



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.10.1995
COM(95) 479 final

95/0253 (ACC)
95/0254 (COD)

Proposal for a
COUNCIL REGULATION (EC)

amending the Annex to Council Regulation (EEC) No 3911/92 of 9 December 1992 on
the export of cultural goods

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

amending the Annex to Council Directive No 93/7/EEC of 15 March 1993
on the return of cultural objects unlawfully removed from the territory of a Member State

(presented by the Commission)

EXPLANATORY MEMORANDUM**I. Introduction****A. The purpose of the Regulation and the Directive**

In order to meet the objective in Article 7a of the EC Treaty of a border-free area in which goods can circulate freely, the Community has developed two extra pieces of legislation covering cultural goods:

- Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods,¹ and
- Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.²

The two instruments provide Community protection for national treasures over and above that which Member States are entitled to offer under Article 36 of the EC Treaty. The scope of such protection is laid down uniformly in the categories of cultural goods in the Annexes. The Annexes are the same for the Regulation and the Directive so that equal protection can be given to a set artefact irrespective of the Member State in which it is found.

- Cultural objects listed in one of the categories of the Annex may only be exported on presentation of the export licence referred to in the Regulation irrespective of which Member State they are going to or coming from.
- Cultural objects in one of the categories of the Annex which have been illegally removed from a Member State which deems them to be national treasures may be recovered under the terms of the Directive, irrespective of the Member State in which they are found.

1 OJ L 395, 31.12.1992, p. 1.

2 OJ L 74, 27.3.1993, p. 74.

In other words, the treatment and protection of a cultural object listed in one of the categories of the Annex and destined for export or recovery must be the same throughout the Community.

B. The problem of water colours, pastels and gouaches

The Advisory Committee on cultural goods set up to help the Commission implement the Regulation generally (Art. 8) and examine any issues connected with implementation of the Annex to the Directive (Art. 17) has pointed out that the current wording of the Annex does not provide identical treatment for water colours, pastels and gouaches. This is because of discrepancies in the different language versions arising from the differing artistic traditions of Member States.

These discrepancies are set out in detail in section II of the explanatory memorandum.

As this state of affairs runs counter to the aim of the Regulation and the Directive and to the wishes of the Member States as confirmed in the Advisory Committee, the Annex needs to be amended.

C. The scope and timing of the amendment

Both the Regulation and the Directive make provision for the Council to review the effectiveness of these measures every three years and to make any necessary amendments on a proposal from the Commission. The Council is also required, again acting on a Commission proposal, to review and if necessary update the amounts in the Annex.

The first of these double three-year reviews will be some time next year.

However, the problems caused by discrepancies in the language versions relating to water colours, pastels and gouaches cannot wait that long as they run counter to the aim of the Regulation and the Directive and need to be sorted out as soon as possible.

It is this specific problem only which this proposal seeks to remedy. Any solution, furthermore, needs to maintain as far as possible the balance reflected in the Annex as drawn up by the Council in 1992.

Other possible improvements to the Regulation and Directive or amendments to the Annex will be considered during the three-year review.

II. Water colours, pastels and gouaches

A. The relevant categories of cultural objects

The Advisory Committee on Cultural mentioned above has observed that there is a discrepancy between the Member States as to where water-colours, gouaches and pastels are to be classified in the Annex which is common to both Council Regulation (EEC) No 3911/92 and Council Directive 93/7/EEC. Some Member States take the view that they are in Category 3 as they are clearly paintings, or at least they are not drawings, while other Member States of a slightly different artistic tradition have always regarded them as drawings and feel they can only be in Category 4. The financial threshold for pictures and paintings of Category 3 is 150.000 ecu while for drawings of Category 4 the financial threshold is only 15.000 ecu. It is therefore clearly necessary that all the Member States treat the same art objects in the same way or serious distortions could arise.

- Category 3 reads "Pictures and paintings executed entirely by hand, on any medium and in any material", while
- Category 4 reads "Mosaics ... and drawings executed entirely by hand on any medium and in any material."

The terminology of the Annex is loosely based on that of the Combined Nomenclature.

B. Linguistic analysis

It is clear from analysis that the nomenclature terminology (Heading 9701) is not of any assistance in this affair. This is because the same, by definition, global range of items have rather different descriptions in different language versions. For illustrative purposes only, the English, French and German versions are given below.

- The English is "Paintings, drawings and pastels".
- The French is "Les tableaux (pictures), les peintures (paintings) ou les dessins (drawings)".
- The German is "Gemälde [paintings] (Z.B.[e.g.] Ölgemälde [oils], Aquarelle [water-colours], Pastelle [Pastels]) und Zeichnungen [drawings]".

These are obviously not word for word equivalent. This is of no particular importance for tariff purposes as all these goods are treated the same way and the only need is to distinguish between these "executed entirely by hand" and "others".

The German text would not allow water-colours to be classed as drawings. Both the English and the German texts would not allow pastels to be classed as drawings. For the English they are a class apart and for the German they are "paintings".

However, the Annex to this Regulation in both English and German does not reflect the Combined Nomenclature, as they both say "Pictures and Paintings" (Bilder und Gemälde) for Category 3 and "Drawings" (Zeichnungen) for Category 4. Note : this is presumably an error perhaps due to direct translation from a French original text, rather than checking the equivalent already used in the Combined Nomenclature. However this does not materially effect the situation.

C. As between categories

As the term "Pictures/Tableaux/Bilder" covers both paintings and drawings the tendency must be to say everything that is not a "drawing/dessin/Zeichnung" of Category 4 is in Category 3. However what is a drawing ? There seem to be at least two clear and mutually incompatible schools of thought.

Many regard works done using water colours, gouache (poster paints) and pastels (coloured chalks) as being drawings. In which case the 15.000 ecu limit applies. This view seems to be predominant in France, Belgium, Greece, and the Netherlands at least. Perhaps it is allied to the nature of the materials used rather than the technique. With all these pigments the binding or carrying material is no longer present when it evaporates leaving essentially a dry powder, like works made by ink, pencil, charcoal or chalk - the primary materials used for drawing proper. Indeed one dictionary is careful to observe that "by tradition water-colours and gouache are called drawing".

This careful phrase is because the other school of thought seems to approach the distinction in terms more of the technique of application. Drawing has as the basic element the use of line and "drawn" surfaces. Painting is distinguished as colouring (even if in black or white) the whole, or nearly the whole surface by sheets of colour. On the borderline between the two might be pastels (and coloured pencils ?) where the result is a surface completely covered by the medium and which therefore in some ways resembles a painting. This is perhaps why the English nomenclature text specifies pastels separately as being neither drawings or paintings and why the German clearly says pastels are paintings. Thus for this school of thought water colours and gouache (and perhaps pastels) are paintings, and thus subject to the 150.000 ecu limit. This school of thought is prevalent in particular in the United Kingdom, Ireland and Germany.

The conclusion of this very limited sketch of the situation is that we are unlikely ever to be able to come to a "logical" mutually acceptable definition of drawing among experts as including or excluding watercolours, pastels and gouaches that will satisfy all the schools of thought.

D. The solution

The fundamental difference of treatment of water-colours, gouaches and pastels in the various Member States, due to different but equally on valid artistic reasons based interpretations of the text, must be addressed before the first 3 year report (see point C above).

In the view of the Commission the time is not ripe for an examination of the financial thresholds in general after only two years of operation and any proposal to modify one or more of them or to introduce a new category would be in itself undesirable. However there is no alternative in the present case. Consequently the change made should be strictly limited to the minimum necessary to deal with the immediate problem.

However, in deciding to which category water-colours, gouaches and pastels should be put regard has to be given as to the practical effects this would have. It has been pointed out to the Commission that it is rare for water-colours, gouaches and pastels to realise the same level of price at auction as oil and tempera paintings (we must not forget that we are dealing with paintings that are at least 50 year old). In general the prices fetched by them seem to be more of the same order as those that are achieved by drawings but tend to be higher. If they were to be put into category 3 as paintings then the effect would be that virtually none of them would be subject to the need for a Community export licence. It would then, at first sight seem preferable to place them in category 4 and treat them as drawings but this would be unacceptable to some Member States due to the administrative burden involved in issuing many more licences than they have to at present for items that could in their view never be of any major cultural significance.

The solution then must lie in creating a new separate Category just for water-colours, gouaches and pastels with an appropriate threshold. It is clear that the higher the threshold is set the more difficult it will be to obtain agreement between the Member States and the lower the threshold the more administrative work that will be generated in issuing licences for works that are not really of a major artistic significance. It is clear to the Commission that as a result of discussions with the Member States in the Advisory Committee that the new threshold will need to lie between 15 000 and 150 000 ecu if it is to be acceptable to them, albeit reluctantly as a compromise. Taking this into account the Commission proposes a threshold of 30 000 ecu for the new Category.

Proposal for a
COUNCIL REGULATION (EC)

95/0253 (ACC)

amending the Annex to Council Regulation (EEC) No 3911/92 of 9 December 1992 on
the export of cultural goods

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular
Article 113 thereof,

Having regard to the proposal from the Commission¹

Having regard to the opinion of the European Parliament²

Having regard to the opinion of the Economic and Social Committee³

Whereas according to different artistic traditions within the Community water-colour, gouache, and pastel pictures are variously regarded as being either paintings or drawings; whereas Category 4 of the Annex to Council Regulation 3911/92 on the export of cultural goods⁴ includes drawings executed entirely by hand made on any medium in any material and Category 3 includes pictures and paintings executed entirely by hand made on any medium in any material; whereas the financial thresholds which apply to these two Categories are different; whereas this could lead to serious differences of treatment inside the single internal market of water-colour, gouache, and pastel pictures depending upon in which Member State they are situated; whereas it is necessary to decide for the purposes of the application of the Regulation into which Category they shall fall to ensure that the financial thresholds applied shall be the same throughout the Community;

¹ OJ No C, . . .1995, p. .

² OJ No C, . . .1995, p. .

³ OJ No C, . . .1995, p. .

⁴ OJ No L 395, 31.12.92, p.1.

Whereas experience shows that the prices realised by water-colour, gouache, and pastel pictures tend to be rather higher than those realised by drawings and much lower than those fetched by paintings in oil or tempora, whereas accordingly it is expedient to place water-colours, gouache, and pastel pictures into a new separate Category with a threshold of 30 000 ecu which would ensure that works of major significance would require an export licence while there would not be the creation of any undue administrative load placed upon the licensing authorities.

HAS ADOPTED THIS REGULATION:

Article 1

The Annex to Council Regulation (EEC) No 3911/92 shall be amended as follows:

(a) In A:

(i) the description in 3. shall be replaced by:

"Pictures and paintings, other than those included in category 3A or 4, executed entirely by hand in any medium and on any material"

(ii) A new 3A shall be introduced as follows:

"3A. Water-colours, gouaches and pastels executed entirely by hand on any material"

(iii) the description under 4. shall be replaced by the following

"Mosaics in any material executed entirely by hand, other than those falling in categories 1 or 2, and drawings in any medium executed entirely by hand on any material"

(b) In B:

a new category shall be inserted

"30 000

—3A (Water colours, gouaches and pastels)"

Article 2

This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Communities. It shall be applicable from 1 September 1995.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels ,

For the Council

The President

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

95/0254 (COD)

amending the Annex to Council Directive No 93/7/EEC of 15 March 1993
on the return of cultural objects unlawfully removed from the territory of a Member State

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community, and in particular
Article 100a thereof,

Having regard to the proposal from the Commission¹

Having regard to the opinion of the Economic and Social Committee²

Acting in accordance with the procedure referred to in Article 189B of the Treaty,

Whereas according to different artistic traditions within the Community water-colour, gouache, and pastel pictures are variously regarded as being either paintings or drawings; whereas Category 4 of the Annex to Council Directive N° 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State³ includes drawings executed entirely by hand made on any medium in any material and Category 3 includes pictures and paintings executed entirely by hand made on any medium in any material; whereas the financial thresholds which apply to these two Categories are different; whereas this could lead to serious differences of treatment inside the single internal market of water-colour, gouache, and pastel pictures depending upon in which Member State they are situated; whereas it is necessary to decide for the purposes of the application of the Directive into which Category they shall fall to ensure that the financial thresholds applied shall be the same throughout the Community;

¹ OJ No C, . . .1995, p. .

² OJ No C, . . .1995, p. .

³ OJ No L 74, 27.3.93, p. 74.

Whereas experience shows that the prices realised by water-colour, gouache, and pastel pictures tend to be rather higher than those realised by drawings and much lower than those fetched by paintings in oil or tempora, whereas accordingly it is expedient to place water-colours, gouache, and pastel pictures into a new separate Category with a threshold of 30 000 ecu which would ensure that works of major significance unlawfully removed from the territory of a Member State can be returned.

HAVE ADOPTED THIS DIRECTIVE :

Article 1

The Annex to Council Directive No 93/7/EEC shall be amended as follows:

(a) In A:

(i) the description in 3. shall be replaced by:

"Pictures and paintings, other than those included in category 3A or 4, executed entirely by hand in any medium and on any material"

(ii) A new 3A shall be introduced as follows:

"3A. Water-colours, gouaches and pastels executed entirely by hand on any material"

(iii) the description under 4. shall be replaced by the following

"Mosaics in any material executed entirely by hand, other than those falling in categories 1 or 2, and drawings in any medium executed entirely by hand on any material"

(b) In B:

a new category shall be inserted

"30 000

—3A (Water colours, gouaches and pastels)"

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six months of its adoption. They shall forthwith inform the Commission thereof.

When member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 3

This Directive is addressed to the Member States.

Done at Brussels ,

For the European Parliament

The President

For the Council

The President

DOCUMENTS

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Catalogue number : CB-CO-95-520-EN-C

ISBN 92-77-94384-X

Office for Official Publications of the European Communities

L-2985 Luxembourg