

# G E S A C

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## **COMMON POSITION OF THE COUNCIL ON *DROIT DE SUITE* (RESALE RIGHT) COMMENTS BY GESAC**

*Droit de suite* (resale right) is the right held by the creator of a graphic, plastic or photographic work to receive a share of the resale price of his or her work.

*Droit de suite* was created in order to enable an artist who sold his or her work at a low price at the start of his or her career to share profits deriving from its resale by dealers (auctioneers, gallery owners, brokers) once the artist had become famous. Apart from the case of very well known artists, graphic and plastic artists only have a slight opportunity to benefit from traditional modes of exploiting intellectual work, i.e. reproduction and representation rights.

Reproduction right is essentially connected with publishing (books, postcards, posters, etc.) and represent a very low, otherwise nil sum for living artists who do not have an international reputation (almost all of the artists concerned). For its part, exhibition right, which is associated with representation right for graphic and plastic artists, remain only theoretical. It has not been implemented anywhere in the European Union.

The commercial value of works created by graphic and plastic artists is incorporated in the material support concerned. These works are therefore exploited through sale and resale. *Droit de suite* makes attempts to re-establish a balance, on the one hand, between the economic position of graphic/plastic artists and that of other creative artists who benefit from the successive exploitation of their work and, on the other hand, between the position of plastic artists and dealers.

The assertion that *droit de suite* only would benefit a few rich families is unfounded: at European Union level, thousands of artists are already benefiting from *droit de suite* in countries where it is applied.

Buyers enrich their collections, vendors receive a sale price and dealers obtain their commission. Sales rooms operate in a privileged financial environment: they take a commission, which varies as they see fit, both from the vendor and the buyer, and which can amount to 30% of the sale price. There is therefore no convincing argument for refusing artists a share of the sale, especially as this share is minimal.

On 16 March last, 4 years after the start of work, the Council reached political agreement on *droit de suite*. This legitimate right by graphic and plastic artists to participate in their work's success had already long since been recognised by 11 of the EU Member States (+ 3 EEA countries). Given the distortions observed in the art market, the general use of *droit de suite* is essential and in this sense, the Council decision leading to recognition of this right at European Union level is welcome. In particular, it will abolish the discrimination which exists between artists of various nationalities. Thus, for example, a work by an English artist sold now sold in Germany benefits from *droit de suite*. In contrast, a work by a German creator sold in the United Kingdom does not benefit from this provision.

However, GESAC can only deplore the alterations of the initial draft directive proposed by the Commission and essentially approved by the European Parliament during the first reading. These alterations void *droit de suite* of its substance and are the result of the extreme opposition of a small number of Member States (principally the United Kingdom) concerned about the interests of major dealers and not those of creators.

## **MAIN PROBLEMS RAISED BY THE COMMON POSITION**

### **1. The transposition and transition period (Articles 12. Par. 1 and 8 Par. 2)**

The political compromise provides for a five-year transposition period as well as a ten-year transition period for the benefit of Member States which do not yet recognise *droit de suite*, i.e. Austria, Ireland, the Netherlands and the United Kingdom. For ten years, these States can exempt their dealers from *droit de suite* where the sales concern the works of dead artists. This is quite inadmissible, as few artists become famous during their lifetimes. Time is generally required for the works to become a commercial success. It is therefore important that at least their heirs benefit from *droit de suite*.

The proposed transposition period does not correspond in any way to the average transposition duration for Community directives, which is two years. It directly contravenes liberalisation of the market and the imperative need to monitor this liberalisation and harmonisation of *droit de suite* as closely as possible. The Commission opposed this overly long transposition/transition period, as it constitutes a very dangerous precedent. Countries seeking accession risk using it to gain excessive periods for implementation and transition in all domains, which would consequently void majority rule of its substance.

Furthermore, this excessive transposition/transition period combined with exception «k»<sup>1</sup> proposed in the amended proposal for a Directive on the harmonisation of certain aspects of

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<sup>1</sup> Article 5.3 k) of the draft directive : Members States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases “ use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event».

copyright and related rights in the Information-Society which can be interpreted as allowing dealers to distribute sales catalogues freely on the Internet, will aggravate distortions in competition. It immediately places the United Kingdom in a position of force in the market for Internet-based art sales. This market, which is developing exponentially in the EU and at international level, essentially concerns «small» works. 80 to 95% of art sales in Europe involve works worth less than EUR 50,000, whose potential buyers are in Europe and not in the United States or Japan and for whom it is not viable to transfer sales to non-EU countries. In practice, if a work is exported for the sole purpose of concluding a sale in a non-EU country and then re-imported to Europe by its buyer, a minimum of 5% VAT is payable on its price. Additional factors such as the cost of transport, insurance and the risk of damage during transport do not justify attempting to make savings on *droit de suite*.

The Internet sales system enables dealers located in country A to sell works located in country B to a buyer who is also located in country B. While this document does not contest the practical character of a system like this, nor opposes its development, it is clear that it will create perverse effects in the absence of harmonisation.

The transposition and transition period will have the inevitable effect of Internet-based sales being mainly made from the United Kingdom. Thus, an essential share of the market will escape application of the Directive for the next 15 years, both to the detriment of creators and dealers in other countries.

Finally, this overly long transposition and transition period is holding up the harmonisation process for *droit de suite* at global level. In particular, it is delaying the spread of *droit de suite* to the United States, which the Copyright Office in Washington is ready to propose as soon as the directive is implemented.

**If the European Parliament does not react by reducing the duration of transposition to normal and by abolishing the transition provisions, the competitive distortions noted justifying the search for harmonisation in the area will be aggravated and last until 2015.**

## **2 Rates and capping (Article 4)**

To prevent the vendor of an expensive work of art being encouraged to sell this work within a non-EU country which does not have a *droit de suite* law, the Commission has proposed a tapering scale of rates.

The initial draft directive provided for a 3-band tapering rate:

- 4% < EUR 50,000
- 3% from EUR 50,000 to 250,000
- 2% > EUR 250,000

For its part, the wording adopted by the Council provides for 4 bands plus 1 capped band:

- 4% < EUR 50,000
- 3% from EUR 50 000,01 to 200 000
- 1% from EUR 200 000,01 to 350 000
- 0.5% from EUR 350 000,01 to 500 000
- 0.25% > EUR 500 000. This fifth band is capped and whatever the sale price of the work of art, the *droit de suite* cannot exceed EUR 12 500

In the majority of countries, the directive will lower the *droit de suite* rates currently applied in the absence of capping: 3% of the sale price in France and Spain, 4% in Belgium and 5% in Germany, Denmark, Greece, Finland and Sweden.

The main argument invoked by the people opposed to *droit de suite* to justify this capping is that the introduction of *droit de suite* in the United Kingdom would have a disastrous impact on the London market and would lead to a relocation of sales.

However, according to projections by the French authors' society, the ADAGP (the top international company in the graphic and plastic arts area) on the basis of an analysis of auction catalogues produced by British dealers within the European Union, the *droit de suite* sum paid based on the rates and bands originally proposed by the Commission (since revised downwards) would according to the dealers concerned, range from 0.02% to 0.15% of their global turnover in Europe.

This low percentage is explained by the wide range of activities carried out by Sotheby's, Christie's, Phillips and Bonhams, whose sales liable for *droit de suite* would not exceed 5 to 6% of the total product sold including all specialist areas. With the ceiling set for *droit de suite* at EUR 12,500, it is estimated that the *droit de suite* sum paid by the dealers concerned would probably be reduced by approximately one third. It would therefore amount to a maximum of 0.10%.

In view of this data, we can only remain sceptical of the fear voiced that the London market would be devastated.

The location of sales in one market or another is not solely dependent on the payment or non-payment of *droit de suite*. It depends on several factors: the privileged historical situation of the New York and London markets, as well as the social, cultural and economic environment. It is almost impossible to identify the relative impact of the various factors concerned.

It is essential to mention here that during the negotiations on the establishment of a harmonised VAT system for works of art (directive 94/5/EC), the United Kingdom, which had previously applied a 0% rate, also vigorously warned of the risk of relocation of sales to non-EU countries. It therefore obtained authorisation to apply derogation measures (application of a 2.5% rate instead of the minimum 5%) up to 30 June 1999.

At the time when agreement on the VAT directive was reached in the Council, the Commission undertook to re-examine the impact of its provisions on the competitiveness of the EU art market compared with art markets in non-EU markets.

In April 1999, the Commission adopted a report with clear conclusions on the basis of a survey carried out by British consultants: no evidence was presented which would indicate that VAT has a major impact on the competitiveness of the EU art market compared with markets in non-EU countries. Even though VAT was raised from 0% to 2.5%, no loss of profits was reported for British dealers. In contrast, growth in the value of art sales in the British market between 1993/4 and 1996/7 was higher than that recorded at global level : it increased by approximately 50% while sales at global level increased by only 34% and fell by 1% in the United States.

The derogation which the United Kingdom enjoyed was therefore shown to be completely unwarranted.

**This capping of *droit de suite* contravenes all copyright principles. It should be abolished.**

### **3. The application threshold for the directive (Article 3)**

The application threshold for *droit de suite* varies between EUR 15 and EUR 1,840 in countries applying this provision. The political Compromise sets the application threshold for *droit de suite* at EUR 4,000 (compared with EUR 1,000 in the initial wording of 1996). Even considering the flexibility offered at national level (Member States remain free to set a lower threshold), this amount which will undoubtedly be applied in several countries is much too high. It deprives a large number of creative artists of their rights.

The development of the on-line market will promote the rapid development of sales of more modestly priced works of art which were previously outside the scope of the international market. It is therefore important to subject these works to *droit de suite*.

**It is essential to return to the rate of EUR 1,000 originally planned by the Commission.**

### **4. The specific case of art galleries**

Art galleries most commonly use the sales room system, which does not generate *droit de suite*, as an initial sale is concerned: the artists recover unsold works at the end of an exhibition and generally share a minimum of 50% of the price of works sold with gallery owners (the gallery owners' share sometimes reaches 80% of the sale price).

The special case of (the currently small number of) promotional galleries which buy works from artists is solved in the draft (whereas 17 and Article 1, Par. 3). These stipulate that when galleries acquire works directly from the artist, Member States can exempt them from *droit de suite* when the resale occurs within the following three years and when the sale price does not exceed EUR 10,000.

**To ensure effective implementation of *droit de suite*, it is essential to stipulate (at least in a whereas) that galleries are responsible for proving that sales meet the exemption conditions defined.**

### **5. Management of *droit de suite***

The draft leaves the Member States free to make management of *droit de suite* obligatory or not. It should be emphasised that **collective management is the sole means of ensuring effective implementation of *droit de suite***. Some EU Member States (Germany, Denmark, Finland, Portugal and Sweden) moreover provide for compulsory collective management of this right. As such, while a copyright society can easily manage the right, an isolated creative artist who is unable to supervise the business of hundreds of dealers across the world will find it much more difficult to do. Similarly, collective management is also in the interest of dealers, as they then only have to inform a limited number of partners and transfer the *droit de suite* payments to them. Collective management prevents a dispersal of effort and makes management of the right effective and coherent.

**GESAC now requests the European Parliament to rectify the negative components of the legislation during the second reading and to reduce the transposition and transition periods to normal as a matter of priority.**