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COMMISSION CONSULTATION ON THE IMPLEMENTATION AND EFFECT OF RESALE RIGHT DIRECTIVE 2001/84/EC GESAC CONTRIBUTION

The Commission's consultation on the implementation and effects of the Resale Right Directive is focused on national market trends 2005-2010. That data will be sent in directly by the societies that manage graphic and plastic arts rights. GESAC wishes in its contribution to highlight a few key facts about resale right and offer information to set the national data in the broader context of developments on the global art market and especially that of contemporary art in the years concerned.

1) Resale right is vital to artists and their successors-in-interest

Authors of graphic, plastic and photographic arts derive most of their income from sales of original works. Only the most highly-reputed are able to benefit from reproduction and performance rights. Resale right enables authors to share in the subsequent physical resales of their works, which therefore makes it their **paramount economic right**. By ensuring continuity of artists' remuneration, resale right acts as a corrective to a constant of the art market whereby artists - especially early on in their career - most often let their works go for low prices to collectors or dealers who put them aside and place them back on the market again once the author's reputation is made. These works are then sold on in successive transactions between sellers, dealers and collectors. And an artist's price index will not uncommonly skyrocket after death, as their works will become scarce. **It is therefore wholly reasonable and fair for the artist or his successors-in-interest to share in the economic success of the works and receive what is all told a modest share (Community legislation provides a sliding scale of rates and a ceiling of EUR 12 500) of the transactions carried out.**

Apart from its economic aspect, resale right is a **major source of information** for artists to see how their career is progressing, auction by auction.

- Resale right is an author's right recognized by the Berne Convention and its term of 70 years from the author's death (pma) must not be thrown into question as some market operators would like. Confining the benefit of resale right to living artists would not only flout the principles of copyright but also be seriously prejudicial to the artists themselves, their successors-in-interest and artistic creation in general. An artist's work often entails material sacrifices and resale right allows the artist to devote himself to his work with the assurance

that his successors-in-interest will be able to profit from his work. **The ability for successors-in-interest to benefit from the exploitation of works after the author's death is part and parcel of all intellectual property rights and there is no objective reason for denying it to the successors-in-interest of visual (graphic and plastic arts) artists.**

Artists set great store by resale right. 20 000 EU visual artists represented by GESAC and EVA testified as much in 1997 when the proposal for a Resale Right Directive was going through the European Parliament.

2) Resale right has no effect on the location of the art market

Where the art market is located - especially for medium-priced works – depends on a wide range of factors (geographic closeness, public taste, market size and structure, tradition, the presence of experts, the expertise and proactivity of operators, legislation, VAT, other taxes, etc.). It starts up where the general climate, and the cultural, social and economic environment is most conducive. The predominance of the United States buoyed up by London in the European Union is currently under challenge from China. Considering how small a component it represents of total art market turnover, resale right cannot seriously be considered as a shaping factor on the art market. And even were it to be so, **it must not be used as a pretext for denying creators an essential intellectual property right.** In 2009/2010, the three marketplaces who posted genuinely strong performances in their art sales were Germany, with revenues up 32%, the United States (+17%) and China (+ 9.4%). And yet **Germany – one of this top three - is a country that applies resale right to the full.**

3) Global art market trends are further evidence that resale right has no significant market impact

The art market has slumped in approximately 10-year cycles (1980, 1990, 2001, 2008) since 1980, but has recovered each time. An analysis of the global market in recent years clearly shows resale right to be very much a side issue to the interests involved. The market is in the hands of a small number of operators who speculate and invest huge amounts in their activities. The amount of these investments far outweighs the amounts they have to pay in resale right.

The **auction sales system** is the benchmark for pricing works and artists' price index. The buyer pays the auction house a premium of 25 to 30% inclusive of all taxes on the lot's hammer price. This premium is halved for very high value lots. In principle, the seller also has to pay commission on a sliding scale depending on the value of the lots, but the auction house will often waive this as an incentive to continue using its services rather than a competitor's. The buyer's premium may also sometimes be passed on to the seller, who then actually receives a much higher amount than the marked price. There is a tendency that **all charges (commissions/premiums, VAT and any resale right) be therefore transferred onto the buyer.**

In 2009/2010, the leading world sellers of contemporary art were Christie's and Sotheby's. Phillips de Pury & Company, specialized more in emerging markets and ultra contemporary creation (the most volatile markets) in order to compete with Christie's and Sotheby's, takes third place. The latter is losing ground worldwide and currently ranks 5th behind the Chinese auction houses Poly and China Guardian for sales of art works (all periods).

In 2008, Christie's and its rival Sotheby's between them accounted for 73% of world auction sales. In order to get the best lots consigned with them, these companies introduced a system of guarantees – before the autumn 2008 financial crisis hit - that enables them to secure the finest works for sale, thereby shutting out potential competitors but weakening them. Consignors of major works were ensured of receiving a pre-agreed amount. If the selling price did not reach the agreed reserve, the auction house would award the difference. Conversely, if the hammer price was above the guarantee, the consignor and the auction house would normally split the excess 50/50. Fierce rivalry between Sotheby's and Christie's led both to continuously increase the amount of the guarantees – an inflationary process fuelled by other operators trying to break into the game with tempting not to say inordinate offers. A lack of buyers in November 2007 left Sotheby's having to purchase paintings by Van Gogh and Braque for which it had guaranteed minimum prices. This first sign of market tightening wiped 37% off the price of Sotheby's shares. From 2007, dealers and brokers looking at the two giants' autumn sale catalogue estimates in New York became concerned about the excesses caused by competition between the auction houses and demanded they get "get serious". Between November 2007 and November 2008, Sotheby's and Christie's awarded guaranteed prices for nearly half the post-war and contemporary art works.

Dealers and auction houses are at once competitors and partners: auction houses are increasingly involved in the private sales market, bringing them into direct competition with dealers (private sales grossed more than \$250 million for Sotheby's and Christie's in 2006). For their part, the big dealers sometimes step in to cover high guarantees awarded to consignors by the auction houses: if the lot does not reach its reserve, they undertake to buy the work. The preset selling price is below the guarantee but sufficiently high for the auction house to break even or clear a very small profit with the selling commission rather than suffer a huge loss.

Until the early 1980s, auction houses did 70% of their business with art dealers, and the rest with museums and individuals. That ratio has now been reversed: collectors and individuals account for 60% of the major auction houses' clientele, strengthening their position and bargaining power with galleries and dealers.

The art market is a narrow market - A hundred personalities listed each year in the specialized British and American monthlies make and break the world art market. Among the collectors, François Pinault tops the list as head of Christie's, one of the two most powerful auction houses worldwide, since 1998. On the ARTnews and Art Review top 100 lists, dealers outnumber and outrank collectors.

4) The shifting centre of gravity and globalization of the art market require a global strategy for resale right

The art market has undergone profound changes since the 1950s, and the pace of change has picked up of late. In the first half of the 20th century, Europe and especially France exercised a predominant influence on the art market. After World War II, creation and the art market flourished more in the United States. The dawn of the 21st century brought a challenge to Anglo-American and European dominance: globalization and the Asian countries taking the driving seat of global growth, have shifted the centre of gravity of art and its market.

Taiwan, South Korea, Singapore and Japan have become key marketplaces. Along with China, these countries make a force capable of overthrowing the order established since the 1960s by the USA.

China's rise has been meteoric: in a very short time, the country has become the second biggest world marketplace for the sale of art works:

- in 2007, 36 of the 100 best-selling contemporary artists were Chinese and 15 of the 35 artists whose works sold above the €1 million line were Chinese;
- in 2009/2010, 5 of the world's top 15 auction houses (for sales of artwork, all periods of creation combined) were Chinese
- in 2008/2009, the UK outsold China by more than €66m in contemporary art sales; that gap had narrowed to €2m in 2009/2010;
- a growing number of operators are investing locally (Christie's, Sotheby's, Gagosian Gallery, Bonhams, Artcurial). While the Anglo-American marketplaces were in the doldrums, China was experiencing an auction boom, posting its best half-year sales revenue (all periods combined), driven by three leading auction houses - Poly International, China Guardian and Beijing Council - and by the Hong Kong branches of Christie's (whose business volume in the Asian market rose by +172%, first half 2009/first half 2010) and Sotheby's.
- the level of auctions in Hong Kong – the capital of Asian art and fourth city for auctions after New York, London and Paris - now rivals that of New York.

The booming Asian market has not yet reached maturity. Contemporary Russian art is also up and coming, while India is capturing an increasingly large market share with a price index up 830% from 1998 to 2008.

An influx of new collectors - New fortunes are made and lost in less than a generation and are no longer concentrated in Europe or the USA. The influx of new collectors - from China, India, Russia, etc. – changes what was the primarily US-based balance. While auction houses traditionally worked with buyers from a score of countries, a report published by Sotheby's shows that buyers of 58 nationalities bid on lots with price tags over €500 000 in 2007.

Emerging new art scenes - Until recently, Asian artists still had to go to the United States or Europe to launch their careers. Now, art scenes are emerging more or less everywhere, primarily supported by local collectors wanting to have their own groups of artists, spread their culture and draw the economic benefits. One strength of the Asian – and especially the Chinese - market is the powerfully proactive support it gives to local artists, including the youngest (the Chinese government promoted 1000 artists at the World Expo 2010 Shanghai). If all the Asian artists of the top 50 – i.e., Chinese, Koreans, Japanese and Indonesians – are included, they accounted for 64% of the best auction results worldwide in 2008/2009.

5) The speculative excesses of the art market cannot be a pretext for throwing resale right into question

Financial institutions - banks, insurance companies, investment and asset management companies - have developed financial products based on the trade in works of art. Like all investments, these financial products aim to maximize the return, but they entail a degree of risk, for there are no guarantees that an artist's popularity will stand the test of time. In a bull market, art – “financial art” - is promoted as a hedge against inflation and a safe bet. Financial art is entirely separate from creation proper, and the artificial boost to prices and the runaway market are highly disadvantageous, including for artists.

- **7 years' uninterrupted growth:** contemporary art prices rose over 85% between January 2002 and January 2008. The number of contemporary art works sold above the €1m line increased by 620% between 2005 and 2008. The Wall Street Journal published a study by two New York University professors in May 2008 comparing the 10- and 20-year performances of three types of investment: stocks, real estate and art. For the decade 1998-2008, art came out top with a 12% annual return on investment (against 7.2% for real estate and 5.9% for stocks).
- **2007: a record-breaking year:** rapidly-increasing demand from new buyers from Asia, Russia and the Middle East as well as a significant increase in the number of speculative players and investment funds in the market, attracted by quick returns made 2007 an exceptional year. 1254 auctions sold over the one million dollar (700 000 euros) line against 810 in 2006. "In 2007, 38,000,000 artworks changed hands worldwide for close to 50bn euros – this is unprecedented" (Vincent Noce, *Libération*, 12 March 2008). US artist Jeff Koons' auction revenue total quadrupled in 2007. Speculation drove the top-end segment of the market to record heights. More than 7% of contemporary paintings and 8.5% of contemporary sculptures sold for over €100 000 between July 2007 and June 2008 (versus 2-4% on average).
- **2008/2009: the contemporary art market falters after 7 straight years of generally rising prices.** The most speculative and volatile segment of the market was the first to suffer from the world economic downturn and the collapse of the US and European stock markets. The banks stopped lending to purchase works of art and US private subsidies to the arts declined, leading to mass job losses in the most prestigious museums. A wave of layoffs swept the art world. The number of unsold works rose, and the price of top artists like Damien Hirst fell, sometimes by half. The combination of rising bought-in (i.e., unsold works) rates and diminishing prices considerably reduced auctioneers' revenues between the first half of 2008 and first half of 2009, producing an overall contraction of auction revenue of -66.8% between these two periods. That said, it is important to bear in mind the extraordinary growth of the major auction houses before the crisis hit the art market: the revenue total of €570m recorded for the period July 2008/June 2009 still represented an increase of 87% compared with the volume of business done in 2005/2006.
To minimize the risk of losses and prevent the crisis in the art market leading to a several years' freeze on art work sales as in 1990/91, the auction houses revised their strategy; they lowered reserve prices, revised their price estimates downwards, focused more on the affordable segment of the market and on stable signatures at the top-end of the market, and limited their price guarantees to outstanding works. At the same time, they embarked on internal restructurings to cut costs (downsizing, closure of branches and so on.).
- **2009/2010: Upturn in the market:** collectors' mistrust of fads and highly speculative buying of works that have not yet stood the test of time has not weakened the demand for more reasonably priced or safe bet art works. The high price paid for an Andy Warhol canvas in November 2009 gave new impetus to the top-end of the market. Second-guessing the 2010 recovery, the major auction houses filled their catalogues with outstanding works and returned to awarding price guarantees of up to several million dollars on major pieces.

The number of contemporary paintings put up for auction was higher between July 2009 and June 2010 than in the period July 2007/June 2008. This profusion of works is why 41% of the contemporary works offered at auctions between July 2009 and June 2010 remained unsold.

The market has made an unsurprising return to the 2004 price levels recorded before the speculative bubble. It is still far from the 975.2 million euros worth of works sold in the booming market (2007/2008), but the price index of contemporary art is once again on the rise: +5.4% in the first half of 2010 after a price drop of close to 42.8% between 1 January 2008 and the end of 2009.

Conclusions and GESAC's recommendations

- Extending resale right EU-wide through Directive 2001/84/EC has been largely beneficial for artists and had no negative impact on the art market.
- Resale right is an author's right on a par with other intellectual property rights and its term of 70 years from the author's death (pma) should not be thrown into question as there is a risk of rendering it meaningless.
- Market trends bear out that resale right has no significant impact on the art market; the maximum amounts introduced to prevent displacement of sales should be scrapped or least significantly increased to reflect rising art market prices.
- The market is globalizing and a global strategy is needed for resale right. The European Commission should use its bilateral (e.g., trade agreements negotiated with third countries) and multilateral (e.g., within WIPO) relations with third countries to press for the right to be implemented. Recital 7 of Directive 2001/84/EC specifies that "*The process of internationalisation of the Community market in modern and contemporary art, which is now being speeded up by the effects of the new economy, in a regulatory context in which few States outside the EU recognise the resale right, makes it essential for the European Community, in the external sphere, to open negotiations with a view to making Article 14b of the Berne Convention compulsory*". Awareness-raising campaigns should be run particularly towards countries with the most developed art markets: the United States, China, Korea etc.

The facts, figures and statistics are taken from:

The Contemporary Art Market 2008/2009 - Artprice

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L'art du marché de l'art – Marie Maertens - Editions Luc Pire, September 2008

Grands et petits secrets du monde de l'art – Danièle Granet & Catherine Lamour – Fayard, April 2010