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Art at The Bar: Competition Law and Civil Liability
in the Art Market Regulation

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ABSTRACT

The art market is rapidly developing along the ways of globalisation, digitalisation, and democratisation. Yet, it has several characteristics that favour market manipulation, such as lack of transparency and conflicts of interest. Despite substantial advancements, it is acknowledged that sector regulation does not address such limitations properly. In the light of US, EU, and national case-law, this article assesses the role that competition law could play in the art sector, also in conjunction with civil liability. It is found that competition law enforcement in the art market has been scarce so far. It provided for effective reaction tools against few, significant market manipulation strategies carried out by key auction houses. On those occasions, competition authorities and undertakings set shared, basic rules of conduct through commitments. Such cases also seem to have inspired recent self- and hetero-regulatory initiatives. All in all, competition law seems to play the residual role of a sentinel in the secondary art market. In contrast, whether or not competition law will be enforced in the authentication service sector mainly depends on how private enforcement will develop in the EU and the US.

KEYWORDS

Art – Auction Houses – Online Platforms – Authentication Boards – Regulation – Competition Law – Civil Liability – EU

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Cecil Graham: What is a cynic?

*Lord Darlington: A man who knows the price of everything, and the value of nothing.
Cecil Graham: And a sentimentalist, my dear Darlington, is a man who sees an absurd value in everything and doesn't know the market price of any single thing.*

Oscar Wilde

1. Introduction

On 15th November 2017, one news caught the attention of the colourful *milieu* of the international art market community: the auction house Christie's New York had sold the *Salvator Mundi*, a painting of Christ attributed to Leonardo (c. 1500). It was not only the importance of the work that impressed artists, gallery owners, merchants, critics, collectors, and art lovers around the world, but also (above all?) the price of the transaction – 450 million US dollars – which made it the most expensive auction in history – for now.¹ As revealed after about a month of well-guarded confidentiality, it turned out that the painting had been purchased by the Abu Dhabi Department of Culture and Tourism. The

¹ *Leonardo da Vinci painting sells for \$450m at auction, smashing records*, in *The Guardian*, 16 Nov 2017.

mysterious painting by Leonardo had left the property of the Russian entrepreneur Dmitry Rybolovlev to join the collection of the recently opened Abu Dhabi Louvre.²

This and similar events only represent the tip of the iceberg of a thriving and dynamic economic sector. The joint report by Art Basel and UBS *The art market 2018*³ found that, in 2017, the global turnover of the art market nearly reached 64 billion US dollars, with a 12% increase on the previous year.⁴ Secondly, as the cited study reports, the art market is highly internationalised, also thanks to the rapid growth of emerging economies. While the US maintains the record for sales value and volume, Chinese demand has increased by 14% with 13 billion US dollars in sales, thus exceeding the British one.⁵ In Europe, British buyers of artworks cover 62% of the market, followed by French, German, Italian, Spanish, and Austrian buyers.⁶

The art market is no longer exclusive to the élites. In fact, high-end buyers, who conclude transactions worth over 50,000 US dollars, only cover 26% of sales volume, despite representing 70% of the total market value.⁷ The value of 43% of transactions lies somewhere in between five thousand and fifty thousand US dollars.⁸ Lastly, agreements worth less than five thousand US dollars represent 30% of the total.⁹ The expansion of online transactions may have contributed to the growth of the intermediate segment of the market. In 2017, virtual deals amounted to 8% of the total, with the potential to reach traditional purchasing channels, *i.e.*, art galleries (24%), exhibitions (19%), artists' studios (18%), and auctions (10%).¹⁰

However, the peculiar structure of the art market and its functioning have many different grey areas. The concentration of intermediary activities into a few large global operators, along with the wide margin of discretion authentication services enjoy, might lend itself to forms of manipulation of market dynamics, ranging from the creation of price cartels to incorrect information practices, to exclusionary conducts aimed at illegitimately benefiting insiders. All this produces a hidden cost that hinders the full realisation of the growth potential of an increasingly globalised art market, in an age when developing countries are opening their markets and online retail is expanding.

² *Mistero svelato: il Leonardo da 450 milioni è stato comprato dal principe Mobammed Bin Salman*, in *Il Sole 24 Ore*, 7 Dec 2017.

³ Art Basel – UBS, *The Art Market 2018*, available at: <https://www.artbasel.com/about/initiatives/the-art-market> (last accessed 5 Feb 2019).

⁴ *Id.*, 15.

⁵ *Id.*

⁶ *Id.*, 41.

⁷ *Id.*, 57.

⁸ *Id.*

⁹ *Id.*, 230.

¹⁰ *Id.*, 301.

To address such challenges, economic operators, especially international auction houses, have promoted self-regulation initiatives. However, such instruments are not legally binding and, therefore, might not be effective.

After describing the main features of the art market and the shortcomings of its regulation, this article aims to assess how competition law could contribute to art market regulation. To answer this question, the main enforcement developments in the US and EU art market are considered, with particular reference to precedents concerning auction houses and authentication boards.

2. History and structure of the art market: some hints

Historically, until the early 16th century, artists and patrons (either secular or religious) negotiated the creation of artworks and their remuneration individually. In principle, pieces of art only circulated as part of the real estate where they were exposed. A significant transformation took place when artworks began to be transported, which increased their added value, as well as competition among authors.¹¹

The modern art market was born in the mid-18th century. With the agrarian and industrial revolutions and the consequent rise of a new middle class, works of art became a status symbol of its newly-acquired wealth and began to be marketed on a larger scale. During this period, France and England became the centre of the global art market, whereas Italy was among the main source countries.¹² It is no coincidence that it was in eighteenth-century England that the two most famous auction houses were born, *i.e.*, Christie's and Sotheby's.¹³

Ever since, the art market began to acquire its current shape. It now consists of a primary and a secondary market. While the former includes artists, agents, galleries, and collectors,¹⁴ the latter is ruled by auction houses, which mediate between supply and demand by organizing auctions and earning fees from both buyers and sellers.¹⁵

¹¹ See, in general, T. Hulst (ed.), *A History of the Western Art Market*, Berkeley, 2017. See also M. Westgarth, *The Art Market and its Histories*, in *The Art Book*, 2009, 16, 2, 32-33; N. De Mari – H.J. Van Miegroet, *The history of art markets*, in D. Throsby – V. Ginburgh, *Handbook of the Economics of Art and Culture*, 2006, vol. 1, 69-70

¹² N. De Mari – H.J. Van Miegroet, *The history of art markets*, 107; Simon, *Hogarth, France and British Art. The rise of the arts in 18th-century Britain*, Hogarth Arts, 2007,

¹³ *The History of Sotheby's Auction House*, available at: http://www.sothebys.com/en/news-video/blogs/all_blogs/sothebys/2017/03/sothebys-history.html; *About Christie's*, available at: <http://www.christies.com/about-us/welcome-to-christies/about-us/> (both last accessed 5 Feb 2019)

¹⁴ A. Zorloni, *L'economia dell'arte contemporanea. Mercati, strategie e star system*, Milan, 2016, 43 et seq.; F. Poli, *Il sistema dell'arte contemporanea. Produzione artistica, mercato, musei*, Bari, 2011, Ch. III; C. Zampetti Edigi, *Guida al mercato dell'arte moderna e contemporanea*, Milan, 2014.

¹⁵ See note n. 14. See also, in general, G. Negri-Clementi (ed.), *Economia dell'arte: Proteggere, gestire e valorizzare le opere d'arte*, Milan, 2017.

In turn, authentication service providers support the secondary market. By matching artworks with their respective creators, art authentication boards play an essential role in the formation of selling prices and in the development of the market, ensuring that transactions are certain and reliable.¹⁶

Finally, the global art market is undergoing significant digitalisation, globalisation, and democratisation processes. On the one hand, the art sector is not alien to the innovations introduced by the so-called digital revolution. This let new operators emerge in the secondary market, such as online platforms operating on behalf of traditional auction houses.¹⁷ On the other hand, also thanks to the development of digital marketplaces, the art market is increasingly less elitist and Euro-American, with the multiplication of transactions of middle and low economic value and the rapid growth of emerging markets.¹⁸ The implementation of the blockchain technology in the art trade could also facilitate the commercial exchange of pieces of art across the globe by ensuring traceability.¹⁹ In November 2018, Christie's tracked the provenance of over 90 artworks to be auctioned using an "art-focused, blockchain-based registry" developed by Artory.²⁰

3. Regulating the art market: self- and hetero-regulation

While there is no such thing as a systematic set of legal rules regulating the art market as a whole, the art sector is not unregulated. In fact, both international and national ethico-legal provisions apply to specific aspects of the art trade.

At the international level, the Hague Conventions of 1907 and 1954 prohibited the looting of cultural properties in armed conflicts and the UNESCO Convention of 1970 regulated their illicit international trade. These international instruments were followed by the European Commission Directive 93/7 on the return of cultural objects and the UNIDROIT Convention on stolen or illegally exported cultural objects (1995). Such agreements have been slow to pour into national law. In addition, a great variety of international, non-binding

¹⁶ R.S. Kaufman (ed.), *Art Law Handbook*, 2000, 829.

¹⁷ J. Zarobell, *Art and the Global Economy*, Berkeley, 2017, 215.

¹⁸ A. Ellis, *The Regulation of the Art Market: Why a Clean-up would be a Clear-out*, in *The Art Newspaper*, Feb 2017, vol. 5, n. 3, available at: https://aeaconsulting.com/insights/the_regulation_of_the_art_market_why_a_cleanup_would_be_a_clearout (last accessed 5 Feb 2019).

¹⁹ Art Basel – UBS, *The Art Market 2018*, 246.

²⁰ S. Mullin, *The Hammer Falls on the First Major Blockchain-based Art Auction*, in *Art Law Blog*, 14 Nov 2018, available at: <https://www.artlawgallery.com/2018/11/articles/auctions/blockchain-based-art-auction/>.

guidelines have been adopted, too.²¹ Finally, several international trade associations²² and national arts dealers' and museums' trade associations²³ have established ethics rules.

At the national level, most countries have their own legislation on the illegal trade of cultural goods to protect cultural heritage. Such constraints, enforced by specific administrative bodies, concern the sale of assets of particular cultural interest (see, in Italy, the Legislative Decree No. 42/2004 and subsequent amendments, so-called Code of Cultural Heritage, *Codice dei beni culturali*).²⁴

Instead, national regulations specifically targeting art market operators are rare. In the US, Illinois legislated to specifically regulate auction houses' activities.²⁵ The Illinois Art Auction House Act (2001) requires auction houses to maintain separate bank accounts for the proceeds made on behalf of sellers for whom the art auction house has acted as agent for the sale of art, antiques, and the like. The Illinois Auction License Act (2001) restricts certain auction services to licensed professionals, also requiring auction houses not to misrepresent important facts about the sale items, as well as to obtain a contract, either written or oral, specifying the merchandise which will be sold and the fee due to the auction house itself.

More recently, anti-money laundering legislation is being reformed both in the EU and US in a way that might impact art market operators, too. In the EU, Directive 2018/1673 reformed the anti-money laundering legislation in such a way that would extend public

²¹ E.g., ICOM, *Code of Ethics for Museums*, (1986 revised 2004); *Washington Principles on Nazi-looted Art* (1998); *Terezin Declaration* (2009); UNESCO, *International Code of Ethics for Dealers in Cultural Property* (1999); INTERPOL, UNESCO and ICOM, *Recommendations on the trade of cultural objects on the internet* (2007).

²² E.g., Antique Tribal Art Dealers Association, *Trade Practices and Guarantee*, (1997, amended 2007); Association of Art Museum Directors, *New Report on Acquisition of Archaeological Materials and Ancient Art* (2008); College Art Association, *A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History* (1995); College Art Association, *Statement on the Importance of Documenting the Historical Context of Objects and Sites* (2004); Confédération internationale des négociants en oeuvres d'art (CINOA), *International Support and Guidelines* (1987, amended 1998 and 2005); International Association of Dealers in Ancient Art, *Code of Ethics and Practice Museums Association, Code of Ethics for Museums: Ethical principles for all who work or govern museums in the UK* (2002); World Archaeological Congress (WAC), *First Code of Ethics* (1990).

²³ E.g., British Art Market Federation, *Principles of Conduct of the UK Art Market Adopted by the British Art Market Federation* (2000); German Museum Association, *Code of Ethics*; J. Paul Getty Museum, *Acquisitions Policy* (2006); Metropolitan Museum of Art, *Collections Management Policy* (2008); Society for American Archaeology, *Principles of Archaeological Ethics* (1996); Swiss Association of Dealers in Arts and Antiques, *Code of Ethics*.

²⁴ While some goods can never be sold (Art. 54, n. 1, Legislative Decree No. 42/2004) or before the proceeding to assess their cultural interest ends (Art. 54, n. 2, Legislative Decree No. 42/2004), other goods can be sold by authorized individuals, provided that the sale is not detrimental to the goods themselves (G. Boldon Zanetti, *Il nuovo diritto dei beni culturali*, Venice, 2016).

²⁵ D.R. Simon, *Fix and Tell: The Sotheby's/Christie's Antitrust Scandal and Proposed Changes to Illinois Art Auction Law*, in *DePaul J. of Art, Technology & Intellectual Property Law*, 2002, vol. 12, is. 2, 269-296, available at: <https://via.library.depaul.edu/jatip>.

oversight to art dealers.²⁶ In the US, rumour has it that a similar proposal will be presented in Congress soon.²⁷

At the forefront of the anti-money laundering legislation reform in Europe, the UK passed new Money Laundering Regulations in 2017, which implemented the EU Fourth Money Laundering Directive and might apply to art businesses, too. These new regulations apply to “High Value Dealers” (HVDs), which are defined as “firm or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when the trader makes or receives, in respect of any transaction, a payment or payments in cash of at least 10,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked”. Therefore, art dealers, auctioneers, and brokers qualify as HVDs if they receive cash payments exceeding 10,000 euros. Under the 2017 regulations, high-volume art dealers will not benefit anymore from simplified customer due diligence; enhanced due diligence is required when negotiating with politically exposed persons (*i.e.*, citizens with prominent positions in their home country, such as politicians, judges, and high-ranking militaries); written risk assessments are required to evaluate the risk of money laundering and terrorist financing, considering all relevant factors (*e.g.*, customers, countries where it operates, products/services, transactions, and delivery channels); finally, enhanced reporting requirements apply, according to which trustees shall provide information on the identity of settlors, other trustees, beneficiaries, all other natural or legal persons having effective control over the trust, as well as all other persons identified in a document relating to the trust. Naturally, all art market operators, including those that are not HVDs, are subject to the Proceeds of Crime Act 2002, which has been reformed by the UK Criminal Finances Act 2017. It establishes several criminal offences relating to money-laundering (punishable with up to 14 years of prison).

It is a common perception that regulation of the art market is not adequate. According to some operators, lack of transparency in commercial transactions and support services might facilitate conflicts of interest and market manipulation. They believe that specific regulations could prevent such practices.²⁸ An improved regulation of the art market would better protect the interests of buyers and give greater certainty to commercial transactions, thus favouring the growth of this economic sector.²⁹

²⁶ E. Kinsella, *Art Dealers Push Back Against the European Union's New Money-Laundering Regulations*, in *artnetnews*, 30th April 2018, available at: <https://news.artnet.com/art-world/european-union-tightens-art-market-oversight-1275338>.

²⁷ *Id.*, *US Art Dealers May Soon Be Subject to Government Financial Regulation*, in *artnetnews*, 2nd May 2018, available at: <https://news.artnet.com/art-world/european-union-tightens-art-market-oversight-1275338>.

²⁸ S. Ackermann, *Art Market Regulation: Why It's Badly Needed*, 7 Nov 2017, available at: <https://www.linkedin.com/pulse/art-market-regulation-why-badly-needed-kenny-ackerman/>; R. Pogrebin – K. Flynn, *As Art Values Rise, So Do Concerns About Market's Oversight*, in *The New York Times*, 27 Jan 2013, available at: <https://nyti.ms/WjbInU> (both last accessed 5 Feb 2019).

²⁹ G. Adam, *How transparent is the art market?*, in *The Guardian*, 28 Apr 2017.

While most operators agree that the art market needs better regulations, they clash over the best way to regulate it. The debate over the best form of regulation for the art market is not yet well-defined in the literature. However, it opposes the supporters of hetero-regulation to the advocates of self-regulation.

On the one hand, some observed that hetero-regulation by public authorities (*i.e.*, government regulation) is probably not the best option since it is expensive and excessively rigid with respect to market dynamics.³⁰ On the other hand, self-regulation would better serve the professionalism and standardisation of the art market. Such a “soft” regulatory intervention would make the market more attractive, without introducing bureaucratic rigidities and new administrative costs.³¹ In 2012, large international auction houses proposed a form of international self-regulation, based on existing legal obligations and dictating the requirements of a functioning global art market, called the Basel Art Trade Guidelines.³² Aimed to complement, rather than to replace, existing initiatives, the Basel Art Trade Guidelines apply to “all art market stakeholders who are involved in the sale of art objects as professionals” (Art. B.1), as well as to all objects that “are of importance for archaeology, prehistory, history, literature, art or science” (Art. B.2). To establish transparency, art market operators have an obligation of disclosure (Art. C.3.2.1) and due diligence (Art. C.4). Conflicts of interest should be avoided: “an expert’s opinion is invalid if the professional independence of the expert is in doubt” (Art. C.4.2.3). Due diligence is enhanced “if the seller requests non-disclosure of his identity to third parties or if the provenance or the authenticity of the art object itself raises serious doubts” (Art. C.4.4). When this leads to insufficient information about provenance, the art market operator should ask the seller full disclosure to the buyer and to provide an appropriate guarantee to tackle the potential consequences of the unclear provenance. If the seller refuses to do so, the market operator should not provide their services and, eventually, inform competent authorities (Art. C.4.4.2). If a controversy arises, the Guidelines recommend Alternative Dispute Resolution (ADR) systems, such as arbitration and mediation (Art. C.7).

The problem with self-regulation is that it is not legally binding. Indeed, it can be hard to enforce the content of guidelines and codes of conducts. In the debate between hetero-regulation and self-regulation supporters,³³ this article aims to assess whether or not com-

³⁰ I. Kaplan, *Should the Art Market Be More Heavily Regulated?*, 23 May 2016, available at: <https://www.artsy.net/Art/artsy-editorial-should-the-art-market-be-more-heavily-regulated> (last access 5 Feb 2019).

³¹ M. Kaye – H.N. Spiegler, *The Art Market: Would More Regulation Spoil All the Fun?*, in *Art & Advocacy*, Oct. 2016, vol. 23, available at: <http://www.herrick.com/publications/the-art-market-would-more-regulation-spoil-all-the-fun/> (last accessed 5 Feb 2019).

³² T. Christ – C. Von Selle, *Basel Art Trade Guidelines. Intermediary report of a self-regulation initiative*, Basel, available at: https://www.baselgovernance.org/sites/collective.localhost/files/publications/basel_art_trade_guidelines.pdf (last accessed 5 Feb 2019).

³³ H. Little, *Does the art market need more regulation?*, in *Apollo International Art Magazine*, 29 Jun 2015, available at: <https://www.apollo-magazine.com/does-the-art-market-need-more-regulation/> (last accessed 5 Feb 2019).

petition law could contribute to art market regulation. In fact, while it is widely believed that the art market is not regulated, this is only partly true. Along with regulations addressing specific aspects of art trade, the art sector is already subject to several branches of the law, such as private law, criminal law, copyright law, and so on. In principle, competition law could play a role in preventing the most significant manipulations of market dynamics by inducing economic operators to follow good practices and effectively implementing self-regulatory instruments, such as guidelines and codes of conduct. In other words, the hetero-regulatory intervention of competition authorities could favour the development of effective self-regulation tools, thus combining the strengths of both institutional solutions (*i.e.*, effectiveness and flexibility, respectively). To this end, the main EU, US, and national competition law precedents will be taken into account.

Also, the potential coordination between competition law and civil liability will be considered. Civil liability could indirectly contribute to the regulation of the art market, given its well-known deterrent and preventive function and its capability to ensure widespread, bottom-up control (see below, para 7).

4. The role of competition law: from Christie's and Sotheby's to on-line platforms

Christie's and Sotheby's were the object of one of the main competition law enforcement cases in the art market. Founded in the mid-18th century as small businesses, Christie's and Sotheby's became the main auction houses globally after World War II, with a peculiar division of roles in the international art market. While Sotheby's occupies the high end thereof, Christie's is mainly aimed at the middle classes.³⁴

The early '90s were a period of deep crisis for both auction houses. In 1993, to reduce the fierce competition between them, they agreed to increase the commissions paid by auction sellers. After the first contacts between the CEOs of the two companies, which took place in 1993, regular meetings followed throughout the decade. Such price-fixing agreement remained operational until the beginning of 2000.³⁵ The agreement met the classic definition of an anti-competitive agreement (*i.e.*, cartel), which is illegal both under US and EU competition laws.

Under US law, Section 1 of the Sherman Act provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared to be illegal”.

³⁴ B. Catalano, *Il Mercato delle Case d'Aste Christie's e Sotheby's. Il caso delle Italian Sales*, Ca' Foscari (Masters' thesis), a.y. 2013-2014, 41 et seq.

³⁵ Commission, Decision of 30 Oct 2002, COM(2002) 4283.

Likewise, in EU law, Art. 101, n. 1, let. a), TFEU provides that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market” are “prohibited as incompatible with the internal market” and “in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions”.³⁶

In 1997, a Federal Grand Jury was convened to investigate suspected agreements contrary to Section 1 Sherman Act among major New York auction houses. After Christie’s provided the US Department of Justice (DoJ) with the documents showing its conspiracy with Sotheby’s, in 2000, Christie’s obtained a grant of leniency (*i.e.*, immunity from criminal prosecution). In the federal US District Court for the Southern District of New York, Sotheby’s pleaded guilty paid for a fine of 45 million US dollars.³⁷

Both auction houses also faced class actions for damages filed by art buyers and sellers who participated in auctions during the conspiracy period before the District Court for the Southern District of New York. In September 2000, both Christie’s and Sotheby’s settled with plaintiffs for more than 250 million US dollars.³⁸

In 2000, Christie’s also provided EU competition authorities with evidence of the agreement to benefit from the leniency program under the 1996 Commission Communication,³⁹ which offered a substantial reduction in penalties to those contributing to the discovery of cartels.⁴⁰ Christie’s went free of sanctions and Sotheby’s benefitted from a 40% reduction in penalties by providing additional evidence of the agreement and collaborating with the Commission.⁴¹ The price scandal of 2000 cast a shadow over the reputation of the auction houses involved. Ever since, they have adopted codes of conduct and internal reporting systems to win back sellers’ and buyers’ trust.⁴²

This case-law analysis shows that, within the art market, (*i*) leniency programs (or “fix-and-tell” policies) play an important role in making anticompetitive agreements emerge and (*ii*) commitments by undertakings after the starting of formal investigations can also

³⁶ F. Ghezzi – G. Olivieri, *Diritto antitrust*, Turin, 2013, 82 et seq.

³⁷ For a legal and economic analysis of the Christie’s/Sotheby’s case in the US, see O. Ashenfelter – K. Graddy, *Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions at Sotheby’s and Christie’s*, in *J. of Competition Law and Economics*, 2005, 1(1), 3-20, doi: 10.1093/jclec/nhi003.

³⁸ *Id.*

³⁹ Commission, Decision of 30 Oct 2002, COM(2002) 4283, 21 et seq.

⁴⁰ *Commission Notice on the non-imposition or reduction of fines in cartel cases Official Journal C 207*, 18/07/1996 P. 0004-0006, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996Y0718\(01\)&from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996Y0718(01)&from=IT) (last accessed 5 Feb 2019).

⁴¹ Commission, Decision of 30 Oct 2002, COM(2002) 4283, 57.

⁴² Sotheby’s, *Code of Business Conduct*, 2015, available at: http://www.sothebys.com/content/dam/sothebys/PDFs/JC_1416483_Legal_Code%20of%20Conduct%20Brochure.pdf (last accessed 5 Feb 2019).

induce operators to be collaborative with competent authorities and proactive in correcting their conducts.

More recent antitrust case-law tackled the anticompetitive potential of the so-called auction rings. These latter consist of groups of dealers that agree not to compete against each other during auctions in order to artificially deflate the price of the auctioned merchandise. To this end, a member of the ring bids on a lot and, after the auction, they conduct a second private auction, where the highest bidder gets the lot. The difference between the public and the private auction prices is then allocated among the members of the ring. In 2011, the Dutch Competition Authority (NMa) started investigating into this practice. The NMa investigations concerned suspected “price-fixing” arrangements among dealers in 19th century paintings. The NMa suspected that, while, in principle, dealers can jointly purchase an artwork, bidding agreements might restrict competition.⁴³ In 2011, the dealers under investigation committed to inform the auctioneer when an art dealer cannot afford a piece of art on his/her own and is consequently bidding jointly with other dealers.⁴⁴ Henk Don, a NMa official, stated that “this commitment makes collaborations between art dealers transparent, and prevents strategic collaborations, for example, to obtain paintings at the lowest possible price. Sellers of paintings thus benefit from this commitment since it will result in better prices. It additionally makes clear what is and what is not allowed, which offers guidance to all dealers on how to act at auctions”.⁴⁵

These developments likely contributed to trigger significant regulatory developments in the UK concerning pre-auction agreements and auction rings. In principle, it can be lawful to purchase works jointly, *e.g.*, if a dealer cannot afford an artwork or wants to minimise the risks of full ownership. Possibly inspired by the Dutch commitments of 2012, the Enterprise and Regulatory Reform Act 2013 provides that dealers who enter into a legitimate agreement must give details of the contract to the auction house (*e.g.*, the names of the parties and the lots being bid on). The 2013 reform also made it easier to prosecute dealers who collude illegally on bidding at auction since prosecutors do not have to prove anymore that members of an auction ring have acted “dishonestly”. Larger dealers are subject to a higher risk of prosecution because it is harder for them to show that they could not afford an artwork.⁴⁶

Even though pre-auction disclosure were made according to applicable legislation, such agreements could still be found anti-competitive since no disclosure defence is available under EU or national competition law. Dealers could defeat allegations by showing that

⁴³ NMa, *Art dealers' commitment increases competition at art auctions*, 11 Dec 2012, available at: <https://www.acm.nl/en/publications/publication/11012/NMa-Art-dealers-commitment-increases-competition-at-art-auctions>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *UK cracks down on auction rings*, in *The Art Newspaper*, May 2014, n. 257, Sect. 2, available at: <https://www.artatlaw.com/press/uk-cracks-auction-rings-may-2014>.

none of them could bid independently. Naturally, it is harder for larger and affluent dealers to prove this.

While auctions traditionally take place at the presence of all interested buyers (or their proxies), online platforms offer a new and increasingly popular channel for art distant-selling. It is no chance that the most recent competition law enforcement developments in the art market targeted such platforms. In November 2016, the British Competition and Market Authority (CMA) launched an investigation into ATG Media, which is the main digital sales platform operating in the UK art market in relation to the supply of auction services in the UK. The investigation is focusing on suspected exclusionary and restrictive pricing practices, including most favoured nation provisions (MFNs) in respect of online sales.

MFNs (also known as “most favoured customer”, or “prudent buyer”, or “non-discrimination” clauses) are contractual provisions in which the seller promises the buyer that it will not offer another buyer better terms than those offered to the first buyer. MFNs are increasingly subject to antitrust scrutiny across the globe, in particular in online markets (such as hotel booking, e-books, and price comparison websites). The main concern of the antitrust authorities is that MFNs may increase barriers to entry for new entrants and raise rivals’ costs. MFNs may also deter sellers from offering discounts, since the clauses will require the seller to provide the same discount to all buyers.

The controversial practices concerned, first, exclusivity clauses under which the contracting auction houses undertook not to use other platforms; secondly, agreements preventing auction houses from offering, in ATG auctions, less favourable conditions than those offered on competing platforms; thirdly, auction houses were banned from advertising competing platforms.⁴⁷

The CMA found that such a conduct restricted competing platforms from entering the market and prevented consumers from obtaining more favourable conditions than those offered on the ATG Media platform. The CMA claimed that such agreements restricted competition under Art. 2, Competition Act. Given that ATG Media is the largest provider of online auction services in the UK, such an exclusionary conduct could also represent an abuse of dominant position, which is prohibited under Art. 18, Competition Act.⁴⁸

ATG Media committed itself to ceasing these practices. The CMA accepted the commitments and concluded the related antitrust proceeding against the online platform without applying any sanction to the company.⁴⁹

⁴⁷ For an official summary of the case, see <https://www.gov.uk/cma-cases/auction-services-anti-competitive-practices> (last accessed 5 Feb 2019).

⁴⁸ Id.

⁴⁹ Id.

A similar result was achieved, in the different domain of unfair commercial practices,⁵⁰ by the commitments offered in 2010 by Sotheby's to the Italian Competition Authority (ICA) to give more transparent information about the so-called resale right (*ius sequelae*), i.e., the right of the author of figurative artworks and manuscripts to receive a percentage of the selling price of their original works from every sale after the first one. The ICA noted that the information given to purchasers was misleading as buyers were not informed that they would pay the *ius sequelae*, which must be paid for by the seller by law.⁵¹ The ICA accepted the commitments by Sotheby's, which avoided any sanction.⁵² In contrast, Christie's did not submit commitments to correct the same unfair practice and, therefore, paid for an administrative penalty of 80,000 euros.⁵³

Finally, logistics services caught the attention of competition authorities, too. In June 2016, the Spanish competition authority (CNMC) launched an investigation into suspected anti-competitive conducts performed by certain companies providing transport, production and assembly services in relation to art exhibitions in Spain and abroad. Suspected conducts include price fixing, market sharing, and agreements to share commercially sensitive information.⁵⁴

5. Authentication services: (anti)competitive implications

5.1 Antitrust cases in the US

In the secondary market, the authentication of artworks is an essential service because it excludes fakes from circulation and gives certainty to the market.

The first authentication tool is the *catalogue raisonné* (reasoned catalogue), which lists the works of an artist.⁵⁵ If a work is not indicated there, secondary market operators can turn to authentication service providers, usually offered by artists' foundations and com-

⁵⁰ An unfair commercial practice is "misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise" (Art. 6, n. 1, Directive 2005/29). In Italy, unfair business practices are regulated by Arts. 18 et seq., Legislative Decree No. 206/2005 (so-called Consumer Code, Cons. Cod.) which transposed the Directive. The competent authority in Italy is the ICA (Art. 27, Cons. Cod.).

⁵¹ ICA, decision of 28 Jul 2010, n. 21416.

⁵² Id.

⁵³ ICA, decision of 28 Jul 2010, n. 21425.

⁵⁴ CNMC, *Nota de prensa*, 24 Jun 2016, available at: https://www.artatlaw.com/wp-content/uploads/2016/07/20160624_Inspecciones_Transporte_Obrasdearte.pdf.

⁵⁵ S. Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, in *Colum. J.L. & Arts*, 2004, 28, 71.

posed of scholars who share a scientific interest in a particular artist.⁵⁶ While the reasoned catalogue is usually the independent initiative of an individual, authentication committees operate collegially and at the request of an interested party, who is, normally, a potential seller. Authentication methods include stylistic investigation and scientific analysis based on chemical tests.⁵⁷ Depending on the decisions of authentication committees (or *catalogue* authors), a work of art may have extremely high value or lose it altogether.

In the US, several civil liability claims have been filed against authenticators since the leading case *Hahn v. Duveen* (1929), where Mrs. Hahn sued an art dealer who had declared that a painting attributed to Leonardo she owned was fake (the parties settled for 60,000 US dollars, a large sum at that time).⁵⁸ While authenticators have been sued on many different grounds in tort since then (e.g., product disparagement, defamation, negligence, and fraud), very few defendants have been found liable.⁵⁹ However, defending has always been expensive, which induced some authentication boards to withdraw from the market.⁶⁰ Authenticators try to prevent liability risks by means of hold-harmless agreements, whereby the owner undertakes not to sue the authenticators for giving her authenticity opinion.⁶¹

A US antitrust case⁶² shows the potential (anti)competitive implications of authentications in the art market. In 1989, the art collector and film producer Joe Simon-Whelan bought a self-portrait by Andy Warhol for 195,000 US dollars and tried to sell it seventeen years later. Encouraged by Andy Warhol Foundations' agents, he asked the Andy Warhol Art Authentication Board Inc., a non-profit organization controlled by the Andy Warhol Foundation for the Visual Arts, to authenticate the self-portrait. As Simon-Whelan stated, it "is almost impossible to sell an Andy Warhol painting without first submitting it to the Board for authentication. The Board claims that theirs is 'just an opinion' but the fact is that Sotheby's and Christie's will not sell a picture unless it has the Board's approval". Simon-Whelan and the authenticator negotiated a hold-harmless agreement. The authentication committee stamped the "DENIED" mark (rejected) on the back of the work, which, consequently, would no longer be accepted as authentic.

⁵⁶ For instance, the *Roy Lichtenstein Authentication Committee*, the *Calder Foundation*, the *Moboly-Nagy Foundation*, and the *Keith Haring Foundation* are authentication boards.

⁵⁷ L. Duboff et al., *The Deskbook Of Art Law*, 1993, 22-41.

⁵⁸ H. Schechter, *Can the New York Legislature Bring Back Authentication Boards? The Effect of Proposed Legislation on Liability for Art Authenticators*, in *Colum. J.L. & Arts*, 2016, 40, 148.

⁵⁹ Id.

⁶⁰ For instance, the Andy Warhol Foundation spent about seven million dollars defending against an antitrust violation claim (see below) and closed less than a year after settlement. In the following year, four other authentication boards decided to close also due to liability risks (id., 146-147).

⁶¹ Id., 148.

⁶² *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423(LTS), 2009 WL 1457177, at *6, 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. 26 May 2009).

After a second test, which had the same outcome, in 2007 Joe Simon-Whelan sued the committee and the foundation, stating that the latter had have artificially reduced the number of works in the market, in violation of Section One of the Sherman Act (trade restraint) and had concluded an anti-competitive agreement to monopolize the market (monopolization, sanctioned under Section Two of the Sherman Act). He also sued the Foundation and the authenticator for fraud.

The US District Court, Southern District of New York found that such antitrust allegations were strong enough to survive a motion to dismiss. It pointed out, first, that Warhol's works represent a relevant sub-market of the broader market of contemporary works of art; secondly, that the printing of the "DENIED" mark could constitute a significant anti-competitive damage: "the double-stamping of 'Denied' on his artwork in furtherance of the alleged antitrust conspiracy has prevented him from competing as a seller in the lucrative market for authentic Warhols".⁶³ Simon-Whelan claimed that there was evidence that the authenticator had acted in bad faith and colluded with the Foundation. Indeed, this latter had made unsolicited suggestions to him to submit its portrait for authentication.

The court also held that hold-harmless agreements do not cover intentional wrongdoing, as alleged by the plaintiff (who was solicited by the Foundation itself to submit its portrait to the authenticator). Therefore, the fraud claim survived a motion to dismiss, too. After a prolonged and expensive legal battle, Joe Simon-Whelan decided to settle his claim, assuring that "no evidence" had emerged of an illicit conduct by the Warhol Foundation.⁶⁴ Naturally, it is impossible to predict what the trial outcome would have been had the plaintiff not experienced financial difficulties. In any case, *Simon-Whelan v. Andy Warhol Foundation* showed how the economic power of certification services might be used to exclude potential competitors from the market and to artificially maintain (or increase) the value of the works held by insiders.⁶⁵

The more recent *Bilinski v. Keith Haring Foundation* case also concerned the antitrust liability of an important authentication board.⁶⁶ In 2007, Bilinski submitted an application

⁶³ G.S. Lacy, *Standardizing Warhol: Antitrust Liability For Denying The Authenticity Of Artwork*, in *Wash. J.L. Tech. & Arts*, 2011, 6, 185, p. 12, available at: <https://digital.lib.washington.edu/dspace-law/handle/1773.1/560> (last accessed 5 Feb 2019).

⁶⁴ H. Hesemans, *Warhol's Woe – Whelan v. The Warhol Art Foundation: Legal authentication and the dynamics of the art world*, working paper, Maastricht University – Law and Art, Jen 2016, DOI:10.13140/RG.2.2.22595.81446.

⁶⁵ For a comprehensive commentary on this case, see G.S. Lacy, *Standardizing Warhol*, 185: "[i]n *Simon-Whelan v. Andy Warhol Foundation for the Visual Arts, Inc.* [...] an art collector alleged monopolization and market restraint after an authentication board denied the authenticity of his Andy Warhol painting by stamping "DENIED" on the back of it. The case is the first antitrust lawsuit against an authentication board to survive the defendant's motion to dismiss. The decision therefore suggests potential liability exposure under the Sherman Antitrust Act for art professionals who render opinions on the authenticity of artwork. This article discusses how *Simon-Whelan* provides a framework for pleading antitrust claims against authentication boards and considers what standard could be appropriate for analysing similar claims at trial".

⁶⁶ For a brief note about this case, see L. Bursey, *Bilinski v. Keith Haring Foundation, Inc.*, No. 14CV1085 DLC, 2015 WL 996423 (S.D.N.Y. Mar. 6, 2015), in *DePaul J. Art Tech. & Intell. Prop. L.*, 2015, 26, 83.

to the Keith Haring Foundation to authenticate her collection; however, the Foundation deemed the works were “not authentic”. In 2010, Sotheby’s and Gagosian Gallery refused to sell Bilinski’s collection. Then, she resubmitted an authentication application but the Foundation confirmed their assessment.

In 2013, the Foundation filed suit against an exhibition in Miami featuring Bilinski’s collection, seeking a temporary restraining order. In 2014, Bilinski filed a claim against the Foundation based on both Sections 1 and 2 of the Sherman Act. However, in 2015, the District Court of New York dismissed all claims. As for the restraint of trade complaint, the court held that the claimant had failed to provide sufficient evidence of a conspiracy to restrain trade between the Foundation and the auction houses that refused to sell claimant’s collection. After all, as the court noted, “the decision by any individual entity not to sell artwork that may not be authentic is an act consistent with lawful, independent action”. As for the monopolisation claim, the court stated that the fact that, based on intellectual property rights, the Foundation exercises a monopoly over the market for Keith Haring’s artworks does not establish *per se* unlawful monopoly power.

Although private enforcement suits against authenticators are rare and have always failed, litigation and settlement costs have driven several authentication boards out of the US market. This has triggered some legislative initiatives to shield authentication committees from liability and encourage them to come back to the market by elevating the standard of proof on plaintiffs and introducing favourable attorney’s fees provisions. In particular, according to the New York State Bill S1229, plaintiff must prove their claim by “clear and converging evidence” and the prevailing authenticator is entitled to the costs and fees of a suit.⁶⁷

5.2 The antitrust liability of authentication boards as certification bodies in the EU: agreements and abuses

Authentication controversies could fall under the scope of EU competition law. In this connection, authentication boards can be considered as standard setting and certification bodies supporting the secondary art market. Indeed, authentication committees identify and apply the standards according to which a work can be attributed to a given artist. In lack of legislation requiring formal requisites (*e.g.*, authorisations or licenses),⁶⁸ an authentication board can be defined and recognised as a qualified standardisation and certification authority on a factual, case-by-case basis, *i.e.*, based on the fact that buyers and sellers

⁶⁷ H. Schechter, *Can the New York Legislature Bring Back Authentication Boards? The Effect of Proposed Legislation on Liability for Art Authenticators*, in *Colum. J.L. & Arts*, 2016, 40, 141-163.

⁶⁸ Actually, even though legislation provided formal requirements for authentication boards to operate, a board operating in violation of such requirements could still be considered as a “qualified authority” if the secondary market recognises so. Otherwise, “illegal” boards, which, however, actually operate in the art market, would be exempted from competition law on merely formal grounds.

consider it as a “qualified authority” in the field (by submitting authentication applications to it and making sale/purchase decisions dependent on its authentication assessments). This, however, raises the preliminary question of whether EU competition law is applicable to standard setting and certification activities.

First, competition law rules only apply to undertakings, *i.e.*, enterprises. The notion of enterprise under EU law is extremely broad, including any entity performing an economic activity.⁶⁹ Therefore, standardisation and certification bodies fall under the scope of such a wide definition since they require a fee to provide a service. As a result, competition law rules and principles can also apply to these entities.

Standard setting and certification activities restrict trade by nature, as they favour certain competitors at the expense of other ones. However, they only violate competition law if they deliberately aim to exclude one or more competitors from the market.⁷⁰

This objective can be achieved either through an agreement (Art. 101 TFEU) or an abuse (Art. 102 TFEU), if the authentication body holds a dominant position in the relevant market.⁷¹

On the one hand, an agreement (or a concerted practice) content could be concluded between a certification body and an auction house to prevent one or more competitors from entering the market to artificially preserve or increase the value of the assets they already have. Art. 101, n. 1, letter. b), TFEU provides that the agreements that may restrict competition also include the those aimed at “limiting or controlling production”, *i.e.*, the supply of goods or services.

On the other hand, an anticompetitive abuse may consist of a unilateral conduct of the authenticator, if she holds a dominant position in the relevant market. The relevant market includes a geographical and a product dimension.⁷² The geographic market is the area where a good or service is traded; so, for large auction houses, the market can be global. The product market includes all goods that are substitutable by consumers. In other words, goods or services that fulfil the same need belong to the same product market: it is indifferent for consumers to buy one or the other. Therefore, assessing the product market requires an empirical assessment of consumers’ behaviours.

⁶⁹ *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, 2012/C 8/02 paras 8-25. See also G. Caggiano, *Il concetto di impresa*, in L.F. Pace (ed.), *Dizionario sistematico del diritto della concorrenza*, Naples, 2013, 47 et seq.

⁷⁰ ECJ, 12 Jul 2012, case C-171/11, *Fra.bo v. DVGW*, EU:C:2012:453.

⁷¹ F. Ghezzi – G. Olivieri, *Diritto antitrust*, 199 et seq.

⁷² *Commission Notice on the definition of relevant market for the purposes of Community competition law* (97/C 372/03), 5; ECJ, 9 Nov 1983, case C-322/81, *Michelin v. Commission*, EU:C:1983:313; ECJ, 16 May 2000, case C-344/98, *Masterfood HB v. Commission*, EU:C:2000:689; ECJ, 24 Oct 2002, case C-82/01, *Aéroport de Paris v. Commission*, EU:C:2002:617; ECJ, 15 Feb 2005, case C-12/03, *Commission v. Tetra Laval*, EU:T:2006:265; ECJ, 14 Oct 2010, case C-280/08, *Deutsche Telekom v. Commission*, EU:C:2010:603.

An undertaking holds a dominant position in the market if it has such a market power that it can behave independently of competitors and consumers. This market power may derive from a sufficiently large market share.⁷³ Intuitively, the more the market is narrow, the easier it is to show that an undertaking holds a dominant position in it. Delimiting the art product market follows the same kind of assessment. It is presumable that every artist defines his/her own reference market. Therefore, an authentication board will hold a dominant position if it certifies most of the works of a certain artist. However, the undertaking might show that the product market actually covers, e.g., all the works of the artistic movement a given artist belong to.

Article 102 TFEU requires such bodies to hold a dominant position in the relevant market. The approach to define it in the art market might be case-by-case. If an authentication board faces competition among different authenticators, a dominant position will be highly difficult to be ascertain, not to mention an abuse. Conversely, if other authenticators are not there or play a marginal role in the secondary market, it will be easier to show a dominant position.

Once an authenticator is found to hold a dominant position in the relevant market, the impact of the contested practices on competition must be demonstrated. In the case of agreements, their object or effect must restrict competition. If an agreement is anti-competitive by object, it is not necessary to demonstrate its potential effects.⁷⁴ In the case of an abuse of dominant position, the conduct must have a detrimental effect on competition (Art. 102 TFEU). This could suggest that it is always necessary to investigate its potential restrictive effects of an abuse. Nevertheless, the case-law of the Court of Justice has long admitted that certain categories of abuses can be manifestly harm competition.⁷⁵ In sum, the potential effect of agreements or abuses on competition must be assessed, except for manifestly anti-competitive conducts.

5.3 The antitrust liability of authentication boards as certification bodies in the EU: potential implications for authentication services

Authenticators might infringe competition law rules either in standard setting or certification activities. As for standard setting, the Commission and the Court of Justice adopted a self-

⁷³ A dominant position is «a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers» (ECJ, 14 Feb 1978, case C-27/76, *United Brands Company and United Brands Continental BV v Commission*, EU:C:1978:22, para 65; see also Commission, *Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Communication 2009/C 45/02; ECJ, 13 Feb 1979, case C-85/76, *Hoffmann - La Roche & Co. AG v Commission*, EU:C:1979:36, para 39).

⁷⁴ F. Ghezzi – G. Olivieri, *Diritto antitrust*, 125.

⁷⁵ These are the so-called naked restrictions. The leading case is ECJ, 13 Feb 1979, case C-85/76, *Hoffmann - La Roche & Co. AG v. Commission*, EU:C:1979:36; see, however, ECJ, 6 Sep 2017, case C-413/14 P, *Intel Corporation Inc. v. Commission*, ECLI:EU:C:2017:632, which states that not every exclusionary effect necessarily restrict competition (para 34).

restraint policy since they lack the expertise to assess technical standards on the merits.⁷⁶ In the *EMC Development* case,⁷⁷ these institutions agreed that standard setting procedures cannot have anticompetitive effects if they are transparent, open, non-discriminatory and the standards are not binding (or if an alternative route is available to market access). In other words, standard-setting activities do not normally restrict competition if participation is not limited, standard adoption procedures are transparent, compliance with standards is not mandatory, and access to standard is correct, reasonable, and non-discriminatory.⁷⁸ If such conditions are not met, standard setting might have anti-competitive implications. Therefore, authentication boards should, first, avoid relying on stylistic authentication methods only, which have a subjective dimension and are hardly verifiable. These should be supported by scientific methods of analysis, based on objective authentication standards. Secondly, authentication procedures should be public and transparent, and involve expert third parties. Thirdly, conflicts of interest should be avoided (*i.e.*, authenticators should not own artworks by the same author). Finally, access to standards should not be denied, otherwise a restriction of competition by object could arise (see para 5.3 below). By respecting such transparency conditions, authentication boards can avoid competition law risks, following the example of most private product standardization bodies.

As for certification activities, the Court of Justice recognized, in the *Fra.bo* case,⁷⁹ that the decisions of a private certification body can have a restrictive effect on the marketing of a product. However, the Court did not assess the effects of the certification activity in question since the action was based on the right to the free movement of goods under Art. 28 TFEU, rather than on competition law under Arts. 101 or 102 TFEU.⁸⁰ As a result, no precedents are available to assess the compatibility of certification activities with competition law.

Moreover, anti-competitive assessments are more likely to emerge when certain conditions are met, such as incentives to exclude, procedural irregularities (or secret proceedings), and conflicts of interest. These circumstances can support the claim that a certain certification was guided more by an economic (self-)interest than by an objective comparison between an authenticity standard and the artwork in question.⁸¹

Showing that lack of authentication can have an anti-competitive effect is rather easy. Although authenticity certificates are not legally binding, a work of art that is not certified

⁷⁶ In this domain, they show a “consolidated deferential approach” (P. Cuccuru, *European standards at the bar: Routes towards a meaningful involvement of the Court of Justice in technical standardisation*, forthcoming in *European Law Journal*, 2018).

⁷⁷ CFI, 12 May 2010, T-432/05, *EMC Development v. Commission*, ECLI:EU:T:2010:189.

⁷⁸ R. Schellingerhout, *Standard-setting from a competition law perspective*, in *Competition Policy Newsletter*, 2011, n. 1, p. 6, available at: http://ec.europa.eu/competition/publications/cpn/2011_1_1_en.pdf (last accessed 5 Feb 2019).

⁷⁹ ECJ, 12 Jul 2012, case C-171/11, *Fra.bo v. DVGW*, EU:C:2012:453.

⁸⁰ B. Van Leeuwen, *European Standardisation of Services and its Impact on Private Law*, Oxford, 2017, 204-205.

⁸¹ G.S. Lacy, *Standardizing Warhol*, 211.

cannot, in fact, be sold. Certified non-authenticity can, therefore, exert the anti-competitive effect of artificially restricting the offer to protect the value of the assets held by the insiders. Indeed, it could amount to a form of output restriction, which is a severe anticompetitive infringement under EU competition law.

In analogy with the case-law concerning standard-setting activities, authentication boards could prevent potential investigations by antitrust authorities by adopting clear and public procedural certification rules, which should include cross-examination and appeal procedures, and removing the conditions that might facilitate opportunistic behaviours (e.g., by requiring experts to abstain in cases of conflict of interests). Such “precautionary” measures could also be the object of competition law compliance programs.⁸²

A particular hypothesis of potential anti-competitive relevance is, finally, the refusal to certify a work of art, which can be considered a restrictive practice of competition by object (or per se). The doctrine of essential facilities⁸³ can be applied to the domain of certification bodies and authentication boards. Under such a doctrine, the owner of an essential resource must let competitors use it, if the resource is shareable and there are no reasons justifying a refusal. The doctrine aims to prevent first comers from exploiting a practical or legal “bottleneck” in the market to exclude potential competitors. Created in the context of natural monopolies (e.g., railways), the doctrine could also apply to intellectual property rights, for example requiring a dominant company to license exclusive rights.⁸⁴

In the art market, refusal of certification can effectively prevent an operator from entering the market. Although not mandatory, the opinion of an authentication board is usually needed to sell a work of art: the authentication service might constitute an essential facility. Consequently, the authenticator cannot refuse to evaluate an artwork; otherwise, it would commit an anticompetitive infringement by object or per se.

6. Competition law sanctions

When they establish an infringement of competition law, authorities will have to impose sanctions under the applicable (European or national) legislation.

⁸² An increasing number of jurisdictions is implementing antitrust compliance programs, under which firms adopting programs to ensure compliance with competition law are granted a reduced sanction. As an example, the ICA grants companies that implement adequate compliance programs before an investigation is started a reduction of the fine up to 15% (ICA, *Guidelines on Antitrust Compliance*, decision n. 27356, available at: http://en.agcm.it/dotcmsdoc/guidelines-compliance/guidelines_compliance.pdf (last accessed 5 Feb 2019).

⁸³ The essential facility doctrine was first developed by the US case-law and has been applied (at times implicitly) by EU courts starting from ECJ, 6 Apr 1995, cases C-241 and 242/91, *RTE e ITP v Commission*, EU:C:1995:98.

⁸⁴ M. Bandera, *Abuso di posizione dominante e rifiuto di concedere in licenza diritti di proprietà intellettuale*, University of Trieste (doctoral thesis), 2009, available at: <http://hdl.handle.net/10077/3158> (last accessed 5 Feb 2019).

With regard to EU competition law, the 2006 Commission guidelines⁸⁵ provide that “fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Arts 81 and 82 of the EC Treaty [Arts. 101 and 102 TFEU] (general deterrence)” (para 4).

The Commission first quantifies the basic amount by using ‘the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the European Economic Area. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement’ (para 13). The amount of the fine corresponds to “a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement” (para 19), up to a maximum of 30% (para 21), taking into account “a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented” (para 22). “the proportion of the value of sales taken into account for [agreements] will generally be set at the higher end of the scale” (para 23).

Moreover, the Commission may “increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates” (para 30), in compliance with the maximum legal thresholds (points 32-33). Such a provision could apply to the art market, where auction houses boast high profits “beyond” the sales of the artworks by a single artist. Although the infringement does not concern a “mass” product, the Commission can, therefore, impose particularly afflictive sanctions.

On the other hand, under domestic competition law, the ICA guidelines⁸⁶ impose, first, sanctions equal to a minimum percentage of 15% of the value of sales, for price-fixing, market-sharing, and limitation, as they constitute the most serious infringements (para 12). Secondly, fines can be increased up to 50% if the company generates a total worldwide turnover which is particularly high compared to the value of sales of the goods or services that are the object of the infringement or belongs to a group of significant economic dimensions. The penalty can then be further increased in light of the illicit profits made by the company responsible for the infringement (paragraph 25). This makes it possible to

⁸⁵ Commission, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02).

⁸⁶ ICA, *Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall’Autorità in applicazione dell’articolo 15, comma 1, della legge n. 287/90*, available at: http://www.ICA.it/component/joomdoc/normativa/concorrenza/Linee_guida_criteri_quantificazione_sanzioni.pdf/download.html (last accessed 5 Feb 2019).

impose dissuasive sanctions against auction houses or authenticators that operate in non-“mass” markets, such as in that of a given author’s artworks.

Thirdly, it is possible to provide for a reduction in the penalty where the undertaking provides decisive information for the assessment of another infringement and falls within the scope of the leniency program (para 23). This reinforces the incentive to collaborate with the competent authorities.

7. Private enforcement between stand-alone and follow-on actions

In principle, competition law seems to be more efficient than private law at responding to market manipulation practices. First, antitrust authorities have more resources than individuals to investigate the dynamics of the market, find evidence, and conduct prolonged and complex legal battles against undertakings. Besides, competition law provides specific tools to make infringements emerge, such as leniency programs and commitments,⁸⁷ and imposes deterrent sanctions. On the contrary, private law remedies do not provide incentives to collaborate and do not go beyond full compensation.

On the other hand, competition law has two fundamental limitations. First, those who have suffered from a lack of authentication may be interested in obtaining compensation for economic losses (for example, in terms of lost opportunities to sell the artwork). Competition law cannot achieve this objective. Secondly, competition authorities cannot exercise an all-encompassing top-down control on the market, given the high information costs of centralised agencies. Civil liability rules might better respond to such needs of compensation and widespread control. Civil liability can complement competition law in a two-fold way.

First, civil liability can intervene after competition authorities find an infringement to fully repair the damages caused by anti-competitive activities. This has a recognised preventive implication, which strengthens the deterrent effect of antitrust penalties. In fact, legislation explicitly provides that violations of competition law constitute civil wrongs (see, in Italy, Art. 1, n. 1, Legislative Decree No. 3/2017).⁸⁸ Consequently, once the competent authority adopts a sanctioning measure, injured parties can sue the undertaking before the courts

⁸⁷ In a nutshell, clemency programs allow those who provide information on a cartel to benefit from a reduction or exemption from the sanction (Commission, *Notice on Immunity from fines and reduction of fines in cartel cases*, 2006/C 298/11; F. Ghezzi – G. Olivieri, *Diritto antitrust*, 335). On the other hand, the second legal means allows the undertakings concerned to propose commitments to meet the concerns expressed to them by the Commission in its preliminary assessment; in this case, the Commission can make these commitments mandatory for companies by imposing a sanction in case of non-compliance (Art. 9, Regulation No. 1/2003).

⁸⁸ G. Benacchio – M. Carpagnano, *I rimedi civilistici agli illeciti anticoncorrenziali. Private enforcement of competition law*, Padua, 2012.

seeking compensation. A civil trial started in the wake of an antitrust intervention can benefit from the preliminary activity already carried out by the competent authority. If, for instance, the ICA definitively established an anti-competitive infringement, the injured party must only prove damages and causation to get compensated. Therefore, a follow-on compensatory action seems to be an efficient way for individuals to react to competitive restrictive practices. It also enhances the deterrent and, therefore, regulatory effects of antitrust sanctions.

Secondly, it should be noted that Directive 2014/104, transposed into the Italian law by the Legislative Decree No. 3/2017, aims to facilitate the private enforcement of EU and national competition law even independently of competition authorities (so-called stand-alone actions).⁸⁹ Under the new legislation, injured parties can ask the judge to order the defendant or a third party to “to disclose relevant evidence which lies in their control”, provided that the request contains “reasonably available facts and evidence sufficient to support the plausibility of its claim for damages” (Art. 5, n. 1, Directive 2014/104). Under Art. 8, n. 2, Directive 2014/104 EU, the parties that do not comply with the judicial order of disclosure may be subject to sanctions as “the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs”. These provisions aim to make it easier for individuals to prove a violation of competition law to support a compensation claim. This could warrant a widespread and “bottom-up” control of anti-competitive conducts, thus complementing the centralised control of the Commission and national authorities, which are burdened by substantial information costs.⁹⁰ A “revamped” private enforcement could attract the attention of antitrust authorities, giving rise to investigations. Both public and private enforcement of competition law might also trigger criminal investigations and prosecutions.⁹¹

Finally, public and private enforcement can play a pedagogical role *vis-à-vis* the industry.⁹² Public discussions in antitrust proceedings and trials can “teach” market operators how to avoid competition law risks, *e.g.*, by implementing adequate compliance programs.

⁸⁹ E. Malagoli, *Il risarcimento del danno da pratiche anticoncorrenziali alla luce della direttiva 2014/104/UE*, in *Contratto e impr. Eur.*, 2015, 390; S. Marino, *Alcune novità nel private enforcement del diritto della concorrenza*, *ivi*, 2014, 75; G.F. Simonini, *Causalità nella fattispecie dell'illecito anticoncorrenziale*, in *Contratto e impr.*, 2015, 777.

⁹⁰ P. Cane, *Tort Law as Regulation*, in *Common Law World Review*, 2012, 31, 305–331.

⁹¹ A.M. Linden, *Tort Law as Ombudsman*, in *Canadian Bar Review*, 1973, 51(1), 157.

⁹² For more insights into the pedagogical role of courts *vis-à-vis* regulatory bodies, see S. Jasanoff, *Science at the Bar – Law Science and Technology in America*, Harvard, 1995 and *Id.*, *Designs on Nature: Science and Democracy in Europe and the United States*, Princeton, 2005.

8. The outcome of antitrust litigation in the art market: an assessment

In light of the above, competition law and civil liability could theoretically have a positive impact on the art market regulation. However, the case-law analysis conducted above should have made it clear that both public and private enforcement of competition law has been limited so far in the art market. In fact, antitrust enforcement in the art sector is rare. This points out that competition authorities have a low level of interest to intervene, possibly because they perceive the art market as a niche, non-essential sector. High entry costs (*i.e.*, expertise) might also discourage enforcement initiatives. Most investigations are triggered by complaints filed by private operators, whereas public enforcement initiatives from competition authorities have a low success rate.⁹³ Private enforcement is also in short supply, probably due to the evidentiary difficulties injured parties might incur in.

Nonetheless, such limited intervention had a two-fold impact on the art market and its regulation. First, both European and national competition authorities successfully intervened against key players of the secondary market (in essence, big international auction houses and on-line platforms) in cases where suspected infringements involved high volumes of transactions both in the physical and digital dimensions. Successful investigations are typically triggered by other market players reporting suspected practices, which suggests that reports seem able to partially ease information costs for investigators. Once such investigations are initiated, undertakings have an incentive to offer reasonable commitments to avoid reputational effects. Competition authorities usually accept such commitments, which in turn set some essential standards of conduct for other market operators.

Secondly, at a more general level, the considered antitrust cases have showcased the main pitfalls of the art market regulation. In a market where trust is a cornerstone, the precedents analysed above, although limited, have pushed crucial art market operators, particularly big auction houses and on-line platforms, to step up self-regulatory initiatives and compliance programs to win back public trust. Also, such precedents have likely contributed to strengthening the political will of lawmakers to improve the regulation of the art sector, in particular to address its lack of transparency and conflicts of interest (see §§ 3 and 4 above). This ascending legislative and political interest in the art sector regulation is not unwarranted since the art market has long ceased to be a small, elitist economic niche. In fact, when considered as a whole, art trade is already a global, multi-billion dollar business, and can be expected to be ever more so in the future.

Naturally, given its limited enforcement, it cannot be argued that competition law plays the role of “co-regulator” of the (secondary) art market. Rather, while industry self-regulation stands above other institutional alternatives in the art market, competition law seems to

⁹³ *E.g.*, ICA, decision, 23 Sep 2009, n. 20318 (1705 – *Case d’asta*).

act more as a sentinel intervening against the most economically significant infringements committed by key operators of the secondary market and signalling to art operators and regulators severe regulatory shortcomings that deserve consideration. As the art market expands its economic and financial size and gets subject to tighter regulatory oversight, activism from art market operators can, however, be expected to surge, pushing competition authorities to start investigations on suspected practices implemented by competing (or even colluding) operators.

In contrast, in the authentication service sector, potential sellers of artworks, not competition authorities, are the most efficient enforcers of competition law since they have a high interest to intervene and the information costs of their claims are low (*i.e.*, they know exactly how much profit they lose for not being able to sell their artworks).⁹⁴ Lack of expertise has been mentioned to be an insurmountable barrier for courts to adjudicate art controversies properly, in particular to make authentication decisions.⁹⁵ Consequently, art market operators should use ADR mechanisms to settle their controversies.⁹⁶ However, as other scholars pointed out,⁹⁷ not only can judges fill the gaps of their knowledge through experts; courts also have a duty to adjudicate cases and individuals are entitled to legal protection in case of injury. The expertise required to adjudicate a case is no valid reason to insulate it from the rule of law, enforced by an independent judiciary.⁹⁸

Nevertheless, private enforcement actions in the art market have been scarce so far in the US and non-existent in the EU, probably due to the evidentiary difficulties claimants might experience. Whether or not competition law will be enforced in the authentication service market mainly depends on how private enforcement will develop in the EU and the US. In this connection, some indication could be drawn from the first private enforcement action in the EU, which has been filed in Portugal in 2015.⁹⁹ In sum, Cocego, a Canadian company, sued the Portuguese firm Sport TV for damages arising from an alleged abuse of dominant position in the pay-TV market, based on a decision by the Portuguese competition authority of 2013. The *Tribunal Judicial da Comarca de Lisboa* referred several preliminary questions to the Court of Justice about the application of Directive 2014/104 and its relationship with national law. By her *Opinion* delivered on the 17th January 2019,

⁹⁴ S. Edgar, *Standing by your man ray: Troubles with Antitrust Standing in Art Authentication Cases*, in *Colum. J.L. & Arts*, 2014, 37, 280.

⁹⁵ A.L. Bandle, *Fake or Fortune? Art Authentication Rules in the Art market and at Court*, in *Int'l J. of Cultural Property*, 2015, 22, 379-399, doi: 10.1017/S0940739115000107.

⁹⁶ *Id.*

⁹⁷ “The conclusion that courts are institutionally incapable of deciding legal disputes because the underlying facts involve a determination on the authenticity of art is a non sequitur. Regardless the difficulty of making factual determinations, courts have a duty to adjudicate disputes properly before them” (S. Edgar, *Standing by your man ray: Troubles with Antitrust Standing in Art Authentication Cases*, in *Colum. J.L. & Arts*, 2014, 37, 282).

⁹⁸ *Id.*

⁹⁹ AG J. Kokott, *Opinion*, 17th Jan 2019, case C-637/17, *Cocego v. Sport TV Portugal, SA et al.*

Advocate general Kokott recommended a rather claimant-friendly interpretation of private enforcement law. Preliminarily, she stated that, while Art. 102 TFEU is directly applicable to controversies among individuals in the EU, the rights to compensation under Directive 2014/104 have no direct horizontal effects.¹⁰⁰ Therefore, before the transposition of the Directive into national law, injured parties are only entitled to start private enforcement actions under national law, which shall be compatible with EU law general principles, namely, Art. 102 TFEU and the principle of effectiveness, under which national law must not make it too hard or impossible the exercise of rights granted by EU law.¹⁰¹ In this connection, the Advocate general observed that a limitation period of three years, such as that provided under Portuguese law, which starts when the claimant is still not aware of the identity of the injurer nor of the amount of damages suffered and is not suspended nor interrupted in the event of a national competition law investigation and procedure makes it excessively difficult for claimants to get compensated and is, therefore, incompatible with EU law.¹⁰² In addition, she affirmed that final decisions by competition authorities should have some evidential value in follow-on civil trials, *e.g.*, by triggering rebuttable presumptions of competition law infringements; otherwise, both Art. 102 TFEU and the principle of effectiveness would be violated.¹⁰³

Such recent developments are naturally not enough to estimate whether Directive 2014/104 will facilitate and stimulate private enforcement in the EU. Nonetheless, follow-on actions can be expected to be more popular than stand-alone ones. Indeed, to ease the evidentiary difficulties inherent in antitrust claims, potential sellers could typically report a suspected infringement to the competent competition authority, wait for its decision, and use it before a civil court to get compensated. However, competition investigators might only be interested in intervening if a sufficient number of potential sellers target a dominant authentication board or catalogue author.

9. Conclusions

In principle, competition law could produce a tangible economic return for the art sector. The deterrent effects of pecuniary competition law sanctions, enhanced by the prospect of compensation claims in civil trials, might have regulatory implications, inducing undertakings to implement good practices to prevent antitrust and civil liability risks. Nevertheless, this article assessed that competition law enforcement in the art market is limited. Its impact on the art sector regulation can be summarised as follows.

¹⁰⁰Id., para 107, n. 1.

¹⁰¹Id., para 77.

¹⁰²Id., para 107, n. 2.

¹⁰³Id., para 107, n. 3.

First, competition law only offered effective reaction tools against few, economically significant market manipulation strategies by key auction houses and on-line platforms, reported by market operators. As by-products of these interventions, commitments by undertakings conveyed some basic, shared standards of conduct for other market operators in sensitive commercial areas.

Secondly, such precedents might also have contributed to attracting the attention of the industry and policymakers on the “grey zones” of the secondary art market regulation, leading to increased self- and hetero-regulatory initiatives.

All in all, competition law seems to play the residual role of sentinel in the secondary art market, especially when suspected infringements involve high volumes of commercial transactions. As the art market consolidates its shift towards a global, multi-billion dollar business and gets subject to tighter regulatory oversight, such sentinel role can be expected to be ever more significant in the future.

In contrast, private enforcement actions against authenticators have never been successful in the US and are non-existent in the EU. Since potential sellers are the best competition law enforcers in authentication cases, whether or not competition law will be enforced in the authentication service sector will depend on how private enforcement will develop in the EU and the US. Due to evidential reasons, private enforcement actions in the EU can be expected to take the form of follow-on actions, rather than stand-alone suits.

