Intellectual property, original works of art: resale right for the benefit of the author

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In accordance with the provisions of Directive 2001/84/EC (the Resale Right Directive) the Commission presents a report on the implementation and effect of the Directive.

It recalls that at the time the Directive was agreed, 4 of the then 15 Member States did not apply the resale right in national law: Austria, Ireland, the Netherlands and the UK. These Member States enjoyed a transitional period to 1 January 2010 during which they could choose not to apply the resale right to the works of eligible deceased artists. These Member States, together with Malta, made use of this provision, and of the option to extend the derogation period for a further 2 years. **This derogation comes to an end on 1 January 2012**, at which point the Directive must be fully implemented in all Member States. This Report examines in particular the impact of the Directive on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive. It pays particular attention to the position of the Community in relation to relevant markets that do not apply the resale right, assesses the role of the Directive in the fostering of artistic creativity and reviews the situation with regard to the management procedures in the Member States.

The resale right affects directly only trade in works by EU living artists, or by EU artists deceased within 70 years of sale. Works subject to the resale right accounted for around EU 2.1 billion in auction sales in 2010 globally. In the EU these works accounted for 50% of the value of fine art auction sales in 2010, compared with 35% of sales in the US, 25% in Switzerland and 3% of sales in the rest of the world.

Bearing in mind the expectation that unharmonised application of the resale right contributed to "displacement of sales" within the EU, the Commission sought to identify:

- whether any **trade diversion** away from those Member States that introduced the resale right for the works of living artists the first time in 2006 and towards other Member States had arisen;

- whether those Member States which have derogation until 1 January 2012 appeared to have a **comparative advantage** in the sales of works of deceased artists. The Commission looked at available data sets for the period 2005 – 2010.

Auction sales of the works of living and deceased artists: art markets across the EU differ in their nature and make-up. For example, while the UK has the highest EU market share by value of auction sales in works eligible for the resale right (64% in 2010), followed by France (12%) and Germany (5%), the greatest volume of transactions was in France (26%).

In all, some 65,000 auction transactions were eligible for the resale right in 2010, of which roughly two thirds sales of works of deceased artists, and one third sales of living artists.

Looking at both the value and the volume of auction sales of works by living artists over the period 2005-2010 **no clear patterns can be established that would indicate that trade diversion** has systematically occurred within the EU away from those Member States which introduced the right for living artists in 2006.

The UK lost market share relative to 2005 for sales of both living and deceased artists. The UK also lost EU market share between 2008 and 2010 for works of living artists eligible for resale, though the UK market share peaked at a high of 61% in 2008 i.e. three years after the coming into force of the Directive. However, other Member States that implemented the resale right for the first time (Austria, Netherlands, and Italy) also gained market share at the expense of the UK during this period. It is also noted that the UK lost EU market share for the works of deceased artists both over the period 2005-2010 and 2008-2010. Of the Member States that already implemented the resale right, France and Germany both slightly gained market share over 2008-2010 for sales of living EU artists (from 5% to 7% and from 3% to 4% respectively), while the share of the "rest of the EU" remained stable at 2%. As regards works of deceased artists, market shares remained stable.

Changes in overall market share: similarly, with regard to market share as a whole (beyond auctions) over the period 2005-2010 no clear patterns can be established. Austria, the Netherlands and Italy saw a slightly increased share of the EU market for the works of living artists, while the UK's share decreased significantly, in line with the broader UK market contraction.

The changes in market shares for trade in the works of deceased artists show a similarly mixed picture. The UK market share decreased by the same degree as the broader market contraction. The market shares of Germany and the Netherlands declined slightly, while those of France, Austria and Italy rose.

Conclusions: no clear patterns can be established to link the loss of the EU's share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006. Neither can any clear patterns currently be established that would indicate systematic trade diversion within the EU away from those Member States which introduced the right for living artists in 2006. Nevertheless, there are **clearly pressures on European art markets**, in all price ranges, and for both the auction and dealer sectors, and it is recalled that the scope of the application of the resale right will be significantly expanded following the ending of the derogation for the works of deceased artists on 1 January 2012.

At the same time, the **quality of the administration of the resale right** appears to vary considerably across the EU, bringing costs to art market professionals and artists alike. The burden can be particularly high for those at the lower end of the market who are proportionately more deeply affected by the costs of administering the right, which have been **estimated at up to EUR 50 per transaction**. The biggest single factor appears to be the determination of qualifying artists. While collecting societies in some Member States maintain excellent records others do not maintain such data or make it available in an efficient manner.

The Commission recognises, furthermore, that in some Member States inefficient administration of the resale right presents a not insignificant burden on art market professionals and may also lead to unnecessarily high deductions from the royalties due to artists and their successors. The report states that:

- in view of the economic significance of the sector, the Commission considers that market developments should be kept under review and will undertake a further reporting exercise and deliver its results in 2014;

- the Commission will also pursue its commitment to persuading third countries to implement the resale right;

- in view of the volume of transactions subject to the resale right, the Commission also considers that there would be benefit in the exchange of best practice at European level so as to minimise the administrative costs in all Member states. To this end it intends to establish a Stakeholder

Dialogue, tasked with making recommendations for the improvement of the system of resale right collection and distribution in the EU.

Lastly, the Commission is concerned that **collecting societies should operate to a high standard of governance and transparency** with regard to their members and to commercial users, and will bring forward a proposal in this regard during 2012 to apply in equal measure to collecting societies administering the resale right.