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# Protecting National Treasures in a Single-Market EC

## INTRODUCTION

Article 36 of the Treaty Establishing the European Economic Community (EEC Treaty) gave each country the right to protect its "national treasures possessing artistic, historic, or archeological value."<sup>1</sup> In creating a single, customs-free market, however, the Treaty did not make special provisions for the protection of such national treasures.<sup>2</sup> With the emergence of a single, borderless European market which threatened to further a growing trade in stolen treasures, the European Commission submitted two new rules regarding the protection of national treasures.<sup>3</sup> One rule is embodied in a Regulation providing for uniform controls on exports of national treasures out of the European Community (EC or Community).<sup>4</sup> The other is Directive 92/280, requiring restitution of national treasures illegally exported from one Member State to another.<sup>5</sup> The new rules represent attempts to reconcile the conflicting principles of free cultural exchange with the protection of cultural heritage, both of which are embodied in the EEC Treaty.<sup>6</sup>

The Community proposed these new protections in response to expert claims that, in a Europe without internal border controls, national treasures could leak out of the Community by passing through the Member State with the most lenient rules.<sup>7</sup> An alliance

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<sup>1</sup> TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 36 [hereinafter EEC TREATY]; Alan Riding, *Europe, Unifying, Has Fears For Its Art*, N.Y. TIMES, Dec. 28, 1992, at 9.

<sup>2</sup> Riding, *supra* note 1, at 9.

<sup>3</sup> Andy Rosenbaum, *European Business: Picture Looks Bad for Art as Doors Open Up*, DAILY TELEGRAPH, Jan. 20, 1992, at 21, available in LEXIS, Nexis Library, Omni File.

<sup>4</sup> Proposal for a Council Regulation (EEC) on the Export of Cultural Goods, art. 2, 112 O.J. (C 53) 8 [hereinafter Regulation on Cultural Goods].

<sup>5</sup> *Culture: Export Regulation and Restitution Legislation to Protect National Treasures*, Eur. Info. Serv., Jan. 21, 1992, available in LEXIS, Europe Library, Allour File [hereinafter *Export Regulation and Restitution*]; Amended Proposal for a Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State 92/280, art. 2, 1992 O.J. (C 172) 7 [hereinafter Directive 92/280].

<sup>6</sup> Riding, *supra* note 1, at 9; *Export Regulation and Restitution*, *supra* note 5.

<sup>7</sup> Tim Jackson, *EC Rejects Art Market Controls*, INDEPENDENT, May 19, 1992, at 8, available in LEXIS, Nexis Library, Omni File.

between art thieves and drug traffickers has helped make the trade in stolen art works a billion dollar industry.<sup>8</sup> European organized crime also is becoming a force in the art and antiquities market.<sup>9</sup> According to one American expert, "[a]rt provides the perfect situation for money launderers: it's untraceable, and it gains value continually. So the traffic will be hard to stop."<sup>10</sup> Within the EC, southern Member States feared that their cultural masterpieces would be lost to rich art dealers in the north.<sup>11</sup> The EC's new rules specify categories of national treasures, such as pre-1900 paintings and old manuscripts, subject to Community protection.<sup>12</sup> The European Commission approved the original proposals on January 15, 1992.<sup>13</sup> Community Ministers approved the amended Directive 92/280 on November 10, 1992.<sup>14</sup> Likewise, the Community Ministers approved the Regulation on December 9, 1992; after endorsement by the European Parliament, Directive 92/280 became law in the spring of 1993.<sup>15</sup>

This Comment discusses the divergent perspectives among European countries regarding protections of national treasures prior to the new rules, and analyzes the nature of the compromise reached by the Member States. Part I describes a variety of protective domestic Regulations for national treasures existing among Member States prior to Directive 92/280. Part II discusses the philosophical split between northern and southern Europe on the desired level of protection for national treasures. Part III analyzes Directive 92/280. Part IV examines the nature and balance of the compromise, and considers several of the issues which still may be in dispute. This Comment concludes that although the new protective measures represent a balanced compromise, doubts linger as to whether and to what extent these complex protections will be enforced.

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<sup>8</sup> Rosenbaum, *supra* note 3, at 21.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (quoting Anthony Intriago, director of the newsletter Money Laundering Alert).

<sup>11</sup> George Brock, *UK Reign in Art Sales Threatened*, THE TIMES (London), May 19, 1992, available in LEXIS, Nexis Library, Omni File.

<sup>12</sup> Rosenbaum, *supra* note 3, at 21.

<sup>13</sup> *Export Regulation and Restitution*, *supra* note 5.

<sup>14</sup> Riding, *supra* note 1, at 9.

<sup>15</sup> See *EC: Single Market—Arrangements for Cultural Assets are Definitively Established*, Reuters, Mar. 17, 1993, available in LEXIS, Europe Library, Alleur File [hereinafter *Arrangements for Cultural Assets*].

## I. MEMBER STATE DOMESTIC REGULATIONS VARIED PRIOR TO THE NEW RULES

All Member States have national laws which forbid the export of their most famous and valued art treasures.<sup>16</sup> The definition of "national treasure" varies, however, among Member States.<sup>17</sup> In addition, not all Member States have restitution systems in place, and those which do exist are not always satisfactory.<sup>18</sup>

Northern European countries' definitions of national treasures are generally liberal, though some classes of items are protected specifically. The Netherlands restricts the sale of property in state museums and has compiled a list of approximately 300 other objects and collections that cannot leave the country without governmental permission.<sup>19</sup> Most of these items are silver and sculptures owned by churches, but paintings by Rembrandt and Bruegel are also included in the list.<sup>20</sup>

Britain imposes export controls on all archeological objects and on paintings sold for \$70,000 or more.<sup>21</sup> Britain also regulates traffic in its national treasures with the "Waverley system." Under this system, once the market has fixed a price of an item at auction, a British museum or gallery can try to match the price.<sup>22</sup> The nation can consider a piece's "heritage" value in determining the importance of retaining or obtaining the work.<sup>23</sup>

In contrast to limited definitions and restrictions in northern Europe, some Mediterranean countries regard "treasure" as almost everything they possess that is more than fifty years old."<sup>24</sup> In France, customs authorization must be obtained for export of a cultural object, and the value of an object has no bearing on any restriction.<sup>25</sup> Prior to Directive 92/280, the French government prepared a bill

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<sup>16</sup> Brock, *supra* note 11.

<sup>17</sup> See Terry Williams, *EC Ministers Debate How to Keep National Treasures at Home*, Reuters, Oct. 17, 1990, available in LEXIS, Nexis Library, Omni File.

<sup>18</sup> *Export Regulation and Restitution*, *supra* note 5.

<sup>19</sup> Suzanne Perry, *EC Debates Difference Between Picassos and Paint*, Reuters, Oct. 17, 1990, available in LEXIS, Nexis Library, Omni File.

<sup>20</sup> *Id.*

<sup>21</sup> Williams, *supra* note 17.

<sup>22</sup> *Art Sans Frontières*, THE TIMES (London), Nov. 11, 1992, available in LEXIS, Europe Library, Allour File.

<sup>23</sup> *Id.*

<sup>24</sup> Tom Walker, *Greece Turns to EC to Regain Marbles*, THE TIMES (London), July 4, 1991, available in LEXIS, Nexis Library, Omni File.

<sup>25</sup> *Free Movement of Works of Art*, BUS. L. BRIEF, Sept. 1992, available in LEXIS, Nexis Library, Omni File.

under which an owner or dealer would apply to the customs authorities and to the Musée de France for a certificate which would allow the object to move freely within the EC for five years.<sup>26</sup>

Spain too has taken a broad approach, requiring export certificates for all antique cultural items.<sup>27</sup> In Greece, anything dating back before 1830 is considered state property.<sup>28</sup> Italy considers over 30 million works of art as falling within the article 36 category.<sup>29</sup> One Community expert declared, "[t]here is so much difference between national legislations that it would be impossible to get a common position."<sup>30</sup>

## II. EUROPE SPLIT ON ISSUE OF OPEN MARKET FOR NATIONAL TREASURES

With the debate over safeguarding national treasures, the battle over control of the European art market intensified in the late 1980's.<sup>31</sup> In southern Europe, the state and church were historically the main patrons and collectors of art, and are still possessive about national cultural heritages.<sup>32</sup> France, Italy, Spain, and Greece, the countries with the "richest cultural patrimonies," demanded new controls.<sup>33</sup> In contrast, Germany, The Netherlands, Belgium, and Great Britain supported the international art market.<sup>34</sup> Britain, in particular, with the Community's most successful auction houses, favored liberalization of the art market.<sup>35</sup>

Southern Member States argued that when EC border controls disappeared in January 1993, irreplaceable pieces would flow northwards in the hands of rich art dealers profiting from the new freedoms.<sup>36</sup> Spain proposed a uniform certificate of free circulation, enabling the EC to monitor the movement of art and prevent people from claiming they unknowingly had purchased a stolen item.<sup>37</sup> Greece and Italy, which lost many precious pieces over the centuries,

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<sup>26</sup> *Id.*

<sup>27</sup> Perry, *supra* note 19.

<sup>28</sup> Williams, *supra* note 17.

<sup>29</sup> Lord Gowrie, *If Brussels Fails to Get it Right*, DAILY TELEGRAPH, Feb. 10, 1992, available in LEXIS, Europe Library, Alleur File.

<sup>30</sup> Williams, *supra* note 17.

<sup>31</sup> See Riding, *supra* note 1, at 9.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Brock, *supra* note 11.

<sup>37</sup> Perry, *supra* note 19.

wanted export embargoes and a retroactive provision demanding the return of treasures which have already gone abroad.<sup>38</sup>

Northern Member States feared the southern countries would twist new EC rules and demand the mass restitution of the many classical and Renaissance treasures in northern museums.<sup>39</sup> Art dealers claimed that protecting works of art reduced their mobility and value: new schemes to list art works would be an "infringement of the rights of individual owners."<sup>40</sup> British auction houses warned the government that restrictions could be an attack on Britain's leading role in the European art trade.<sup>41</sup> Overly protective measures also would inhibit a contemporary artist's ability to make a living.<sup>42</sup> As one British commentator noted, "[m]ost art is for the highest bidder. Under the proposed EC Regulations against exports of works of art, the Renaissance would never have happened."<sup>43</sup>

Great Britain also opposed the Commission's extension of search and seizure powers over stolen objects.<sup>44</sup> A House of Lords committee took issue with laws being rushed through the European Commission ordering police to search Britain's private homes, museums, and auction houses.<sup>45</sup> Currently, authorization to search is granted under UK law only where there is a reasonable suspicion that an offense under UK law has been committed.<sup>46</sup> The committee wanted police to obtain a court order before they searched properties and to proceed only when they have evidence that treasures have been acquired dishonestly.<sup>47</sup>

### III. THE NEW RULES PROTECTING NATIONAL TREASURES

On February 25, 1992, the European Commissioner for Culture introduced the two proposals on export regulation and restitution of illegally removed works.<sup>48</sup> On May 18, 1992, a majority of European arts and culture ministers rejected the draft proposal of Direc-

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<sup>38</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>39</sup> See Walker, *supra* note 24.

<sup>40</sup> Brock, *supra* note 11.

<sup>41</sup> *Id.* Britain's salesrooms handle more than half of all European art transactions. *Id.*

<sup>42</sup> See Williams, *supra* note 17.

<sup>43</sup> *Art Sans Frontières*, *supra* note 22.

<sup>44</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>45</sup> Sheila Gunn, *Stately Treasures Defended*, THE TIMES (London), Aug. 3, 1992, available in LEXIS, Nexis Library, Omni File.

<sup>46</sup> Trevor Mason, *Treasure Search Powers Criticised*, Press Ass'n Newsfile, Aug. 30, 1992, available in LEXIS, Nexis Library, Omni File.

<sup>47</sup> *Id.*

<sup>48</sup> EC: *Publication of the Commission Proposals on the Movement of Cultural Goods*, Reuters, Mar. 11, 1992, available in LEXIS, Europe Library, Alleur File.

tive 92/280.<sup>49</sup> The proposal would have allowed each government to define their protected national heritage as broadly as they liked.<sup>50</sup> The draft list included fourteen categories of national treasures, including postage stamps, collections of natural specimens, and "archives of any kind, on any medium, and any elements which are more than 50 years old."<sup>51</sup> One journalist noted that this description "would cover the contents of many an attic."<sup>52</sup>

Member States' views varied on the appropriate minimum monetary values entitling items to protection. Ireland wanted protection for photographic collections worth more than 1,000 ECU.<sup>53</sup> Germany thought the minimum value should be 100,000 ECU.<sup>54</sup> Italy opposed any minimum value for items, believing that the notion of national heritage could not be reconciled with that of commercial value.<sup>55</sup>

Critics called such a plan unworkable.<sup>56</sup> These critics claimed that giving governments five years to decide whether to seek the return of an object, and extending protection for thirty years after an object has been removed from that country adds uncertainty to the art market.<sup>57</sup> British critics also complained that the proposed rules put the burden of proof on owners to demonstrate that they "exercised all due care" to ensure that they were not buying something illegally exported from another country.<sup>58</sup> Prior to the Directive's adoption, British officials claimed that a majority in the Community favored simpler methods.<sup>59</sup> "There will be tough negotiations before ministers meet again. . . . But it's clear if there is going to be an agreement, it will be by moving in the direction we want," predicted one British official.<sup>60</sup>

The Directive adopted by the European Parliament in November 1992 varies only slightly from the draft rejected six months earlier. It will enable classes of cultural objects which are removed to an-

<sup>49</sup> Jackson, *supra* note 7.

<sup>50</sup> Brock, *supra* note 11.

<sup>51</sup> Jackson, *supra* note 7.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> EC: *Publication of the Commission Proposals on the Movement of Cultural Goods*, *supra* note 48.

<sup>56</sup> Jackson, *supra* note 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

other EC country illegally to be seized and returned to the EC country of origin.<sup>61</sup> In the country where a stolen national treasure is found, a tribunal will order its return to the country of origin.<sup>62</sup> Each Member State designates one or more central authorities to find illegally exported objects and to act as intermediaries between the holder of the object and the requesting Member State.<sup>63</sup> If the requesting Member State is not satisfied with the result, it may appeal to the European Court of Justice.<sup>64</sup> If restitution is granted, compensation would be paid to anyone who had acquired the objects in good faith.<sup>65</sup>

The list of national treasures details a core of items, including those covered under article 36 of the EEC Treaty<sup>66</sup> or specified in the Annex of Directive 92/280.<sup>67</sup> The Annex lists fourteen categories of protected items, from archaeological finds to statues, on the basis of age and monetary value.<sup>68</sup>

In order for a country to be eligible for restitution, an item illegally removed from that country must meet a variety of time-related criteria. For example, the system only applies to goods removed after December 31, 1992.<sup>69</sup> Treasures which have been out of a country for more than thirty years cannot be reclaimed unless they form part of a public collection "recognized as not being subject to

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<sup>61</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>62</sup> *EC Proposes Plan to Protect Cultural Treasures*, Reuters, Jan. 15, 1992, available in LEXIS, Nexis Library, Omni File.

<sup>63</sup> *Export Regulation and Restitution*, *supra* note 5.

<sup>64</sup> *Id.*

<sup>65</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>66</sup> National treasures of artistic, historical, or archaeological value or protected industrial or commercial property.

<sup>67</sup> Directive 92/280, at 14–15 (annex). The annex sets out 14 categories of items ranked as national treasures: (1) archeological discoveries more than 100 years old; (2) objects (including furniture) from artistic, historical, or religious monuments more than 100 years old; (3) paintings executed prior to 1600; (4) engravings and prints; (5) sculpture; (6) constructions and composite works; (7) photographs; (8) manuscripts more than 100 years old; (9) books more than 200 years old; (10) archives over 50 years old; (11) philatelic specimens; (12) fauna, flora, minerals, or anatomy of historical, archaeological, palaeontological, ethnographic, or numismatic interest; (13) motor vehicles over 75 years old; (14) antiques over 100 years old. A second list indicates minimum monetary value for an object to be considered a national treasure: paintings dated between 1600 and 1900 with a value of at least 75,000 ECUs; paintings dated after 1900 with a value of at least 150,000 ECUs; engravings and prints worth at least 7,500 ECUs; sculpture worth at least 50,000 ECUs; constructions and composite works worth at least 100,000 ECUs; photographs worth at least 7,500 ECUs; philatelic specimens worth at least 25,000 ECUs; furniture or musical antiques worth at least 20,000 ECUs; or any other antique under category 14 worth at least 50,000 ECUs. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Directive 92/280, *supra* note 5, art. 8.



a time limit.<sup>70</sup> Additionally, a country may not reclaim an object if it has been missing for only five years, and that country knew of its whereabouts but did not take action.<sup>71</sup>

Beyond this basic list, Member States will be free to add other cultural objects they consider "national treasures."<sup>72</sup> These additions, however, will not be covered by Community rules and will be protected by national laws only.<sup>73</sup> The Commission encouraged all frontier posts to provide a computerized list in order to identify and regulate the movement of national treasures outside of the EC.<sup>74</sup>

The Commission approved the Regulation on export of national treasures on December 9, 1992. The Regulation did not enter into force until April 1, 1993, however, because of its link with Directive 92/280.<sup>75</sup> Directive 92/280 will be implemented generally by the end of 1993, and by March of 1994 in Germany, Belgium, and The Netherlands.<sup>76</sup>

#### IV. ANALYSIS OF THE NEW PROTECTIONS

##### A. *Post-Directive 92/280 Issues in Dispute*

Directive 92/280 may lead to future legal conflicts as questions of ownership and compensation are not for national law and courts to determine.<sup>77</sup> Also, individual countries are able to define and protect a national treasure in keeping with local tastes and traditions.<sup>78</sup> As a result, there may be significant variation in the definition of national treasures across Europe.<sup>79</sup>

Member State officials and experts question the enforcement and market effects of Directive 92/280. While Italy took credit for rules requiring the return of stolen or illegally exported goods, some Italian officials expressed doubt as to whether they will be enforced

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Export Regulation and Restitution*, *supra* note 5.

<sup>73</sup> *Id.*

<sup>74</sup> Williams, *supra* note 17.

<sup>75</sup> Shortly after the publication of Directive 92/280 in the Official Journal. *Arrangements for Cultural Assets*, *supra* note 15; UK: *Department of National Heritage—Revised Export Controls for Cultural Property Come Into Effect*, Reuters, Mar. 16, 1993, available in LEXIS, Europe Library, Alleur File.

<sup>76</sup> *Arrangements for Cultural Assets*, *supra* note 15.

<sup>77</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>78</sup> Riding, *supra* note 1, at 9.

<sup>79</sup> *Id.*

by other Member States.<sup>80</sup> In contrast, British auction houses fear that art sales will be stifled by restitution claims of foreign governments.<sup>81</sup> "The requesting state has no obligation to follow up . . . but in the meantime, the painting would have to be withdrawn from an auction."<sup>82</sup> In response to British concerns, Member States agreed that if a sale is objected to by another country, *prima facie* evidence must be brought before the selling country's court to prove that the work should not be sold.<sup>83</sup>

The relationship between Directive 92/280 and the Regulation is also a source of confusion. The Community promulgated Directive 92/280 under article 100a of the EEC Treaty, which consults the Parliament and the Economic and Social Committee, while the Regulation falls under article 113, which allows a majority voting by ministers but no consultation.<sup>84</sup> "The two measures are not unrelated and should be considered in tandem."<sup>85</sup> Many experts say it is too early to know how the new rules will affect protection of and trade in cultural objects.<sup>86</sup> The uncertainty is due in large part to the complexity and scope of Directive 92/280, and the different ways it may be interpreted throughout the Community.<sup>87</sup>

### B. *A Balanced Compromise Between North and South?*

Directive 92/280 is part of a compromise.<sup>88</sup> The strategy is two-pronged: a Regulation requiring export certificates for treasures leaving the EC; and Directive 92/280 establishing procedures for returning treasures that have been taken illegally from one EC country to another.<sup>89</sup> Member States now have three avenues through which they can protect their national treasures.<sup>90</sup> First, a Member State may invoke article 36.<sup>91</sup> The jurisdiction of national courts to interpret

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Tom Walker, *EC Curbs Movement of Cultural Treasures*, THE TIMES (London), Nov. 11, 1992, available in LEXIS, Nexis Library, Omni File.

<sup>84</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>85</sup> *Id.*

<sup>86</sup> Riding, *supra* note 1, at 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Free Movement of Works of Art*, *supra* note 25.

<sup>89</sup> Perry, *supra* note 19.

<sup>90</sup> *EC: Content of Draft Directive 92/280 and Regulation Aimed at Ensuring Protection and Free Movement of Cultural Goods*, Reuters, Jan. 17, 1992, available in LEXIS, Europe Library, AllEUR File.

<sup>91</sup> *Id.*

and apply article 36 remains intact, provided the protection is effected by means other than border controls.<sup>92</sup> Second, items removed illegally will be returned under Directive 92/280.<sup>93</sup> Third, the Regulation will ensure that art works from all Member States will be protected from export to non-EC countries.<sup>94</sup>

Although Directive 92/280 attempts to achieve a balance between protection and a liberal art market, the agreement does not satisfy many Member States.<sup>95</sup> Greece voted against it, objecting to the time limit for EC countries to return goods from public collections that have left other states illegally.<sup>96</sup> Italy and Britain supported the Directive with some hesitation.<sup>97</sup> Germany abstained because it perceived the Directive's procedures as too bureaucratic.<sup>98</sup>

Of the fourteen categories of goods subject to restitution, the art market is most interested in paintings.<sup>99</sup> Directive 92/280's rules on paintings are fairly liberal: the artist must be deceased and the work must be valued at over \$187,500.<sup>100</sup> At the other extreme are archaeological items which only must be at least 100 years old to be protected.<sup>101</sup> Art dealers also achieved a compromise on the amount of new paperwork involved.<sup>102</sup> For example, after learning that it might have to issue half a million certificates per year just for export of coins, the British government successfully limited the permit requirements to only valuable coins or collections.<sup>103</sup>

Among concessions made to the southern countries, the ministers agreed that ecclesiastical items would be included under the special protection for public collections.<sup>104</sup> Most objects can be retrieved within thirty years, rather than the six originally favored by Britain.<sup>105</sup> Of course, northern Member States' national treasures also will be protected.<sup>106</sup> Under the new Regulation, Britain's auctioneers will

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Riding, *supra* note 1, at 9.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Perry, *supra* note 19.

<sup>99</sup> Riding, *supra* note 1, at 9.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Perry, *supra* note 19.

<sup>105</sup> Simon Tait, *Battle on the Border*, THE TIMES (London), June 3, 1992, available in LEXIS, Nexis Library, Omni File.

<sup>106</sup> Walker, *supra* note 24. Sotheby's suggested that some British masterpieces lost in the past could not have slipped through the net had the proposed rules been in place. *Id.*

have to obtain an increased number of export licenses if they wish to export cultural goods outside the Community.<sup>107</sup>

When discussions regarding national treasures began, some thought Greece's long-standing demand that Britain return the so-called Elgin marbles would be a telling test case.<sup>108</sup> As it turned out, the frieze, taken by Lord Elgin from the Athens Acropolis in the 19th century and now in the British Museum, will not be affected by the new Directive 92/280.<sup>109</sup> Britain succeeded in ensuring that the rules on restitution of illegally exported art works could not be retroactive.<sup>110</sup> Officials in Greece insisted Britain would have to face up to "misdemeanors carried out in the name of archeology."<sup>111</sup> One British official responded: "The fact that the Elgin Marbles are in the British Museum makes them part of our cultural heritage. Lord Elgin did nothing illegal anyway."<sup>112</sup>

Despite Britain's victory on the issue of retroactivity, Directive 92/280 was not an unconditional triumph for art's free-market proponents. Southern Member States feared that an open-bordered EC would lead to a plundering of their collections and cultural heritages. The Directive and Regulations address this issue, demanding Community-wide restitution efforts, and new rules to regulate items leaving the EC.<sup>113</sup> The purpose of Directive 92/280 is to protect national treasures in the single-market EC, not to settle long-time grievances over individual pieces.<sup>114</sup>

Art dealers may suffer from the EC's measures. The new restrictions may inhibit art sales to buyers outside the EC. Fear of restitution also may slow sales where a work's recent history or place of origin is unknown.

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<sup>107</sup> Boris Johnson, *Brussels Law Will Stop Art Treasures Being Looted*, DAILY TELEGRAPH, Jan. 16, 1992, at 6.

<sup>108</sup> *Export Regulation and Restitution*, *supra* note 5.

<sup>109</sup> *EC Proposes Plan to Protect Cultural Treasures*, *supra* note 62. In 1801, Lord Elgin, then British Ambassador to Constantinople, received authorization from the Turkish government to remove statues, friezes, and metopes from the Parthenon and other Athenian buildings. The "Elgin Marbles" officially became property of Great Britain in 1816 when a Select Committee of the House of Commons purchased them for £35,000. On May 13, 1983, the Greek government officially requested that Great Britain return the Elgin Marbles. The British refused to honor the request. Ann P. Prunty, Note, *Toward Establishing an International Tribunal for Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles*, 72 GEO. L.J. 1155, 1155 (1984).

<sup>110</sup> Brock, *supra* note 11.

<sup>111</sup> Walker, *supra* note 24.

<sup>112</sup> *Id.*

<sup>113</sup> See generally Directive 92/280, *supra* note 5; Regulation on Cultural Goods, *supra* note 4.

<sup>114</sup> See UK GOVERNMENT PRESS RELEASES, Mar. 3, 1993, available in LEXIS, Europe Library, Alleur File.

Concessions have been made on both sides, and the Directive 92/280 and Regulation appear to achieve a balance between protection and maintenance of a free art market. The new rules establish a uniform system of minimum protection, within which Member States may expand definitions and protections of their national treasures. The cooperative design of the new rules surely will test the resolve of Member States to work as a single enforcement unit in the post-1992 EC.

### CONCLUSION

In the words of one EC diplomat, "You can't treat the Mona Lisa the same way you would treat a bag of sugar."<sup>115</sup> While southern Member States feared that the fall of border controls would lead to a plundering of cultural heritages, northern Member States opposed new restrictions as a hindrance to the art market. The new rules protecting national treasures should be an effective compromise between forces of protection and free market.

The drafters of the EEC Treaty envisioned a European economy free from internal borders, yet also recognized the desire of many Member States to protect their national treasures. On the eve of the single-market Community, the European Commission established a protective system which, though complex, should work to provide minimum protections for the cultural heritages of Europe's distinct Member States without seriously inhibiting the art market. The tension between national interests and a united Europe is the classic dilemma of the EC, and implementation of the new rules regarding protection of national treasures will be a telling indication of the success of EC cooperation.

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<sup>115</sup> *EC Culture Ministers Agree that Art Works are Different*, Reuters, May 18, 1990, available in LEXIS, Europe Library, Alleur File.