Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art

(96/C 178/05)

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(Submitted by the Commission on 25 April 1996)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 189b of the EC Treaty,

1. Whereas, in the field of copyright, the artist's resale right is an inalienable right enjoyed by the author of an original work of art or original manuscript to an interest in any sale of the work subsequent to the first transfer by the author;

2. Whereas the artist's resale right is intended to ensure that authors share in the economic success of their works; whereas it helps to redress the balance between the economic situation of authors and that of other creators who benefit from successive exploitations of their works;

3. Whereas the artist's resale right forms an integral part of copyright and is an essential prerogative for authors; whereas the imposition of such a right in all Member States meets the need for providing creators with an adequate and standard level of protection;

4. Whereas under Article 128 (4) of the EC Treaty the Community is to take cultural aspects into account in its action under other provisions of the Treaty;

5. Whereas the Berne Convention for the Protection of Literary and Artistic Works provides that the artist's resale right is available only if legislation in the country to which the author belongs so permits; whereas the right is therefore optional and subject to the rule of reciprocity; whereas it follows from the case-law of the Court of Justice of the European Communities on the application of the principle of non-discrimination laid down in Article 6 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92, *Phil Collins and Others* [1], that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other Member States rights conferred on national authors; whereas the application of such clauses in the Community context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality;

6. Whereas the artist's resale right is currently provided for by the domestic legislation of a majority of Member States; whereas such laws, where they exist, display certain differences, notably as regards the works covered, those entitled to receive royalties, the rate applied, the sales subject to payment of a royalty, and the basis of assessment thereof; whereas the application or non-application of such a right has a significant impact on the competitive environment within the internal market; whereas as with any other parafiscal charge it is an element which must be taken into account by each individual wishing to sell a work of art; whereas this right is therefore a factor which contributes to the creation of distortions of competition as well as displacements of sales within the Community;

7. Whereas such disparities in the application of the artist's resale right 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 7a of the Treaty; whereas in such a situation Article 100a of the Treaty constitutes the appropriate legal basis;

8. Whereas the objectives of the Community as set out in the Treaty include laying the foundations of an ever closer union among the peoples of Europe, promoting closer relations between the Member States belonging to the Community, and ensuring their economic and social progress by common action to eliminate the barriers which divide Europe; whereas to that end the Treaty provides for the establishment of an internal market which presupposes the abolition of obstacles to the free

[1] [1993] ECR I-5145.

movement of goods, freedom to provide services and freedom of establishment, and by the introduction of a system ensuring that competition in the common market is not distorted; whereas harmonization of Member States' laws on the artist's resale right contributes to the attainment of these objectives;

9. Whereas Council Directive 77/388/EEC [1], as amended by Directive 94/5/EC [2], supplementing the common system of value-added tax progressively introduces a Community system of taxation applicable *inter alia* to works of art; whereas measures confined to the tax field are not sufficient to guarantee the harmonious functioning of the art market; whereas this objective cannot be attained without harmonization in the field of the artist's resale right;

10. Whereas existing 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; whereas there is no need to eliminate or prevent the emergence of differences which cannot be expected to affect the functioning of the internal market;

11. Whereas it is not necessary to harmonize every provision of Member States' laws on the artist's resale right; whereas it will be sufficient to limit the harmonization exercise to those domestic provisions which have the most direct impact on the functioning of the internal market; whereas, however, the objectives of this limited harmonization exercise cannot be sufficiently achieved by the Member States acting alone; whereas, in accordance with the third paragraph of Article 3b of the Treaty, the proposed course of action does not go beyond what is necessary to achieve the abovementioned objectives; whereas this Directive is therefore, in its entirety, consistent with the requirements of the principles of subsidiarity and proportionality;

12. Whereas, pursuant to Council Directive 93/98/EC [3], the term of copyright runs for 70 years after the author's death; whereas the same period should be laid down for the artist's resale right; whereas, consequently, only the originals of works of contemporary or modern art may fall within the scope of the artist's resale right; whereas, in general, works of contemporary or modern art occupy a relatively modest place among sales by public auction;

13. Whereas the scope of the artist's resale right should be extended to any resale, with the exception of transactions between private individuals, of the work subsequent to the first sale by the author; whereas the artist's resale right therefore applies to transactions effected by all professional sellers, such as salesrooms, art galleries and, in general, any dealer in works of art;

14. Whereas effective rules should be laid down based on experience already gained at national level with the artist's resale right; whereas it is appropriate to calculate the royalty as a percentage of the sales price and not of the increase in value of works whose original value has increased;

15. Whereas the categories of works of art subject to the artist's resale right should be harmonized; whereas works of applied art should be excluded;

16. Whereas the fixing of a Community minimum threshold for the application of the artist's resale right takes account of the requirements of the internal market; whereas, however, Member States should be given the opportunity to fix national thresholds which are lower than the Community threshold so as to further the interests of young artists;

17. Whereas the non-application of the artist's resale right below the minimum threshold makes it possible to avoid disproportionately high collection and administration costs;

18. Whereas the rates set by the different Member States for the application of the artist's resale right vary considerably at present; whereas the effective functioning of the internal market in works of contemporary or modern art requires the fixing of uniform rates;

19. Whereas a system consisting of a tapering scale of rates for several price bands may help to prevent the Community rules on the artist's right from being circumvented; whereas the rates must reflect the interests both of artistic circles and of the art market;

20. Whereas the person liable for payment of the royalty is the seller; whereas the latter is the person or undertaking on whose behalf the sale is concluded;

21. Whereas provision should be made for the possibility of periodic adjustment of the threshold and rates; whereas, to this end, it is appropriate to entrust to the Commission the task of drawing up periodic reports on the practical effect of the application of the artist's resale right and, where appropriate, of making proposals for amendment of the threshold and rates;

(1) OJ No L 145, 13. 6. 1977, p. 1.
(2) OJ No L 60, 3. 3. 1994, p. 16.
(3) OJ No L 290, 24. 11. 1993, p. 9.

22. Whereas the persons entitled to receive royalties must be specified, due regard being had to the principle of subsidiarity; whereas it is not appropriate to take action through this Directive in relation to Member States' laws of succession; whereas, however, those entitled under the author must be able to benefit fully from the resale right after his death;

23. Whereas Member States should be free to determine the procedures for collecting and managing the amounts paid over by virtue of the artist's resale right; whereas in this respect management by a collecting society is one possibility; whereas, however, Member States must ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed;

24. Whereas enjoyment of the artist's resale right must be restricted to nationals of the Member States and foreign authors whose countries afford such protection to authors who are nationals of Member States;

25. Whereas appropriate procedures for monitoring transactions should be introduced so as to ensure by practical means that the artist's resale right is effectively applied by Member States; whereas this implies a right on the part of the author or his authorized representative to obtain any necessary information from the person liable for payment of royalties,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Subject-matter of the artist's resale right

Member States shall provide, for the benefit of the author of an original work of art, an artist's resale right, to be defined as an inalienable right to receive a percentage of the sales price obtained from any resale of the work; with the exception of transactions effected by individuals acting in their private capacity, subsequent to the first transfer of the work by the author.

Article 2

Works of art to which the artist's resale right relates

For the purposes of this Directive, 'original work' means manuscripts and works of plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics and photographs, provided they are made by the artists himself or are copies considered to be original works of art according to professional usage in the Community.

CHAPTER II

PARTICULAR PROVISIONS

Article 3

Threshold

1. Royalties collected pursuant to Article 1 shall be payable when the sales price is equal to or higher than ECU 1 000.

2. Member States may fix a national threshold which is lower than the threshold laid down in paragraph 1.

Article 4

Rates and collection

The royalty collected pursuant to Article 1 shall be set at the following rates:

(a) 4 % of the sale price between ECU 1 000 and ECU 50 000;

(b) 3 % of the sale price between ECU 50 000 and ECU 250 000;

(c) 2 % of the sale price above ECU 250 000.

The royalty shall be payable by the seller.

Article 5

Calculation basis

The sales prices referred to in Articles 3 and 4 are net of tax.

Article 6

Persons entitled to receive royalties

1. The royalty collected under Article 1 shall be payable to the author of the work and, after his death, to those entitled under him.

2. Member States may provide for the collective management of sums paid over by virtue of the artist's resale right. They shall determine the arrangements for collecting and distributing royalties where the author is a national of another Member State.

Article 7

Third-country nationals entitled to receive royalties

Member States shall provide that authors who are nationals of third countries shall enjoy the artist's resale right in accordance with this Directive, provided that authors from the Member States enjoy reciprocal treatment in the third countries concerned.

Article 8

Duration of the artist's resale right

The artist's resale right shall last for the period laid down in Article 1 of Directive 93/98/EEC.

Article 9

Right to obtain information

The author or his authorized representative may require any dealer, sales director or organizer of public sales to furnish any information that may be necessary in order to secure payment of sums payable under the artist's resale right during the previous year of original works of art.

CHAPTER III

FINAL PROVISIONS

Article 10

Revision clause

The Commission shall present to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2004 and every five years thereafter, a report on the implementation of this Directive and shall, where appropriate, put forward proposals for adjusting the minimum threshold and the rates of the royalties to take account of changes in the sector.

Article 11

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1999.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 12

Entry into force

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities.*

Article 13

This Directive is addressed to the Member States.