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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)

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1. INTRODUCTION

1.1. The aims of the Directive

The Resale Right Directive (2001/84/EC of 27 September 2001) (*the Directive*) was conceived with two major objectives in mind: to "ensure that authors of graphic and plastic works of art share in the economic success of their original works of art"¹ on the one hand and, on the other, to harmonise the application of the right across the EU. It was considered that "The application or non-application of such a right has a significant impact on the competitive environment within the internal market, since the existence or absence of an obligation to pay on the basis of the resale right is an element which must be taken into account by each individual wishing to sell a work of art. This right is therefore a factor which contributes to the creation of distortions of competition as well as displacement of sales within the Community."²

Consistent with these aims, the Directive promoted harmonisation of the substantive conditions for the application of the resale right: (i) eligibility and the duration of protection; (ii) the categories of works of art to which the resale right applies; (iii) the scope of the acts to be covered i.e. all acts involving dealers in works of art; (iv) the royalty rates applicable across defined price bands; (v) the maximum threshold for a minimum resale price attracting the right (€3,000); and (vi) provisions on third country nationals entitled to receive royalties. The Directive came into force on 1 January 2006.

At the time the Directive was agreed 4 of the then 15 Member States did not apply the resale right in national law: Austria, Ireland, the Netherlands and the UK. These Member States enjoyed a transitional period to 1 January 2010 during which they could choose not to apply the resale right to the works of eligible deceased artists. These Member States, together with Malta, made use of this provision, and of the option to extend the derogation period for a further 2 years. This derogation comes to an end on 1 January 2012, at which point the Directive must be fully implemented in all Member States.

1.2. The objective of this Report

Article 11 of the Directive foresees that the Commission should submit to the European Parliament, the Council and the Economic and Social Committee a report on the implementation and the effect of the Directive. This report answers to that requirement. In line with the provisions of Article 11 this Report examines in particular the impact of the Directive on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive. It pays particular attention to the position of the Community in relation to relevant markets that do not apply the resale right, assesses the role of the Directive in the fostering of artistic creativity and reviews the situation with regard to the management procedures in the Member States.

¹ Recital (3) of the Directive

² Recital (9) of the Directive

1.3. Procedural issues and consultation of interested parties

In preparing this Report, the Commission conducted a broad-based public consultation on all key questions identified in Article 11, including seeking information from Member States.

503 responses were received for publication. Of these the vast majority (422) were from citizens - artists' successors in title (248, primarily in France and Italy) and artists (174, primarily from France and the UK). Responses were also received from art market professionals (48), collecting societies, artists' trade associations and some public authorities.

2. EFFECTS OF THE DIRECTIVE

2.1. Background - the Global Art Market

The global art and antiques market, including both fine and decorative art, was worth €43 billion in 2010, a year when it returned to its 2008 level after a year of "crisis" in 2009 (when sales contracted to €28 billion).³

The EU had a global market share of 37% by value in 2010, followed by the US (34%), and China (23%).⁴ The most marked trend in the global art and antiques market over the last six years is the dramatic rise in the Chinese market share from 5% in 2006, and the concomitant drop in market shares of the US and the EU (see Figure 1 in Annex 1).

Art and antiques market sales rose by 13% to 35 million transactions in 2010. Global sales are split between auction houses (49% in 2010) and dealers (51%). In 2010, auction sales overall reached a value of some €21 billion and **fine art** auction sales⁵ reached a value of some €7 billion. See Table 1 in Annex.

The art and antiques market as a whole makes a significant contribution to the global economy not only in terms of turnover, but also in terms of the businesses it supports and the employment and skills it generates both directly and indirectly. Arts Economics has estimated that in 2010 there were around 400,000 listed businesses (auction houses, dealers) worldwide; and in the EU over 59,000 businesses including 4,000 auction houses and 55,000 dealer businesses employing close to 270,000 and supporting a conservatively estimated figure of over 110,000 jobs in ancillary and support services used directly by the art trade.

2.2. Competitiveness of the market in modern and contemporary art in the EU in relation to relevant markets that do not apply the resale right

The resale right affects directly only trade in Contemporary and Modern fine art i.e. works by EU living artists, or by EU artists deceased within 70 years of sale. Works subject to the resale right accounted for around €2.1 billion in auction sales in 2010 globally. In the EU these works accounted for 50% of the value of fine art auction sales in 2010,⁶ compared with

³ All figures are based on data provided by Arts Economics with data from Artnet.

⁴ The data provided by Arts Economics on the Chinese art and antiques market share includes Mainland China, Hong Kong, Macao and Taiwan.

⁵ i.e. excluding decorative art

⁶ Data on fine art auction sales is used as the primary basis for discussion of movements in the global art markets here as sales are a matter of public record, and the period 2005-2010 has been taken into

35% of sales in the US, 25% in Switzerland and 3% of sales in the rest of the world. See Table 1 in Annex.

2.2.1. Auction sales of the works of living artists

Global fine art auction sales of the works of all living artists in 2010 amounted to around €1 billion, with the EU accounting for almost a third of these sales. Global auction sales of the works of living EU artists accounted for one third of the value of sales of works of living artists in 2010 (€340 million).⁷

Fine art auction sales of the works of all living artists grew by 136% in value over 2005-2010. US and EU growth was below the average (60% and 92% respectively) while Switzerland and China both recorded high growth rates of 334% and 646% respectively.⁸

The EU lost global market share for auction sales of the works of living artists over the period 2005-2010, from 37% down to 30%, mainly as a result of the UK's loss of market share from 27% to 20%. At the same time, the US lost market share from 54% down to 37% while China gained share from 8% to 24%. Switzerland's market share increased slightly from 0.3% to 0.5%.

The EU further lost market share in the sale of works of living EU artists over the period 2008 to 2010.⁹ This followed a high UK market share of 62% in 2008, 3 years after the coming into force of the resale right Directive. At the same time, US market share has increased by 5 percentage points to 28%; and some Member States that implemented the resale right in 2006 for living EU artists also saw their market shares climb over this period (Austria, Netherlands, Italy¹⁰). See Table 1. Looking at the available data over a longer time frame, EU market share in the works of living EU artists has risen from 60% in 2002 to 66% in 2010, and the UK market share from 40% to 42%.

In light of the broader movements in the Contemporary (and overall) art markets, there is currently insufficient evidence to indicate that the loss of EU market share for works of living artists over the period in question is directly attributed to the harmonisation of the resale right in 2006 (see further under Section 2.4 below).

2.2.2. Auction sales of works of artists deceased within 70 years of the date of sale

Global fine art auction sales of "Modern" art works (artists born between 1875 and 1945) amounted to around €3.5 billion in 2010. The EU "heirs" market (works of artists deceased within 70 years of the date of sale) accounted for €1 billion of this.

Overall, the market grew by 126% over the period 2005-2010. Switzerland, the US and the EU sales grew by 25%, 69% and 85% respectively against the very high growth rate in China

account, bearing in mind that the Directive came into force on 1 January 2006. Detailed data on works subject to the resale right are only available for the period 2008-2010.

⁷ Unlike other markets where auction sales may be evenly split, many living artists sell their works primarily through dealers and less so through auction. Dealer sales may be relatively higher in this sector, and are estimated at double the value of auction sales.

⁸ Comparisons must be treated with caution, given the strong interest in China, for example, in traditional Chinese art

⁹ These data must be treated with caution: they do not cover the period before and after the harmonisation of the resale right. The period 2008-2010 has also been an unprecedented period of boom and bust.

¹⁰ Italy implemented the resale right in practice in 2006.

of over 1300%. The EU lost global market share, again largely as a result of the UK losing market share (from 27% to 20%), as did the US and Switzerland. China's market share gained dramatically from 4% to 23%.

As regards the EU "heirs" market, it is noted that the UK has lost market share, by 5 percentage points to 37%, over the period 2008-2010 in the absence of the application of the resale right to the "heirs" market (and indeed, the UK lost significant market share on the broader market for deceased artists over the same period, from 34% to 20%). US' market share has risen by 5 percentage points in the same period and the market shares of other EU Member States (whether or not they apply the right for heirs) have remained stable. There is currently no discernible pattern to suggest that Member States which do not levy the royalty on the works of deceased artists have performed better over the period than those that do. See Table 1 in Annex.

2.3. Impact on the Internal Market

Bearing in mind the expectation that unharmonised application of the resale right contributed to "displacement of sales" within the EU, the Commission sought to identify whether any trade diversion away from those Member States that introduced the resale right for the works of living artists the first time in 2006 and towards other Member States had arisen; and whether those Member States which have derogation until 1 January 2012 appeared to have a comparative advantage in the sales of works of deceased artists. The Commission looked at available data sets for the period 2005 – 2010.

2.3.1. Auction sales of the works of living and deceased artists

Art markets across the EU differ in their nature and make-up. For example, while the UK has the highest EU market share by value of auction sales in works eligible for the resale right (64% in 2010), followed by France (12%) and Germany (5%), the greatest volume of transactions was in France (26%).¹¹

In all, some 65,000 auction transactions were eligible for the resale right in 2010, of which roughly two thirds sales of works of deceased artists, and one third sales of living artists. See Table 1 in Annex.

Looking at both the value and the volume of auction sales of works by living artists over the period 2005-2010 no clear patterns can be established that would indicate that trade diversion has systematically occurred within the EU away from those Member States which introduced the right for living artists in 2006.

The UK lost market share relative to 2005 for sales of both living and deceased artists. The UK also lost EU market share between 2008 and 2010 for works of living artists eligible for resale, though the UK market share peaked at a high of 61% in 2008 i.e. three years after the coming into force of the Directive. However, other Member States that implemented the resale right for the first time (Austria, Netherlands, and Italy) also gained market share at the expense of the UK during this period. It is also noted that the UK lost EU market share for the works of deceased artists both over the period 2005-2010 and 2008-2010. Of the Member

¹¹ The high value of UK sales is accounted for by a small number of very high-priced sales. In 2010, for example, 54% of the value of the art market occurred in the price band of €2 million, (representing only 0.5% of transactions).

States that already implemented the resale right, France and Germany both slightly gained market share over 2008-2010 for sales of living EU artists (from 5% to 7% and from 3% to 4% respectively), while the share of the "rest of the EU" remained stable at 2%. As regards works of deceased artists, market shares remained stable. See Table 1 in Annex.

2.3.2. *Changes in overall market share*

Similarly, with regard to market share as a whole (beyond auctions) over the period 2005-2010 no clear patterns can be established. Austria, the Netherlands and Italy saw a slightly increased share of the EU market for the works of living artists, while the UK's share decreased significantly, in line with the broader UK market contraction.

The changes in market shares for trade in the works of deceased artists show a similarly mixed picture. The UK market share decreased by the same degree as the broader market contraction; the market shares of Germany and the Netherlands declined slightly; while those of France, Austria and Italy rose.

2.4. **Factors affecting the development of art markets**

Many stakeholders have pointed to the fact that the characteristics of different art markets, their development, and the relative competitiveness of markets depends on a wide range of factors. The wider taxation system, including the application of VAT can play a significant role. Within the EU it is noted that VAT rates vary widely from 15% to 25%. Rates of commission and administrative costs, including those relating to the administration of the resale right, have been cited.

Other issues are relevant. Art markets are susceptible to changes in taste, and to changes in perception of the investment value of art. In this context, the availability of expertise, the specialisation of any given market, trust and contacts remain important. Developments in the global distribution of wealth may be relevant, as evidenced notably by the rise of the Chinese art markets. At the same time, the mobility of the art market, including the growing attraction of national and international art fairs in the dealer sector, has also been cited.

2.4.1. *Mobility in the higher price brackets*

The global art market is, further, characterised by a few "global market hubs" where the highest value art – above €50,000 - is bought and sold. These hubs, which have the greatest share of sales in the higher price bands, include the US, China and the UK. This is borne out by the higher than average sales prices in these countries (See Figure 2 in Annex), and the fact that a small number of sales account for a high percentage of the value of transactions.

Many respondents have noted that sales of higher priced works are more susceptible to international competitive pressures, and that charges linked to such sales are more likely to lead sellers to divert sales to markets where transaction costs overall are lower, even taking account of transport costs.¹² In this vein, auction houses have noted cases of clients choosing to re-locate sales to New York, citing the resale right as a cost factor in that decision. The dealer sector has noted a tendency to shift transactions to one of the burgeoning international art fairs, with Art Basel being cited as a case in point. In summary, sellers will rationally

¹² See, for example, "The impact of artist resale rights on the art market in the UK", Toby Froschauer, January 2008.

move to do business in those markets where the transaction will be most beneficial, and the resale right is one in a number of factors that play a role in the choice of sales location.

2.4.2. Administrative burden in the lower price brackets

The greatest volume of trade by far takes place at the lower end of the market i.e. primarily "domestic" markets which tend to see a high volume of low value sales. Such markets may be national or may function alongside international markets (London being an example of this) and are commonly based on a high volume of lower value sales, mostly sourced locally and for the most part sold to local buyers (see Figure 3 in Annex). It has been noted that these markets tend to be dominated by smaller businesses which are vulnerable to regulatory burdens that increase their costs. This issue is explored in Section 3 below.

3. IMPLEMENTATION ISSUES AT NATIONAL LEVEL

3.1. The royalty rates

The centre piece of the Directive was the harmonisation of applicable royalty rates in five identified bands aimed to harmonise the application of the resale right in so far as disparities distorted terms of competition within the internal market. No stakeholders have indicated that the bands and royalty rates should be amended, or that the discretionary 5% rate for sales of a value lower than €5,000 should be abolished.

With regard to the minimum threshold for the application of the resale right the rates vary between €15 and €3,000. No evidence has been put forward to suggest that variations at national level have had a negative effect on intra-EU trade.

3.2. Management procedures

The Directive allows Member States to provide for compulsory or optional collective management of the resale right royalty. While the majority of Member States provides for obligatory collective management of the resale right, a significant number opted for optional collective management. Stakeholders did not question the scope for different approaches to collective rights management.

Beyond this, the Directive is silent on the implementation and administration of the right. There are significant divergences in national systems resulting in differences in terms of ease and cost of administration, both for art market professionals and collecting societies administering the resale right.

3.2.1. Administrative costs

Most art market professionals raised the issue of administration costs. It was pointed out that particularly SMEs, which usually have a higher market share by volume than by value, would suffer from high administrative costs that are triggered by every transaction. It is noted in this regard that there were over 65,000 eligible auction sales alone in 2010). The costs of administering the right have been estimated at up to €50 per transaction. These are primarily staff costs associated with (i) the determination of qualifying artists; (ii) the determination and location of heirs and other right holders (iii) processing omissions and refunds; together with IT system costs.

The biggest single factor appears to be the determination of qualifying artists. While collecting societies in some Member States maintain excellent records others do not maintain such data or make it available in an efficient manner. Some collecting societies publish lists of rights holders that have concluded a contract with them and are entitled to receive resale right royalties. In Member States where registration of the artist with a collecting society is a precondition for the payment of resale right royalties, collecting societies are able to provide a complete list of potential beneficiaries.

Where collecting societies do not make the information available in a systematic and comprehensive manner, the task appears to fall to art market professionals to undertake the search themselves. The situation with regard to the cross-border availability and accessibility of eligibility records is patchy.

The maintenance of comprehensive and searchable records of eligible artists has been cited as a major requirement for the reduction of administrative costs associated with the resale right. Another approach appears to be the use of an optional and simplified lump sum payment system. In one Member State cross-industry (rights holders, industry) agreement on the implementation of the right, and cooperation in the development of compatible IT systems, have been cited as major elements in assuring efficient management of the right.

3.2.2. Costs for collecting societies

Collecting societies cite administration costs in a range of 10% to 20% of the collected royalties. The administration costs of collecting societies are usually deducted before the distribution of the royalties and therefore borne by the beneficiaries.

In Member States where collecting societies can only collect resale rights royalties on the basis of individual mandates, usually all collected royalties can be distributed. In Member States with other systems beneficiaries sometimes cannot be found. In these cases up to 5% of the collected royalties are not distributed.

3.2.3. The "cascade effect"

Art dealers have also criticised the so called "cascade effect" of the resale right, meaning that royalties have to be paid for every transaction and cannot – contrary to the VAT – be refunded for transactions between traders. The resale right has a cumulative effect on works of art that are sold several times. In Member States where not only the seller but also the buyer can be obliged to pay the royalty, an art dealer involved in two consecutive transactions may pay the royalty two times in a row for the same work of art (first as a buyer and then as a seller).

4. IMPACT ON ARTISTS

4.1. Benefits and costs for artists

The Commission sought information from the collecting societies responsible for the collection and distribution of the resale right royalty on (a) the number of artists benefiting from the right annually between 2005 and 2010; and (b) the amount distributed. Ten collecting societies were able to provide this information i.e. covering 10 out of 27 Member

States.¹³ See summary in Table 3 in Annex. In these 10 Member States, some €14 million royalties were distributed in 2010, among 6,631 artists and their heirs, a rather stable figure compared to €14,4 million royalties distributed to 7,107 artists and their heirs in 2007. Around half of the royalties were collected in France alone. Collecting societies in four Member States (Belgium, Denmark, France, and Slovakia) were able to provide a breakdown of distributions between living and deceased artists for 2006-2010. In these four Member States 22% of royalties by value and 41% of royalties by volume were distributed to living artists over the period.

These figures are largely supported by the research undertaken by Arts Economics. In 2010, eligible auction sales comprised works by over 5,000 living artists, and reached 19,000 transactions and a value of €225 million. Heirs account for a much larger portion of sales eligible for the resale right, making up 82% of eligible sales by value, 71% by volume, and 63% of beneficiaries (see Table 4 in Annex).

45% of the living artists making eligible sales in 2010 (2,271) fell in the price bracket below €3,000, attracting a royalty rate of up to €150. A further 39% fell into the price bracket up to €50,000, attracting a royalty of up to €2,030. The overwhelming majority of artists and successors in title that contributed to the consultation welcomed the resale right system as making a difference, both financially and in terms of recognition. Some collecting societies also maintain schemes whereby a deduction for cultural purposes (10% of resale right revenue) is used specifically to support young artists. Collecting societies in some Member States have expressed regret that the harmonisation of the applicable rates under the resale right directive has resulted in a lower royalty rate than had been the case in national legislation before the introduction of the €12 500 cap, and the tapering royalty value e.g. Germany, where a 5% flat rate for all sales had previously applied.

5. CONCLUSIONS

5.1. Competitiveness of European markets

No clear patterns can be established to link the loss of the EU's share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006. Neither can any clear patterns currently be established that would indicate systematic trade diversion within the EU away from those Member States which introduced the right for living artists in 2006. Nevertheless, there are clearly pressures on European art markets, in all price ranges, and for both the auction and dealer sectors, and it is recalled that the scope of the application of the resale right will be significantly expanded following the ending of the derogation for the works of deceased artists on 1 January 2012.

At the same time, the quality of the administration of the resale right appears to vary considerably across the EU, bringing costs to art market professionals and artists alike. The burden can be particularly high for those at the lower end of the market who are proportionately more deeply affected by the costs of administering the right. The Commission

¹³ Some collecting societies were able to provide the amount of royalties distributed, but not the number of artists benefiting; others gave a total amount, but no annualised data; one gave the number of artists benefiting, but no value. Societies in eight Member States were not able to provide any information at all.

recognises, furthermore, that in some Member States inefficient administration of the resale right presents a not insignificant burden on art market professionals and may also lead to unnecessarily high deductions from the royalties due to artists and their successors.

- In light of the economic significance of the sector, the Commission considers that market developments should be kept under review. The Commission will undertake a further reporting exercise and deliver its results in 2014.
- The Commission will also pursue its commitment to persuading third countries to implement the resale right.
- In light of the volume of transactions subject to the resale right, the European Commission also considers that there would be benefit in the exchange of best practice at European level with a view to managing and minimising the administrative costs in all Member states. To this end it intends to establish a Stakeholder Dialogue, tasked with making recommendations for the improvement of the system of resale right collection and distribution in the EU.
- More broadly, the European Commission is concerned that collecting societies should operate to a high standard of governance and transparency with regard to their members and to commercial users, and will bring forward a proposal in this regard during 2012 to apply in equal measure to collecting societies administering the resale right.

Annex 1

Figure 1 – Change in global art market shares 2006-2010

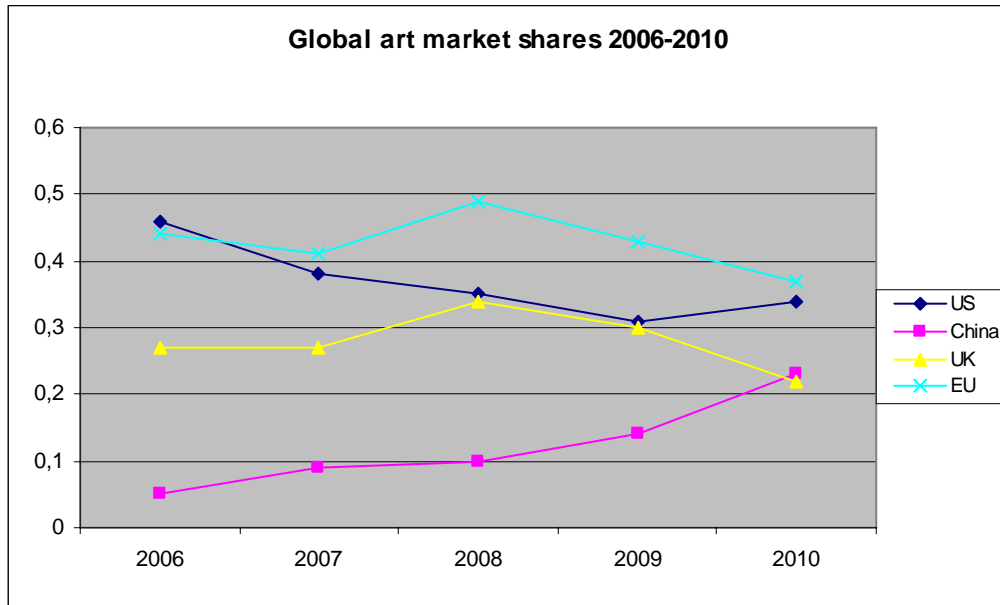


Table 1 – Auction sales 2008 and 2010

	Auction sales 2008 (€m)					Auction sales 2010 (€m)					
	All living artists	Living EU artists	Works of artists deceased within 70 years of sale	Works of EU artists deceased within 70 years of sale	Total auction sales (fine and decorative art)	All living artists	Living EU artists	Works of artists deceased within 70 years of sale	Works of EU artists deceased within 70 years of sale	Total auction sales (fine and decorative art)	Fine art auction sales
AT	6,5	6,0	15,1	14,3	131,6	8,5	7,6	22,1	19,8	222,8	76,6
FR	40,7	27,4	162,4	136,1	1105,3	51,6	24,1	200,9	120,6	1153,4	396,8
DE	17,4	14,9	61,4	57,2	454,5	16,8	12,3	69,2	53,6	416,5	143,3
IT	20,2	11,7	72,6	60,7	514,1	16,9	14,6	53,0	53,5	250,2	86,1
NL	2,8	2,2	11,4	10,8	126,7	6,7	4,7	1,5	16,9	124,6	42,9
SE	4,9	4,3	20,2	16,0	138,9	9,7	9,4	27,1	22,6	153,3	52,7
UK	506,3	347,0	900,6	752,8	6391,1	199,4	145,1	695,4	661,0	4224,9	1453,4
Rest of EU	15,8	14,4	51,5	47,5	437,0	15,1	6,9	107,7	83,7	693,8	238,7
EU	614,5	429,0	1295,0	1099,9	9299,3	319,1	224,7	1176,8	1031,7	7239,5	2490,4
US	421,4	127,9	1129,9	626,5	6607,8	389,5	97,6	1308,2	694,4	6499,6	2235,9
CH	3,9	3,0	26,9	25,9	272,8	5,7	3,4	35,2	29,3	376,5	129,5
Rest of World	350,3	5,7	201,8	37,0	2791,1	357,1	17,5	970,8	43,8	6661,2	2226,8
TOTAL	1390,2	564,5	2653,6	1784,8	18971,0	1071,6	343,2	3490,3	1799,2	20776,8	7082,6

Table 2 - Auction sales of works of living artists and European artists with eligible heirs, EU, 2010

	Value €m	No. of artists/heirs benefiting	Volume of transactions
Living artists	225	5,072	18,670
European artists with eligible heirs	1,032	8,814	46,380
Total	1,257	13,886	65,050
Living artists as % of total	18%	37%	29%

Figure 2

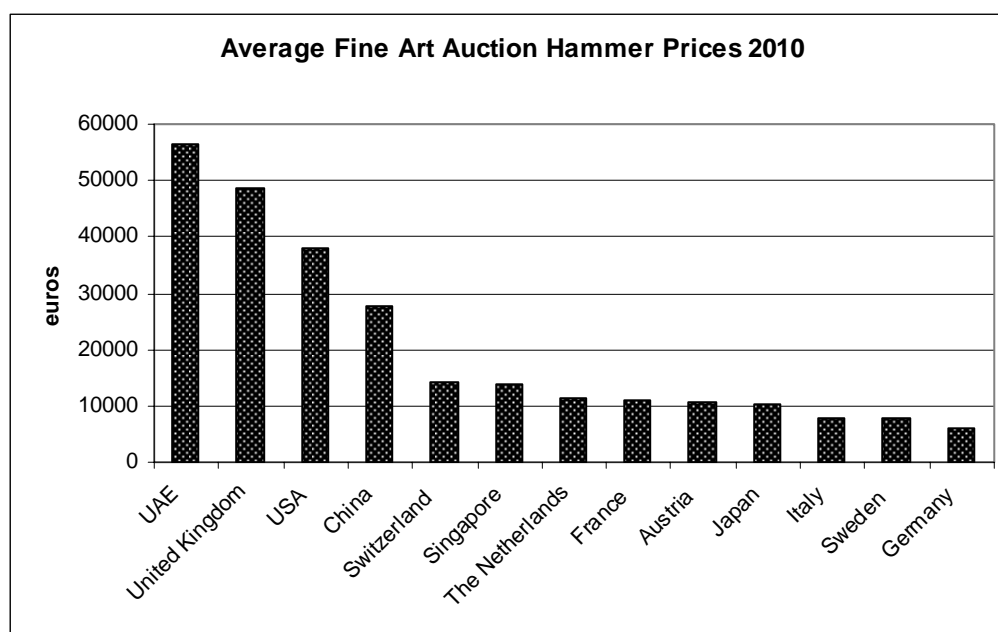


Figure 3

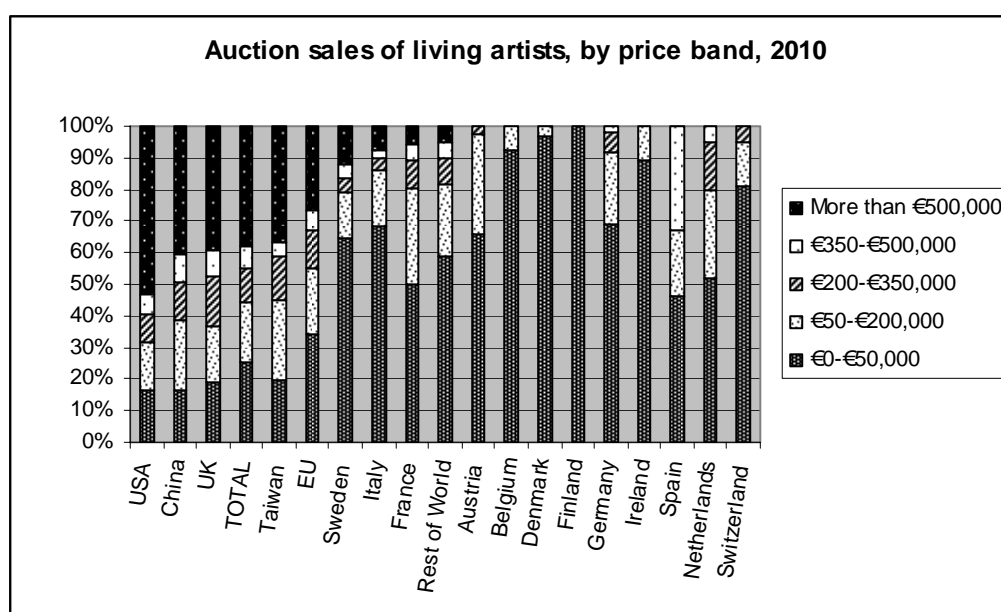


Table 3 – Number of artists benefiting, and value of royalties distributed 2005 -2010, selected EU Member States

	2005		2006		2007		2008		2009		2010	
	No	Value €m	No	Value €m	No	Value €m	No	Value €m	No	Value €m	No	Value €m
AT			19	0,038	27	0,07	43	0,111	39	0,093	38	0,11
BE	291	0,256	413	0,505	448	0,51	545	0,623	508	0,46	513	0,554
DK			1604	0,225	2071	1,346	1989	1,403	1511	0,742	1894	0,857
EE		0,007	10	0,018	14	0,021	13	0,011	9	0,01	11	0,004
FR	1991	2,934	2191	5,2	2233	6,51	1985	6,68	1959	6,06	2054	6,848
DE	878	2,351	1020	2,751	1191	3,47	1157	3,374	1112	4,319	1021	3,427
NL			46	0,06	39	0,053	54	0,067	44	0,056	58	0,105
PT					4	0,001	6	0,005	19	0,027	26	0,026
SK	76	0,021	110	0,025	135	0,037	152	0,049	132	0,038	50	0,022
UK			414	0,987	945	2,99	1123	3,45	913	2,594	966	2,696
Total		5,569	5827	9,809	7107	15,008	7067	15,773	6246	14,399	6631	14,649