Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection

(Case number RC 1.15)

In letters dated 10 June 2004 and 20 September 2005, the State Secretary for Culture, Education and Science asked the Restitutions Committee to issue a recommendation regarding the decision to be taken concerning an initial application and additional application by Amsterdamse Negotiatie Compagnie NV in liquidation for the restitution of the works of art which are currently in the possession of the State of the Netherlands and that were part of the trading stock of the gallery Kunsthandel J. Goudstikker NV, as it existed on 10 May 1940.

The Proceedings

On 26 April 2004, Amsterdamse Negotiatie Compagnie NV in liquidation (referred to below as 'the Applicant') filed a substantiated application with the State Secretary for Culture, Education and Science (referred to below as 'the State Secretary') for the restitution of 241 itemised art objects described in the application as '*the goods that the State of the Netherlands has in its custodianship and that were part of the Goudstikker Collection'*. The State Secretary submitted this application to the Restitutions Committee (referred to below as 'the Committee') for its advice in a letter dated 10 June 2004. In a letter of 31 July to the State Secretary and letters of 8 January 2005 and 31 July 2005 to the Committee, the Applicant revised the list of 241 art objects enclosed with the letter of 26 April 2004, expanding it to a list of 267 art objects.

According to a statement in the first application, the application is 'supported' by Marei von Saher-Langenbein (referred to below as 'von Saher-Langenbein'), the widow of Eduard von Saher, Jacques Goudstikker's only son. At the request of the Committee, the authorised representatives explained the meaning of this support in a letter of 8 January 2005. This was provided '*in case goods were included among the reclaimed art objects that belonged to the*

private assets of Mr Jacques Goudstikker and/or Mrs Desi Goudstikker-von Halban.' Because this was not the case, the Committee regards Amsterdamse Negotiatie Compagnie NV in liquidation as the sole applicant. Amsterdamse Negotiatie Compagnie NV has been the new name of Kunsthandel J. Goudstikker NV (referred to below as 'Goudstikker') since a 1952 resolution. The liquidation of assets of the company wound up as from 14 December 1955, which was concluded on 28 February 1960, was reopened on 31 March 1998 by order of the Amsterdam District Court.

R.O.N. van Holthe tot Echten, Master of Laws, and Prof. H.M.N. Schonis, Master of Laws, are acting in the proceedings before the Committee as the authorised representatives of the Applicant and of von Saher-Langenbein.

The Committee has reviewed all the written documents submitted in this case, specifically including the applications and explanatory notes filed with the State Secretary on behalf of the Applicant on 26 April 2004 and 31 July 2005, the reply dated 8 January 2005 from the Applicant's authorised representatives to the Committee's questions and the response of 31 July 2005 to the draft investigatory report compiled by the Committee. For the State Secretary's part, the Committee has read a letter with appendices of 30 September 2004 from deputy State Advocate H.C. Grootveld, Master of Laws, to the director of the Cultural Heritage Department of the Ministry of Culture, Education and Science with respect to the status of judicial cases pending before the court in which the State of the Netherlands and the Applicant are involved.

During a hearing on 12 September 2005 organised by the Committee, the Applicant provided a verbal explanation of its application. Besides the authorised representatives Van Holthe tot Echten and Schonis, the following persons attended on behalf of the Applicant: Von Saher-Langenbein (the Applicant's liquidator as well as the 'supporter' of the application), Charlène von Saher (Jacques Goudstikker's granddaughter), A. Bursky (the Applicant's liquidator), L.M. Kaye, Esq. (Von Saher-Langenbein's counsel), Prof. I. Lipschits (the Applicant's advisor), Mr C. Toussaint (the Applicant's art history advisor), R. Smakman (colleague of authorised representative Van Holthe tot Echten), as well as the interpreters Van den Berg and Cillekens. A transcript was drafted of the hearing, which the Committee sent to the authorised representatives in a letter dated 13 October 2005.

In response to the requests for advice it has received, the Committee instituted a fact-finding investigation, the results of which are documented in a draft report dated 25 April 2005 that was sent to the Applicant on 4 May 2005. In a letter of 31 July 2005, the Applicant sent its response to the Committee's draft report. Subsequently, points of the draft report were revised. This response has been appended to the documentary report (referred to below as 'the Report') adopted by the Committee on 19 December 2005. The Report is deemed to comprise part of this recommendation.

General Considerations (regarding art dealers)

a) The Committee has drawn up its opinion with due regard for the relevant (lines of) policy issued by the Ekkart Committee and the government.
b) The Committee asked itself whether it is acceptable that an opinion to be issued is influenced by its potential consequences for decisions in subsequent cases. The Committee resolved that such influence cannot be accepted, save in cases where special circumstances apply, since allowing such influence would be impossible to justify to the Applicant concerned.
c) The Committee then asked itself how to deal with the circumstance that certain facts can no longer be ascertained, that certain information has been lost or has not been recovered, or that evidence can no longer be otherwise compiled. On this issue the Committee believes that, if the problems that have arisen can be attributed at least in part to the lapse of time, the associated risk should be borne by the government, save in cases where exceptional circumstances apply.
d) Finally, the Committee believes that insights and circumstances which, according to generally accepted views, have evidently changed since the Second World War should be granted the status of new facts.
e) Involuntary loss of possession is also understood to mean sale without the art dealer's consent by 'Verwalters' [Nazi-appointed caretakers who took over management of firms owned by Jews] or other custodians not appointed by the owner of items from the old trading stock under their custodianship, in so far as the original owner or his heirs did not receive all the profits of the transaction, or in so far as the owner did not expressly waive his rights after the war.

Special Considerations

A few basic assumptions are first explained below under Section I. Section II addresses the loss of possession during the first months of the war in 1940, the period during which Jacques Goudstikker, sole managing director and principal shareholder of Goudstikker, had already fled the Netherlands, and some of his employees had sold the immovable and movable property of his gallery, mainly to Alois Miedl and Hermann Göring. Section III discusses previous applications for the restoration of Goudstikker's rights, namely:
- the negotiations with the Dutch rights restoration authorities conducted after the war that ultimately, on 1 August 1952, resulted in a settlement agreement in respect of the art objects, and
- a restitution application filed with the State Secretary by Jacques Goudstikker's heirs in 1998, which, following its rejection, was brought before the Court of Appeals of The Hague.

In Section IV, the Committee provides its judgement of the works of art delivered in 1940 to Miedl and Göring, respectively. In Section V, the Committee then sets out its position on the other art objects included in this restitution application. Finally, in Section VI, the Committee

discusses the consequences of possible restitution.

I. Basic Assumptions

The Facts

1. For the facts serving as the basis of this recommendation, the Committee refers the reader to the Committee's Report, deemed to comprise an integral part of this recommendation.

The Committee's Decision-Making Framework

2. Under Article 2 of the Decree of 16 November 2001 establishing its tasks and responsibilities, the Committee has the task of advising the State Secretary on decisions to be taken concerning applications for the restitution of items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime. The Committee must observe relevant government policy.

Items of Cultural Value Concerned

3. The Applicant seeks the restitution of 267 works of art, mainly paintings, from the Dutch National Art Collection that are claimed to have been part of Goudstikker's trading stock, as stated in List I appended to this recommendation. After the war, the Sate of the Netherlands recovered these works of art primarily from Germany and they were subsequently incorporated into the National Art Collection. As of 2005, a large portion of the works of art is on loan to various Dutch museums and government agencies under Netherlands Art Property (NK) inventory numbers.

   The Committee has determined that the majority of the art objects whose restitution is requested (227 in number) were the property of Goudstikker when in May 1940, Jacques Goudstikker was forced to leave the gallery behind, although some of the paintings were co-owned by Goudstikker and others. In Jacques Goudstikker's papers and below, these paintings (21 in number) are called the 'meta-paintings'. The Committee's recommendation regarding the meta-paintings can be found under 14.

4. It is certain or likely that a total of 40 of the 267 works of art whose restitution is requested were not part of Goudstikker's property on 10 May 1940. It is true that the provenance of some of the works of art from this category may not be entirely conclusive, but it is not likely that they belonged to Goudstikker's old trading stock. Three of the paintings were present in the gallery on 10 May 1940 owing to consignment or commission. As for the other works of art from this category, some may have been part of Goudstikker's trading stock at one time or another, but not during the period that is relevant to this application.

   As these 40 art objects cannot be regarded as Goudstikker's former property, the Committee concludes that there are no grounds whatsoever for granting the restitution application in respect of these paintings. The considerations provided below do not pertain to these works of art, which are specified in List II appended to this recommendation.

II. Involuntary Loss of Possession during the War

5. The foremost question the Committee feels it must address is whether Goudstikker's loss of possession should be regarded as involuntary. The Committee deems the following events relevant to answering this question.

When the war broke out on 14 May 1940, Jacques Goudstikker, principal shareholder and sole managing director of Goudstikker, managed to flee the Netherlands by boat with his wife Désirée Goudstikker-von Halban and son Eduard. During the journey, Jacques Goudstikker lost his life in an accident; Désirée and Eduard ultimately reached the United States. The gallery, with a trading stock of 1,113 (inventoried) works of art, was left behind without management, as Jacques Goudstikker's authorised agent also died suddenly in early May 1940. Two of Goudstikker's employees, A.A. ten Broek and J. Dik, Sr., took on the management of the gallery, and Ten Broek was subsequently named company director during an extraordinary general meeting of shareholders held on 4 June 1940. Almost immediately after the capitulation of the Netherlands, Alois Miedl, a German banker and businessman living in the Netherlands, joined the art business and took over the actual management.

In a contract dated 1 July 1940, Miedl purchased all of Goudstikker's assets, including the trading name of the gallery. This contract was then amended shortly thereafter in connection with the concurrent interest of General Field Marshal Hermann Göring in the gallery. On 13 July 1940, two purchase agreements were subsequently concluded between Goudstikker, represented by Ten Broek, and Miedl and Göring, respectively:

- Under the agreement with Miedl, Miedl acquired from Goudstikker, for an amount of NLG 550,000, the co-ownership of the meta-paintings, the right to the trade name 'J. Goudstikker' and the immovable property, i.e. Nijenrode castle in Breukelen, the building in which the gallery was located on the Herengracht in Amsterdam, and 'Oostermeer', the country house in Ouderkerk aan de Amstel;
- Under the agreement with Göring, Göring acquired, for an amount of NLG 2,000,000, the rights to all art objects that belonged to Goudstikker on 26 June 1940 and that were located in the Netherlands. Göring acquired a right of first refusal to the meta-paintings, which right was exercised, resulting in Göring's acquisition of several meta-paintings.

Although both agreements stipulated that *'as accurate a list as possible would be drawn up as soon as possible'*, no such list was ever compiled. For their part in arranging the sale, the gallery's personnel received from Miedl a combined sum of NLG 400,000. In addition, at the time the agreement was concluded, Mrs Goudstikker-Sellisberger, Jacques Goudstikker's mother who had stayed behind in Amsterdam, was said to have been granted the protection of Miedl or Göring.

Désirée Goudstikker – heir of Jacques Goudstikker and representing 334 of the 600 shares partly on behalf of her underage son – refused to grant permission for the sale as requested of her by Ten Broek.

On 14 September 1940, Alois Miedl founded 'Kunsthandel voorheen J. Goudstikker NV' [Gallery formerly known as J. Goudstikker NV] (referred to below as: 'Miedl NV'). The decision to wind up Goudstikker was made on 2 October 1940, and the company was thus wound up. This winding-up was reversed with retroactive effect on 26 February 1947. Of the

purchase price of NLG 2,550,000 involved in the sale to Miedl and Göring, an amount of NLG 1,363,752.33 (also see Part VII) was left for Goudstikker after the war.

6. The Committee feels that the loss of possession as described above can be considered involuntary under the current restitution policy.

This conclusion is legitimised by the mere circumstance that Jacques Goudstikker's widow refused permission for the transactions and that there is doubt about the authority of those who sold the works of art on behalf of Goudstikker. The Committee also takes into consideration that the possible legal validity of the transactions resulting in loss of possession could only have occurred because of the appointment as director of the gallery of an employee who was sympathetic towards the German buyers (Ten Broek), and that this appointment occurred during an extraordinary general meeting of shareholders on 4 June 1940 that was convened in a manner that rendered decision-making invalid.

Contributing to this opinion is also the fact that both buyers purchased works of art on a large scale immediately after the capitulation of the Netherlands, a situation in which Göring could – and undoubtedly did – use the influence of his high rank in the Nazi hierarchy. In respect of Miedl, it cannot be ruled out and so it must be assumed (see the general consideration under *c*) that sales to him, as a friend of Göring's, were involuntary. It is true that Miedl helped Jewish families during World War II and he himself was married to a Jewish woman, but he also had clear Nazi sympathies. He profited from the war by deriving sizable profits from trade with Germans, working particularly to amass the art collections of Göring and Hitler. It is known that even in an early phase of the occupation, Miedl pressured Jewish art owners in an attempt to sway them to sell to Göring via him.

In the years shortly after the war, the Council for the Restoration of Rights also established that the transaction in which Miedl purchased the Goudstikker gallery should be labelled as involuntary, as evident from the considerations dedicated to the matter by the Council for the Restoration of Rights, judicial division, Chamber of Amsterdam on 21 April 1949, in which involuntariness was determined even '*if the sale were to have occurred at a normal purchase price'*.

The Committee would also like to mention, perhaps superfluously, the recommendations of the Ekkart Committee made in January 2003 in respect of the gallery, to the effect that: *'in any case, threats of reprisal and promises of the provision of passports or safe-conducts as a component of the transaction should be considered among the indications of involuntary sale'*.

The Committee's judgement in respect of art objects obtained during the war by others besides Göring or Miedl will be addressed in section 15 below.

III. Previous Applications for Restitution

7. The next question the Committee feels it must answer is whether the application to return the works of art should be regarded as a matter that has been conclusively settled based on a previous settlement. The result of this would be that the current application would no longer qualify as admissible. In its memorandum of 14 July 2000, the government formulated its position regarding restitution and recovery of items of cultural value, stating that an application can only be taken into consideration if:

   - *it is a new application, i.e. not an application that was already settled by a decision of a competent judicial body for the restoration of rights or by amicable restoration of rights*
   - *it is an application already settled as part of a restoration of rights in respect of which new, relevant facts have subsequently become available.*

   The Ekkart Committee proposed the following additions to this in its recommendations to the government in 2001:

   - *The Committee advises restricting the concept of 'settled cases' to those cases in which the Council for the Restoration of Rights or another competent court has handed down a verdict or in which a formal settlement between entitled parties and the agencies that supersede the SNK [Netherlands Art Property Foundation] has been reached;*
   - *The Committee advises interpreting the concept of new facts more broadly than has been customary in policy thus far and to also include deviations in respect of the rulings handed down by the Council for the Restoration of Rights as well as the results of changed (historical) insight in respect of the justice and consequence of the policy pursued at the time.*

   On 29 June 2001, the government also refined the concept of a 'settled case' as follows:

   > *The government is consequently willing to follow the Committee in its recommendation but feels that the concept of an 'official settlement' can lead to uncertainty. In the government's opinion, a case will be considered settled if the claim for restitution has intentionally and deliberately resulted in a settlement or the claimant has explicitly withdrawn the claim for restitution.*

   Pursuant to the recommendations of the Ekkart Committee of 28 January 2003 regarding the art trade and a written clarification thereof by its chairman Prof. R.E.O. Ekkart, the cited recommendations apply integrally to this application.

8. In respect of the art objects delivered to Miedl in 1940, it is important to note here that a settlement agreement was signed by Goudstikker on 1 August 1952, and in respect of the works of art delivered to Göring in 1940, a ruling was handed down by the Court of Appeals of The Hague on 16 December 1999.

   <u>Settlement Agreement of 1 August 1952</u>

   After World War II, Goudstikker sought restoration of rights in respect of the so-called 'Miedl transaction'. For years starting in 1947, Désirée Goudstikker negotiated the matter

with the administrators who were appointed on behalf of the Netherlands Property Administration Institute (NBI) for Miedl's assets and the gallery Miedl NV he had founded. The NBI represented the Dutch state in these negotiations. The negotiations on the restoration of rights ultimately, on 1 August 1952, resulted in a settlement agreement in respect of the works of art. This firstly arranged for the (re-)purchase by Goudstikker of more than three hundred art objects from the assets of Miedl that had been put under administration, as well as the termination of the pending lawsuit Goudstikker had brought before the Judicial Division of the Council for the Restoration of Rights. In this agreement, Goudstikker also waived the ownership rights to the other art objects delivered to Miedl NV during the war:

> *(Art. 1.4) In respect of the Party of the one part [in summary: the State], the Party of the other part [i.e. Goudstikker] waives all rights it could invoke towards anyone whomsoever in respect of paintings and art objects and shares in paintings and art objects that were delivered by GOUDSTIKKER NV to MIEDL NV between May of nineteen hundred and forty and May of nineteen hundred and forty-five, regardless of whether these have since been recovered from foreign countries or are located in foreign countries, as well as proceeds that in the event of sale have been or will be in lieu thereof.*

Unlike in a previous draft of the settlement agreement, in the final agreement, Goudstikker did not waive rights to the items that were delivered to Göring during the war.

<u>Application for Restitution to the State Secretary and Ruling by the Court of The Hague of 16 December 1999</u>

On 9 January 1998, Von Saher-Langenbein requested that the State Secretary return the 'Goudstikker collection'. The State Secretary rejected this application, ruling that in his view, even according to current standards, the restoration of rights had been carefully settled after the war, and that he saw no reason to reconsider the matter. The Applicant and Von Saher-Langenbein subsequently appealed this decision before the Court of Appeals of The Hague, at which time they also submitted an application for the restoration of rights for the 'Göring transaction' on the basis of post-war legislation on the restoration of rights (Decree on Restoration of Legal Transactions, E 100 from 1944). The court found this application inadmissible, given that the period from the post-war arrangement had expired on 1 July 1951 and the application was thus submitted too late. In addition, the court also examined whether there was a 'compelling reason' to officially grant restoration of rights, giving consideration to the following:

> *The court first of all takes into consideration that nearly 50 years have passed since the time when the last applications for restoration of rights could be submitted.*
> *Also of significance is the following.*
> *It is evident from the documents that the Company intentionally and deliberately decided against seeking restoration of rights in respect of the Göring transaction at the time. The court cites the Memorandum from M. Meyer, Master of Laws,. of 10 November 1949, as well as the report by A.E.D. von Saher, Master of Laws, of April 1952 (...)*
> *Goudstikker now avers that the Company decided against requesting restoration of rights in respect of the Göring transaction under the sway of the position of the State (or its bodies), purporting that the Göring transaction occurred voluntarily, and because Desirée Goudstikker-Halban was misled by the then director of the SNK, Dr A.B. de Vries, with respect to the value of the paintings that comprised part of this transaction.*

In the court's opinion, regardless of any position the SNK, the NBI or other State bodies may have taken in the matter at any time after the war, the Company was free to submit an application for restoration of rights to the Council. The Company had expert legal advisors who could have argued the involuntariness of the Göring transaction during proceedings before the Council, yet this was not done for the Company's own reasons.
Goudstikker's assertion that De Vries misled Desirée Goudstikker-Halban with respect to the value of the paintings does not carry sufficient weight. If this were the case – which the State refutes – then, the court feels, it should have been up to the Company or its advisors Meyer and Lemberger, since the SNK was (in a certain sense) its counterparty, to have one or more independent experts make (counter) assessments of the value of the paintings.

IV. Judgement of the Committee regarding the Works of Art delivered to Miedl and Göring, respectively

Works of Art delivered to Miedl

9. As for the validity of the settlement, the Committee's first consideration is that it has not been convinced by legal arguments that the agreement should not be deemed valid. The Applicant's authorised representatives have claimed that the settlement is null and void because it came about under coercion and deception. It is certain, as documented in the settlement itself, that Jacques Goudstikker's widow was very disappointed with the content of the agreement that was reached after many years. The circumstance that she signed the settlement despite this disappointment indicates that she opted for the lesser of (what she considered to be) two evils. In legal terms, this cannot be termed coercion, and no compelling arguments to support the accusation of deception have been submitted nor found by the Committee. The Committee will not address the issue that the legal nullity or voidableness of the settlement was not invoked on time. In the Committee's opinion, the settlement is thus legally valid.

10. The Committee also answers the question of whether, as a result of the validity of the settlement, this category of works of art can be regarded as a conclusively settled case in the affirmative.

In the Committee's view, a valid settlement is distinct from a valid legal ruling in that the former contains an individual statement by the parties who had previously been in disagreement but who have now met in the middle by reaching a settlement, whereas the legal ruling creates a situation imposed from above with which the losing party will generally disagree and remain in disagreement.

In this case, in the settlement, Goudstikker waived ownership rights to the benefit of the Dutch State and opted to put an end to the lawsuit brought before the Council for the Restoration of Rights. The Committee, citing the general considerations under *e*, is of the opinion that *waiving ownership rights*, as Goudstikker has done, unlike *deciding against submitting an application for the restoration of rights,* is of such a definitive nature, that, despite the broad concept of new facts, it cannot be applied here.

In conclusion, the Committee has arrived at the judgement that, even by present-day standards, by signing the settlement agreement in 1952, Goudstikker unconditionally waived the ownership rights to the art objects delivered to Miedl, on the basis of which the Committee cannot advise the State Secretary to return these art objects.

11. The Committee has considered what is known as the Elte Report as definitive when it comes to categorising the individual art objects covered by the settlement. This is an accountant's report written by J. Elte for Miedl NV in 1942, shedding light on the performance of the July 1940 agreements between Goudstikker and Miedl and Göring, respectively. In the Committee's view and according to the Elte list, among the category of works of art covered by the settlement are also some paintings that Göring purchased under contract but that were actually delivered to Miedl.

The Committee is consequently of the opinion that the works of art stated in LIST III under A are covered by the settlement, whereas the works of art that were delivered to Göring stated on LIST III under B, are *not* covered by the settlement.

Works of art delivered to Göring

12. It has been established that Goudstikker involuntarily lost the other art objects in LIST III under B and that they were not covered by the settlement. Given those circumstances, these works of art should be returned to the Applicant, unless the case should be deemed to have already been conclusively settled. The government policy which the Committee is bound to observe stipulates that the restoration of rights must not be reiterated.

In its first recommendation to the government, the Ekkart Committee advises restricting the concept of a 'settled case' to those cases in which the Council for the Restoration of Rights or another competent court has handed down a ruling or in which a formal settlement between entitled parties and agencies that supersede the Netherlands Art Property Foundation [SNK] has been reached. The government evidently agreed with this recommendation, according to a government statement of 29 June 2001, on the understanding that they refined the concept as follows: *'A case will be considered settled if the claim for restitution has resulted intentionally and deliberately in a settlement or the claimant has explicitly withdrawn the claim for restitution*.' With this addition, the government has apparently sought continuity with the wording of the court's ruling (as the legal successor of the Council for the Restoration of Rights) of 16 December 1999, in which the court decided that there were no substantial reasons to officially grant restoration of rights to applicants, because at the time, applicants had intentionally and deliberately decided against requesting the restoration of rights in respect of the Göring transaction.

Although the Committee cannot ignore this determination by the court, that does not automatically mean that by deciding against asking for the restoration of rights, the Applicant's actual *rights* to the Göring collection have been surrendered. Goudstikker could have had various reasons at the time for deciding against seeking restoration of rights that in no way suggest the surrender of ownership rights to the Göring collection. One example that can be cited is that the authorities responsible for restoration of rights or their agents wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily. As another indication that Goudstikker did not want to surrender

the rights to the Göring collection in 1952, the Committee would like to point out the deliberate omission of this category of works of art from the final revision of Article 1.4 of the aforementioned settlement.

Added to that is the fact that in 1999, the court could not take into consideration the expanded restitution policy the government formulated after that, which renders the Committee able and imposes an obligation on the Committee to issue a recommendation is based more on policy than strict legality. This expanded policy and the resulting expanded framework for assessment, representing generally accepted new insights, causes the Committee to decide that the Applicant's current application is still admissible, despite the court's previous handling of the application.

13. Based on the above and given the involuntary nature of the loss of possession, the Committee concludes that the application for restitution of the works of art delivered to Göring in 1940 as specified in appendix III-B, which are not covered by the waiver of rights in the settlement agreement of 1 August 1952, should be granted.

The Committee's opinion in respect of the meta-paintings that were delivered to Göring follows below under 14.

The meta-paintings

14. Of the 21 meta-paintings – the paintings Goudstikker co-owned with others – specified in List IV appended to the recommendation, the thirteen paintings listed under B on that list belong to the 'Göring collection'. The remaining eight meta-paintings, under A of this list, belong to the works of art delivered to Miedl.

Goudstikker involuntarily lost possession of these thirteen meta-paintings, as was the case with the other works of art that Göring obtained, and the rights to these paintings were not waived either. The only reason that might stand in the way of restitution is thus the co-ownership of those paintings by third parties, largely art dealers. Evidently, those third parties did not have any objection whatsoever at the time to leaving these paintings – which were, after all, intended for sale – in Goudstikker's physical possession. The Committee sees no reason why it should now rule any differently. The object of such an arrangement is to obtain the highest possible sale price, and apparently the co-owners had great confidence in that respect in the skills and renown of Goudstikker, who, incidentally, was not allowed to sell these paintings below the purchase price without the co-owners' consent and who would not be allowed to do so after their restitution either.

As it is the Committee's job to provide advice in such a way that, if the State Secretary accepts the advice, a situation is achieved that as closely as possible approximates the former situation of 10 May 1940, it recommends returning the paintings listed in LIST IV under B as meta-paintings to the Applicant, who should, if possible, notify the co-owners after the restitution is effected.

V. Other Art Objects

The 'Ostermann Paintings'

15. The twelve paintings designated in the first application and the Committee's Report as the 'Ostermann paintings' (numbers 1 to 12 on LIST V appended to this recommendation) comprised part of Goudstikker's trading stock at the time that Jacques Goudstikker was forced to leave his gallery behind in May 1940. In all likelihood, they were sold with the assistance of Goudstikker's staff to the German W. Lüpps in May 1940, before Miedl took over the gallery. E.J. Ostermann, a German who became a naturalised Dutch citizen in 1919, acted as the agent, receiving a sum of NLG 20,000 from Miedl. It is very likely that Goudstikker never received the purchase price of NLG 400,000. The circumstances of the loss of possession are otherwise the same as outlined above under 5 and 6.

Given these circumstances, it can be assumed that Goudstikker's loss of possession of these paintings was involuntary as a result of circumstances directly related to the Nazi regime. As the paintings do not fall under the ambit of the settlement of 1 August 1952 nor were the subject of any other application for the restoration of rights, the Committee's recommendation shall consequently be that these paintings should be returned to the Applicant. This is only partially possible, however, as will become evident below under consideration 17.

VI. Consequences of Restitution

Consideration in exchange for restitution

16. Another question that must be addressed is whether, in exchange for the restitution of a portion of the art objects to the Applicant, as considered above, there should be a repayment of the consideration received at the time for the sale.

At the recommendation of the Ekkart Committee, government policy states in this respect that restitution of the proceeds of sale should only be raised in the case if and in so far as the former seller or his heirs did actually receive the free disposal of those proceeds. In cases of doubt, the Applicant shall be given the benefit of the doubt.

As far as possible, the Committee has attempted to gain an impression of the amounts involved in the loss of possession of the works of art by Goudstikker. Stating the caveat that the Committee had information to go on that was collected during and after the war, information that does not always match up, an overview is provided below.

After the war, an amount of NLG 1,363,752.33 remained for Goudstikker from the amount of NLG 2,500,000 that was paid by Miedl and Göring for the sale of the gallery, as a result primarily of costs involved in sales transactions and disbursements of amounts connected with Goudstikker's winding up. In exchange for repossession of the immovable property and more than three hundred art objects as part of the amicable restoration of rights

after the war, Goudstikker then had to pay the authorities responsible for restoration of rights a sum of NLG 483,389.47. Accordingly, the amount of sales proceeds that was at the free disposal of Goudstikker can be set at NLG 880,362.86.

On the other hand, besides losing the trading stock of 1,113 inventoried works of art, Goudstikker was confronted with other sizeable losses. The loss of the gallery's goodwill and the loss of a large number of non-inventoried works of art and other goods can be designated as the largest, unsettled loss items. The second spouse of the widow Goudstikker, A.E.D. von Saher, Master of Laws, has estimated the value of just the non-inventoried works of art alone at between NLG 610,000 and NLG 810,000.

The Committee has determined that, after so many years, it is not possible to gain an accurate idea of Goudstikker's financial consequences of losing the gallery. In view of the following facts:

(a) that Goudstikker suffered heavy losses during and because of the war and occupation of such a nature that a significant, if not the most significant, gallery of the Netherlands ceased to exist after the war;
(b) that at least 63 paintings from Goudstikker's trading stock were sold by the Dutch State in the fifties and that the proceeds from that sale were channelled into state coffers and, in any case, were not allocated to Goudstikker;
(c) that the Dutch State has enjoyed a right of usufruct to the paintings for a period of nearly six decades without paying any consideration in exchange;
(d) and that, as proposed below under 17 of this recommendation, no compensation will be paid for the four paintings that have gone missing;

the Committee recommends that restitution should not involve any financial obligation on the part of the Applicant.

Missing and Stolen Works of Art

17. Two of the paintings belonging to the Göring transaction (NK 1437 and NK 1545) have been reported missing, while two paintings that are part of the Ostermann category (NK 1887 and NK 1889, numbers 9 and 10 on LIST V) are registered as stolen.

It must be established in respect of these four paintings that they cannot be returned (at this time), although they do qualify for restitution according to the Committee's opinion as set out above. Consequently, the Committee does not consider it unreasonable for the Applicant to be indemnified for them. However, now that it has been established that Goudstikker did receive the amounts from the transaction with Göring, whereas the recommendation under 16 is not to require the obligation for any (re)payment in exchange for the restitution of numerous art objects, the Committee feels that that compensation need not occur. If one or more of these paintings should return to the custodianship of the State of the Netherlands, this must result, the Committee feels, in the restitution thereof to the Applicant.

Public Interest

18. In conclusion of this recommendation, the Committee has asked itself whether there are weighty considerations, besides those mentioned above, that could impact the recommendation to return the art. In this framework, the question has been raised of whether there could be a public interest that should be weighed as part of this recommendation. After

all, the restitution concerns a large number of works, including some that are very significant in terms of art history, some of which have already been on display in the permanent exhibitions of Dutch museums for years.

Pursuant to the criteria of the Cultural Heritage Protection Act (referred to below as 'the WBC'), if a work of art has such significance in terms of cultural history or science that it should be kept for the Netherlands, there can be a case of a public interest to keep a collection or individual objects permanently for the cultural assets of the Netherlands. Article 2 of the WBC states that this concerns works of art that are irreplaceable and indispensable: irreplaceable, if no equivalent or similar objects in good condition are present in the Netherlands, and indispensable, if they have symbolic value for Dutch history, play a linking role in the exercise of research in a broad sense and/or represent comparative value in that they make a substantial contribution to the research or knowledge of other important objects of art and science.

The Committee considers that, in establishing a public interest, it matters whether this determination was applicable to the situation immediately prior to the loss of possession, or whether the understanding of the irreplaceability and indispensability arose in the period after recovery, while the works were under the custodianship of the Dutch state. In that respect, it can be observed that in 1940 there was as yet no protection of Dutch cultural assets, as the WBC aims to do. The Committee also feels that any post-war shift in the appreciation of the works of art cannot and should not have any influence on the recommendation to restore the art to the Applicant.

Regardless of the application of the WBC after effectuation of the restitution of the art, the Committee concludes that, in this case, no public interest is deemed present that could impede restitution to the Applicant.

Conclusion

The Committee advises the State Secretary:

1. to reject the application to return the works of art specified under consideration 4, in respect of which it has been established that Goudstikker cannot be designated as the original owner (List II);
2. to reject the application to return the paintings that were delivered to Miedl during the war and that are subject to the provisions of Article 1.4 of the settlement agreement of 1 August 1952 (List III-A);
3. to grant the application in respect of the works of art that are part of the Göring transaction (List III-B), with the exception of NK 1437 and NK 1545 that have gone missing, while the meta-paintings included there are to be returned in their capacity as meta-paintings (and in List IV-B);
4. to grant the application in respect of the works of art belonging to the 'Ostermann paintings', with the exception of NK 1886 and NK 1887 which have been stolen (List V).

Adopted in the meeting of 19 December 2005,

B.J. Asscher (chair)
J.Th.M. Bank
J.C.M. Leijten
P.J.N. van Os
E.J. van Straaten
H.M. Verrijn Stuart
I.C. van der Vlies