.

C. Measures relating to movement within the Community

38. Existing national laws are aimed at physically retaining the object in question in the territory of the Member State concerned. Frontier checks enable the dispatch of national treasures to be prevented to some extent.

Where, in the present situation, a national treasure has left the territory of a Member State, the latter no longer has any de facto powers over the object: it can only bring pressure to bear (through penal sanctions) in an attempt to recover it, unless there is an agreement between the country of origin and the country of destination. Some Member States may well take the view that stepping up the measures taken at national level (see section A above) will not be sufficient to prevent an unacceptable increase in the number of objects dispatched unlawfully (i.e. without the established procedures being followed). The question therefore arises whether measures should be taken at Community level to prevent such an increase. Several measures can be contemplated; some of them would be more difficult to put into effect than others.

(1) Distinction between authorization to export and authorization to dispatch

39. The first question to discuss is whether Member States intend to apply their laws after 1992 without taking account of the planned destination of the object, as is the case at present. It is quite possible that Member States might agree to allow an object to be dispatched<sup>1</sup> to another Member State, provided that it were not subsequently exported to a non-member country; the authorization to dispatch the object would in that case be conditional.

40. Such a distinction would be meaningful only if the Member States agreed to introduce common rules at the Community's external frontiers, as described above (points 32 et seq). In that case, the result of distinguishing between authorization to export and authorization to dispatch would be that the first Member State would remain the "Member State of origin" for the purposes of the common rules on exports, although the object would be lawfully located in the territory of another Member State. Such a distinction would be fairly difficult to put into practice, since it should presuppose that the second Member State, to which the object had been (by definition lawfully) dispatched, were informed by

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<sup>1</sup> In this communication, the term "dispatch" is used instead of "export" where an object is moved within the Community only.

the first Member State that the latter was opposed to subsequent export: the second (or third, or fourth) Member State would normally regard itself as the Member State of origin for the purposes of issuing any export authorization, since the object arrived lawfully in its territory.

41. The distinction between export authorization and authorization to dispatch also gives rise to problems other than practical ones, and in particular the question of how long the first Member State can continue claiming to be the "Member State of origin" for the purposes of exports (how could it, for example, once an item had been in the territory of another Member State for some ten or twenty years, subject to it being exported to a non-member country on the grounds of the need to protect a "national" treasure?).

(2) Mutual recognition of national laws

42. Another approach that could be contemplated would be to replace the possibility of physically preventing an object from leaving national territory by the assurance that an object will be returned where it has been dispatched illegally.

This could take the form of mutual recognition by the Member States of the prohibitions and restrictions enshrined in their laws, with the result that they would have to apply such measures in their territory to national treasures belonging to the national heritage of the other Member States by returning such treasures where they have been unlawfully dispatched. Such a suggestion presupposes that agreement be reached on the principle, scope and, where appropriate, conditions of such mutual recognition (see point 43 below) and that clear rules be drawn up for determining to what national heritage a given object in the Community belongs or has belonged (see points 44-45 below).

43. In view of the great differences between national laws, mutual recognition of prohibitions on dispatch without prior authorization will not be a simple matter to agree: it could give rise to a situation in which a Member State is obliged to seize and return an object which, if its own domestic law had been applicable, would not have been the subject of protective measures.

Such mutual recognition should not therefore be unlimited. In the first place, the laws of other Member States can clearly be recognized only insofar as they are compatible with Articles 30 to 36 of the EEC Treaty: the system can never result in the enforcement of prohibitions that are themselves incompatible with Community law. If the political will existed, the Council could make mutual recognition of national laws subject to stiffer restrictions than those already imposed by Article 36 of the EEC Treaty, so that recognition would apply only in the case of the most important objects.

Furthermore, in order to limit exercise of the right to restitution of an object unlawfully dispatched from a Member State's territory, restitution could be made subject to certain conditions that demonstrate to the country

returning the object that the latter is genuinely important to the Member State of origin (for example, the condition that the object in question be placed in a collection on public display).

44. It is a more delicate matter to determine the Member State of "origin" of any object located somewhere in the Community, i.e. to determine in the case of each object concerned the Member State that would be entitled, where appropriate, to demand the return of the object to its territory.

The simplest solution would appear to be to set a reference date on which all objects are presumed to "originate" in the Member State in whose territory they are then located (unless they have been loaned, e.g. for an exhibition). The date chosen could, for example, be that on which the mutual recognition of national laws came into force.

45. If that course of action were taken, a Member State requesting the return of a national treasure would therefore have to prove that it was located in its territory on the reference date; a variety of evidence could be used for the purpose: for example, registers, lists or catalogues on which the object appears. The Member State in question would naturally also have to prove that the object was (a) not allowed to be removed from its territory without its prior authorization and (b) indeed dispatched unlawfully.

If the object had been lawfully dispatched to another Member State after the reference date, the latter country would become the "Member State of origin". For the purposes of intra-Community trade, however, such a possibility would be fairly remote, since Article 36 of the EEC Treaty allows restrictions on intra-Community trade in cultural property only after the item in question has been in the territory of a given country for an extended period, a situation that would not arise until the late 21st century.

46. Mutual recognition of Member States' laws could be achieved by means of a Community measure.

Nevertheless, the Commission should discuss with the Member States, as suggested in the "Palma document" (see point 2), whether the same result could not be achieved by ratifying either the Unesco or the Council of Europe Convention (mentioned in points 15-16). If so, the Commission could send the Member States a recommendation that they sign and ratify one or both of the Conventions within a specified period and on the basis of a common attitude with regard to its or their provisions.

47. If Member States wished to be certain that any national treasure unlawfully dispatched would be returned to their territory, such a system of mutual recognition would be satisfactory in that respect.



The system would, however, clearly also have major drawbacks for bona fide purchasers and consequently, at an earlier stage, for traders, antique dealers, etc., who could be faced at any time with a restitution claim from a Member State. Bona fide purchasers can be afforded better protection (see points 57 et seq. below): the solution would be to do away with the need for the legal concept of "good faith" by organizing trade in cultural property in such a way that the trader can assure the purchaser that he will not be faced with a claim. Such a method of safeguarding trade would, however, involve formalities, which would afford the purchaser the certainty (and not merely an assurance based on "good faith") that the rules have been complied with, but would also inconvenience the trade. It should be borne in mind that the procedures would have to be applied not only to cultural property whose dispatch is envisaged, but also to cultural objects that have always been located in the territory of a Member State and whose dispatch is in no way envisaged.

(3) An optional harmonized documentation system for cultural property

48. Should the Member States wish to implement some of the abovementioned measures, it could be deemed useful to harmonize national procedures so that the decision to authorize dispatch and export (or acknowledgement that the object in question may be freely dispatched, but not exported) is made in a manner that is clear to anyone in the Community. To that end, a system could be contemplated whereby it would be possible to lodge with the authorities a file on any item of cultural property, giving a description thereof and any other useful information, on the basis of which an identification sheet would be drawn up according to a standard format throughout the Community.

49. This section discusses the use that could be made of an identification sheet system if it were to remain optional; section 4 (points 64 et seq.) discusses the consequences of making such sheets mandatory for some or all cultural property.

Before entering into the discussion, however, it should be stressed that a system of identification sheets accompanying cultural property could be genuinely effective and reliable only in the case of objects that can be individually identified: it would be much more difficult to apply such a system to series-manufactured objects such as books, coins, stamps, silverware or tableware.

50. The sheet could have a variety of uses: every decision by a Member State affecting the cultural object in question could thus be added to the file and noted on the sheet, in particular authorizations to dispatch and export the object, acknowledgement that it may be freely dispatched or exported or refusal to allow it to be removed from the territory.

51. Possession of such an identification sheet would clearly enable the holder or any subsequent purchaser to contest any unjustified claim by the Member State of origin and would also enable the object to be sold to anyone in the Community under conditions (harmonization of the form) which would assure the purchaser that he would not be liable to a claim from the Member State of origin.

52. If it were limited in that manner, however, the identification sheet would serve to safeguard trade in only those objects for which a decision had been taken (i.e. those which have crossed a frontier) and would not solve the problem of all those "national" objects put on sale in the Member State in which they were made. The possibility could therefore be envisaged of allowing the identification sheet for any object (whether or not removal from the territory is planned) to be endorsed, by an administrative authority, a member of the legal profession (such as a notary or solicitor) or other reliable persons, with a declaration that the object has been present in the territory of the Member State concerned since at least the reference date (or, where appropriate, that it has been present in the territory of a Member State since the reference date, has been lawfully dispatched and has been in the territory of the second Member State since dispatch).

The purchaser of an object accompanied by an identification sheet endorsed with such a declaration could be certain that the object he intends to purchase has not been unlawfully dispatched from another Member State. As long as he kept the object in the territory of the Member State in which he purchased it, he could be certain never to be faced with a request for its return to another Member State. If he wished to dispatch the object to another Member State, he would have to follow the procedures or else run the risk of subsequently being confronted with a restitution claim.

53. The possibility could also be envisaged of granting the holder of any cultural object the right to have its status (exportable or not) determined in advance by the administration. The administration's answer would thus be obtained well before any dispatch or export was contemplated. Such a declaration should have a certain period of validity (e.g. five years). The advantage would be that the dealer could, at the time of sale, dispose of an unencumbered object: he would know, and the purchaser would know, that the operation could take place at all events. It might, however, prove difficult to put such a suggestion into practice in the early stages, if the number of objects submitted for a decision were too large.

54. Lastly, the possibility could be envisaged of equating the identification sheet with an assurance that the object is not stolen. If there were a European catalogue of stolen works of art or a comparable system set up by the insurance companies, an identification sheet could not be drawn up, on submission of the file, until a check had established that the object was not stolen. The same aim could be achieved, but in a manner that would be much more exacting for the trade, if the identification sheet were deemed to constitute a (contractual) undertaking on the part of the dealer that the object was not stolen. The vendor could ensure that such was the case by demanding similar assurances from his supplier. If, despite the existence of the identification sheet, the object nevertheless proved to be stolen, the purchaser could take action against the vendor.

(4) A mandatory documentation system for cultural property

55. The Community could also make it mandatory to lodge with the authorities, in respect of some or all of the categories of cultural property covered by the rules, a file, a summary of which (the identification sheet) would have physically to accompany the object in question. It has already been stressed that such a system would probably prove exacting for the art trade and possibly also difficult to put into practice at any given time for all the objects concerned, since the administration would be temporarily inundated with applications. It should nevertheless be pointed out that the system would not necessarily require the authorities to take any particular action with regard to each object: it would be sufficient for the owner to lodge the file on the reference date and draw up the identification sheet himself, the faithfulness of which (identity of the object and its presence in the territory on the reference date) could be confirmed by persons recognized by the authorities for the purpose (notaries, solicitors, curators of museums, etc.).

56. A mandatory system would also have its advantages. The purchaser of a cultural object must be made aware of its correct status and he would not be entitled to claim any injury if a Member State were subsequently to demand that the object be returned to its territory: the purchaser would be able to ascertain from the identification sheet whether the object had been unlawfully dispatched to another Member State, and could not claim good faith if he purchased an object without an identification sheet.

57. Secondly, a mandatory system would greatly facilitate application of the common rules on exports, since the owner or new purchaser would not have to initiate investigations (Where was the object on the reference date? Had it been lawfully dispatched from that Member State to another one after that date?) in order to determine which Member State was responsible for issuing an authorization when he intended to export the object to a non-member country, since the information would appear on the identification sheet.

58. Lastly, if establishment of an identification sheet also constituted an assurance that the object was not stolen, the public authorities could combat the receiving of stolen works of art much more easily, since unscrupulous dealers could no longer claim that they were unaware of an object's true status.

(5) Registers of national treasures

59. Mandatory documentation for cultural property is clearly the most bureaucratic of all the ideas set out for consideration, but would at least be a clear-cut solution. It links up to some extent with the idea of registers. Thought can be given to the question whether national treasures can be protected at European level on the basis of Member States' registers of national treasures, possibly grouped together to form a European register. The latter would theoretically be the ideal solution, but the feasibility of compiling such a European register, possibly in the medium term, should be examined carefully with the Member States.

### III. CONCLUSIONS

The Commission is proposing approaches to the problem of reconciling, with a view to completion of the internal market, the fundamental principle of the free movement of cultural property with Member States' right to protect their "national treasures possessing artistic, historic or archaeological value" (Article 36 of the EEC Treaty).

The situation after 1992 will be as follows:

- Member States will remain entitled to take the necessary measures to protect their national treasures where such measures are justified by Article 36 of the EEC Treaty and compatible with Community law;
- they will, on the other hand, no longer be able to carry out checks at the Community's internal frontiers to ensure the effectiveness of any measures they have taken under Article 36. It is therefore necessary to discuss what could be done at Community level to ensure that the abolition of checks at internal frontiers does not have adverse repercussions on the protection of national treasures.

The approaches proposed in this communication are based on a set of concrete measures (at national level, in points 29-31, at the external frontiers, in points 32-37, and within the Community, in points 38-59) which are in line with the principle of subsidiarity and have due regard to the particular cultural characteristics of the Member States.

Their aims are chiefly twofold:

- to provide for the mutual recognition of Member States' laws, thus ensuring that national treasures unlawfully dispatched from the territory of a Member State are not exported to a non-member country;
- to determine the possibilities for the return of national treasures that have been unlawfully dispatched from the territory of a Member State.

The Commission would stress that the conclusions of the Coordinators' Group concerning the need for measures were confirmed by the Madrid European Council; the appropriate provisions should, furthermore, be adopted by 31 December 1992. The Commission takes the view, in particular, that all Member States should in the first instance ratify the Unesco Convention of 14 November 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. It reserves the right, once this communication has been examined by the Council and the European Parliament, subsequently to present proposals relating to the measures contemplated in points 32-59 above or any other measures. The ideas set out in this communication constitute a point of departure and can be supplemented by any other suggestion made during discussions with the Member States and the sectors concerned.