OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 17 December 2009 [1]

1. In 1859, Jean-François Millet completed and sold his famous painting *L'Angélus*. Years after his death, at a time when his family, like many others affected by the First World War, was in straitened circumstances, the painting changed hands at a price which considerably enriched the seller. It is said to have been the contrast between the two circumstances which led the French legislature to introduce, in 1920, a *droit de suite*, or resale right, under which subsequent sales of works of art give rise to a royalty payment to the author or his heirs. [2]

2. The right has since spread to other legal systems. It was introduced into the Berne Convention in 1948, [3] on an optional basis, and was made compulsory in the European Union by Directive 2001/84 ('the Directive'). [4] Although the principle is uniform and the rates applied are harmonised, Member States enjoy discretion in several regards.

3. As French law currently stands, following the death of the author of the work, the beneficiaries of the resale right are limited to the author's heirs at law, to the exclusion of any testamentary legatees.

4. The artist Salvador Dalí [5] died in 1989, leaving all his intellectual property rights to the Spanish State by will. Had he died intestate, those rights would have passed to a number of collateral heirs.

1 — Original language: English.

2 — See the statement by the Minister for culture and communication in the French National Assembly on 16 March 2006 (http://www.assemblee-nationale.fr/12/cri/2005-2006/20060175.asp).

3 — Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, revised in particular at Brussels on 26 June 1948. All the Member States of the European Union are parties to the convention.

4 — Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32). Although the term '*droit de suite*' is widely used in English, in particular in the English version of the Berne Convention, I shall henceforth use the term 'resale right', as in the Directive.

5 — It is interesting to note that Dalí was himself deeply influenced by *L'Angélus*, and in 1963 published a lengthy 'paranoiac-critical' interpretation of it, under the title *Le mythe tragique de l'Angélus de Millet*.

5. In accordance with French law, the resale rights on sales of Dalí's works in France have been collected on behalf of those collateral heirs. A dispute has arisen between the Spanish society which collects royalties on behalf of the Spanish State, represented by a foundation set up by Dalí before his death, and the French collecting society which has paid royalties to his collateral heirs.

6. In that context, the Tribunal de grande instance, Paris, asks whether the French limitation of beneficiaries of the resale right to heirs at law is compatible with Union law.

I — Legal background

A — *The Directive*

7. Recital 1 in the preamble to the Directive states that 'the resale right is an unassignable and inalienable right', and recital 3 explains that it is intended 'to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art' and to help 'redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works'.

8. Recital 9 notes the pre-existing situation, in which most, but not all, of the then 15 Member States provided for a resale right, albeit with significant variations, notably as regards the works covered, those entitled to receive royalties, the rate applied, the transactions subject to payment of a royalty, and the basis on which it was calculated. It goes on: 'The application or non-application of such a right has a significant impact on the competitive environment within the internal market, since the existence or absence of an obligation to pay on the basis of the resale right is an element which must be taken into account by each individual wishing to sell a work of art. This right is therefore a factor which contributes to the creation of distortions of competition as well as displacement of sales within the Community.'

9. Recital 10 similarly stresses that '[s]uch disparities with regard to the existence of the

resale right and its application by the Member States have a direct negative impact on the proper functioning of the internal market in works of art as provided for by Article 14 of the Treaty', while recital 11 notes that harmonisation of Member States' laws on the resale right contributes to the attainment of the freedoms inherent in the internal market. Consequently, according to recital 13, '[e]xisting differences between laws should be eliminated where they have a distorting effect on the functioning of the internal market, and the emergence of any new differences of that kind should be prevented', a concern which is reiterated, in substance, in recitals 14 and 15. In particular, according to recital 23, the effective functioning of the internal market in works of modern and contemporary art requires that uniform rates for the resale right should be fixed to the widest possible extent.

10. However, recital 13 also states that '[t]here is no need to eliminate, or prevent the emergence of, differences which cannot be expected to affect the functioning of the internal market', and recital 15 that '[i]t is not … necessary to harmonise every provision of the Member States' laws on the resale right and, in order to leave as much scope for national decision as possible, it is sufficient to limit the harmonisation exercise to those domestic provisions that have the most direct impact on the functioning of the internal market'.

11. In a similar vein, but more specifically, recital 27 states: 'The persons entitled to receive royalties must be specified, due regard being had to the principle of subsidiarity. It is not appropriate to take action through this Directive in relation to Member States' laws of succession. However, those entitled under the author must be able to benefit fully from the resale right after his death …'.

12. Of the substantive provisions of the Directive, Article 1(1) requires Member States to 'provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author'.

13. The rates to be applied are set uniformly in Article 4(1), with minor discretionary variants in Article 4(2) and (3).

14. Under Article 6(1), the royalty is to be payable 'to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.' [6]

15. Article 8 provides, in particular:

'1. The term of protection of the resale right shall [run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public [7]].

2. By way of derogation from paragraph 1, those Member States which do not apply the resale right on (the entry into force date referred to in Article 13), shall not be required, for a period expiring not later than 1 January 2010, to apply the resale right for the benefit of those entitled under the artist after his/her death.

3. A Member State to which paragraph 2 applies may have up to two more years, if necessary to enable the economic operators in that Member State to adapt gradually to the resale right system while maintaining their economic viability, before it is required to apply the resale right for the benefit of those entitled under the artist after his/her death. …'

16. Article 12 requires Member States to implement the Directive before 1 January 2006, and Article 13 specifies the date of its entry into force as the day of its publication in the *Official Journal of the European Communities*, namely, 13 October 2001.

B — *French law*

17. The resale right has been provided for in French legislation since 1920. [8] The relevant provision was none the less amended in 2006

6 — The politically half-correct language of this provision, in English, seems to suggest that the sex of artists, like that of angels, is debatable.

7 — See Article 1(1) of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9), now replaced by Article 1(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) (OJ 2006 L 372, p. 12).

8 — Loi du 20 mai 1920 frappant d'un droit au profit des artistes les ventes publiques d'objets d'art, repealed and replaced by Loi n° 57-298 du 11 mars 1957 sur la propriété littéraire et artistique.

in order to bring it fully into line with the requirements of the Directive. [9] Article L.122-8 of the Code de la propriété intellectuelle (Intellectual Property Code) thus now provides:

'Authors of original works of graphic or plastic art who are nationals of a Member State of the European Community or of a State party to the Agreement on the European Economic Area enjoy a resale right, which is an inalienable right to participate in the proceeds of any sale of a work subsequent to its first transfer by the author or by those entitled under him or her …'

18. Article L.123-7 further specifies:

'After the author's death, the resale right referred to in Article L.122-8 shall accrue to his or her heirs …, to the exclusion of all legatees and successors in title, for the current calendar year and for 70 years thereafter.' [10]

19. I shall refer to that definition of the beneficiaries of the resale right after the author's death as 'the contested rule'.

20. The order of succession of heirs is governed by Article 734 et seq. of the French Civil Code and comprises four successive categories. Within each category, priority depends on the degree of relationship. Collaterals beyond the sixth degree do not succeed. [11]

21. Article 912 et seq. of the Civil Code divide a deceased's estate into a part reserved by law for certain heirs and a part which may be disposed of by will to legatees. As a general rule, the whole estate may be disposed of by will if the deceased is not survived by descendants or by the spouse of an existing marriage (or, prior to 2007, by direct ascendants). The contested rule is thus an exception to that general rule.

9 — Loi nº 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information.

10 — This provision has remained unchanged since the length of the applicable period was extended from 50 to 70 years in 1997. The term 'successors in title' here translates the French '*ayants cause*', which may be presumed to have a different meaning from '*ayants droit*', the term used in the Directive for 'those entitled under him/her', even though the two are often used interchangeably in French.

11 — Under Article 724 of the Civil Code, in the absence of heirs and legatees, the State succeeds to the estate.

C — *Spanish law*

22. The resale right was introduced into Spanish law in 1987, [12] and was brought into line with the provisions of the Directive by Law 3/2008. [13] The Spanish legislation, unlike the French, does not exclude any category of persons from those who can be entitled under the author of a work, but has simply specified, since 1996, that entitlement is transmitted only by succession *mortis causa*.

II — Facts, procedure and questions referred

23. In 1983, Salvador Dalí set up the Fundació Gala-Salvador Dalí [14] ('the Foundation')

'to promote, foster, disseminate, celebrate, protect and defend in Spain and in any other State the artistic, cultural and intellectual oeuvre of the painter, his property and rights of whatever nature; his life experience, his thoughts, his projects and ideas and artistic, intellectual and cultural works; his memory and the universal recognition of the genius of his contribution to the Fine Arts, to culture and to contemporary thought'. [15]

24. Dalí died a widower in 1989, leaving no children or descendants but, in his will, making the Spanish State 'universal and unconditional heir to all his property, rights and artistic creations, fervently calling upon it to preserve, disseminate and protect his works of art'. The State accepted that legacy, giving the task of administering and exploiting the rights concerned to the Ministry of Culture, which passed it on to the Foundation.

25. In 1997, the Foundation gave the Spanish collecting society Visual Entidad de Gestión de Artistas Plásticos ('VEGAP'), of which it is a member, an exclusive mandate to exercise its rights and collect dues in respect of Dalí's

12 — Ley 22/1987, de 11 de noviembre, de Propiedad Intelectual, Article 24, as recast by Real Decreto Legislativo 1/1996, de 12 de abril, por el que se apruebe el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia.

13 — Ley 3/2008, de 23 de diciembre, relativa al derecho de participación en beneficio del autor de una obra de arte original, Articles 2(1) and 6.

14 — Gala was the name by which his wife, Elena Dmitrievna Diakonova, was generally known. She had died in 1982.

15 — See http://www.salvador-dali.org/fundacio/es_historia.html.

works anywhere in the world. VEGAP, which has a reciprocal representation contract with its French sister society, Auteurs dans les Arts Graphiques et Plastiques ('ADAGP'), asked ADAGP to manage the rights over Dalí's works in France, with effect from 17 October 1997.

26. Since then, ADAGP has collected and paid to VEGAP, on behalf of the Foundation, all amounts due in respect of exploitation of the artist's works in France – with the exception of resale rights, which it, at least initially, collected on behalf of, and paid to, Dalí's collateral heirs.

27. On 28 December 2005, the Foundation and VEGAP brought proceedings against ADAGP before the Tribunal de grande instance in Paris. They argue that, according to both French and Spanish choice of law rules, succession to Dalí's movable estate is governed by Spanish law because, on his death, he was a Spanish national domiciled in Spain. The Foundation is therefore the sole beneficiary of all rights over Dalí's works, in particular the resale right in respect of public sales. It seeks an order for ADAGP to pay it, through VEGAP, all royalties collected on sales of Dalí's works since 17 October 1997.

28. ADAGP, it appears from the national case-file, has not distributed any such royalties collected since the action was brought, and is prepared to pay them to whichever party or parties the Tribunal de grande instance decides is properly entitled. Royalties already paid to the six collateral heirs whom it considered entitled in accordance with French law, it submits, must be recovered if appropriate from those heirs. It has therefore joined the heirs to the proceedings as third-party defendants, although none has entered an appearance.

29. The Tribunal de grande instance notes that France has maintained a resale right for the benefit of heirs at law alone, whereas the Directive specifies that it is to be payable to 'those entitled under' the deceased artist. It wonders whether that is permitted by the

Directive, either as a matter of course or pursuant to the derogations in Article 8.

30. It has therefore referred the following questions to the Court for a preliminary ruling:

'Can France, subsequent to the directive of 27 September 2001, retain a resale right allowed only to heirs to the exclusion of legatees or successors in title?

Do the transitional provisions of Article 8(2) and (3) of the directive of 27 September 2001 allow France to have a derogation?'

31. Written observations have been submitted by the Foundation and VEGAP, by the French, Italian and Spanish Governments and by the Commission. At the hearing, oral argument was presented by the Foundation, the French and Spanish Governments and the Commission.

III — Assessment

32. The referring court wishes to know, essentially, whether the Directive, with particular regard to Articles 6(1) and 8(2) and (3), is to be interpreted as allowing France to maintain a resale right the benefit of which is restricted, after the author's death, to his or her heirs at law, to the exclusion of legatees or successors in title.

33. Before addressing those questions, however, I think it helpful to consider certain aspects which might affect the applicability of the Directive in the circumstances of the main proceedings and even, in the Spanish Government's submission, the admissibility of the questions referred for a preliminary ruling.

34. I note, first, that the main proceedings are between private parties, and do not involve France as a Member State to which the Directive is addressed. Second, those proceedings concern, at least in part, amounts which may have been collected, on the one hand, before the Directive was adopted and, on the other hand, after its adoption but before the time allowed for its transposition had expired. Third, in the main proceedings, the

claimants do not rely on any incompatibility between French law and the Directive, but on the applicability of Spanish rather than French law to determine the beneficiaries of the resale right.

forwarded to the Court that the Foundation and VEGAP do not seek to rely on the Directive against ADAGP or Dalí's heirs in the main proceedings. The Tribunal de grande instance appears rather to have raised the issue of its own motion, and it is only in their submissions to this Court on the issue thus raised that the Foundation and VEGAP have argued that the contested rule is incompatible with the Directive.

A — '*Horizontal direct effect*'

35. According to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, so that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. [16] Since the main proceedings in the present case are indeed between private parties, that rule would appear to preclude reliance on any possible incompatibility between French law and the Directive.

37. In those circumstances, it seems to me that the case-law in question is not in fact relevant. Even though the Court has stated in general terms that a provision of a directive cannot apply in proceedings between private parties, the basis for that statement is that one private party cannot rely upon the provisions of a directive in order to assert a right against, or to impose an obligation on, another such party. That consideration does not apply where the national court raises the matter of its own motion.

36. However, it seems clear from the order for reference and the national case-file

38. In that regard, the Court has consistently held that, in the absence of Community rules (now rules of European Union – 'EU' – law) in the field, it is for the domestic legal system

16 — See, most recently, Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paragraph 59.

of each Member State to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render virtually impossible or excessively difficult the exercise of such rights (principle of effectiveness). Thus, EU law precludes a domestic rule which, by preventing a national court from considering of its own motion whether a measure of domestic law is compatible with a provision of EU law, fails to respect either of those principles. It does not, however, require a national court to raise such an issue of its own motion where neither principle is in issue. [17]

39. Clearly, EU law cannot preclude a national court from raising of its own motion (as the referring court has done) an issue of compatibility of national law with the provisions of a European directive. On the contrary, the obligation on national courts to interpret domestic law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought [18] is a positive spur to their raising such issues.

40. In the present case, it is for French law to determine whether the Tribunal de grande instance is competent to seek a preliminary ruling on the contested rule's compatibility with the Directive and to give effect to such a ruling. In that regard, if the rule were to prove incompatible with the Directive, it would presumably have to be disapplied, since its explicit terms appear difficult to interpret so as to include legatees, and the obligation to interpret national law in conformity with Union law cannot serve as the basis for an interpretation of national law *contra legem*. [19]

41. However, no suggestion has been made that the Tribunal de grande instance is not competent to seek a preliminary ruling or to take whatever steps may be necessary to give effect to that ruling. I shall proceed on the

17 — That well-known line of case-law, which I summarise here, began with Case C-312/93 *Peterbroeck* [1995] ECR I-4599 and Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705, and has been most recently set out in Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233 at paragraphs 28 to 42. See also the Opinion of Advocate General Poiares Maduro in the latter case, points 13 to 41.

18 — See, most recently, *Mono Car Styling*, cited in footnote 16, paragraph 60 et seq.

19 — See *Mono Car Styling*, cited in footnote 16, paragraph 61 and the case-law cited there.

basis that it is competent and can give appropriate effect to the Court's ruling.

B — *Applicability ratione temporis of the Directive*

42. ADAGP has been collecting resale royalties on sales of Dalí's works since 17 October 1997. The Directive entered into force on 13 October 2001, and Member States were required to bring into force the measures necessary to comply with it before 1 January 2006 (subject to certain possible temporary derogations under Article 8(2) and (3), until 1 January 2010 or 1 January 2012 respectively, which are the subject of the national court's second question).

43. In respect of the period from 1 January 2006 onwards, therefore, the interpretation of the Directive is relevant. However, it can have no direct relevance in respect of the period before 13 October 2001 or, indeed, in respect of the period between those two dates.

44. Although during the period for transposition of a directive Member States must refrain from taking any measure liable seriously to compromise the result prescribed, they are not obliged to adapt their legislation before the end of that period. In the present case, the contested rule was not amended in any way during the period for transposition.

45. As regards the duty of consistent interpretation, national courts are obliged to interpret domestic law (as far as possible) in conformity with a directive only once the period for its transposition has expired. [20] In the intervening period, they must merely refrain (again, as far as possible) from any interpretation which might seriously compromise the future attainment of the objective pursued by the directive, after the period for transposition has expired. [21]

46. However, as I have noted, the plain wording of the contested rule appears difficult to

20 — See Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, especially at paragraphs 43 to 45; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 114 and 115.

21 — See *Adeneler*, cited in footnote 20, paragraph 123; Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 39.

interpret in any other way. If that is so, the 'as far as possible' proviso in the Court's case-law seems to rule out any duty of consistent interpretation in this case. Consequently, in the event of incompatibility between the contested rule and the Directive, the only apparent option would be to disapply the rule, [22] and an obligation to do so could arise only in respect of the period after the deadline for transposition. If the contested rule were to be disapplied in respect of that period, clearly the further question would arise whether it could still be applied in respect of earlier periods, but that would be a matter entirely for French law and not for EU law.

C — *Applicable law*

47. The principal argument of the Foundation and VEGAP, both in the main proceedings and before the Court, and of the Spanish Government before the Court, is that it is for Spanish and not French law to determine the identity of 'those entitled under' Salvador Dalí after his death, since it is Spanish law which governs succession to his movable estate. Consequently, they submit, the question of the compatibility of the contested rule with the Directive does not arise. The Spanish Government adds that the questions are therefore inadmissible, since they are not necessary to resolve the dispute in the main proceedings.

48. While it is true that the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, [23] I do not think it possible to reach that conclusion in the present case. To do so would require the Court to make a finding of national law – the determination of the law applicable to succession to the estate of a deceased person is not yet regulated by EU law in any way [24] – which is a step beyond what it is competent to do.

22 — See, most recently, Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 140.

23 — See, most recently, Case C-505/07 *Compañía Española de Comercialización de Aceite and Others* [2009] ECR I-8963, paragraph 26.

24 — The Hague Conference on Private International Law has drawn up a Convention on the law applicable to succession to the estates of deceased persons, concluded on 1 August 1989 – but, of the Member States of the European Union, it has been signed by only Luxembourg and the Netherlands, and ratified by only the Netherlands. And, a month before the hearing in the present case, the Commission published a proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final, of 14 October 2009) – but, needless to say, that proposal is still far from being law. Articles 3 et seq. of the Hague Convention and 16 et seq. of the Commission proposal would, were they applicable, mean that succession to Salvador Dalí's estate would be governed by Spanish law.

49. However, in a situation such as that in the main proceedings, it seems to me that the national court needs to know, first, whether the identity of the beneficiaries of the resale right after the artist's death is to be governed by the law under which the royalty is collected or by the law governing succession to the artist's estate. Only in the latter case must it decide which law governs that succession, a question which is outside the Court's competence. The Court can, on the other hand, indicate whether the Directive provides any guidance on the initial question.

50. The term 'those entitled under' the author is nowhere defined in the Directive. Implicitly, but none the less clearly, recital 27 in the preamble leaves it to be defined by national law, and refers in particular to Member States' laws of succession. That was also, it is clear from the legislative history, the intention shared by the Commission and the Council during the legislative process. [25] And, while the Parliament did propose amendments to the draft provision, it was convinced that the principle of subsidiarity required that the identity of the beneficiaries after the author's death should be determined by national law and that there should be no interference with inheritance law. [26] I would add that, had there been any intention to harmonise choice of law rules in the field of succession, the Directive could not have been based, as it is, simply on Article 95 EC, [27] but would have had to refer, like the proposal referred to in footnote 24, to Articles 61 EC and 67 EC. [28]

51. Consequently, when a dispute arises concerning the identity of the beneficiary or beneficiaries of the resale right after the death of the author of a work, before a court in the Member State in which the corresponding royalty was collected, that court must apply the rules which, according to its domestic law, determine that matter. Failing any more specific provision, that will mean the substantive rules of whatever national law is designated by its choice of law rules as governing the succession.

52. However, the fact that the Directive is clearly not intended to interfere with national law, and does not link the identification of the

25 — See in particular the Council's statement of reasons of 5 June 2000 for its common position of 22 May 2000 (7484/00 ADD 1), point 23, and the Commission's opinion of 24 January 2001 on the European Parliament's amendments to the Council's common position (COM(2001) 47 final), point 3.1.2(b).

26 — See the Parliament's first reading report of 3 February 1997 (document A4-0030/97), explanatory statement, point IV(A)(2), and its second reading report of 29 November 2000 (document A5-0370/2000), explanatory statement, section III, eighth paragraph.

27 — See, now, Article 114 TFEU.

28 — See, now, Article 67 TFEU.

beneficiaries after the artist's death exclusively to the law governing succession to his or her estate, implies in my view that a Member State is not precluded from adopting a more specific provision, in the form of a substantive rule which overrides in whole or in part the choice of law rules which would otherwise designate that law.

53. That conclusion, moreover, appears also to be the most consistent with Article 14ter of the Berne Convention, according to which the resale right accrues, after the author's death, to 'the persons or institutions authorised by national legislation', wording which appears broader than a reference to succession law, however designated.

54. It is therefore for the Tribunal de grande instance to determine whether the contested rule is such an overriding rule and, if not, which law of succession is designated by the applicable choice of law rules.

55. On the assumption that, as a result of that analysis, the contested rule applies in the main proceedings, the question of its compatibility with the Directive must be addressed.

D — *The first question*

56. Does the Directive allow a Member State, in its domestic legislation, to limit the category of 'those entitled under' the artist in the way embodied in the contested rule?

57. It seems to me that, for reasons similar to those I have discussed above when considering the latitude allowed to Member States in determining the applicable law, the answer must be 'yes'.

58. The Directive does not define 'those entitled under' the artist after his or her death. It leaves that definition to national law and, by implication, more particularly (though not

necessarily exclusively) to national succession law. Differences between national legal systems which cannot be expected to affect the functioning of the internal market may be left intact. [29] There is thus no uniform category of 'those entitled', and Member States may adopt or maintain any definition which cannot be expected to have such an effect.

59. The main concern, as is clear from recital 9 in the preamble to the Directive, [30] was to avoid a situation in which sales of works of art were concentrated in Member States in which the resale right was either not applied or was less onerous, to the detriment of auction houses or other dealers in Member States which sought to allow the artist (and his or her successors of whatever kind) to share in the profits generated by the increasing value of the works of art.

60. Such a situation existed before the Directive was adopted, and was caused by the reluctance of sellers to forgo a proportion of the price fetched by a work of art. I would agree with the Commission that, following the adoption of the Directive, the likelihood that sellers will be prompted to choose the Member State in which they sell by reference to the identity of the persons who will be entitled to the royalties – a factor which does not influence the amount to be paid, and which, indeed, may well not be known to the seller – is negligible, and cannot be expected to affect the functioning of the internal market. In that regard, I am unconvinced – indeed, puzzled – by the Spanish Government's suggestion at the hearing that sales might be attracted to Member States in which there would be *no* person 'entitled under' the artist. Even if no other specific provision is made in a particular national system, it seems to me that a deceased artist's estate will always go to someone, even if only to the State as *ultimus haeres*.

61. Similarly, I would reject the argument put forward by the Foundation and VEGAP and by the Spanish Government, to the effect that the concept of 'those entitled under' a deceased artist must comprise all those entitled under the applicable law of succession and cannot be differentiated into separate

29 — Recital 13 in the preamble.

30 — See point 8 above.

categories, some who are entitled and others who are not.

62. If the contested rule is one which overrides the choice of law rules relating to succession, there can be no reason why it should not be able to exclude some of those who might have been entitled under the law of succession. Such an exclusion can, in any event, have no adverse effect on the single market.

63. Nor is there any reason to take a different approach if the contested rule is itself a substantive rule of succession law. An individual's liberty to dispose of his or her estate after death may vary from one legal system to another, and various rules or mechanisms may limit the possibility of making bequests outside, for example, the circle of heirs at law, or of descendants and/or a surviving spouse. The distinction drawn in the contested rule falls, it seems to me, within that area, and thus within the range of legitimate choices in national succession law to which the Directive refers in order to determine the beneficiaries of the resale right following the artist's death.

64. There was some discussion at the hearing as to whether, even though the Directive leaves the definition of 'those entitled' to national law, Member States were not under some obligation to respect each others' rules of succession, in a spirit of loyal cooperation, or perhaps of 'comity of Member States', when establishing that definition. I fear, however, that such an approach would come dangerously close to a 'back-door harmonisation' of succession or choice of law rules, which is beyond the scope of the Directive – from the point of view both of its legal basis and of the express legislative intent.

65. As both make clear, the role of the Directive is limited to eliminating distortions to the competitive environment within the internal market. Mutual recognition – in this case the recognition by a royalty-collecting Member State of the definition of 'those entitled under' a deceased artist in the Member State whose law of succession applies to that artist's estate – is a laudable concept. I do not, however, consider that it falls within the ambit of this particular directive. Ensuring

that a resale right is levied throughout the Union is central to the Directive's purpose. Ensuring that the right benefits precisely those entitled under a particular law of succession is not.

66. The choice embodied in the contested rule is one of policy and, as such, is always debatable. [31] It is, however, in my view a choice which remains fully within the latitude available to the Member States and one which cannot be expected to affect the functioning of the internal market. It is therefore not precluded by the Directive.

E — *The second question*

67. If the Court agrees with my proposed answer to the first question, the second question – whether the contested rule may be maintained under the optional and transitional derogations in Article 8(2) and (3) of the Directive – will not require an answer. To the extent that it might none the less be necessary, that answer can be very brief.

68. The derogations in Article 8, read together with Article 13 of the Directive, are expressly available to Member States which did not apply the resale right on 13 October 2001.

69. France did apply the resale right on that date, and so cannot benefit from the derogations.

70. In any event, those derogations only allow Member States *not to apply* the resale right for the benefit of those entitled under the artist; they do not concern the question of application to a restricted group of beneficiaries only.

31 — One might, for example, wonder why such a rule should apply only to the resale right and not, say, to copyright in literary works (the answer being possibly linked to the fact that the resale right, unlike copyright, is unassignable and inalienable). And the debate might have been particularly heated in the present case if Salvador Dalí had not been survived by heirs in the sixth degree or closer, so that the resale right was collected by the French State despite the fact that Dalí explicitly intended it to go to the Spanish State.

Conclusion

71. In the light of the above considerations, I propose that the Court should answer the questions raised by the Tribunal de grande instance, Paris, as follows:

Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art does not preclude a national rule under which, after the author's death, entitlement to the resale right passes only to heirs at law, to the exclusion of legatees or successors in title.