The Confédération Internationale des Négociants en Œuvres d'Art (CINOA) is the principal art and antique dealer organisation representing nearly 5,000 dealers in 22 countries and is a member of the European Coalition of Art Market Organisations.

Although CINOA does not represent auctioneers, the Artist Resale Royalty affects the whole of the art market base and therefore, we submit a copy of the European Coalition of Art Market Organisations submission to the European Commission's Consultation on the implementation and effects of the EU Artist Resale Right (ARR) Directive in March 2011. This document provides an overview of the negative consequences on the trade in the EU and a summary of the main concerns.

More information on CINOA can be found on www.cinoa.org

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The European Coalition of Art Market Organisations

European Federation of Auctioneers; Federation of European Art Gallery Associations; Syndicat National des Antiquaires; Syndicat National des Maisons de Ventes Volontaires; The British Art Market Federation; El Consorcio; Associazione Nazionale Case d'Asta, Bundesverband Deutscher Galerien und Editionen, Vereeniging van Handelaren in Oude Kunst in Nederland, Nederlandse Galerie Associatie, Federatie van Taxateurs Makelaars Veilinghouders in Roerende Zaken, Confédération Internationale des Négociants en Oeuvres d'Art

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IMPLEMENTATION AND EFFECTS OF THE RESALE RIGHTS DIRECTIVE (2001/84/EC)

The European Commission is now in the process of conducting its delayed assessment of the implementation and effects of the resale Right Directive. The Directive applies a levy to sales of the work of living artists and of deceased artists for up to 70 years after the date of death. These sales together make up a large part of the art market as a whole, accounting for over 60% of all sales of fine art by value.

The Directive was agreed as an internal market measure in 2001 and was intended to eliminate a distortion in Europe's internal art market. Under Article 11 of the Directive, the Commission was obliged to submit a report on the implementation and effects of Directive before 1 January 2009, paying particular attention to the competitiveness of the market for modern and contemporary art in the EU, especially in relation to relevant markets that do not apply the resale right.

Independent research recently published indicates that the EU as a whole has experienced a steadily declining share of the market for Modern and Contemporary art and that the Directive has failed in its aim of redistributing the EU internal art market. In addition, Recital 7 of the Directive drew attention to the internationalisation of the art market and of the need to reach an international agreement on the resale right. Since the Directive was agreed, no progress has been made on such an agreement.

The Commission's review therefore presents the last opportunity for a reassessment of the Directive in the light of the failure to reach a global agreement and before a derogation, limiting the resale right in some member states to the work of living artists, expires on January 1st, 2012.

1. Loss of EU Market Share

Despite commitments made in the Directive, **no progress has been made in achieving an international agreement on artists' resale rights** (ARR) and Europe's art markets therefore now find themselves at a **significant competitive disadvantage** compared to other major markets which do not apply ARR.

The European art market's global share has declined over recent years, falling from 48% in 2005 to 37% in 2010, **with significant market share being lost to markets such as the US, China and Switzerland**. The EU's global share of the auction market for Contemporary (living artists) art fell by 7% between 2005 and 2010. Europe's largest art market, the UK, lost its position as the second largest art market for the works of living artists in 2010 to China, while the US remained the dominant market with a 36% share. All of the other major art markets in the EU such as France, Germany and Italy also saw their relative shares contract, as art markets outside the EU gained.

The market for the work of deceased artists within the terms of the Directive (i.e. within 70 years of the sale or the "heirs' market") accounts for a substantially larger proportion of the fine art market than the living artists' sector - 48% of its total value in 2010. The heirs' sector saw sales of €1.2 billion at auction in the EU in 2010, nearly four times greater than the living artists' sector with more than double the number of transactions.

Evidence also suggests that even for transactions at relatively low levels of value, the cost of shipping and selling a work of art abroad will be significantly less than the additional cost imposed by the ARR and therefore there is a **strong incentive to conclude sales outside of the EU**. For example, for all works over €40,000, it is cheaper to ship a painting to the US, than to sell it in the EU and therefore to pay the resale right levy. In the EU in 2010, around 65% (by value) of the works sold by living artists were at prices greater than €50,000. In the 'heirs' market', 76% of works sold were for greater than €50,000.

In markets such as the UK and France, loss of sales to the US and China are already a major threat, while markets in Germany, Italy and Austria report an exodus of sales to Switzerland, given its proximity and the absence of ARR there. The termination of the derogation that currently applies in six member states can only result in an increased risk that sales will be diverted to third countries.

2. Failure of Internal Market Redistribution

Despite being a major objective of the Directive at the outset, **evidence shows that the Directive has not lead to a redistribution of the EU internal art market**. In the market for works by living artists in the period between 2005 and 2010, the global market share of all EU states was either stable or declined (for example in France from 5.3% to 4.8% and significantly in the UK from 24.8% to 18.6%). Share was not gained in any significant way by other markets in Europe, but lost to external markets such as China (which increased its share from 7.5% to 23.7%).

There is no sign that the introduction of a single system of ARR on the work of living artists has resulted in a transfer of sales from the UK to other EU art markets. The market share of most other art markets within the EU has remained generally static over the period 2005 to 2010. Therefore it would appear that the relative national shares of the EU's internal art market have remained unaffected by the introduction of a single system of ARR on living artists, while the EU's global share has been in decline.

3. Administrative Complexity and Costs on Small Businesses

One of the major criticisms of the ARR system is the high cost of collecting and distributing ARR payments. The art trade in the EU is made up of 60,000 largely small to medium sized businesses. The average number of employees in the dealer sector is 3 persons and in auction houses around 20. The impact of the administrative cost of ARR on many of the smaller businesses in the trade has been substantial. Given the complex nationality and residency requirements which result from the lack of an international agreement on ARR, neither the art market nor the collecting societies have the means of easily determining with certainty at the time of the sale which artists or heirs are entitled to receive payments. This creates needless additional costs by obliging the art market to carry out its own research on each transaction thus adding to the considerable administration cost of the ARR. Many of these difficulties could be solved if there was a register of artists who are entitled to receive payments or if an international agreement could be reached.

There are also concerns regarding the **'cascade effect' created by ARR which is unfair on market operators** as dealers are often required to make the payment twice or more on the same transaction. As the levy is charged on the transaction and not on the profit, **the levy is due even if the seller makes a loss on the sale**. In our view any such levy should follow the same logic as VAT and be charged on profit only and structured to avoid double taxation, 'cascade' effect.

Given the 244% increase in the number of sales that would be liable by extending ARR to the work of deceased artists, the added administrative impact, particularly on small businesses, is likely to be more onerous. For sales of the work of deceased artists it is necessary not only to establish the date of death, but more significantly the citizenship of the artist at the date of death and whether his or her heirs are citizens of the EU.

4. The resale Right only benefits a very small minority of artists.

Fewer than 3 out of every 100 living artists benefit from the right in the EU and the bulk of the payments go to the heirs of a few famous deceased artists.

A detailed analysis of all auction sales in the EU in 2010 concluded that the works of about 12,500 deceased artists (deceased within 70 years of the 2010) and of 8,600 living artists, of which around 5,070 were European and therefore eligible to receive ARR, appeared on the auction market. Set against the total number of artists practicing in the EU, 5,070 represents a very small proportion of those who are eligible to benefit. According to the most recent figures available from Eurostat, there were 168,232 employed artists in the EU. This figure is likely significantly to underestimate the total number of artists as it does not include artists who have other professions, for example as art teachers, or are unemployed. Given that, the European Commission predicted in 1999 that approximately 250,000 would benefit from the resale right, the reality is that the work of only a small minority of, mostly already successful, artists appears on the secondary market.

5. Lack of reliable information and a general lack of transparency creates severe practical difficulties

There are also major concerns about the **lack of transparency** in the collecting society system, which means that very little is known about who actually benefits from the ARR and what becomes of the considerable volumes of undistributed money.

In many countries, collecting societies enjoy a **monopoly right to collect and distribute ARR**, even when an artist is not registered with their organisation. As monopoly operators, they are free to set their own charges and there is little oversight or scrutiny of their activities or their use of the funds collected. Collecting societies can often take fees of up to 30% for collecting and distributing payments and there is little transparency about how funds are used.

Collecting societies do not release details of payments made to artists, claiming that to do so would breach confidentiality. However even from the publicly available data it is clear that, contrary to optimistic predictions made before the introduction of the Directive, only a tiny percentage of artist have gained from ARR, and of those, and even smaller minority receive most of the payments.

CONCLUSION

There is mounting anecdotal evidence that the existence of ARR in the EU is a factor in persuading sellers to sell in already very dominant markets where ARR is not applied. Many studies have recognised that ARR is one of many factors that affect the location of sales, but it can not entirely be a coincidence that the EU, which is alone among major art markets in applying ARR, has steadily been losing global market share in the Contemporary art market. Contemporary art is the most mobile sector of the art market and one of the most volatile. European artists are strongly represented in the global resale market and their work does not have to be sold in the EU to achieve the highest prices. For example the most expensive work by any living artist, the British artist Lucien Freud's Benefits Supervisor Sleeping, was sold at auction in New York in 2008 for $33.6 million, and the US already has 29% of the auction market for the work of living European artists.

Although ARR may only be one of many factors causing the present shift in the art market away from the EU, the aggregation of many factors leads to the loss of market share over time. ARR may not be the sole factor in the EU's relative decline, but it is certainly a contributory factor which is likely to have an increasing effect as time goes on by deterring major art sales from taking place in the EU. Furthermore customer perception is an important factor in determining the place of sale. **The existence of ARR on sales adds to the increasing perception, particularly on the part of overseas clients, that the EU is a complicated and expensive place to do business.**

Any further decline of the EU’s share of the global art market will reduce revenue in the EU and consequently will threaten employment. The art market in the EU directly employs close to 300,000 people and supports a further 112,525 jobs in ancillary services used by the art trade.

Although the full impact of the ARR within the EU is likely to be only seen in the next few years, given the growing strength of global competition, it is impossible to avoid the conclusion that the presence of a transaction charge, more or less unique to the EU, seems likely only to add to the difficulties of a market that appears already to be in relative decline.

It is therefore essential that the European Commission takes the opportunity to undertake a full and comprehensive revision of the Directive, including an extension of the current derogation for works by deceased artists to all EU member States and until an international agreement is reached.