

**EXPLANATORY MEMORANDUM TO
THE ARTIST'S RESALE RIGHT REGULATIONS 2006**

2006 No. 346

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. **Description**

2.1 This is a draft instrument subject to the affirmative resolution procedure. If approved the Regulations will implement Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art ("the Directive"). The Directive has been extended to the European Economic Area.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative Background**

4.1 The Regulations will be made under section 2(2) of the European Communities Act. In order to implement the Directive by the deadline laid down for its transposition, the Regulations should be made and come into force by 1st January 2006. Given the need to find time for Parliamentary debate, it will unfortunately not be possible for this deadline to be met. However, once they are approved by Parliament the Regulations will be made at the earliest opportunity, and will come into force on the day immediately following the day on which they are made.

4.2 The Regulations will create an intellectual property right ("resale right") previously unknown to United Kingdom law, although it has long existed in certain other European countries, in particular France (where it is known as "droit de suite"). In implementing the Directive, the Regulations at the same time implement the optional Article 14^{ter} of the Berne Convention for the Protection of Literary and Artistic Works. Resale right consists in the entitlement of artists to receive a royalty on the resale of their works, provided that an art-market professional is involved in that sale and the sale price is above a specified minimum threshold.

4.3 The right lasts for as long as the copyright in the work subsists, which is normally for 70 years after the death of the artist. It may accordingly be inherited by the artist's successors. Two points arise from the fact that resale right was previously unknown to United Kingdom law. The first is that, where an artist dies before the Regulations come into force, there will at that time have been no resale right to pass to a successor. In regulation 16, the

Regulations accordingly make provision for which of the artist's successors is to be regarded as holding resale right in such circumstances. The second point is that the Article 8(2) of the Directive provides a special derogation which is limited to those Member States which did not previously have resale right in their national law. Such a State may prevent the successors of a deceased artist from exercising their resale right until 1st January 2010. Regulation 17 takes advantage of that derogation.

4.4 Resale right is declared by the Directive to be inalienable, and accordingly may neither be assigned nor waived. This principle is implemented in regulations 7 and 8. The limited exceptions provided by regulation 7(3) (transfer between charities) and regulation 11 (transfers of legal title to trustees) are not in reality a derogation from that principle, as the beneficial ownership of resale right is not thereby affected.

4.5 The Regulations also impose certain nationality requirements on the enjoyment of resale right (see regulation 10). Only an EEA national, or a national of a country specified in Schedule 2, may benefit from resale right. This reflects the fact that (leaving aside EEA nationals, who must be treated equally with United Kingdom nationals) resale right is a right enjoyed on the basis of reciprocity. Thus only the nationals of countries which make resale right available to EEA nationals may benefit from the rights given under the Directive. That principle is also applied to charitable bodies, which may benefit from resale right only where they are based in such a country.

4.6 The rates of royalty applicable are set out in Schedule 1 to the Regulations. Those rates are largely determined by Article 4 of the Directive, but in so far as the Directive allows a choice of percentage rate for the lowest price band, the lower figure of 4% has been chosen.

4.7 A Transposition Note is attached at Annex 1.

4.8 The DTI submitted an explanatory memorandum (7050/96) on 10/6/96 relating to 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 origin work of art". The Commons Select Ctte on European Legislation considered it legally and politically important and for debate which was held on 29/1/97. The Lords Select Ctte on the European Communities cleared it from Sub-Cttes A & E (Progress of Scrutiny, 2/7/96, Sess 95/96). On 15/4/98, DTI submitted EM 6992/98 on an "Amended proposal for a European Parliament and Council Directive on the resale rights for the benefit of the author of an original work of art". The Commons Select Ctte on European Legislation considered it politically important and cleared it by letter from the Minister dated 21/10/1999 (Report 29, Item 20550, Sess 98/99). The Lords Select Ctte on the EU referred it to Sub-Ctte A but did not report on it (Progress of scrutiny, 15/5/98, Sess 97/98). DTI also submitted an EM (5665/01) on 1/3/2001 on an "Opinion of the Commission pursuant to third sub-paragraph of Article 251(2) of the EC Treaty on the European Parliament's amendments to the Council's common position relating to 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 amending the proposal of the Commission pursuant to Article 250(2) of EC Treaty". The Commons European Scrutiny Ctte considered it politically important and cleared it (Report 1, item 22117, Sess 01/02). The Lords Select Ctte on the EU did not report on it (Progress of Scrutiny, 9/3/01, Sess 00/01).

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Lord Sainsbury of Turville, Parliamentary Under-Secretary of State for Science and Innovation, has made the following statement regarding Human Rights:

In my view the provisions of the Artist's Resale Right Regulations 2006 are compatible with the Convention rights.

7. Policy background

7.1 The purpose of the Directive is to reduce distortions in competition resulting from the fact that resale right presently exists in only some Member States (and exists in different forms), while enabling artists to share in the economic success of their works. However, in response to concerns as to the effect of the Directive on the United Kingdom art-market, in implementing the Directive full advantage has been taken of the exceptions and derogations allowed. In two respects only the Regulations go beyond the minimum required by the Directive, namely as regards (1) the minimum price threshold for a sale to be liable to resale royalty (1,000 rather than 3,000 euro), and (2) the provision made for joint liability of the seller and an art-market professional involved in the sale. The details of the proposed implementation and the options available under the terms of the Directive were set out in a consultation document in February 2005. All views expressed in response to the consultation were taken into account and the proposed draft Regulations amended in several respects.

7.4 In particular, in response to a number of points raised during the consultation, significant changes were made regarding the determination of jurisdiction and the definition of a work of art. In both respects, the Regulations now follow more closely the wording of the Directive, in order to avert the risk of "gold plating" the implementation of the Directive. The option for compulsory collective management was adopted after consideration of the evidence put forward and responses received regarding cost effectiveness and ease of operation. The selection of 1,000 euro as the minimum price threshold was similarly made after consideration of responses and evidence put forward.

8. Impact

8.1 A Regulatory Impact Assessment for this instrument is attached at Annex 2.

9. Contact

9.1 Ceri Witchard at the Patent Office (an executive agency of the Department of Trade and Industry) can answer any queries regarding the instrument. Tel: GTN (1214) 3709 or e-mail: ceri.witchard@patent.gsi.gov.uk

Regulatory Impact Assessment

1. Introduction

1.1 This Regulatory Impact Assessment (RIA) describes the costs, benefits and risks in the transposition of Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art ('the Directive').

2. Purpose and Intended Effects of the Regulations

2.2 The Regulations are to implement Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art ('the Directive'). The Directive entered into force on 13 October 2001 and is required to be transposed into national law by 1 January 2006.

2.3 The Directive is an internal market measure adopted under Article 95 of the EC Treaty. It requires Member States to introduce a harmonized right for authors of an original work of art, and their successors in title, to benefit from a share of the proceeds when the artists' works are resold on the art market. The Regulations introduce a new right which has not previously existed in the UK, although it has existed in several other EU Member States. The Directive has also been extended to the European Economic Area.

2.4 The Directive is largely prescriptive although there are a number of options available to Member States. As made clear in consultations with interest groups both before and after adoption of the Directive, it has always been the Government's intention to minimise the risk of diversion of trade and to allow the gradual adaptation of the art market in the UK to this new right. In particular the Directive contains a derogation as regards the sale of the works of deceased artists, which can be made use of only by those Member States (such as the UK) which did not have a resale right at the time the Directive came into force.

3. Risk Assessment

3.1 It is possible that some sales will be diverted from the UK to countries which do not apply a resale right; primarily Switzerland or the USA, the UK's main competitors in the art market. This was recognised when the Directive was being negotiated, prior to acceptance, and the cap on royalty payments to €12,500 is intended to reduce the scale of likely diversion.

3.2 It is difficult to predict the value of sales which may be lost due to diversion of trade. There are a large number of factors influencing the decision of where to locate a sale and the requirement to pay a resale royalty will be just one of these. At a certain value (estimated at approximately €50,000) the costs of transporting and insuring a work of art are estimated to be exceeded by the cost of royalty payments. However, the expected market price and other costs of selling, such as taxation and agents' fees, are also factors contributing to the decision to relocate a sale.

3.3 The risk of diversion is also lessened due to the impact of export VAT. If a dealer sends e.g. a painting outside the EU for sale and the buyer is an EU national

then that buyer will have to pay 5% of the painting's value to bring it back into the EU. This will dissuade an EU buyer bidding for a painting at the value they may have been prepared to pay had the sale been within the EU, therefore lowering the price achieved for the work. There is always the possibility that a non-EU buyer will be prepared to pay more for the work but if a dealer believes this is likely then the sale may well have been diverted even if resale right had not been introduced. As this 5% is greater than the rate for resale royalties, and is not capped, it will be a factor any seller is likely to consider when locating a sale.

3.4 A seller will consider a large number of factors before deciding where to locate sale. Although resale royalties will not be the major factor in this decision will be one of a number of factors determining the cost of selling within the EU.

3.5 The UK implementation has adopted all options which minimise the risk of diversion, but it is possible that there may be some diversion of sales at the top end of the market.

4. Assessment of policy options

4.1 Threshold

4.1.1 Option 1 – Set the threshold at the maximum €3,000 - This is a low cost option in that it reduces the number of sales which are eligible for royalty payments. At this value it is clear that the payment made to the artist will exceed any costs incurred in its collection. However, this would eliminate a large number of sales by low earning artists; those the Directive is primarily aimed at assisting. It would also effectively exclude certain categories of works, such as photographs, which rarely fetch prices at this level. The UK will not be taking this option.

4.1.2 Option 2 – Set a threshold of €1,000 - Including sales of between €1,000 and €3,000 would considerably increase the number of artists benefiting from resale payment. This option would significantly increase the number of UK artists benefiting from resale royalties (85% of works sold in this price range are by British artists) and it is also this price bracket that has the highest proportion of living artists. These are likely to be low earning artists who would most benefit from additional income and are the group the Directive is primarily intended to assist.

4.1.3 There has been extensive consultation on this issue and the cost-benefit analysis demonstrates that the costs to business in processing resale royalties will be minimal and the benefit to artists on low incomes considerable. This option would not increase the risk of diversion of sales.

4.1.4 A threshold of €1,000 was considered for a number of reasons. It is not considered worthwhile on a cost-benefit basis to collect royalties on a lower threshold. Also this value is indicated by an artists group as a cut-off point, below which works tend to be sold through non-specialist dealers and auction houses who would find the burden of collection particularly onerous as they have so few sales including eligible art works.

4.1.5 The benefit of this measure to UK artists together with the cost-benefit analysis makes this an exceptional case justifying implementing beyond the absolute minimum required by the Directive. The UK will be taking this option.

4.2 The rate payable on the lowest price bracket

4.2.1 Option 1 – Set a 4% rate on the lowest band - This would provide the lowest payment of royalties to artists, reducing payments to all artists whose works sell at lower prices and raising the sale price at which the maximum royalty payment is reached. As this minimises the risk of diversion of sales the UK will be taking this option.

4.2.2 Option 2 – Set a 5% rate on the lowest band - Raising the rate on the lowest price band would effectively increase all royalty payments on works which are below the maximum payment and would decrease the sale price of a work at which the maximum royalty would be paid. This would increase the number of works that are at risk of diversion. The UK will not be taking this option.

4.3 Management

4.3.1 Option 1 – allow optional collective management - This would allow artists the freedom to choose whether to exercise their right individually or to become a member of a collecting society who will exercise their right on their behalf. Studies into resale right have shown that this arrangement would lead to higher administration costs and more frequent legal challenges increasing the burden on business. The UK will not be taking this option.

4.3.2 Option 2 – require compulsory collective management - All claims for resale royalties would have to be made via a collecting society, the artist could not elect to administer their right independently. As studies have indicated that this is the lowest cost option for business and ensures the greatest compliance for artists; the UK will be taking this option.

4.4 The derogation for works by deceased artists

4.4.1 Option 1 – not use the derogation - Resale royalties would be payable on all eligible works immediately, regardless of whether the artists is still living. This would benefit the heirs of deceased artists. The market for works by deceased artists is particularly strong in the UK; these are also the high value works which are most susceptible to diversion. This UK will not be taking this option.

4.4.2 Option 2 – use the derogation - Resale royalties will not be payable on works by deceased artists until 2010 (extendable to 2012). It is desirable to give the art market a period during which it can adjust to the introduction of resale right; therefore this option will be taken. The decision whether to extend the period to 2012 will have to be taken in the light of the circumstances then prevailing, and a case for doing so must be notified to the Commission no later than the end of 2009. It is essential that the risk of diversion is minimised; the UK will be taking this option.

5. Costs

5.1 Under the Directive the seller will be required to make a royalty payment on the sale of an eligible work of art. This will inevitably increase the cost of selling within the UK. Some of these costs may be absorbed by the art market professional but it is likely that costs will be split between agent, buyer and seller.

5.2 Based on the figures for the year 2003/2004¹ from the Art Sales Index, sales of art in the UK auction houses amounted to approximately £460 million, of which approximately £165 million would have been eligible for resale royalty. These sales are estimated to account for approximately half of the sales that take place each year, the remainder being made up of sales by dealers. However, it is difficult to be sure of this as dealer sales are not published in the same way as auction house sales. It is important to note that these figures are for sales of fine art only, and do not include the applied arts.

5.3 Therefore, approximately 25 % by volume and 36% by value of sales of fine art would have attracted a royalty payment if resale right was applied to works by both living and deceased artists.

5.4 Initially the right will only apply to living artists and only 1758 sales, out of a total of 7696 potentially eligible sales, would have attracted a resale royalty in 2003/2004; approximately 8% of sales of fine art.

5.5 However, sales of fine art make up only a small part of the UK art market, sales of applied art are far greater by volume and value. According to earlier figures² the total UK art market was worth approximately £4.6 billion in 2001, the majority of these being applied arts which are not considered to be covered by the Directive; Using this figure as an indication of the approximate size of art market in 2003, less than 10% of sales by value will attract a resale royalty when the right is applied to both living and deceased artists.

5.6 There will be administrative costs in collecting and distributing royalties. There will be higher initial start-up costs as new systems and procedures are developed but these should reduce with time.

6. Benefits

6.1 A large number of artists will be entitled to resale royalties under the new regime. The sliding scale of rates is designed such that less well known artists who produce lower value works receive proportionally higher royalties than well established and presumably wealthier artists.

6.2 According to the figures available, £1.8million of royalties would have been payable to living authors, £1.1million of which would have been paid to British authors. If the right were applied to both living authors and the heirs of deceased

¹ Figures available for March 2003 to February 2004

² 2001

authors, a total of £11.4million of royalties would have been paid, £6.1million of which would have been paid to British authors and their heirs.

6.3 Artists will benefit from their increasing reputation by receiving a royalty payment on a work they produced earlier in their careers. This rewards artists for their continuing work in creating and promoting their art.

7. Business Sectors Affected

7.1 The Regulations only apply to sales involving ‘art market professionals’ and not sales between private individuals. Therefore the main sectors affected are art galleries, auction houses and dealers.

8. Small Firms Impact Assessment

8.1 During the consultation process evidence was produced to indicate that costs involved in the administration of resale royalties would be considerably lower than had previously been stated. The evidence shows that for small businesses the costs are likely to be very low, approximately £10 a quarter plus an additional cost of less than £1 per transaction. All further costs will be absorbed by the collecting society. Research shows that, although there will be an administrative burden on small businesses this will not cause severe difficulties.

8.2 Anecdotal evidence indicates that only a small number of non-specialist auction houses will deal with qualifying works of art. The majority of small auction houses sell very few works of art; the majority of sales being non-art goods. It is clear that most non-specialist auctioneers sell only very low value works, generally less than £200 estimated value; works exceeding this value are likely to be transferred to a specialist art market professional. Further, these works are often very old and would not be within copyright and therefore would not qualify for resale right.

8.3 Smaller dealers and auctioneers deal in lower value or specialist areas of the market. These are of a localised nature and unlikely to suffer from diversion of trade. There is a possibility that diversion of sales at the top end of the market may have an effect on smaller dealers if the number of buyers coming to the UK is reduced and consequently the passing trade for smaller business is reduced.

9. Consultation

9.1 During the negotiations leading up to the adoption of the Directive extensive consultations were carried out with interested parties in the UK.

9.2 Throughout the implementation procedure extensive consultation was undertaken. An open consultation based on a draft Statutory Instrument generated 140 responses from a wide range of interested parties. Additionally there were regular meetings and frequent correspondence between officials and representatives of both artists and the art trade.

9.3 All responses and representations were considered and, in light of this, a number of amendments were made to the draft implementing Regulations.

9.4 The Patent Office also commissioned independent research to update earlier figures and provide a baseline assessment with which any future data can be compared.

9.5 The Patent Office has carefully considered the views and recommendations presented in the House of Commons Culture, Media and Sport Committee report into the Market for Art. This made a number of recommendations as to how the Directive should be implemented in the UK to achieve a balance in benefiting artists whilst minimising any risk of damage to the UK's strong art market.

10. Enforcement

10.1 All authors of eligible works are entitled to receive royalties on their resale in accordance with conditions laid down in the implementing Regulations. The liability of the seller, or the art market professional involved in the sale, will be enforceable by means of civil action in the courts. Under the Regulations authors or their collecting societies will also be able to demand information relating to the sale of their works to enable them to secure payment. The duty to provide such information will again be enforceable in the courts. The Patent Office will have no role in enforcement of the right to receive resale royalties.

11. Guidance for business

11.1 Guidance for business, in the form of a question and answer sheet has been produced. This was developed based on issues that were raised during the consultation process. It is unfortunate that, due to legislative timetabling this guidance was not published the full 12 weeks before the implementation date. This can be viewed at

<http://www.patent.gov.uk/about/consultations/resalerights/index.htm>

copies can also be requested from The Patent Office.

Declaration:

“I have read this Regulatory Impact Assessment, and I am satisfied that the benefits justify the cost.”

Signed: *Lord Sainsbury of Turville*

Parliamentary Under Secretary of State for Science and Innovation
Department of Trade and Industry

14th December 2005

THE ARTIST'S RESALE RIGHT REGULATIONS 2006

Transposition Note

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

Requires all EU Member States to create an unassignable and inalienable right, to be enjoyed by the authors of original works of graphic or plastic art (and after death by their successors), to a share of the resale price of their works when these are sold by, to or through a professional art dealer.

Extended to the European Economic Area by Decision of the EEA Joint Committee No 171/2002 of 6 December 2002.

| Article | Objectives | Implementation |
|-------------|--|---|
| 1.1 | Requires a resale right to be created. | <i>Regulation 3(1). Regulations 7 and 8 ensure that it is inalienable and cannot be waived.</i> |
| 1.2 | Restricts resale right to sales in which an art-market professional is involved. | <i>Regulation 12(3)(a).</i> |
| 1.3 | Option to exempt works resold for €10,000 or less and acquired directly from the author less than three years before the resale. | <i>Regulation 12(4) exercises option.</i> |
| 1.4 | Royalty is payable by the seller, but an art market professional involved in the sale may be required to share liability or may be made solely liable. | <i>Regulation 13(1)(a). Regulation 13(1)(b) and (2) exercises shared liability option.</i> |
| 2.1 | Defines the “original works of art” to which resale right attaches. | <i>Regulation 4(1).</i> |
| 2.2 | Specifies when a copy can be regarded as an original work of art. | <i>Regulation 4(2).</i> |
| 3 | Allows Member States to set a minimum price threshold for liability to resale royalty, which must not exceed €3,000. | <i>Regulation 12(3)(b) sets a threshold of €1,000.</i> |
| 4.1 and 4.2 | Sets out the applicable rates. | <i>Regulation 3(3) and Schedule 1 (option in Article 4.2 not exercised).</i> |

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| 4.3 | Allows Member States to determine the rate applicable to the portion of the sale price up to €3,000 where they set a threshold less than that sum, provided that the rate set is not lower than 4%. | <i>Schedule 1</i> applies the 4% rate for all amounts up to €50,000. |
| 5 | Sale price is to be taken net of tax. | <i>Regulation 3(4)</i> (which also provides for conversion of sale price into euro). |
| 6.1 | Royalties are payable to the author and those entitled after the author's death. | <i>Regulations 3(1), 9(1) and 16(2)</i> . |
| 6.2 | Provision may be made for compulsory or optional collective management. | <i>Regulation 14</i> (compulsory collective management). |
| 7.1 | Resale right to be enjoyed by a national of a third country only if that country extends resale right protection to EU nationals. | <i>Regulation 7(4), regulation 10(1) to (3), and Schedule 2</i> . |
| 7.3 | Member States may treat authors who are habitual residents as their own nationals. | Option not implemented. |
| 8.1 | Term of protection for resale right is the same as that laid down for copyright (by Directive 93/98/EEC). | <i>Regulation 3(2)</i> . |
| 8.2 | Derogation allowing postponement of the exercise of resale right by an artist's successors (available to Member States who do not have resale right at time of coming into force of Directive on 13 October 2001). | <i>Regulation 17</i> . |
| 9 | Requires there to be a right to obtain information about a sale. | <i>Regulation 15</i> . |
| 10 | Resale right applies to works still in copyright on 1 January 2006. | <i>Regulation 3(1) and regulation 16(1)(b)</i> . |
| 12.1 | Directive must be implemented by 1st January 2006. | <i>Regulation 1</i> allows for the possibility of delayed implementation, but the Regulations will be made at the earliest opportunity and will come into force on the day immediately following the day on which they are made. |

Note on “over-implementation”

These Regulations do what is necessary to implement the Directive, but in the following respects go further than the strict minimum required by the Directive—

- (1) A minimum price threshold of €1,000 has been chosen, which is less than the €3,000 permitted by the Directive.
- (2) As regards the liability to pay resale right, a specified art-market professional is made jointly and severally liable with the seller (which is permitted but not required by the Directive).