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Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a proposal for a Directive on the resale right for the benefit of the author of an original work of art /* SEC/2000/1516 final - COD 96/0085 */

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a proposal for a Directive on the resale right for the benefit of the author of an original work of art

1. BACKGROUND

The Commission adopted its proposal for a Directive on 25 April 1996 [1] (COM(1996)97 - 1996/0085/COD).

[1] OJ C 178, 21.6.1996, p.16.

The Economic and Social Committee delivered its opinion on 18 December 1996 [2].

[2] OJ C 75, 10.3.1997, p.17.

On 9 April 1997, the European Parliament adopted at first reading under the codecision procedure (Article 251) a legislative resolution approving the Commission proposal subject to the amendments contained in that resolution, and calling on the Commission to amend its proposal accordingly.

On 12 March 1998, pursuant to Article 251 of the EC Treaty, the Commission adopted an amended proposal incorporating, wholly or in part, 21 of the 27 amendments adopted at first reading by the European Parliament.

On 20 June 2000, the Council, acting in accordance with Article 251(2) of the EC Treaty, adopted a common position on that proposal for a Directive.

This Communication sets out the Commission's opinion on the common position of the Council, pursuant to Article 251(2) of the EC Treaty.

2. PURPOSE OF THE DIRECTIVE

The aim of the Directive is to put in place a harmonised legal framework in respect of the resale right, so as to ensure the proper functioning of the market in works of modern and contemporary art within the European Union.

The resale right is the right of the author of an original work of art and, after his death, of his legal heirs or other persons entitled under him to receive a percentage of the price of a work when it is resold. Its aim is to redress the balance between the economic situation of authors of works of graphic and plastic art and that of other creative artists.

This right is enshrined in law in 11 of the 15 Member States and is applied in 8 of those Member States according to substantially different methods (as regards the works covered by resale right, transactions giving rise to payment and rates applicable). The Directive therefore seeks to put an end to distortions of competition which affect the market in modern and contemporary art in the Community by generalising

and harmonising the resale right.

3. Comments on the common position of the council

3.1. Summary of the Commission's position

The Council unanimously adopted a common position, with which the Commission was not in a position to give its agreement.

The Commission regrets in particular the introduction by the Council of a ten-year transitional period during which Member States who do not apply the resale right on the date of entry into force of the Directive will be able to limit its application to living artists only (Article 8(2)). The Commission believes that, while the implementation of the Directive may cause specific difficulties to those Member States in particular, the problems raised are not such as to justify such a long transitional period. In order to meet these concerns, the Council has provided, in Article 12(1) of its common position, for a period of five years in which to transpose the Directive into national law. This period is already exceptionally long in an area which falls within the internal market. The cumulative effect of these two periods is very likely to lead to the desired harmonisation being postponed for 15 years. The Commission cannot accept that the distortions of competition which the Directive is supposed to remedy can persist for such a long time. Looking beyond the Directive, it regrets that, in an area which falls within the internal market, the Council has decided not to maintain a reasonable period of time between the adoption of a piece of harmonising legislation and its application. In its view, this runs counter to the effectiveness of Community action and is liable to create an unfortunate precedent for other internal market initiatives.

As for the other aspects of the Directive, the Council, with only a few exceptions, endorsed the Commission's approach in its amended proposal by incorporating virtually all of those amendments of Parliament at first reading which were accepted by the Commission.

3.2. Action taken on the amendments adopted by Parliament at first reading

Parliament adopted, at first reading, 27 amendments to the original Commission proposal.

In its amended proposal, the Commission accepted wholly or in part the majority of these amendments, i.e. 21 out of 27 (amendments 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 15, 17, 18, 22, 24, 25, 26, 27, 34, 45, 49, 51, 52, 55, 57 and 64).

The Council accepted in substance the amendments adopted by the Commission. Furthermore, the Council incorporated into its common position certain aspects of the following amendments which the Commission did not incorporate in its amended proposal:

- Article 1 incorporates amendment 17 regarding the distinction made between different art professionals and the preferential treatment for art galleries,
- Article 2 incorporates amendments 18 and 64 to include glassware among the works of art covered by the resale right.

In addition, the Council made amendments to the Commission's amended proposal which do not correspond to Parliament's amendments and which are explained in the following paragraphs.

3.3. Amendments introduced during discussions within the Council

3.3.1. Amendments to the recitals

As regards the recitals, following the line taken by the Commission in its amended proposal, the Council incorporated, or based its text to a large extent on, amendments 1 to 6, 49, 9 to 11, 13 and 15 proposed by Parliament.

Furthermore, the Council adapted the recitals in line with the amendments made to the articles of the Directive. In particular, it stressed the need for Member States which are unfamiliar with the resale right to incorporate it into their legal system gradually (recital 16). It also decided to expand on the reasons for Community action in this field and to emphasise the limits of such action (recitals 8 to 15).

3.3.2. Amendments to the articles

Article 1 : The purpose of the resale right

The Council divided this article into four paragraphs.

The first paragraph incorporates amendment 17, as set out in the Commission's amended proposal, and emphasises that the resale right is an inalienable right that cannot be waived.

With regard to transactions giving rise to the resale right, the Commission did not go along with amendment 17, which proposed to distinguish between the various art market professionals. The Commission's intention was that the resale right should apply to all sales occurring after the first transfer of the work by the author, with the exception of transactions by individuals acting in their private capacity.

The Council chose, in a new paragraph 2, to adopt a positive approach which is closely modelled on Amendment 17, in that it takes the involvement of art market intermediaries as a criterion for applying the resale right to a transaction. An indicative list of these intermediaries is supplied. The Council did this for practical reasons, believing it necessary for enforcement purposes to have an objective means of distinguishing between professional transactions on the one hand and those effected by private individuals on the other. The Council therefore expanded recital 17 to indicate that the resale right did not extend to acts of resale to museums by individuals acting in their private capacity. These amendments and those of the new paragraph 2 do not affect the definition of the subject matter of the resale right as proposed by the Commission.

In a new paragraph 3, the Council, in line with amendment 17 which the Commission had not incorporated on this point, also wanted Member States to be able, where appropriate, to take account of the promotional role played by art galleries vis-à-vis artists. They may therefore allow art galleries to be exempted from the resale right, albeit on two conditions: that the resale occurs within three years and that the resale price does not exceed EUR 10 000.

In a new paragraph 4, the Council incorporates the principle enshrined in the last sentence of Article 4 of the original proposal, whereby the royalty shall be payable by the seller. However, it also provides that Member States may derogate from this principle as regards liability for payment.

Article 2: Works of art to which the artist's resale right relates

The Council divided this article into two paragraphs.

In the new paragraph 1, the Council lists the original works of art which are subject to the resale right. The Council, following amendments 2, 9, 18 and 64 incorporated by the Commission, confirmed that original manuscripts are not subject to the resale right as harmonised by the Directive, but stated in a new recital 18 that, under the Berne Convention, Member States may apply a national resale right to this specific category of works. Like the Commission, it specified that the resale right applies also to works of plastic and graphic art. Furthermore, the Council followed amendments 18 and 64 by including glassware in the works of art subject to the resale right in Article 2(1). The Commission had not incorporated this element of the two amendments in its amended proposal.

The Council, like the Commission, did not endorse Parliament's suggestion to limit to 12 the number of copies which could be considered as original. The Council did consider it appropriate, however, to specify, in a new paragraph 2, certain conditions for defining copies, made in limited numbers, of original

works of art.

Article 3: Threshold

The Council followed amendment 45 which the Commission had incorporated in its amended proposal as regards the structure of Article 3, and in particular the introduction of a threshold for the resale right.

However, the Council set this threshold at EUR 4 000, whereas Parliament had suggested EUR 500 and the Commission, in its amended proposal, had maintained the original threshold of EUR 1 000. The Commission had proposed a threshold in order to avoid a situation where the cost of administering the resale right for market professionals, in certain low-value transactions, would exceed any profit to the artists. On the other hand, it took the view that this threshold should not be too high, so that the benefit of the resale right was not restricted to recognised artists alone. Below this threshold, Member States remained free to apply or not to apply the resale right, given that the resulting disparities were not likely, in view of the low commercial value of the works concerned, to affect trade in the internal market.

The Commission regrets that, because of the introduction of such a high threshold, many transactions will now be excluded from the scope of the Directive, thereby diminishing its harmonising effect. This type of provision also effectively deprives the large majority of artists of the benefits resulting from such harmonisation.

Article 4: Rates

The Commission was aware that too high a resale right could lead to a displacement of sales to countries outside the Community which do not apply the resale right, particularly in the case of transactions in the highest price brackets. The Commission therefore proposed to introduce three selling price bands on a tapering scale of rates. For the purpose of determining these bands and rates, the Commission took the situation in the Member States as a reference.

Parliament confirmed this approach in its amendments 57 and 34, although it proposed to subdivide these bands and lower the rates, which the Commission could not accept.

The Council further qualified this tapering scale by creating five bands, which affects the upper price brackets in particular. It also placed a ceiling of EUR 12 500 on the resale right.

The Commission shares the Council's concern that all possible precautions must be taken to avoid displacement of sales in the highest price brackets. Nevertheless, it regrets the introduction of a ceiling which, in practice, means that the most famous artists are prevented from benefiting from the fruits of their success. It finds it hard to imagine that such a ceiling would be placed on profits in other areas of intellectual or industrial property (such as patents or trade marks).

As for the first band of sales prices (up to EUR 50 000), the Council gave Member States the option of applying a 5% rate instead of the 4% proposed by the Commission and endorsed by Parliament. The Council also introduced a provision that, where Member States opt to apply the resale right below a threshold of EUR 4 000, they should apply a rate of 4 or 5% or even a higher rate if they avail themselves of the option in paragraph 3. This confirms that the first price band applies, at least from the Community threshold of EUR 4 000 or, if the Member States establish a lower threshold, from that threshold.

The Council added to the sentence at the end of this article and moved it to the new Article 1(4)

Article 5: Calculation basis

The Council, following the line taken by the Commission, did not incorporate Amendment 51, which proposed taking added value as the basis of calculation. It maintained the sales prices net of tax, which corresponds to practice in the Member States.

Article 6: Persons entitled to receive royalties

In the case of paragraph 1, the Council followed the Commission by stating that the author and, after his death, his successors in title shall enjoy the resale right. In its Amendment 55, Parliament proposed that only the legal heirs of the author should benefit. Neither the Commission nor the Council wished to incorporate this amendment in order not to interfere with the law of succession in the Member States.

For reasons of consistency, the Council refers in paragraph 1 to the transitional period introduced by Article 8(2), during which certain Member States will not be required to apply the resale right to those entitled under artists after their death.

Paragraph 2 deals with the practical arrangements for the management of the resale right. Concurring with the Commission on the substance of the issue, the Council was reluctant to prevent Member States from introducing compulsory collective management of the royalty.

The Council went along with the Commission, which had deleted from the article, in line with Amendment 52, the requirement for Member States to collect and distribute royalties where the author thereof is a national of another Member State. The Council endorsed recital 23 of the Commission's amended proposal (recital 27 of the common position), which nevertheless provides that Member States are required to carry out these functions.

Article 7: Third-country nationals entitled to receive royalties

The Council added two new paragraphs to Article 7.

Paragraph 1 reiterates in substance the Commission's amended proposal, which incorporated Amendment 24. However, it no longer calls for reciprocal treatment in practice but for reciprocal treatment under the law.

In the new paragraph 2, the Council provides that the Commission may take responsibility for publishing the list of countries whose legislation includes the resale right, so as to put this reciprocal treatment into practice. The Commission has stated that it will take responsibility for this task.

Paragraph 3, introduced by the Council, gives Member States the possibility of applying the resale right to third-country nationals who have their habitual residence in the Member State concerned.

Article 8: Term of protection of the resale right

The Council added two new paragraphs to Article 8.

In its amended proposal, the Commission took account of the wishes expressed in Amendment 25 to improve the wording of this article. The Council, in new paragraph 1, followed the Commission.

Paragraph 2 introduces a transitional period of ten years during which Member States which do not apply the resale right on the date of entry into force of the Directive will be able to limit its application to living artists only. However, in paragraph 3, the Council provides that, in the event of the successful conclusion, before the end of this period, of international negotiations aimed at extending the resale right at international level, the Commission would submit appropriate proposals.

The Commission has undertaken to request a mandate from the Council, as soon as possible, to conduct these negotiations. The Council, for its part, has stated that it will examine this request with due care and attention. If these negotiations were to be completed before the end of the ten-year period referred to in paragraph 2, the Commission will submit proposals to bring this transitional period to an end.

The Commission still regrets the introduction of this long transitional period which is, as explained in point 3.1, the main reason why it is unable to agree to the common position.

The introduction of the resale right in two stages by certain Member States, first for living artists and thereafter to persons entitled under them after their death, is intended to allow economic operators in these countries to adjust to this right gradually. It also seeks to meet the fears expressed by these art market professionals of a large-scale displacement of the market towards certain third countries as a result of the introduction of this right. The Commission believes that these concerns have already been taken into account in Articles 3 and 4 of the common position and that this transitional period is therefore not justified.

As regards the procedures for applying the resale right, the Commission has taken care to limit the administrative requirements for professionals as far as possible. The original aim of the application threshold laid down in Article 3 was to avoid excessive red tape in the case of low-value transactions. Since the Council significantly raised this threshold, the formalities connected with the resale right now concern only a limited number of transactions - a situation which the Commission regrets in its comments on Article 3. Such a transitional period, particularly one of this length, does not seem to be proportionate to the efforts required of art market professionals.

Regarding the displacement of sales towards non-Community countries which do not apply the resale right, the Commission, as indicated in its comments on Article 4, remains convinced that the way to limit this risk is to have a tapering scale of rates for the different sales price bands, especially for the higher price brackets where the market can be considered to be global. Moreover, the Council further qualified this tapering scale by creating five bands instead of the three proposed by the Commission and by applying increasingly low rates to the higher price bands. It also - and the Commission expressed its misgivings about this - placed a limit on the principle of proportionality of the resale right by capping the benefits which artists can expect to receive. Once again, in the light of these precautions, which have been further reinforced by the Council, the transition period does not seem to be justified.

Moreover, the Commission would point out that other factors, such as exchange rate fluctuations, the difference in purchasing power between markets and the relative strength of domestic economies, are liable to have a much greater influence on the resale right than any such international movements. The Commission would also point to the fact that similar predictions were made when Directive 94/5/EC introducing special VAT arrangements applicable to second-hand goods, works of art, collectors' items and antiques [3] was adopted. Under that Directive, the United Kingdom introduced VAT on imported works of art which, although at the lower rate of 2.5%, caused great concern to those in the profession. In a report published on 28 April 1999 [4] on the impact of Directive 94/5/EC on the competitiveness of the Community art market compared to third countries' art markets, the Commission found that "the adoption of Directive 94/5/EC has had no significant impact on the Community art market" and even that "the art market has boomed since the introduction of VAT on imports". The Commission also concluded from this that there was no necessity for prolonging the transitional measures which allowed the United Kingdom to apply this lower rate until 30 June 1999, as the existing legal framework was sufficient to guarantee the future prosperity of the Community art market.

[3] OJ L 60, 3.3.1994, p.16.

[4] COM(1999) 185 final.

Article 9: Right to obtain information

The Council endorsed Amendment 26, incorporated by the Commission in its amended proposal, which extended from one to three years the period during which an author or those entitled under him may request the information necessary for the effective application of the resale right. In practice, the Council extended this period by stating that it would start to run on the first day of January of the year following the date on which the resale had taken place, whereas the Commission and Parliament had taken as their starting point the date of the transaction itself.

The Council amended the text slightly to make it clear who is entitled to request this information and who must furnish it.

Article 10: Application in time

The Council deemed it necessary, for reasons of legal certainty, to add this article which stipulates that the Directive shall apply to protected works in the Member States as from the target date fixed for its transposition (five years after its adoption).

Article 11: Revision clause

The Council added two paragraphs to this article.

In paragraph 1, which concerns the revision clause, the Council endorsed Amendment 27 as worded in the Commission's amended proposal. However, the Council's approach differed significantly from that of Parliament and the Commission with regard to the frequency of the reports to be produced by the Commission. The Council laid down that the Commission should submit an initial report three years after the deadline for transposition of the Directive by the Member States and a report every four years thereafter. Parliament considered that the Commission should present its initial report two years after the transposition of the Directive and reports every three years thereafter. The Commission, for its part, had proposed a period of five years both for the initial report and for successive reports.

The Council also added to the issues to which the Commission should pay particular attention in its reports. The Council wanted the Commission, in particular, to examine the effect of the introduction of the resale right on the modern and contemporary art market. To this end, the Commission should pay particular attention to the competitiveness of the market in modern and contemporary art by comparison with the major markets in countries outside the European Union which do not apply the resale right, and to the implications of introducing this right on the internal market and its impact on those Member States which did not apply it prior to the entry into force of the Directive.

In keeping with an increasingly common practice, the Council established in the new paragraphs 2 and 3, a Contact Committee composed of representatives of the Member States and chaired by the Commission. This group meets either on the initiative of the Commission or at the request of the delegation of a Member State. Its task is to organise consultations on all questions deriving from the application of the Directive and to facilitate the exchange of information on developments in the art market in the Community.

Article 12: Implementation

The Council allowed a period of five years, from the start of the year following the year in which the Directive is adopted, for Member States to transpose the Directive.

The Commission regrets the introduction of this excessively long period for a piece of intellectual property legislation and, more generally, in an area which falls within the internal market. Member States normally have a period of two years to implement harmonising directives, and five years seems disproportionate to the regulatory changes to be made in the laws of the Member States. The issue of the gradual adaptation of economic operators to this right has been discussed in point 3.2, in the comments on Article 8. The Commission would stress that it is above all the addition of this transposal period to the transition period provided for in Article 8(2) which it considers prejudicial to the completion of the internal market in this area, but also, in the future, in other sectors.

Conclusion

The Commission considers that the adoption by the Council of this common position on the resale right represents an important step towards the establishment of a Community art market. It also points out that the protection of the resale right is designed to extend the benefits of the internal market to authors of works of graphic and plastic art.

The Council generally endorsed the approach adopted by the Commission in its amended proposal by

incorporating, in full or in part, virtually all of the first-reading amendments.

That is why the Commission deplors the fact that certain amendments made by the Council make it impossible to put in place, within a reasonable period, a resale right which is as effective as it would have wished.

Consequently, as far as the effectiveness of the resale right is concerned, the Commission regrets for the reasons set out above the introduction of a high application threshold and a ceiling beyond which artists will no longer be eligible to a resale right commensurate with their success.

The Commission would have been able to accept these aspects, however, if a more satisfactory solution had been found to the issue of the periods for implementation of the Directive. Under these circumstances, and despite all its efforts to reach an agreement, the Commission was unable to accept the text of the common position, which does not provide for reaching a satisfactory level of harmonisation within a reasonable period of time.

The Commission will continue to explore, with the other Institutions concerned, possible ways of finding a better solution within the context of this Directive to the issue of the application periods for this Directive.