



EUROPEAN  
VISUAL  
ARTISTS

## ***EVA Submission on the Consultation in preparation of a Commission report on the implementation and effect of the Resale Right Directive (2001/84/EC)***

EVA represents 23 European collective management societies for fine arts, photography and other visual works. Our members manage primary and secondary rights for close to 60.000 painters, sculptors, photographers, designers, illustrators and other authors of visual works. One of the rights administered is the resale right which was subject of EU-wide harmonisation by Directive 84/2001<sup>1</sup>. All members are connected with each other by reciprocal agreements and exchange efficiently all remunerations and royalties perceived for visual authors.

EVA is also observer of WIPO.

Concerning the evidence required with the consultation EVA refers to its members' submissions.

### **Introduction**

The EVA societies are grateful for receiving this occasion to report and comment on the effects of the implementation of European Council and Parliament Directive 84/2001. From a market perspective this legislation is an important part of the creation of a single European art market. Other important elements were the opening of the French auctioneering business to the EEA in 2001 and the harmonisation of the import VAT due to Directive 94/5/EC<sup>2</sup>.

For the artists the adoption of the Directive was an important success and a milestone in their initiatives to obtain recognition and fair treatment not only as creative beings but also as contributors of important values, cultural goods and high value content for all citizens. The resale right is an essential right for authors of fine arts and photography. Their main income, though, is generated by selling original works. However, these first sales generally generate relatively low prices. Much higher sale prices are normally achieved in the

---

<sup>1</sup> OJL 272/32, 13.10.2001 („Directive“ in the following)

<sup>2</sup> OJL 60, 3.3.1994, 16

pursuing resales which generate income exclusively for sellers, art market professionals and all related professions but not for authors.

Moreover, all other authors, such as composers and play rights receive revenues whenever their works are performed or copied throughout the entire protection term of life time and 70 years post mortem auctoris.

Only by means of the resale right this lack of balance can be efficiently redressed.<sup>3</sup>

The harmonisation became urgent following the Phil-Collins-Case and others (C-92/92 and C-326/92)<sup>4</sup> because the European Court of justice clarified in the judgments that the principle of non-discrimination laid down in the Treaty has to be applied. The reciprocity rule in 14ter Berne Convention does hence not apply within the EU countries. Even before the judgment the situation was unbalanced in the EEA because a great majority of countries applied the right while it was not applied in particular in the UK with the biggest art market in the EU, and some other countries. Due to the judgment the lack of balance increased creating obstacles to the internal art market as long as the resale right is not – fully - harmonised within the EEA.

This necessary harmonisation process is only completed once the entire Directive has been fully implemented in all member countries of the EEA. Temporary derogations, such as the exclusion of works of deceased artists by countries that first introduced the right, have to be brought to an end before the implementation process may-be regarded as fully completed. Heirs of authors in countries that fully apply the directive may require the royalty only where the temporary derogation is not in place. They are excluded from the right until the derogation expires.

The EVA societies are surprised that the Commission gathers information for preparing a report on the implementation at such a time where the Directive is still not fully implemented in all countries belonging to the EEA. It is not conceivable how meaningful evidence could be obtained at such an early stage. The UK, Ireland, The Netherlands, Austria and Malta still do not apply the resale right on an important sector of the market: on the works of deceased artists. This situation will continue for another year when the last and final prolongation of this optional derogation following Article 8 Directive will expire.

---

<sup>3</sup> See: Recital 3) Directive

<sup>4</sup> (1993) ECR I-5145

One of the countries where the full implementation of the directive has not been completed is the UK with the biggest art market in Europe - with a 69 % share of the EU art market in 2008<sup>5</sup>. Together with the other countries that exclude works of deceased artists a total of 72 %<sup>6</sup> of the European art market is still not working on grounds of a fully harmonised application of the resale right. The 2008 study on the UK art market prepared for the UKIPO concludes that application of the right for deceased artists would quadruple the size of art market affected both in value and amount of royalties.<sup>7</sup> The economic results gathered before full implementation of the Directive is achieved cannot reflect the true effect of the harmonisation. The report can only provide valid information after the derogation has expired and the right applies on resale of all protected original works of art.

Despite of the date set in article 11 Directive the report is not due until the moment its content can be provided: *“The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2009 (...) **a report on the implementation and the effect of this Directive**”*. A report on the implementation cannot be prepared before the Directive is effectively implemented otherwise the Commission risks to take decisions on an incomplete evaluation and would have to repeat the preparation of the report again after full implementation.

1 January 2009 would have only been an appropriate date for delivery of the first report, if implementation had been fully achieved within the regular implementation deadline that ended beginning of 2006 following article 8.1 Directive.

The Directive provided Member States with a very generous implementation deadline of 4 years although in general and even in complicated legal matters a general delay of 18

---

<sup>5</sup> Key findings page 13, The International Art Market 2007-2009, Clare Mcandrews, in the following: TEFAF study 2010

<sup>6</sup> Share of turnover 2008 of UK, Ireland, Austria and Netherlands, based on TEFAF study 2010, table 2.6; due to drop of UK share 2009 to 42% leads to 46% share of the countries excluding works of deceased artists in the following year;

<sup>7</sup> Graddy, Horowitz, Shimansky 2008, “A study into the effect on the UK art market on the introduction of the artists’ resale right” page 22: In summary, the average price of paintings and the distribution of EEA artists in relation to UK artists is quite similar under the present ARR regime and one which also extends the right up to 70 years after death. The primary difference between applying ARR only to living artists and applying it to living artists and their heirs within 70 years of death is the size of the market effected and the amount of ARR collected: both approximately quadruple from current levels. While the application of ARR legislation appears to have had very little effect on sales of living artists, it would be imprudent to predict the same result when the size of the market affected is about four times the current size affected.

months is the rule. Therefore this alternation of the Draft Directive, inserted on request of the UK delegation, was disapproved by the Commissioner at the time, Mr. Bolkestein.

Quote from the Commission press release of 19 July 2001: *"But Mr. Bolkestein also had to admit to some disappointment: "I would have preferred to see a higher level of harmonisation and earlier implementation". Emphasising this second point, he said: **"Ten years is better than the fifteen the Council were originally contemplating, but it is still a very long time. These time limits must remain the exception in order to guarantee the effectiveness of Community action within the single market."***

The above quote also proved that the Commission at the time understood the period of 10 years as the implementation term. This delay includes the temporary derogation to exclude deceased artists and its maximum prolongation until beginning of 2012. In EVA's view the Commission has reason to maintain its interpretation.

Besides, some countries implemented the right with long delays. Spain had only implemented the Directive on 23 December 2008 with law 3/2008 on section 24 Spanish copyright Act. This was 3 years after expiry of the deadline. But sales information from 2009 is not valid because of the financial crises that had a great influence on all markets. The figures for 2010 will not be completed before the deadline of this consultation expires. Therefore important evidence from one of the Member States will not be available.

In other countries authors had to resort to legal means to force governments to introduce the Directive after the deadline had expired. In particular Ireland, where the well-known artist Robert Ballagh entered a legal process against the State after one of his works was resold in auction in 2006 while the Directive was still not implemented. Legal action was also taken in the Netherlands.

If the Directive had been fully implemented until 1 January 2006 the Commission would have been in the situation to gather information of 2 calendar years in the beginning of 2008 and to work out a report until the end of the year. The two schedules would have matched.

The derogation of deceased artists was not the regular case but an option for certain countries that had to comply with certain conditions:

Recital 17 and article 8.3 Directive require that the transitory derogation is necessary for the "economic operators in the Member State to adapt gradually to the resale right system (...)". That such additional adaption was in fact necessary after a first delay of 4 years to

implement is still lacking evidence. To the contrary, the report commissioned by the UK IPO in 2008, (see fn. 7) came to the result that the UK art market had not suffered at all.

Despite a consultation in the UK with an overwhelming result in favour of expiry of the transitory derogation by the end of 2009, the UK government nonetheless decided for the prolongation until the end of 2011 by the only argument, that due to the financial crises, negative effects of the resale right might not be excluded. This decision by the UK government became subject to criticism by the House of Lords because the constituency had not been heard properly<sup>8</sup>.

In this context it is reminded that the Commission had the opportunity to give its opinion on the prolongation, pursuant article 8.3. Phrase 2 Directive but unfortunately did not make use of it.

It was not certain at the time the directive was adopted that any country would exclude works of deceased artists.

Therefore the revision clause should be read in conformity with the entire context and thus take into account that unexpectedly a large section for application of the right will only be introduced **over 10 (!) years after adoption of the directive or 6 years after expiry of the implementation term.**

Following the logic of the Revision clause, the delay for delivery of the first report should be prolonged **until the end of 2014.**

The time for the delivery of the first report is also badly chosen because of the **world-wide financial and economic crisis** that falls into the reporting. The crises has undeniable strong effects on all markets world-wide rendering it impossible to make reliable observations on isolated effects and their impact on the art market.

The figures published by the art market to evaluate the global art market developments since the crisis show that, in fact, no link to the introduction of the resale right can be made. Following the hypotheses that the resale right Directive had an effect on the markets, one would expect, that countries where the right was implemented for the first time or its protection level was raised the market should have suffered losses. For other countries

---

<sup>8</sup> Report from the house, Annex

where the harmonisation led to a lower level for instance by increasing the application threshold, lowering the rates applicable and through introduction of the ceiling one would expect that the market made gains. However, the contrary effect can be noticed: EU countries where the right was introduced or exercised for the first time raised their turnover more than countries where harmonisation should have led to lower number of sales eligible to resale right and lower amounts of royalties due provided the hypotheses were correct.

Regarding developments over the decade from 1998 – 2008<sup>9</sup> which includes the period of implementation of the resale right Directive so far, the countries where harmonisation led to lower resale right royalties do not appear to be “winners” in increased art market turnover while those introducing the right for the first time did not lose but made further gains of shares.

**In Germany** the implementation of the Directive 84/2001 led to 3 changes that potentially lowered the number of resale right affected sales and the amount of payable royalties. The application threshold was raised from € 50 to € 400. The applicable percentage was lowered from 5 % on the entire sales price to the sliding scale of percentages applicable for fixed price bands. Finally, the introduction of the ceiling had the effect that any sales at and above € 2 Million generated from now on € 12 500 as a maximum.

However, the average turnover development in Germany during the decade was 23.4% which was only half of the average growth in the entire EU that reached 45.2%.<sup>10</sup>

At the same time **the French art** market turnover increased by 17%.

**The Italian** the art market turnover increased significantly over the decade and reached the top of 60.2%. The resale right harmonisation had no visible negative impact on the Italian art market. Although the old legislation already provided for the right it had never been exercised before its modification pursuant Directive 84/2001.

If the introduction of the resale right had a considerable negative impact on the art market one would not expect that the Italian market size instead of decreasing would lead the growth figures with 15 percent points above the average growth.

**The UK** art market also grew above average during the mentioned period of time by 52.4%.

---

<sup>9</sup> TEFAF study 2010, tables 2.3 and 2.4

<sup>10</sup> See fn 3

In this context it is worth recalling that already in the past the UK art market professionals predicted major losses and market shifting to third countries as a result of the introduction of the import VAT. Import VAT was raised from 2.5% up to 5% in June 1999 in the UK without showing any of the effect predicted. There was no shifting of art market shares to third countries or losses due to its introduction<sup>11</sup>. However, today even most important art dealers do not approve this link between increasing taxes and losses on the art market.<sup>12</sup>

The resale right was introduced on 14 February 2006 making use of the temporary derogation that excludes application on works of deceased artists.

**In Switzerland** the turnover decreased by 3.1% over the same decade although there is no resale right in place neither for the living nor for the heirs of deceased artist.

Growth of the art market turnover in **the US** was only at 14.9% during the period 1998 – 2008.

---

<sup>11</sup> Report from the Commission to the Council on the Examination of the Impact of the relevant provisions of Council Directive 94/5/EC on the Competitiveness of the Community art market compared to Third countries' art markets, COM (1999) 185 final, see Annex

<sup>12</sup> Art News Paper, March 2011, page 1 and 5, see annex

**1. Please describe developments in the art market in your country over the period 2005-2010.**

***It would be helpful if you could describe these developments:***

- a) With respect to trade in the works of: (i) living artists; and (ii) deceased artists***
- b) By sector: (i) auction houses; (ii) art market galleries and dealers***
- c) By price range (up to €50,000; €50,001 - €200,000; €200,001 - €350,000; €350,001 - €500,000; and above €500,000)***

The EVA members will reply on national level directly and through the respective government bodies in charge. EVA refers to these contributions and adds the following observations on European level:

The EU art market in the years 2005 to 2010 has seen constant increase until the last months of 2008 when the global financial crisis took its toll. It is since then recovering quickly and it is stated that despite the recession in 2008/09 the market is still above any results before 2006.<sup>13</sup> There is no evidence at all that the introduction of the resale right could have plaid a role causing negative impact on the EU art market over this period of time. See above under introduction.

**2. Please describe the factors that have influenced the developments in, and the competitiveness of, the art market in your country over this period:**

- With respect to the works of: (i) living artists; and (ii) deceased artists***
- By sector: (i) auction houses; (ii) art market dealers and galleries***
- By price range***
- With respect to third countries***

During the period between 2005 and 2010 two factors are predominantly influencing the results: the resale right will not be fully implemented in 5 Member States in the EU which hold more than half of the entire EU art market. The UK, Ireland, Netherlands, Malta and Austria will include works of deceased artists only as from beginning of 2012. These countries held in 2008 72% of the EU art market size. An important portion of the resale

---

<sup>13</sup> TEFAF study 2010, key findings, page 13

right is therefore not subject of any report prepared before after full implementation for a considerable period of time.

Moreover the UKIPO study in 2008 on the effect of the resale right in the UK stated that the size of the effected market and the amount of royalties to be paid when resale right will be applied to the benefit of heirs of deceased artists is likely to quadruple. While art markets recover quickly from the recession it appears unjustified that heirs are deprived of their right for such a long period. The TFAF study concluded that besides of a recession of the market after the financial crises, markets returned already in the second half of 2009 to turnovers above results of any year before 2006.

Recital 17 and 27 clarify that the term of protection as harmonised by Directive 93/98/EC fully applies to the resale right and that after expiry of the derogation in Article 8 Directive heirs may no longer be excluded. Continued exception of heirs would infringe the resale right Directive as well as the Term of Protection Directive. Without sufficient justification it would also infringe Article 14ter of the Berne Convention and Article 17.2 of the European Charter of Fundamental rights. A justification in that sense is not that sellers will have to pay more than today. Like in any other case of a deprivation of property payment of damages would be due.

EVA members prepare to take all necessary steps in the event of a prolongation of the exception of heirs beyond the end of 2011.

Despite application of right for works of deceased artists in the biggest EU art market, UK, the competing art market in France is doing very well. We refer to a recent economic study<sup>14</sup> that concludes that the art market depends on numerous factors that are largely independent from whether a resale right is in place or not.

Effects of the resale right as isolated factor are therefore not measurable at least not as a negative factor. However, that the French art market developed well after the financial crises might be partly due to the positive effects of Directive 84/2001.

The German Newspaper "Frankfurter Allgemeine Zeitung" informed on 8 January 2011<sup>15</sup>:

---

<sup>14</sup> Joëlle Farchy et Jessica Petrou, Sorbonne, Mars 2011, „Le droit de suite est-il soluble dans L'analyse économique ? »

<sup>15</sup> Angelika Heinick, FAZ 8 January 2011, „Alle Welt will wieder nach Paris“

„Import statt Export: In Frankreich feiern die Auktionshäuser ihre Umsätze des vergangenen Jahres“.

„Schon im ersten Halbjahr 2010 zeichnete sich die Überwindung der Krise ab.“

„In den vergangenen Jahren sind die beiden internationalen Firmen (Sotheby's and Christies) dazu übergegangen, Frankreich nicht nur als Reservoir für zum Export bestimmter Meisterwerke, sondern als Handelsplattform für den europäischen Markt zu nutzen.

Christie' in Paris reached in 31 auctions in 2010 nine times hammer prices above 1 million € and Sotheby's 15 times within 32 auctions.

The article includes many examples proving that the French art market does not appear to suffer negative effects from the import VAT. To the contrary due to Sotheby's own reports, it achieves 35 % of its turnover in France by imported art works.

There are also reports on recovery of other art markets, for instance in Germany<sup>16</sup>

Additional factors that influence prices of art work in sales by art market professionals are the buyers' and seller's commissions, shipping costs, insurances and related costs such as for catalogues.

Our member DACS has collected case studies that show impressively the difference in dimensions from which the following is chosen as example:

Alberto Giacometti

Walking man I (1960)

Sold for £65 million

Sotheby's February 2010, London

Hammer Price: £58 million

Sale price; £65 million

Buyer's premium: £7 million

**Buyer's premium represents 12% of hammer price**

Potential Artists Resale Right due: £10,000

**Royalty represents 0.02% of hammer price**

---

<sup>16</sup><http://www.lempertz.com/pm0+M5d9d9d78cd4.html> contemporary art sale in June 2010

**3. What role, if any, has the resale right played in the development of the art market in your country? What effect has it had on trade in the internal market? What effect has it had in terms of the competitiveness of the art market in your country vis-à-vis other relevant markets that do not apply the resale right?**

As said before, no negative impact on the art market can be measured. However, to the particular success of the French art market after the financial crises the partly harmonisation due to the resale right application on works of the living artists in the UK will have added. The imbalance between the countries has been reduced and the outlook at full implementation in the UK is quite promising for France and other art markets on the Continent.

The result of the report commissioned by the UKIPO in 2008 was that in the absence of any evidence of damage to the UK art market its only conclusion was rather weak that it would be “imprudent” to exclude an impact when the right will apply to heirs.<sup>17</sup>

Concerning other relevant markets where the resale right is not applied reference was made already as concerns the US art market with lower growth than the European art market during the decade from 1998 – 2008 of just 14%. In Switzerland growth was negative over the mentioned decade.

Moreover in both countries there are movements by artists to introduce the resale right.

## USA

In the US a considerable number of artists and estates have signed a common declaration to support the introduction of the right.<sup>18</sup> The initiative is headed by the estate of Roy Lichtenstein, the famous pop artist and supported by Frank Stella, known for his hard-edge paintings and recently elected President of CIAGP.<sup>19</sup> We therefore have reasons to assume that the resale right will be implemented in the USA. Shifting of market shares because of the resale right are already today very unlikely due to the much higher costs of shipping and

---

<sup>17</sup> Compare fn 3, above

<sup>18</sup> See Annex –

<sup>19</sup> See EVA and CISAC websites



EUROPEAN  
VISUAL  
ARTISTS

insurance. With the introduction of the right in the USA it would be completely excluded as cause for shipping works from Europe to the USA.

A draft bill is prepared and is about to be introduced to the newly elected and set up legislative committee of the House of Representatives. The draft is oriented on the European resale right. After an initiative in the 80ths the government initiative is pending until the outcome of the EU harmonisation.

The introduction of the resale right in the US is of great interest for European artists. EVA made an inquiry for artists represented by EVA members on what their benefit would be if the resale right would apply in the USA. We expect that the introduction of the resale right in the USA would provide European artists with a significant source of additional income. The USA hold approximately 30% of the world art market. Works of numerous European artists are resold in US auctions where regularly high prices are reached.

For the past year 2009 our member ADAGP has collected sales' information from the Sotheby's and Christie's official websites for public sales in New York and evaluated sales' results for their direct members. Although, the evaluation is not complete, because it does not cover all US sales houses and all European authors, it gives an impression of the importance of art works from European artists on the US art market. The total amount achieved is 212 million USD.

Provided that the resale right were applied in the USA during the period these sales took place and an average percentage of 3,5% on the sales price would have been applied a total amount of

**FRANCE: 7,420 million USD** in royalties would be due for the European artists being members in the French society ADAGP listed in the attached evaluation for sales in 2009.

Our German member VG Bild Kunst made an evaluation covering important sales for 4 artists during the years 2006-2009. The source of information is art.net.

**GERMANY: 1,5 million USD** for the 4 listed artists being members of VG Bild-Kunst for the most important sales between 2006 and 2009

Our Norwegian member BONO informed us that the work "Vampire" of Edvard Munch was sold in November 2008 for over 38 million USD which would have qualified for 1.3 million USD in royalties.

It is therefore obviously in the interest of European artists that the resale right will be introduced in the USA as well as in other Third countries provided the reciprocity is reached pursuant 14b Berne Convention and Article 7.2 of the Directive.

### **China**

The Chinese market however, does not qualify for an appropriate comparison. The Chinese market appears to concentrate on domestic and other Asian art while rich Chinese collectors buy in the traditional European market places, such as London and Paris<sup>20</sup>.

### **Australia and New Zealand**

The resale right was successfully implemented in Australia and is efficiently managed by collective management.<sup>21</sup>

As follow up the management scheme will be set up also in New Zealand.

### **Philippines**

A new collecting society for visual works was set up in Manila to manage the resale right which is provided for in the Philippine Copy right act.

#### ***4. What is the outlook for the art market in your country? What are the major risks and opportunities facing the sector?***

AND

#### ***5. It would be helpful if you could further support your answers to Qs1-5 above with as much evidence as possible, including the following market data for each year over the period 2005-2010:***

- ***art market turnover***
- ***value of sales by auction***
- ***value of sales by dealers and galleries***
- ***volume of auction and dealer sales by price range (up to €50,000; €50,001 - €200,000; €200,001 - €350,000; €350,001 - €500,000; and above €500,000)***

---

<sup>20</sup> See fn 15 with several examples for Paris sales 2010.

<sup>21</sup> <http://www.resaleroyalty.org.au/>

- *imports of works of art*
- *exports of works of art*

See above, we refer to the individual submissions by our members.

**6. What is the cost of administering the resale right royalty (a) for living artists; and (b) on behalf of deceased artists? Who bears this cost?**

There is no differentiation between administration costs for living artists and heirs. Collecting societies gather necessary documents of evidence about the legal entitlement of persons other than the artists themselves at the time of joining the collecting society. There is no need for additional administrative steps at each act of resale as the information and evidence is already available.

For heirs of artists not being member of a collecting society there is no significant difference. This is mainly a matter of distribution of moneys in case of compulsory collective management. The reports of our members concerned show, that only an insignificant number of authors cannot immediately be located. The collecting societies' efforts are to 90 – 95% fruitful. Often heirs and authors join a collecting society once they received a payment. The same percentage is therefore applied to all resale royalties collected by a collecting society. The cost deductions are subject to transparent and democratic decision taking by members within the collecting societies. They are also subject to control by surveillance bodies.

Amounts deducted from the royalties to be paid to authors range between 10% in Germany, 12% in France and 15% in the UK. This average amount is exceeded in some countries with very small art markets where economies of scale cannot be realised. The biggest of these countries is Sweden with a 20% cost rate and a global art market share of below 1%<sup>22</sup>. In Italy the cost rate is fixed by the legislator. Others concern far smaller markets and are not even mentioned in the art market studies.

EVA estimates the costs by art market professionals to be very low because these professionals should be able to refer to their existing accountancy and other administrative records.

---

<sup>22</sup> TEFAF study 2010 page 24

Our member DACS has records on costs of art market professionals and achieved important evidence through interviews conducted in 2008 for the UK IPO consultation. 60% answered that the right took them less than 5 minutes and cost less than 10 £ per quarter in administration.

Several societies have set up electronic devices to facilitate art market professionals' declarations that can be demonstrated if required.

***7. How many artists have benefitted from the resale right for each year over the period 2005-2010? What is the value of the royalties that have been distributed (a) to living artists; and (b) on behalf of deceased artists?***

This information can be achieved by the individual reports of our members. In general the collection on behalf of heirs of deceased generates between twice and four times as much value in revenues. This is no specific effect of the resale right but a general one that can be observed in all artistic sectors such as music and film -even at sports. There are only a few stars. For a majority of artists it takes still a lifetime before becoming famous if at all.

***8. What is the value of the royalties that have been collected but not distributed? How are these monies being used?***

In all member states without compulsory collective management the collecting management organisation distributes all revenues collected for its members. In countries with compulsory collective management resale royalties are collected also for non- members provided the work and sale qualifies for application of the right and the author is either EEA citizen, considered like a citizen or is originate from a country with which reciprocity on resale right is in place following the Berne Convention.

Legislation that provides for compulsory collective management also includes rules on the treatment of moneys that cannot be distributed.

In Belgium, Sweden and Denmark 5% of the revenues could not be distributed. The legislation requires that moneys are reserved for appearing authors for 10 years, in Denmark for 3 years.

## ***9. What is the role of the resale right in fostering artistic creativity?***

### **Recognition of artists' contribution to the economies and for creating cultural goods**

Artists mainly live from the selling of original works. In general artists' are selling works at low prices for different reasons for instance because the first sale can be considered as an investment to facilitate the dissemination of the work and also because most artists think that bargaining is not compatible with the image of artists. The resale right is the only means to enable artists to benefit to a modest level on subsequent sales made if art market professionals take part in the transfer.

The resale right also brings the protection of fine arts in a balance with other protected work categories such as music and theatre plays where the authors and their heirs are remunerated for each performance during life time and 70 years after the author's death.

### **The circulation of works and their changing market value becomes transparent**

Many artists emphasise the importance to know about the economic success of previous works. The resale right is a means to gather such information which gives important feedback to the authors. This information is highly valuable for artists for their future creations and directions. It is also an important means to receive information on the place where their work is located. Many laws provide a right of the author to access to their work which cannot be exercised when subsequent transfers of the work and the purchaser remain undisclosed.

### **Heirs and estates contribute to preservation and access to culture heritage**

Heirs and estates to a large extent undertake costly efforts to preserve and archive the works of their ancestors, thus, creating access to unique sources for researchers and the larger public. The situation is comparable with the heritage of buildings classified as cultural heritage. Such efforts are not funded by any cultural programs.

Heritage of copy rights including the resale right are an issue of fair treatment of the arts. Directive 84/2001 clearly indicates that the same protection term applies as for any other authors' right.

***Additional aspects:***

Some statements which are regularly maintained by art market professionals and which are important for the understanding of the issues are treated in the following, although not expressively taken up by the Commission in its questionnaire for the consultation process.

**The art market and employment**

Art market professionals regularly claim that the resale right would endanger jobs. It is claimed that in 2009 in the EU there were over 59,000 businesses in the art trade directly employing 270,000 people. These figures are questionable, not only because the source of information are the art traders themselves that have a vested interest in high numbers. There are no figures available from an objective employment body or social insurance authority as evidence of the reported employment figures. Outside the few big auction houses and the biggest art galleries reliable figures are unlikely. When it comes to art traders, whose business is marked of in-transparency, evidence is even more unlikely to be found.

Furthermore, there is no differentiation between paid and unpaid jobs or full and part time employment. A majority of art dealers and galleries has no all-day opening hours and hence no clear way to measure the hours any work is done.

It is known that in particular staff qualified with university degrees – mainly art historians – work predominantly as volunteers with little or no payment.

As an example please find attached the list of vacancies published by the German gallery association where the vast majority of jobs fall under the category “voluntaries” or “practicum”<sup>23</sup>.

**Import VAT**

---

<sup>23</sup> <http://www.bvdg.de/stellenmarkt-angebote.php>

Following the 6<sup>th</sup> Directive on VAT (777/388/EC) from 17 May 1977 provided for the step by step introduction of harmonised rates in Member States for the import of arts works from third countries.<sup>24</sup> Today the minimum standards are applied in the entire EEA. However there is still variety in the applicable rates applied in the Member States.

The UK received a specific derogation and was allowed to introduce half of the minimum rate of 5% for a transitory period. In June 1999 the derogation expired and the UK delegation demanded that either the derogation was perpetuated for the UK or all Member States were allowed to apply half of the minimum rate.

The Commission concluded in its report dated 28 April 1999 (COM(1999) 185) final “report from the Commission to the Council on the Examination of the impact of the relevant provisions of Council Directive 94/5/EC on the competitiveness of the Community art market compared to third countries’ art market” that there was no reason for continuation of the derogation.

Since the introduction of the first part of the import VAT rate the UK art market continued to prosper and grew faster than the US art market during the same period of time.

### **Individual management of resale right**

Following article 6.2 Directive Member States may opt for the introduction of either mandatory or compulsory collective management. However, recital 26, phrase 4 stipulates that Member States have to ensure that revenues for authors from other EEA countries are efficiently transferred. This request is not limited to collective management but must apply to the same degree to individual rights management.

Collective management provides functioning networks for the management on national level and the international exchange of information and revenues. The question should be raised by the Commission whether in countries that did not provide for compulsory collective management the individual management works efficiently. It should also be inquired whether individual rights management is perceived as more practicable solution for the art market professionals and if so, for which reason. Would for instance the administrative costs be higher or lower for the art market professionals when contacted individually by

---

<sup>24</sup> List of rates page, 18:

[http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/vat/how\\_vat\\_works/rates/vat\\_rates\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf)

authors and heirs in a non-standardised manner? Does the international exchange of royalties work efficiently if the right is managed individually?

### ***Conclusion***

- It is too early for a meaningful report on the implementation of Directive 84/2001 because the right is not fully implemented in more than half of the EU art market before the end of 2011 when the derogation for deceased artists in the UK, Ireland, Austria, the Netherlands and Malta expires.
  - Art markets in Europe have recovered fast from the financial crises.
  - The resale right harmonisation is an important factor to provide fair conditions to the EU art market albeit negative influence on national markets is not measurable due to the complexity of the markets and the numerous factors playing a role.
  - The resale right harmonisation is an important tool to prevent discrimination of artists and heirs within the EEA.
  - The European art markets are strong and competitive with Third countries where the right does not exist.
  - In the USA a powerful campaign lead by important artists and estates, such as Frank Stella and Roy Lichtenstein are under way for the introduction of the resale right.
  - The exclusion of heirs from the right infringes European and national legislation and is not justified by the simple fact the sellers would have to pay more.
-