

# 2000AG0042

**Common Position (EC) No 42/2000 of 19 June 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art**

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Common Position (EC) No 42/2000

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with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... on the resale right for the benefit of the author of an original work of art

(2000/C 300/01)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) In the field of copyright, the resale right is an unassignable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.

(2) The resale right is a right of a productive character which enables the author/artist to receive consideration for successive transfers of the work. The subject matter of the resale right is the physical work, namely the medium in which the protected work is incorporated.

(3) The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to 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.

(4) The resale right forms an integral part of copyright and is an essential prerogative for authors. The imposition of such a right in all Member States meets the need for providing creators with an adequate and standard level of protection.

(5) Under Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty.

(6) The Berne Convention for the Protection of Literary and Artistic Works provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore

optional and subject to the rule of reciprocity. 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 12 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*(4), that domestic provisions containing reciprocity clauses cannot be relied on in order to deny nationals of other Member States rights conferred on national authors. 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.

(7) It is important that the resale right should be applied as widely as possible at the international level. Negotiations should therefore be entered into with a view to making Article 14 ter of the Berne Convention compulsory.

(8) The resale right is currently provided for by the domestic legislation of a majority of Member States. Such laws, where they exist, display certain differences, 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 these are calculated. 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) Such 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. In such a situation Article 95 of the Treaty constitutes the appropriate legal basis.

(10) 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. To that end the Treaty provides for the establishment of an internal market which presupposes the abolition of obstacles to the free movement of goods, freedom to provide services and freedom of establishment, and for the introduction of a system ensuring that competition in the common market is not distorted. Harmonisation of Member States' laws on the resale right contributes to the attainment of these objectives.

(11) The sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment(5), progressively introduces a Community system of taxation applicable, inter alia, to works of art. Measures confined to the tax field are not sufficient to guarantee the harmonious functioning of the art market. This objective cannot be attained without harmonisation in the field of the resale right.

(12) 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. There is no need to eliminate, or prevent the emergence of, differences which cannot be expected to affect the functioning of the internal market.

(13) A precondition of the proper functioning of the internal market is the existence of conditions of competition which are not distorted. The existence of differences between national provisions on the resale right creates distortions of competition and displacement of sales within the Community and leads to unequal treatment between artists depending on where their works are sold. The issue under consideration has therefore transnational aspects which cannot be satisfactorily regulated by action by Member States. A lack of Community action would conflict with the requirement of the Treaty to correct distortions of competition and unequal treatment.

(14) In view of the scale of divergences between national provisions it is therefore necessary to adopt harmonising measures to deal with disparities between the laws of the Member States in areas where such

disparities are liable to create or maintain distorted conditions of competition. It is not however 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.

(15) This Directive complies therefore, in its entirety, with the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty.

(16) Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights(6), the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right. Consequently, only the originals of works of modern and contemporary art may fall within the scope of the resale right. However, in order to allow the legal systems of Member States which do not, at the time of the adoption of this Directive, apply a resale right for the benefit of artists to incorporate this right into their respective legal systems and, moreover, to enable the economic operators in those Member States to adapt gradually to the aforementioned right whilst maintaining their economic viability, the Member States concerned should be allowed a limited transitional period during which they may choose not to apply the resale right for the benefit of those entitled under the artist after his death.

(17) The scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional. This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public. With regard to the particular situation of art galleries which acquire works directly from the author, Member States should be allowed the option of exempting from the resale right acts of resale of those works which take place within three years of that acquisition. The interests of the artist should also be taken into account by limiting this exemption to such acts of resale where the resale price does not exceed EUR 10000.

(18) It should be made clear that the harmonisation brought about by this Directive does not apply to original manuscripts of writers and composers.

(19) Effective rules should be laid down based on experience already gained at national level with the resale right. It is appropriate to calculate the royalty as a percentage of the sale price and not of the increase in value of works whose original value has increased.

(20) The categories of works of art subject to the resale right should be harmonised taking into account professional usage in the Community.

(21) The non-application of royalties below the minimum threshold may help to avoid disproportionately high collection and administration costs compared with the profit for the artist. However, in accordance with the principle of subsidiarity, the Member States should be allowed to establish national thresholds lower than the Community threshold, so as to promote the interests of new artists. Given the small amounts involved, this derogation is not likely to have a significant effect on the proper functioning of the internal market.

(22) The rates set by the different Member States for the application of the resale right vary considerably at present. The effective functioning of the internal market in works of modern and contemporary art requires the fixing of uniform rates to the widest possible extent.

(23) It is desirable to establish, with the intention of reconciling the various interests involved in the market for original works of art, a system consisting of a tapering scale of rates for several price bands. It is important to reduce the risk of sales relocating and of the circumvention of the Community rules on the resale right.

(24) The person by whom the royalty is payable should, in principle, be the seller. Member States should be given the option to provide for derogations from this principle in respect of liability for payment. The

seller is the person or undertaking on whose behalf the sale is concluded.

(25) Provision should be made for the possibility of periodic adjustment of the threshold and rates. To this end, it is appropriate to entrust to the Commission the task of drawing up periodic reports on the actual application of the resale right in the Member States and on the impact on the art market in the Community and, where appropriate, of making proposals relating to the amendment of this Directive.

(26) 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, at least following the expiry of the transitional period referred to above.

(27) The Member States are responsible for regulating the exercise of the resale right, particularly with regard to the way this is managed. In this respect management by a collecting society is one possibility. However, Member States must ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed. This Directive is without prejudice to arrangements in Member States for collection and distribution.

(28) Enjoyment of the resale right should be restricted to Community nationals as well as to foreign authors whose countries afford such protection to authors who are nationals of Member States. A Member State should have the option of extending enjoyment of this right to foreign authors who have their habitual residence in that Member State.

(29) Appropriate procedures for monitoring transactions should be introduced so as to ensure by practical means that the resale right is effectively applied by Member States. This implies also a right on the part of the author or his authorised representative to obtain any necessary information from the natural or legal person liable for payment of royalties. Member States which provide for collective management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SCOPE

#### Article 1

##### Subject matter of the resale right

1. Member States shall 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.

2. The right referred to in paragraph 1 shall apply to all acts of resale involving as sellers, buyers or intermediaries art-market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

3. Member States may provide that the right referred to in paragraph 1 shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10000.

4. The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.

## Article 2

### Works of art to which the resale right relates

1. For the purposes of this Directive, "original work of art" means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.
2. Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.

## CHAPTER II

### PARTICULAR PROVISIONS

## Article 3

### Threshold

1. It shall be for the Member States to set a minimum sale price from which the sales referred to in Article 1 shall be subject to resale right.
2. This minimum sale price may not under any circumstances exceed EUR 4000.

## Article 4

### Rates

1. The royalty provided for in Article 1 shall be set at the following rates:
  - (a) 4 % for the portion of the sale price up to EUR 50000;
  - (b) 3 % for the portion of the sale price from EUR 50000,01 to 200000;
  - (c) 1 % for the portion of the sale price from EUR 200000,01 to 350000;
  - (d) 0,5 % for the portion of the sale price from EUR 350000,01 to 500000;
  - (e) 0,25 % for the portion of the sale price exceeding EUR 500000.

However, the total amount of the royalty may not exceed EUR 12500.

2. By way of derogation from paragraph 1, Member States may apply a rate of 5 % for the portion of the sale price referred to in paragraph 1(a).
3. If the minimum sale price set should be lower than EUR 4000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 4000; this rate may not be lower than 4 %.

## Article 5

### Calculation basis

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

## Article 6

### Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him.
2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

## Article 7

### Third country nationals entitled to receive royalties

1. Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title.
2. The Commission, taking into account information provided by the Member States, may publish an indicative list, for information purposes, of those third countries which fulfil the condition set out in paragraph 1.
3. Any Member State may treat authors who are not nationals of a Member State but who have their habitual residence in that Member State in the same way as its own nationals for the purpose of resale right protection.

## Article 8

### Term of protection of the resale right

1. The term of protection of the resale right shall correspond to that laid down in Article 1 of Directive 93/98/EEC.
2. By way of derogation from paragraph 1, those Member States which do not apply the resale right on ... (7), shall not be required, for a period expiring not later than ...(8), to apply the resale right for the benefit of those entitled under the artist after his death.
3. In the event of the successful conclusion, before ...(9), of international negotiations aimed at extending the resale right at international level, the Commission shall submit appropriate proposals.

## Article 9

### Right to obtain information

The Member States shall provide that during a period expiring three years after the first day of January of the year following the date on which the resale has taken place, the persons entitled under Article 6 may require any dealer and commercial agent, sales director or organiser of public sales to furnish any information that may be necessary in order to secure payment of royalties in respect of the sale.

## CHAPTER III

## FINAL PROVISIONS

## Article 10

## Application in time

This Directive shall apply in respect of all original works of art as defined in Article 2 which, on ...(10) are still protected by the legislation of the Member States in the field of the resale right or meet the criteria for protection under the provisions of this Directive on that date.

## Article 11

### Revision clause

1. The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than ...(11) and every four years thereafter a report on the implementation and the effect of this Directive, paying particular attention to the competitiveness of the market in modern and contemporary art in the Community, especially as regards the position of the Community in relation to relevant markets that do not apply the resale right and the fostering of artistic creativity and the management procedures in the Member States. It shall examine in particular its impact on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive. Where appropriate, the Commission shall submit proposals for adapting the minimum threshold and the rates of royalty to take account of changes in the sector, and any other proposal it may deem necessary in order to enhance the effectiveness of this Directive.

2. A Contact Committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the Chairman or at the request of the delegation of a Member State.

3. The task of the Committee shall be as follows:

- to organise consultations on all questions deriving from application of this Directive,
- to facilitate the exchange of information between the Commission and the Member State on relevant developments in the art market in the Community.

## Article 12

### Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January ...(12). They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the 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 13

### Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

## Article 14

Addressees

This Directive is addressed to the Member States.

Done at ...

For the European Parliament

The President

For the Council

The President

(1) OJ C 178, 21.6.1996, p. 16 and OJ C 125, 23.4.1998, p. 8.

(2) OJ C 75, 10.3.1997, p. 17.

(3) Opinion of the European Parliament of 9 April 1997 (OJ C 132, 28.4.1997, p. 88) confirmed on 27 October 1999, Council Common Position of 19 June 2000 and Decision of the European Parliament of ... (not yet published in the Official Journal).

(4) [1993] ECR I-5145.

(5) OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

(6) OJ L 290, 24.11.1993, p. 9.

(7) Date referred to in Article 13.

(8) Ten years after the date specified in Article 12(1).

(9) Ten years after the date specified in Article 12(1).

(10) Date referred to in Article 12(1).

(11) Three years after the date specified in Article 12(1).

(12) Five years from the beginning of the year following that in which the Directive is adopted.

## STATEMENT OF THE COUNCIL'S REASONS

### I. INTRODUCTION

1. On 25 April 1996 the Commission submitted a proposal for a Directive of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art(1); the proposal was based on Article 95 of the EC Treaty.

2. The European Parliament delivered its opinion at first reading on 9 April 1997(2). Further to that opinion the Commission put forward an amended proposal for a Directive on 12 March 1998(3). The Economic and Social Committee delivered its opinion on 18 December 1996(4).

3. The Council adopted its Common Position in accordance with Article 251 of the Treaty on 19 June 2000.

## II. PURPOSE

4. The purpose of the Commission proposal is to establish a harmonised legal system for resale rights; a resale right may be defined as the right of the author of an original work of art, and, after the author's death the right of his heirs or other persons entitled under him, to receive a percentage of the price of the work when it is resold.

## III. COMMON POSITION

### Recitals

5. The Council has added, deleted or amended a number of the recitals, mainly in order to reflect changes made to the articles of the Directive.

### Articles of the proposal

#### Article 1 - Subject matter of the resale right

6. The Council has followed European Parliament amendment 17, which was incorporated into the Commission's amended proposal, adding the words "which cannot be waived, even in advance" (Article 1(1) of the Common Position).

7. The Commission originally proposed that the resale right should apply to any resale of the work with the exception of transactions effected by individuals acting in their private capacity. In amendment 17 the European Parliament proposed that the right should apply to any resale of the work "by public sale, in a commercial establishment or with the involvement of a seller or dealer", an amendment that was not incorporated into the amended Commission proposal. However, the Council has followed the European Parliament's approach and has specified the acts of resale to which the right applies (Article 1(2) of the Common Position), namely all acts involving an art market professional, whether as seller, buyer or intermediary, on the grounds that the activities of art market professionals can be verified and it is hard to check resale acts between a vendor and a purchaser both acting in a private capacity without involving a professional. The Council's intention here (as explained in recital 17) was also to exclude from application of the resale right acts of resale by individuals acting in a private capacity to non-profit museums which are open to the public.

8. European Parliament amendment 17 also proposed that the resale right should not apply to the first transfer of ownership between sellers or between a seller and a final purchaser taking place within three years of the seller having acquired the work. This aspect was not incorporated into the Commission's amended proposal. The Council was sympathetic to the European Parliament's wish to take account of the particular situation of art galleries, which acquire works directly from authors who are often unknown and has followed the European Parliament on this point but has limited the exemption to cases where the resale price does not exceed EUR 10000, so as not to penalise authors by depriving them of their royalties if the resale price is higher than that amount.

9. The Commission's initial proposal established the principle that the royalty was payable by the seller (last paragraph of Article 4), a principle endorsed by the European Parliament, the Commission in its amended proposal and by the Council in its Common Position. However, the Council felt that the principle should be stated in Article 1 and that Member States should be able to lay down rules on the person liable for payment of the royalty that depart from that principle (Article 1(4) of the Common Position).

#### Article 2 - Works of art to which the resale right relates

10. European Parliament amendments 2, 9, 18 and 64 proposed excluding original manuscripts, which the Commission had included in its initial proposal, from the categories of works of art to which the resale right should apply; the Commission's amended proposal followed the European Parliament's amendment

on this point. Since Article 14 ter of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) expressly provides that the resale right applies to the original manuscripts of writers and composers and since situations vary from Member State to Member State, the Council chose not to oblige the Member States to exclude manuscripts from the resale right but instead to leave the matter to them to decide. The Council has accordingly excluded original manuscripts of writers and composers from the scope of harmonisation under the Directive (recital 18 and the fact that there is no reference to such manuscripts in Article 2 of the Common Position).

11. The Commission originally proposed applying the resale right to "works of plastic art", a term which the European Parliament proposed replacing by "works intended to be viewed" (amendments 18 and 64). The Commission sought to accommodate this amendment by using the term "works of graphic or plastic art" in its amended proposal. The Council has incorporated the Commission's amended proposal on this point.

12. The European Parliament proposed (amendment 64) adding "glass" to the works of art listed in Article 2. The Commission did not incorporate this amendment into its amended proposal. The Council has followed the European Parliament's proposal on this point and added "glassware" to the list in the Common Position.

13. The European Parliament proposed (amendments 18 and 64) limiting to a maximum of 12 the number of copies of a work of art that would be considered as originals for the purpose of this Directive. The Commission did not incorporate this amendment into its amended proposal on the grounds that some of the works of art concerned (e.g. lithographs and photographs) could be copied in larger numbers and still be considered originals by professionals and collectors. The Council has followed the Commission's arguments on this point. The Council has specified in its Common Position (Article 2(2)) that copies of works of art which have been made in limited numbers by the artist himself or under his authority (and which will normally have been numbered, signed or otherwise duly authorised by the artist) are considered to be original works of art.

#### Article 3 - Threshold

14. The European Parliament proposed (amendment 45) a changed structure for Article 3, a proposal which was accepted by the Commission in its amended proposal and by the Council in its Common Position.

15. Under Article 3 Member States may individually set the threshold sale price from which resale right will apply, while at the same time a Community-level maximum amount is laid down, which national thresholds may under no circumstances exceed. In its original proposal, the Commission proposed setting the Community ceiling at EUR 1000(5); the European Parliament proposed EUR 500; the Commission maintained EUR 1000 in its amended proposal; the Council has decided on a figure of EUR 4000 in its Common Position. This figure is based on the observation that almost all sales of works of art for less than EUR 4000 are domestic market transactions and therefore without consequence for the proper functioning of the internal market. Each Member State should therefore be free to determine nationally the sale price below which the cost of collecting and administering the royalty would be disproportionate to the benefit accruing to the artist.

#### Article 3a proposed by the European Parliament - Calculation basis

16. The European Parliament proposed a new Article 3a (amendment 51) replacing the basis for calculating royalties (the entire sale price) by the difference between the price obtained when the work of art is resold and the purchase price paid by the seller. The Commission rejected this amendment on several grounds: that it was incompatible with Article 14 ter of the Berne Convention, that this calculation basis was not in practice applied in any Member State and that the provision was inconsistent with the European Parliament's proposed amendments to Articles 1 and 4. The Council has followed the Commission's approach on this point.

## Article 4 - Rates

17. The Commission proposed a tapering scale of rates applying to several sale price bands. The European Parliament proposed (amendments 57 and 34) modifying the amount triggering the move between the second and third bands (EUR 100000 instead of EUR 250000) and changing the rate applying to the third band (1 % instead of 2 %). The Commission did not incorporate these amendments into its modified proposal. In its Common Position, the Council has opted for a triggering figure of EUR 200000, which is between the Commission's proposed EUR 250000 and the European Parliament's proposed EUR 100000, and has accepted the rate of 1 % that the European Parliament proposed for the third band. The Council has also added two further bands and capped the total amount of the royalty at EUR 12500. The additional rates and the cap are intended to point up the fact that resale right tapers off and so to lessen the risk of sales, and especially those making the highest prices, being relocated to third countries not applying resale rights.

18. As far as the first royalty band is concerned (up to and including a sale price of EUR 50000), the Council has combined the 4 % rate proposed by the Commission and approved by the European Parliament, with a provision allowing Member States to apply an alternative rate of 5 % (Article 4(2)). This option reflects the fact that 5 % is the rate already applied in several Member States and that sales in this price band mainly concern the domestic market, making a difference of 1 % at this level unlikely to have a significant impact on the proper functioning of the internal market.

19. The wording of the Commission proposal gave the impression that the portion of the sale price under the amount set in Article 3(2) would not be subject to resale rights. The Council has dispelled this uncertainty; the drafting of Article 2(1)(a) and Article 4(2) now makes it clear that the first rate of 4 % (or 5 % depending on the case) applies to the first portion of the sale price in its entirety.

20. The European Parliament proposed specifying in Article 4 that if, pursuant to Article 3(1), a Member State set a national minimum sale price that was less than the threshold amount laid down in Article 3(2), it should also set the rate applicable to the portion of the sale price up to the threshold amount, but that that rate should not be lower than 4 %. This addition was included in the Commission's amended proposal and has been incorporated into the Council's Common Position (Article 4(3)). Thus a Member State exercising the option under Article 4(2) could apply a rate of 5 %, or more, to the first portion of the EUR 4000 of the sale price. Since only small amounts are involved, the differences arising between Member States are not expected to have any impact on the functioning of the internal market.

21. The provision in the last paragraph of Article 4 of the Commission proposal has been transferred to Article 1(4) of the Council's Common Position (see paragraph 9).

## Article 5 - Calculation basis

22. In connection with its proposal for an Article 3a (see paragraph 16), the European Parliament also proposed deleting Article 5 of the Commission proposal. Since the Commission and the Council rejected the proposed Article 3a, Article 5, specifying that the sale prices referred to in Articles 3 and 4 are net of tax, has been kept.

## Article 6 - Persons entitled to receive royalties

23. The European Parliament proposed (amendment 55) that Article 6(1) should stipulate that after the author's death, royalties should be payable to his legal heirs. This amendment was not incorporated into the Commission's amended proposal on the grounds that inheritance law is the exclusive prerogative of the Member States and that the Directive should not interfere with the author's freedom to choose who should inherit his right. The Council followed the Commission's reasoning on this point.

24. To take account of the derogation provided for in Article 8(2) (see paragraph 31), the Council has specified in Article 6(1) that application of resale rights after the author's death to the persons entitled under him is subject to that derogation.

25. The European Parliament proposed (amendment 52) deleting the requirement under Article 6(2) that Member States should determine the arrangements for collecting and distributing royalties where the author was a national of another Member State, a requirement that was already mentioned in recital 23 of the Commission proposal (recital 27 of the Council's Common Position). This requirement was not included in the amended Commission proposal or in the Council's Common Position.

26. The European Parliament also proposed that Article 6(2) should stipulate that the management of the sums paid over by virtue of the resale right should be the responsibility of the author, who may arrange for collective management thereof. The Commission did not incorporate this change into its amended proposal, as it did not wish to rule out the possibility of a Member State providing for collective management of the royalty. The Council has followed the Commission's approach, adding that Member States may provide for compulsory or optional collective management of the royalty.

#### Article 7 - Third-country nationals entitled to receive royalties

27. The European Parliament proposed a number of drafting amendments to Article 7 (amendment 24), in particular to include a reference to the legislation of the Member State concerned as well as to this Directive, where the harmonisation pursuant to the Directive was partial. The Commission incorporated these amendments into its amended proposal. The Council has followed the European Parliament's approach but replaced the European Parliament's words "and their internal legislation" by "and the legislation of the Member State concerned" and aligned the wording of part of this provision on Article 14 ter(2) of the Berne Convention (Article 7(1) of the Common Position).

28. In the interests of transparency the Council also added a second paragraph to Article 7, whereby the Commission may publish, for information purposes, an indicative list of those third countries which fulfil the condition set out in paragraph 1; the Commission has said that it intends to publish such a list.

29. In view of the situation obtaining in at least one Member State, the Council has added a third paragraph to Article 7 allowing a Member State, for the purposes of that Article, to treat authors who are not nationals of a Member State but who have their habitual residence in that Member State in the same way as its own nationals.

#### Article 8 - Term of protection of the resale right

30. The European Parliament (amendment 25) proposed a drafting change to Article 8. In its amended proposal the Commission chose to refer neither to the period of time that the resale right lasted nor to the lapse of the right but to state that the term of protection of the artist's resale right corresponds to that laid down in Article 1 of Directive 93/98/EEC (author's lifetime plus 70 years after his death). The Council has followed the amended proposal on this point (Article 8(1) of the Common Position).

31. However, the Council has made provision for an optional, temporary derogation regarding the application of the resale right to the author's successors in title after his death (Article 8(2) of the Common Position). This optional derogation, which is available only to Member States which do not at present apply resale rights, is intended to allow them to incorporate that right into their legal systems and to enable economic operators in those Member States to adapt gradually to the right, by applying it first to the author only and subsequently to those entitled under the author after his death (recital 16). This derogation may be applied for a maximum transitional period of 10 years.

32. In Article 8(3) of its Common Position, the Council requires the Commission to submit appropriate proposals (e.g. to curtail the transitional period) if international negotiations on extending the resale right at international level have been concluded within 10 years. It should be remembered here that the European Parliament (amendment 4) proposed a new recital on the desirability of conducting international negotiations on this subject; the substance of that proposal has been incorporated into the Council's Common Position (recital 7).

#### Article 9 - Right to obtain information

33. In its amendment 26 the European Parliament proposed extending from one to three years the period during which authors of works of art could ask for the information necessary to secure payment of the sums payable under their resale rights. The substance of this amendment was incorporated into the amended Commission proposal and the Council's Common Position. The Council has specified further that the expiry date of the period is to be calculated from 1 January of the year following the date on which the resale took place, which reflects customary practice for such calculations in the field of copyright. In addition, rather than referring to authors or their authorised representatives, the Council refers to "the persons entitled under Article 6", which covers not only the author but also those entitled under him after his death.

#### Article 10 - Application in time

34. In order to dispel any doubts as to whether or not the Directive applies to works created before the date of transposition of the Directive in those Member States not yet applying the resale right, the Council found it necessary to add a new Article covering the application in time which makes clear that it does.

#### Article 11 - Revision clause (Article 10 of the Commission proposal)

35. The European Parliament proposed (amendment 27) bringing forward the date of the Commission's first report from 1 January 2004 to 1 January 2002 and providing for reports to be submitted every three instead of every five years thereafter. The Commission did not incorporate these changes into its amended proposal. The Council has laid down that the first report is to be submitted within three years of the deadline for transposing the Directive, which corresponds to the period proposed by the European Parliament (from 1 January 1999 to 1 January 2002), with subsequent reports being submitted every four years thereafter, which is an intermediate solution between the Commission and the European Parliament proposals (Article 11(1) of the Common Position).

36. The European Parliament also proposed specifically mentioning the points to which Commission reports should pay particular attention. The Council has included these in its Common Position, adding specific references to the competitiveness of the market in modern and contemporary art, the position of the Community in relation to relevant markets that do not apply the resale right, the impact on the internal market and the effect of the introduction of the resale right in those Member States in which it is not yet applied.

37. The Council has established a Contact Committee, composed of representatives of the competent authorities of the Member States and chaired by a representative of the Commission (Article 11(2) and (3) of the Common Position). This body is based on the Contact Committee proposed by the European Parliament in its opinion on the proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society(6).

#### Article 12 - Implementation (Article 11 of the Commission proposal)

38. The Commission initially proposed 1 January 1999 as the ultimate date for the transposition of the Directive. Since that deadline has passed, the Council chose to set the deadline for transposing the Directive five years from the beginning of the year following that in which the Directive is adopted. The Council considers that those Member States which do not yet apply resale rights need a transposition period of five years.

#### IV. CONCLUSION

39. Council's Common Position takes on board the substance of the majority of the amendments proposed by the European Parliament. The Commission does not accept the Council's Common Position, because of the length of the transitional period during which some Member States will be allowed not to apply resale right to deceased artists' successors in title (Article 8(2)), which, combined with an exceptionally lengthy transposition period in an area relating to the internal market, serves to delay the harmonisation effect by 15 years. The Council would stress that the transitional period lasts a maximum of 10 years and

could be shortened in the circumstances described in Article 8(3).

(1) OJ C 178, 21.6.1996, p. 16.

(2) OJ C 132, 28.4.1997, p. 88.

(3) OJ C 125, 23.4.1998, p. 8.

(4) OJ C 75, 10.3.1997, p. 17.

(5) The ecu amounts in the Commission proposals and European Parliament amendments have been replaced by euro amounts.

(6) European Parliament opinion of 10 February 1999 (OJ C 150, 28.5.1999, p. 171, amendment 58).