Opinion of the Economic and Social Committee on the 'Amended proposal for a Council Regulation (EC) on Community Design'

(2000/C 75/13)

On 9 September 1999 the Council decided to consult the Economic and Social Committee, under Article 308 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 14 December 1999. The rapporteur was Mr Lehti.

At its 369th plenary session (meeting of 27 January 2000) the Economic and Social Committee adopted the following opinion by 57 votes to four, with two abstentions.

1. **Introduction**

1.1. A system of Community design law is to be implemented by a Council regulation and a related directive. The regulation would establish a similar type of legal set-up (a Community design right) as that which exists for Community legislation on trade marks, whereby one application would be sufficient for obtaining legal protection for the design of the external form of an object in all Member States. The Office for Harmonisation in the Internal Market (trademarks and designs) based in the Spanish city of Alicante would grant Community design rights.

1.2. The draft regulation would also create an unregistered Community design right, which would be valid for three years after the design was made available to the public within the Community.

1.3. The substantive legal provisions of the draft regulation are consistent with the legal protection provided by Directive 98/71/EC, as this directive harmonises Member States' national legislation on design rights. The directive must be implemented through national legislation by 28 October 2001 at the latest.

1.4. The original draft directive was submitted in 1993. As discussions on the draft directive were still ongoing, work on the draft regulation was postponed in autumn 1995. The Directive was finally adopted on 13 October 1998 as a result of the Conciliation procedure. According to the compromise reached by the Conciliation Committee, Member States must continue to apply their existing regulations on the use of spare parts for the repair of defective or faulty products. The agreement on spare parts is embodied in Articles 14 and 18 of the Directive, as well as the recitals. The Commission submitted the amended proposal for a Council Regulation in June 1999.

During the Conciliation procedure the discussion focused in particular on the free use of spare parts for repair purposes and the protection of their design. In design terms, the problem related mainly to component parts of complex products which may be used to restore the original appearance of the latter. The so-called 'repair' clause should avoid the creation ofcaptive markets in spare parts, in particular in the motor vehicle sector. The Committee notes that this problem also exists in other sectors.

1.5. The Commission undertook to launch a consultation exercise after adoption of the Directive, involving the parties most concerned. The consultation exercise is now underway and a summary of it will be drawn up.

1.6. The draft Regulation excludes, for the time being, the registration of the design of a component part of a complex product, the appearance of which determines the design of the component part (Article 10a). A proposal on the use and protection of spare parts under this draft regulation shall be submitted by the Commission in parallel with the proposal which the Commission shall make to complete the internal market in respect of spare parts within the framework of the Design Directive.

2. **General comments**

2.1. The Committee believes that the design protection Directive already implemented and the complementary Regulation are important measures for the European Community. The absence of uniform design protection legislation has made the registration of designs through separate national systems an expensive and slow process. Small- and medium-sized enterprises in particular have not always succeeded in obtaining sufficiently extensive protection for their products.

2.2. The Committee believes it is important for the directive on the legal protection of designs to be transposed into national legislation by 28 October 2001. The Committee recognises that this will entail reviewing, and possibly even completely revising, existing Member State legislation on design protection. The Directive and the complementary Regulation should harmonise design protection legislation within the Community and make it possible to obtain design protection throughout the Community by means of a single registration procedure.

2.3. The Committee feels that inclusion of the concept of unregistered designs in the Regulation will be effective. It will provide better design protection for products with a short real life span, such as textiles and toys. The concept and content of unregistered designs should, however, be clarified. In addition, the restriction regarding bad faith in Article 20(2) makes an unregistered design practically worthless, the more so as the right holder has no right to information; it should therefore be deleted entirely.

2.4. Progress on the Regulation has taken place according to schedule. The Commission aims to complete work on the Regulation by the end of 2000. Of the Regulation's 128 articles, numbers 1 to 100 have been dealt with so far. The work of the Council working group is still at a very early stage and the wording has not yet been finalized. Agreement on some key articles has still not been reached, partly due to problems of language and interpretation. There are also clearly differing views on design protection for unregistered products. Various comments have been submitted on all of the 100 articles discussed so far. The aim is to complete the first reading by early 2000 and the Commission wants the Regulation to be adopted by the end of 2000.

2.5. The Committee considers that the current wording of Article 10 on components is consistent with the intention of the Directive. The proposal would maintain in force Member States' existing legal provisions relating to the protection of spare parts. Changes can only be introduced to these provisions if the purpose is to liberalise the markets for such parts. Furthermore, the matter will be reviewed three years after implementation of the Directive. At this time the Commission will propose any necessary amendments to both the Directive and the Regulation, as this matter was 'frozen' during discussions on the Directive. However the Commission intends to make changes to the wording without changing the content of the article itself. The Commission will also submit an opinion on incorporating spare parts into the design protection Regulation.

2.6. The Committee considers that the wording of the draft regulation will require further honing to achieve conceptual clarity. The current proposal leaves too much scope for interpretation.

2.7. The legal basis of the draft Regulation has been changed, as the President of the Legal Affairs and Citizen's Rights Committee of the European Parliament invited the Commission to withdraw the draft Regulation and to put forward a new proposal, based on Article 308 of the Treaty. Under this Article the Regulation will be adopted unanimously in the Council after consultation of the Parliament.

3. **Specific comments**

3.1. The Committee feels it is necessary to bring certain points to the attention of the Commission in order to improve the objectives and effectiveness of this important regulation on the protection of designs.

3.2. Article 1.2a: The concept of unregistered designs requires further clarification especially with regard to the duration of protection. The problem relates to an important matter of principle, namely that the entire concept must be drafted in such a way that there is no scope for interpretation. This also applies to Article 8.

3.3. Article 4.3: The wording of the definition of 'normal use' in this clause does not follow the wording of the Designs Directive. In fact, it reverts substantially to the wording of Article 3.4 of the Council's Common Position of 17 June 1997, which was rejected by Parliament on its second reading and not reinstated during conciliation. It is important that the wording of the Directive is followed precisely in the Regulation.

3.4. Article 15: It is not sufficiently clear from the text how relationships between designers are to be determined.

3.5. Article 20.2: Although the Committee understands and supports the intention behind this clause, it finds the wording somewhat ambiguous. The Committee understands that the intention is to safeguard persons who unintentionally or innocently use a design or acquire a product which incorporates a design for which unregistered design protection is claimed. The Committee queries, however, whether the words 'the use contested results from copying in bad faith the design protected' is wide enough to cover every circumstance. Further consideration of the wording of this clause is required.

3.6. Article 27.5: The Community Design is intended to be based upon the unitary principle: i.e., it is a Community right. Article 27.5 completely undermines that principle by allowing extensive and substantial derogations to apply in individual Member States. In the Committee's opinion, with the possible exception of designs which are contrary to public policy or morality (Article 10), no derogations from the unitary principle should be allowed.

3.7. Article 39: It is vital that applications for registration of designs of component parts should identify the complex product to which they relate with sufficient detail to enable third parties to recognise them for what they are with reasonable certainty. Applicants for registration of a design of a component part of a complex product should be required to

submit a drawing or illustration of the complex product to enable examination to take place under Article 48 (see below under Article 49a).

3.8. Article 49a: It is essential that examination under Article 48 should include at least some examination for compliance with the requirements for protection, otherwise there is a very real risk of innocent third parties being 'litigated to death' by the abusive application of the system.

3.9. Article 67: The principles relating to the examination of facts need to be specified more clearly.

Brussels, 27 January 2000.

The President

of the Economic and Social Committee

Beatrice RANGONI MACHIAVELLI

Opinion of the Economic and Social Committee on the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Enhancing Tourism's Potential for Employment'

(2000/C 75/14)

On 10 May 1999 the Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned communication.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 14 December 1999. The rapporteur was Mr Malosse.

At its 369th plenary session (meeting of 26 January 2000), the Economic and Social Committee adopted the following opinion by 71 votes to two, with one abstention.

1. **The background to the Commission's communication**

1.1. The European Commission has forwarded to the Economic and Social Committee, along with the Council, the European Parliament and the Committee of the Regions, a Communication on the follow-up to the Conclusions and Recommendations of the High Level Group on Tourism and Employment, published in October 1998. Consequently, the Committee opinion will also examine the work of the High Level Group (HLG).

1.2. The Communication is the most recent of the policy documents aiming to relaunch a European tourism policy, which has been 'grounded' since the November 1997 European Conference on Tourism, organised by the Luxembourg presidency. Since 1996, a proposal for a multi-year programme for European tourism, known as 'Philoxenia' [1], has been so successfully blocked by the Council that it would no longer appear to be on the cards (although the Commission does still include it in its strategy, when it mentions the Austrian presidency's much watered-down compromise proposal). The Communication could, thus, provide the 'new approach' called for by the Committee in the own-initiative opinion it adopted at the plenary session of 24 and 25 March 1999 [2].

1.3. The Communication draws deeply from the conclusions of the High Level Group (HLG). Its primary point is the need for up-to-date, Europe-wide statistics on tourism activities, skills and the most notable current schemes. It sensibly makes a link between tourism and the National Employment Action Plans, European employment policy instruments set up following the Luxembourg jobs summit in 1997. Lastly, the Communication singles out a number of the proposals made in the HLG report, highlighting potential synergies of structural, research and development, education and training, and business policy instruments. The Communication should devote more space to some of the HLG's

[1] COM(96) 168 final — OJ C 222, 31.7.1996, p. 9; OJ C 30, 30.1.1997, p. 103.

[2] OJ C 138, 18.5.1999, p. 4.