

**Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art'**

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Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art` ( ) (97/C 75/03)

On 3 June 1996 the Council decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 4 December 1996. The Rapporteur was Mr Decaillon.

At its 341st Plenary Session (meeting of 18 December 1996) the Economic and Social Committee adopted the following opinion by 65 votes to 23, with 19 abstentions.

1. Aim of the Proposal

1.1. The Directive seeks to harmonize national arrangements for the artist's resale right, by extending the right to all EU countries, and stipulating a certain number of common rules for the implementation of the right.

1.2. The artist's resale right is defined as the right for the author (and for his heirs for 70 years after his death) to receive a percentage of the price of a work when it is resold by public auction or by a 'qualified agent`.

1.3. The artist's resale right is an integral part of copyright, and is recognized as such in the Berne Convention on the protection of literary and artistic works [Article 14(b)]. The aim is to ensure that the author shares in the profits arising from his creation, and it is thus a right to remuneration.

1.4. Signatories to the Berne Convention are given much leeway when it comes to recognizing and legislating for the artist's resale right. Eleven of the fifteen EU Member States recognize the right in principle, and eight already put it into practice. Even here, implementation arrangements vary widely.

1.5. This legislative diversity within the EU leads to distortion of competition and thus acts as a barrier to the smooth operation of the European market in contemporary and modern art. These distortions within the EU often work to the advantage of leading auction houses in countries which do not recognize the artist's resale right, as it gives these auction houses a competitive advantage with respect to sales of European works.

1.6. Countries which do not yet recognize the artist's resale right are particularly attractive for large transactions, since considerable savings can be made at the authors expense.

1.7. The Phil Collins Ruling (ECJ 1993), which upholds the principle of non-discrimination of EU citizens on the grounds of nationality, strengthens the case for harmonization, since, in those countries which recognize it, an EU author's resale right will now have to be recognized regardless of nationality. This means that authors are treated differently according to whether their work is sold in a country where the resale right is applied or not.

1.8. A British artist such as David Hockney, for example, benefits from the artist's resale right when his paintings are sold in Paris, whereas the heirs of Henri Matisse cannot claim similar payment when his paintings are sold in London.

## 2. General comments

2.1. The Committee welcomes the provisions of the Proposal, which remove distortions of competition within the single market. The provisions provide a more level playing field, and create a harmonized legal framework which will foster the smooth operation of the modern and contemporary art market within the European Union.

2.2. The extension of the artist's resale right to all Member States reflects the Commission's desire to provide creators with a high, uniform level of protection. The Committee can but endorse this intention.

2.3. The artist's resale right provides artists and authors with income and social recognition of the value of their work. This is particularly important for young artists who are just getting a foot on the ladder. The artist's resale right thus helps to boost artistic output.

2.4. EU harmonization of the resale right would be a first step towards extending the right to all EEA countries, and to the countries of Central and Eastern Europe, the Baltic States and the independent states of the former USSR, which are linked to the European Union via association, partnership or cooperation agreements.

## 3. Specific comments

### 3.1. Article 1 (Subject matter of the artist's resale right)

3.1.1. The proposal stipulates that the artist's resale right shall apply (with the exception of the first transfer of the work by the author and transactions effected by individuals acting in their private capacity) to all transactions involving protected works.

3.1.2. This provision does not take account of the specific problem of art galleries, which are subject to special rules in several Member States. The Committee calls for Member States to be given the option to tailor implementation of the artist's resale right to fit in with the special arrangements negotiated under interoccupational agreements, with the proviso that these arrangements must not lead to a drop in protection for the artist.

### 3.2. Article 2 (Works of art to which the artist's resale right relates)

3.2.1. This article lists the various types of works of art to which the artist's resale right relates.

3.2.2. The Committee would draw the Commission's attention to the fact that professional usage varies from country to country in assessing the number of works which can be considered original.

### 3.3. Article 4 (Rates and collection)

3.3.1. The proposed graduated rate (4 % of the sale price between ECU 1 000 and 50 000; 3 % between ECU 50 000 and 250 000, and 2 % for transactions in excess of ECU 250 000), is intended to reduce the risk of sellers switching to third country markets.

3.3.2. Whilst this provision is wise, it does not excuse the Commission from arguing forcibly, in international arenas and in multilateral and bilateral negotiations with third countries, for worldwide extension of the artist's resale right, in the interests both of artists and authors, and of art dealers.

### 3.4. Article 6 (Persons entitled to receive royalties)

3.4.1. Under this Article, royalties are 'payable to the author of the work, and, after his death, to those entitled under him'. Member States may provide for the collective management of this right.

3.4.2. The Committee feels that collective management of the artist's resale right is the most appropriate solution to protect the author's interests. This is already the practice in several EU Member States.

### 3.5. Article 7 (Third-country nationals entitled to receive royalties)

3.5.1. The Committee welcomes the extension to third countries of the principle of reciprocal treatment in that the artist's resale right is to be granted to foreign artists provided they are citizens

of a country which grants the resale right to Community artists.

### 3.6. Article 9 (Right to obtain information)

3.6.1. This introduces the right for the author or his representative to obtain information concerning the sale of his work from the vendor.

3.6.2. A monitoring procedure of this kind seems fully in order for the proper implementation of the artist's resale right. The Committee feels, however, that if the collation of information is to be efficient and avoid hindering the smooth operation of the agencies concerned, it must be governed by appropriate measures. The Committee would stress the positive role which authors' copyright associations could play in collating information.

### 3.7. Article 10 (Revision clause)

3.7.1. The Committee welcomes the provision that the Commission is to present to the European Parliament, the Council and the Economic and Social Committee, on or before 1 January 2004 and then every five years, a report on the implementation of the directive, and will, where appropriate, put forward proposals for adjusting the minimum threshold and the rates of the royalties to take account of changes in the sector.

Brussels, 18 December 1996.

The President of the Economic and Social Committee

Tom JENKINS

() OJ No C 178, 21. 6. 1996, p. 16.

### APPENDIX to the opinion of the Economic and Social Committee

The following counter-opinion received more than a quarter of the votes cast, and was defeated after discussion:

#### 1. Point 2 - General comments

Replace point 2 by the following text:

'2.1. The Committee supports the objectives of encouraging young artists and of providing artists with a reasonable reward for their work. However it does not believe this proposal meets these objectives and, further, would be damaging - not least in transferring more resale business to auction outside the European Union. To emphasize these points the Committee points out the following:

2.1.1. The right is not required by the Berne Convention. Four Member States have no right. Four, which introduced the right, have not, because of difficulties, implemented it. At least one Member State allows artists to waive the right. The viability of collecting organisations is not always strong. All those with the right have introduced limitations.

2.1.2. Agreement is needed at the international level. Outside the EU the right does not exist. In any major market the introduction of such a right will act as an extra cost on auction sales and is likely to result in a transfer of business to centres outside the EU - particularly New York and Geneva. Indeed the art auction business declined in those countries in the EU where the right was applied.

2.1.3. As the Commission admits - it provides no benefit to young artists and the benefit is largely to artists who are selling profitably and to artists' heirs. Indeed a large number of graphic and plastic artists have refused to exercise their right. The right is discriminatory as financial reward is entirely dependent on the number of times a work is sold.

2.1.4. There is a number of legal limitations to the extension of rights, for example it will

- exclude private vendors

- exclude certain categories such as architecture, design furniture making.

2.2. The Committee invites the Commission to submit a revised proposal, taking into account the above points, which is not dependent on the number of times a work of art is sold and which does not undermine auction houses and galleries vis-à-vis their international competitors. The Commission proposal must be conditional on an agreement which can be enforced on a world wide level.`

## 2. Point 3 - Specific comments

In the beginning of the paragraph, add:

'If the right is proceeded with then the following comments should be considered:'`

Result of the vote

For: 37, against: 55, abstentions: 13.