



Department of Business and Management  
Master's Degree in Management  
Chair in Markets, Regulation and Law

**The Art Market's lack of regulation and  
transparency**

SUPERVISOR  
Professor Luca Arnaudo

CANDIDATE  
Rosa Maria Tomasello  
702481

CO-SUPERVISOR  
Professor Giuseppe Colangelo

Academic Year 2018/2019

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## **Abstract**

The scope of this research paper is to analyse and discuss the lack of transparency in the art market. First of all, defining what value is in art, and which factors affect the prices of artworks by looking at their characteristics with the hedonic price indices established by Core (1939) and the main auction houses parameters: Sotheby's and Christie's. Furthermore, I will examine the current regulation of the art market, with an overview of the national and international legislation and the possibilities of self-regulation or government intervention. Also, I will discuss the problem of information asymmetry in the market and which issues this brings up. Secondly, I will make an overview of the art global sales and market share with a focus on the Italian market and the US recent trade restrictions and the impact of digitalization and globalization that brought to the emergence of the secondary market with the online sector and blockchain issue. Thirdly, I will study the role of competition law, considering the cases of collusion of the two main auction houses, Christie's and Sotheby's, and how competition law might be the answer to limit this market manipulation. Finally, I will discuss the problem of the art market lack of transparency with the Italian Scientific Director of MondoMostre-Skira, Thomas Clement Salomon, to see the point of view of a professional. As you will see during the analysis of this research paper, my question on whether an international regulation is possible, will not be completely answered. In fact, it is a very complex and incomplete topic, that is still considered a black hole in the economic and juridical sector.

## Introduction

“It is better to idealize commercial things  
than to commercialize aesthetic things”

Grand-Carteret, *Vieux papiers* (1896)

There are people that falls in love with a painting to furnish their homes, and people that look at the route of the artist, waiting that the painting gains value, as an investment that can be stored until the price rises.

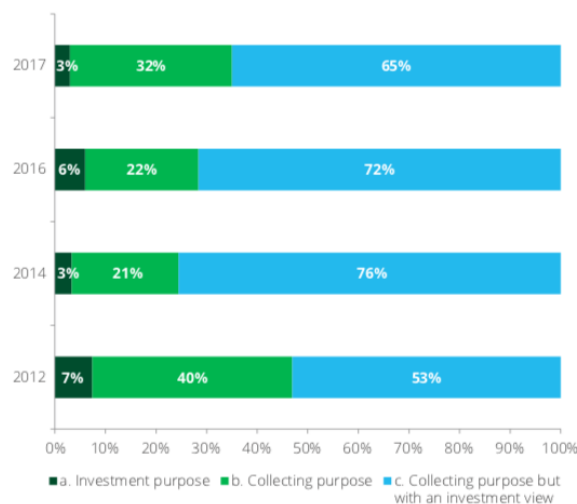
There has always been a connection between art and emotion, but also an interdependence between the art market and the financial one. Nowadays, enormous amounts of money are spent for art works. Buying and selling paintings, either from young artists or from the Masters, is an activity that is considered to have high rate of returns on this investment. The art market is a dynamic economic sector. On 15<sup>th</sup> November 2017, everyone in the world, either who is an art lover and who is not interested in it, was astonished by the *Salvator Mundi* of Leonardo da Vinci, sold by the auction house Christie’s for 450 million US dollars.<sup>1</sup> It is the greatest art transaction until now and it was made by Saudi Prince Badr bin Abdullah bin Mohammed bin Farhan al-Saud. This art transaction has been in the centre of many debates due to several issues, such as the veracity of attribution of the painting to Leonardo da Vinci and regarding the final location of the painting, that was supposed to be in the Abu Dhabi Louvre, but where it never arrived. For these reasons, I will make a focus on this case study at the end of this thesis, as this is a significant case of market non-transparency, and, in my opinion, it perfectly sums up the difficulties this extremely interesting but still mysterious market has. Are people willing to pay that amount of money to enhance culture, to fulfil their passion in art and beauty, or just to invest in something that one day will be even more valuable? Art is something too personal and intimate to have an objective

<sup>1</sup> Helmore, Edward. Leonardo da Vinci painting sells for \$450 m at auction, smashing records. *The Guardian*, 16 Nov 2017

answer. A perfect example is the Rabbit from Jeff Koons sold for \$92,210,000 million by Christie's auction house on May 15, 2019.<sup>2</sup> It was the biggest transaction ever made for a living artist. Many argued whether it made sense to pay such an amount for an art piece that Jeff Koons can recreate several times, as he is still alive. This is an example of how having big galleries behind you with powerful marketing tools makes the difference in the career and valuation of an artist.

As we will deeply analyse in this thesis, because of the lack of regulation in the art market, every year important industries such as Deloitte, ArtTactic and Art Basel together with UBS, create reports to analyse the art market trends and to make a global financial overview regarding every side of this opaque market. For example, Deloitte and ArtTactic in 2017 investigated on the reasons why collectors buy art. The survey showed that the majority of the art collectors buys art for passion but with an investment view<sup>3</sup>.

**Figure 1:** Survey on why people buys art  
Source Deloitte



Fonte: Deloitte Luxembourg & ArtTactic Art & Finance Report 2017

<sup>2</sup> Prisant, Barden. Why someone will pay \$92,210,00 for Jeff Koons Rabbit. *Forbes*, May 1, 2019

<sup>3</sup> *Deloitte*. Il Mercato dell'Arte. Report 2018

This might be the answer to the move made by Steve Cohen, important American investor, that decided to buy the Rabbit of Jeff Koons for an enormous amount of money.

As we will see, the art market has evolved deeply. Nowadays, many collectors buy art with an investment perspective. In fact, “paintings are known to be illiquid: only a fraction of the stock is on sale during one run of the market.”<sup>4</sup> This concept is called fractional investment, that is a percentage ownership in an asset. The individual shareholder shares the benefits of the asset such as usage rights, income sharing, and reduced rates. This type of investment has always been popular regarding vacation properties, and now is used also in art.

This connection with the economic market, had raised many debates that brought to the creation of related literature. In particular, price determination of a painting is still a major topic discussed between economists, artistic curators and philosophers. On one side, Baumol (1986)<sup>5</sup> criticises the unpredictable oscillations of the prices, defining the market absolutely unstable. On the other side, Frey and Pommerhene (1989) affirms that paintings do not have a “natural price” but are influenced by demand and supply.<sup>6</sup>

Court (1939), Anderson’s (1974), Stein (1977), Baumol (1986) and many others contributed on analysing the rate of return of paintings. In fact, the financial rate of return on paintings is lower than for investment in financial assets (due to higher risk in the former market) because it is important to underline that paintings also have a “psychic return” from owning and viewing the paintings.<sup>7</sup>

<sup>4</sup> Chanel, O. Grequam, L. Ginsburg, V. Core. The relevance of hedonic price indices. *The Journal of Cultural Economics* 20, 1-24, 1996.

<sup>5</sup> Baumol, W. J. Unnatural Value: Or Art Investment as Floating Crap Game. *The American Economic Review*, 1986.

<sup>6</sup> Frey, B.S & Pommerehne W.W. Art Investment: An Empirical Inquiry. *Southern Economic Journal* 56, (2), 396-409, October 1989

<sup>7</sup> Frey, B.S, Eichenberger, R. On the rate of return in the art market: Survey and Evaluation. *European Economic Review* 39, 528-537, 1995

This aspect of “psychic return” have been disregarded in the literature, but it is quite important. There is a big difference between “Pure speculators” and “Pure collectors”. The former is heavily influenced by change in risk, change in cost and unexpected change in regulation. As a matter of fact, if the art market has price variations and more risks, pure speculators tend to leave the market due to uncertainty. Differently, pure collectors are insensitive to these variations, as their major interest is the love of the painting.

This is why regulation has an important role. In fact, one of the main focuses of this thesis is how regulation and national and international laws are essential to make sure that the art market becomes more transparent. As far as we are concerned, restrictions on the trade in art are becoming more severe, and this is becoming a problem for pure speculators who want to trade paintings and invest on them.

The EU law had always tried to regulate the art market to make it more transparent. On January 1995, there had been the implementation of the “VAT Directive” which establishes a common system of taxation for sales of second-hand good, works of art, collector’s items and antiques and for imports of works of art into the Community.<sup>8</sup> As Christiane Scrivener, member of the Commission, with special responsibility for taxation, customs and consumer policy, stated: “It also safeguards the interests of consumers, who will no longer run the risk of being taxed twice (if not more!) when they buy an antique or a second-hand car. On top of the fluidity of trade that professional dealers need, it ensures the security of transactions for consumers”.

Today the EU regulation on the art market is becoming stricter. On April 2018, there has been the implementation of the “Fifth Anti-Money Laundering Directive” EU Directive 2018/1673. This directive was created to make sure that the art market becomes more transparent and to fight money laundering and

<sup>8</sup> *European Commission*. Press Relate Database. VAT Directive 1995.

terrorist financing across the European Union.<sup>9</sup> Italy in particular, already has an anti-money laundering regulation: Legislative Decree No 231 of 21 November 2007. Art market intermediaries shall report any suspect transactions to the competent authority (Unità di Informazione Finanziaria) if they know, suspect or have a reasonable reason to suspect that money-laundering or activities supporting terrorism were carried out or are being carried out.<sup>10</sup> Moreover, art dealers cannot accept more than € 3.000 cash and have to keep record of any document, data and information to prevent money-laundering.

Regarding the monetary aspect, what determines the value of art? Is there a transparent international way in which the value of art can be determined? In the first part of this research paper I will analyse and discuss the structure of the art market, with the big issue of information asymmetry and an overview of the national and international regulation.

<sup>9</sup> *Official Journal of the European Union*, Directive (EU) 2018/243

<sup>10</sup> *Art Law Report*. Art Law: Restrictions on the exports of cultural property and artwork. November 2017. Pg. 66



## Chapter 1: The Structure of the Art Market

The modern art market was born in the mid-18<sup>th</sup> century. From that moment on, art became a status symbol and began to be marketed on a larger scale. More precisely, the modern art market is managed by demand and supply, and it is extremely flexible. In fact, demand and supply is controlled by a restricted number of people, such as, auction houses, museums, investors and collectors. It can be considered an “hybrid type” of prediction market, as art is sold and bought for values that are very elastic and subjected by different variables.

Historically speaking, the centre of the art market was, England, France and Italy. This is probably why, in 1744 and 1766 the two most famous auction houses were born in England: Sotheby’s and Christie’s. As far as we are concerned, these two auction houses are still today the two main auction houses that control the secondary market, together with Phillips de Pury, also founded in London in the 18<sup>th</sup> century.

The art market had changed enormously since those times. In fact, nowadays, the centre of the art market is the US together with China that is becoming every year more important. This is why, both Christie’s and Sotheby’s have grown in the market, expanding themselves in those countries.

The structure of the art market today consists of a primary and a secondary market. The primary market is composed by artists, agents, galleries and collectors. In particular, the primary market is when a painting, and its price, enters the market for the first time. In other words, the paintings available for purchase comes directly from the artist’s studio. This means that the primary market regards production and private sale. Also, prices in the primary market are usually lower than in the secondary market, as they are not inflated by the auction houses.<sup>11</sup>

<sup>11</sup> White, J. Mastering the primary art market. *Art Business*. October 23, 2014.

The secondary market is ruled by the auction houses. This means that if a person that bought an art piece in the primary market wants to sell it, it enters the secondary market. More precisely, the secondary market regards resale and collection. As we will see later on in this chapter, the prices of artworks on the secondary market are determined by different factors, such as condition, provenance and the importance of the artist.<sup>12</sup> In fact, auction houses play a determinant role in the formation of selling prices and in the insurance that these transactions are reliable and transparent.

In the 21<sup>st</sup> century, the structure of the art market has seen a deep evolution. As a further matter, since the significant digitalization and globalization the art market has been undergoing, the secondary market had been subjected to several changes. In fact, nowadays, there has been the emergence of the online platforms and the implementation of the blockchain technology in the art trade. On one side, this facilitated the commercial exchange of art across the globe, but, on the other side, it enhanced the need of an international regulation to make sure that there is more transparency and reliability of these transactions.

### 1.1 The value of art: Sotheby's and Christie's parameters

“Nowadays people know the price of everything  
and the value of nothing.”

Oscar Wilde, *The Picture of Dorian Gray* (1890)

In this section, I will analyse the value of art. It is a very complex topic, as there is not a universal objective answer to how to determine the value of art. As we will see there are different parameters utilized to value art. Together with those parameters, there is the concept of irrational behaviour of buyers. People buy art

<sup>12</sup> ArtLand Editors. The primary versus the secondary market. *Art Land*. October 2, 2017

for different reasons, and sometimes it is just because of subjective taste. Other times, it is to “elevate” themselves culturally, or just to be trendy. It is difficult to analyse what goes on in the mind of consumers, but Sotheby’s and Christie’s created some parameters used from experts to objectively evaluate artworks.

Founded in 1744 by Samuel Baker, Sotheby’s is the oldest and largest internationally recognised auction house in the world. Baker started his career by selling important libraries, such as those of the Earls of Sunderland and the Dukes of Devonshire. Importantly, following Napoleon’s death he sold the books he had taken into exile with him in St. Helena. Furthermore, from WWII, Sotheby’s started selling important paintings of all period times. From then on, the expansion started.<sup>13</sup>

Initiated in London, Sotheby’s auction house expanded in New York (1995), Hong Kong (1973), India (1992), France (2002) and China (2012). It is considered today a synonym of innovation, because of its huge advances in technology, as it started a series of online-only sales. Noteworthy, in 2016 Sotheby’s acquired the Mei Moses Art Indices, which brought the auction house to be even more avant-gardist and sophisticated.

The Mei Moses Art Indices, today known as Sotheby’s Mei Moses is a precise analytical tool to evaluate and measure the art market. The Index was developed by two Professors of the New York University in 2000: Jianping Mei and Micheal Moses. It measures the performance of art through the analysis of repeated sales, that means to analyse the sales of the same object in different moments of time to trace the changes in value.

It is not only important for Sotheby to examine trends and value, but mainly to its clients that can have all the information needed when they decide to buy an art piece. “The indices comprise a constantly updated database of 45,000 repeat sales of objects in eight collecting categories, approximately 4,000 of which change

<sup>13</sup> Sotheby’s Official website

hands each year. The methodology enables Sotheby's to compare the investment performance of Art against various asset classes, analyse its performance against myriad benchmarks and competitors and measure the impact of macro-economic and societal forces on the art market.”<sup>14</sup>

Despite that, many critics raised the issue that analysing only repeated sales is limited to a sample that is too small and not representative of the complexity of the market. In fact, private sales and individual sales are missing in the analysis. Furthermore, the index is based only on sales of Christie's and Sotheby's, not considering the rest.<sup>15</sup>

Sotheby's has 10 criteria in evaluating art: Authenticity, Condition, Rarity, Provenance, Historical Importance, Size, Fashion, Subject Matter, Medium and Quality.<sup>16</sup>

Authenticity:

“Authenticity is the soul of the object,” says Chinese works of art expert Nicolas Chow.

Authenticity is the first step when valuating art. The first step valuers do is to make sure that the art piece is authentic and responds to the artist route. How can they be sure that an art piece is authentic or not?

First of all, the “catalogue raisonné” is extremely important in the procedure of recognition of authenticity. The catalogue raisonné is a descriptive catalogue of works of art with explanations and scholarly comments. Experts consider the catalogue as their “best friends” as inside there is all the information needed. A great example is the Pablo Picasso's catalogue raisonné. It is an extensive catalogue with thousands and thousands of works, and everything reported in the catalogue is considered authentic.

<sup>14</sup> *Sotheby's*. Sotheby's acquires the Mei Moses Art Indices. October 26, 2016

<sup>15</sup> Barrillà, S. A. Sotheby's acquista Mei Moses. *Il Sole 24 Ore*. 30 ottobre 2016

<sup>16</sup> *Sotheby's*. The Value of Art, Episode 1, Authenticity.

available at: <https://www.sothebys.com/en/series/the-value-of-art>

Obviously, not everything might be in the catalogue, as art can be very ancient, and many master pieces might have been lost. In this case, if there is no documentary evidence, experts will have to build a scholarly consensus, that means a “connoisseurship”. A connoisseurship is an expert knowledge or training, especially in fine arts. In this case, the hard work really steps in. In fact, the experts, to understand if an art piece is authentic or not, have to analyse different characteristics of the painting, such as the signature and the way the painter uses its hand. For example, if the artist uses specific highlight on the cheeks, or paints the ears in a particular way and so on.

Technology had come so far that there are a lot of tests that can tell you everything of the art piece, such as where it comes from, if the paper is appropriate for the period and many other features. Very interestingly, experts sometimes also make the “smell test” to understand the historical period and the geographical zone. For example, works that were used in temples should smell of incense. People might think it is easy to create fake art and make it evaluate by experts as real art pieces. In reality, there are a huge amount of details that can tell you even the day in which the artwork was created.

#### Condition:

The painting might be cracking on the surface of the canvas, but is this a signature feature of the artist or it is only in bad condition? Only experts can understand this fine line and evaluate an artwork. When assigning prices to art, jewellery, wine, watches and more, Sotheby’s pays a lot of attention also to the condition. “Condition is the stage of preservation of the object”, says Nicolas Chow. It is the physical life of the work of art reflected in the present. To become a specialist, it is extremely important to know how to determine the condition of an art piece, because experts need to accurately represent the conditions to a potential buyer.

Condition impacts value tremendously. As Selby Kiffer, international senior book specialist at Sotheby’s affirms, the first copy of the “Great Gatsby” by F. Scott

Fitzgerald if in a great condition can value \$ 400.000, while if you take the book cover and throw it away, the same book will value maybe \$ 10.000. Moreover, as Julian Dawes, co-head of day sales, impressionist & modern art, affirms, when you are looking at an impressionist painting, most of the times there is something wrong, and so it almost becomes as something is not wrong with it, it just has condition issues.<sup>17</sup>

As far as we are concerned, we have been through two world wars and as a matter of fact there are many art pieces not in the right condition, but we should also consider the third criteria to evaluate the art piece: rarity.

Rarity:

“It is rarity that bestows the artistic guarantee”.

Marcel Duchamp<sup>18</sup>

“Good things are so scarce nowadays”, says Mee-Seen Long, vice chairman Chinese art.<sup>19</sup> For example, the chicken cup is an extremely rare and iconic art piece in the Chinese art. Sotheby’s sold one in the 1900 which was not in perfect condition, but which was unique, and at a record price. When rarity is combined to demand, prices are very high. Rarity is not necessarily interdependent with beauty and value. In fact, an art piece might be rare because only few have been created but might also be not valuable.

Provenance:

“Who wore it, when did she wear it, how did she wear it, how often did she wear it. This is what we live for, to get the great stories”, says Nicholas Chow. An art

<sup>17</sup> *Sotheby’s*. The Value of Art, Episode 2, Condition.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-2-condition?locale=en>

<sup>18</sup> Moulin, R. *The Genesis of the Rarity of Art*, vol. 3, 2011, pp. 441–472.

<sup>19</sup> *Sotheby’s*. The Value of Art, Episode 3, Rarity.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-3-rarity?locale=en>

piece that belonged to an important person, as an emperor, an actress or a politician, has a huge increase in value. Not only the artist is interesting and valuable, but also the story of the ownership can be very fascinating for the buyer, as you add personality to the object. A striking example is the Rothko painting owned by David Rockefeller in the 1960s. The expected price by Sotheby's was around 40 million dollars, and it eventually achieved 72 million dollars because of the story behind it and because it had been hanging in the office of the Rockefeller centre.<sup>20</sup>

#### Historical Importance:

Every artwork had been created in specific circumstances and historical periods. Just think about "Guernica" of Pablo Picasso. That painting was created in 1937 and it has important historical relevance, it represents the context of WWII. It was created in response to the bombing of Guernica, in northern Spain, by Nazi Germany and Italian warplanes. It has a huge symbolic meaning and an enormous value. A further example can be the "Declaration of Independence of the United States of America" which marked an extremely important passage in history.

Also, regarding photography, they are not only art, but also historical documents. They represent a moment that you will never be captured again, that probably changed history. <sup>21</sup>

<sup>20</sup> *Sotheby's*. The Value of Art, Episode 4, Condition.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-2-condition?locale=en>

<sup>21</sup> *Sotheby's*. The Value of Art, Episode 5, Historical Importance.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-5-historical-importance?locale=en>

### Size:

Size has different relevance for different categories. Some art pieces are more valuable if they are smaller, and other works the opposite way. It is really interconnected with the criteria analysed above. That means, that it really depends whether the artist usually creates big art works or small ones.

### Fashion:

“A great Andy Warhol painting from 1963 is like a Chanel suit – it never goes out of style,” explains contemporary art expert Meredith Kirk. A variable that is very important in art, is fashion. Art is a trend that changes in time. There is a period in which colourful modern art is what everyone wants, and there is a period in which classic or medieval art is the most wanted.

It is obviously a very dangerous thing for a young artist career. As he or she might have a peek in fashion and sell its works at a high price, and then be forgotten. Prices shift very easily, and people try to bet on “what is coming next to be trendy”.<sup>22</sup>

### Subject Matter:

Nudes, landscapes, Catholic art, red colour, or dragon in the Chinese art world, are subjects that will never not be loved. Contemporary art completely challenged those subjects by creating new ones that might sometimes be difficult to understand. Complex compositions are the ones that usually sells the best. <sup>23</sup>

### Medium:

Medium is the first thing that specialists look at to understand the value of an art piece. Medium is the way an artist created its artwork. Artists can use a huge amount of different techniques and objects to create something, and it is an

<sup>22</sup> *Sotheby's*. The Value of Art, Episode 7, Fashion.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-7-fashion?locale=en>

<sup>23</sup> *Sotheby's*. The Value of Art, Episode 8, Subject Matter.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-8-subject-matter?locale=en>



evolving and innovative process. It can be a normal oil on canvas, that is the most popular, or stones, or different metals. For example, Andy Warhol is one of the most experimental artists, that painted on canvas, drew, created sculptures and made so that his portfolio is for every kind of taste. It is true that oil on canvas is the most popular and wanted technique, but there are some exceptions. For example, Degas is famous for how he used the pastel in his paintings. For this reason, his works made with pastels are much more valuable.<sup>24</sup>

#### Quality:

The last characteristic that specialists analyse when valuating an art piece is quality. Quality is a special mix of craftsmanship, technical innovation and “timeless” works. As Ian Kelleher, car specialist, affirms “Quality will last a lifetime” and this is what makes an artwork really precious. It is a magical element that cannot be repeated by anyone else. As Julian Dawes, co-head of day sales, impressionist & modern art, states: “Quality is the most subjective of all criteria”.

### 1.2 The problem of information asymmetry

One of the main features of the art market is information asymmetry between buyers and sellers. Akerlof (1970) analysed the phenomenon of asymmetrical information where seller of assets (such as art works) knew more about the asset than did buyers. In this case, poor quality assets might have a price that is not fair, making buyers do a “bad investment”. Differently, some art owners might know very little about the value of their artwork, undervaluing the asset, so that the buyer will buy it at a non-realistic price.<sup>25</sup>

This information asymmetry is typical of the contemporary art market, where the product traded is configured as a trust good, whose quality is not easy to be

<sup>24</sup> *Sotheby's*. The Value of Art, Episode 9, Medium.

Available at: <https://www.sothebys.com/en/videos/the-value-of-art-episode-9-medium?locale=en>

<sup>25</sup> Coffman, B. R. Art Investment and Asymmetrical Information. *Journal of Cultural Economics*. Vol 15 N 2, pp. 83-94, 1991

understood by the buyer neither before nor after purchase because of its lack of technical and cultural knowledge, which is available only to a specialist (for instance, a critic).<sup>26</sup>

Economic theory, thanks to Joseph Stiglitz (1987), came to the general conclusion that the law of demand has no rational foundation when buyers evaluate the quality of a good from its price. What happens is that, a potential collector, due to lack of information, estimates the quality of the work of art on the basis of its price. That is to say, the higher the price, the higher the quality perceived of the artwork.<sup>27</sup>

As we have deeply discussed, valuation of art is very complicated. For this reason, the buyer might not have all the information needed to understand if he or she is making a right investment.

Also, information asymmetry lies in the provenance and ownership of the artwork. In fact, because of the right of secrecy of private owners, many times buyers do not know where the artwork comes from, and at what price it was sold previously. “There are perfectly legitimate reasons for consignors of art wanting to protect their privacy, generally for reasons of security,” says art lawyer Megan Noh.<sup>28</sup> “Dealers, galleries and private sellers – the primary market for art – hold information more tightly. Unlike auction houses, they generally do not reveal what pieces they sell or at what price. Auction houses and private sellers rarely disclose the identity of buyers or sellers. This lack of information often makes it harder for buyers to attach any concrete value to the artworks being sold. Economists who have studied the art market refer to this sort of secrecy as “information asymmetry,” which they say keeps buyers from knowing when they are paying inflated prices”, affirms Lawrence M. Kaye and Howard N. Spiegler, partners of Art Law Group.<sup>29</sup>

<sup>26</sup> Zorlioni, A., *The Economics of Contemporary Art-Markets, Strategies, and Stardom*. Springer, 2013.

<sup>27</sup> *ibidem*

<sup>28</sup> Adam. How transparent is the art market? *The Financial Times*, 28 April 2017

<sup>29</sup> Kaye, L.M, Spiegler, H.N. *The Art Market: Would More Regulation Spoil All the Fun?* October 2016 – *Art & Advocacy, Volume 23*

Information asymmetry is one of the main causes of non-transparency and manipulation of the market.

The best example that one can think of is the fact that you might buy an artwork that had been stolen or acquired under dubious circumstances, such as money-laundering. Also, phone bidding during an auction creates even more secrecy. In fact, many buyers at auction sales cannot be identified because they bid through the phone. The interesting part is that many phone bidders are physically present at the auction, using this process to guard their identities. This anonymity permits bidders to affect auction prices and manipulate the art market without being identified.

“Secrecy in a market prevents the market mechanisms from working as they should,” said William Baumol, a professor of economics at New York University. “The loans and guarantees and overall secrecy are a form of manipulation by the auction houses to increase their profits.” To make it clearer, “secrecy keeps you from knowing you’re paying too much,” said Rachel Campbell, an economics professor at the University of Maastricht (Holland) and an advisor to London’s Fine Art Fund, the premier hedge fund in the art investment field.<sup>30</sup>

This secrecy that characterizes the art market raises a lot of questions. Robert E. Litan, a co-author of the book *Good Capitalism, Bad Capitalism* (Yale University Press, 2007), has explained it well when he said that the secrecy is a status thing among collectors. “I can’t think of any other field in which the lack of a price tag is acceptable, but this is a cultural thing among art buyers.”<sup>31</sup> In fact, the concept of lack of price exposure creates several debates, because the buyer is not capable to notice if the price has been inflated or not.

As we have seen, valuation of art is a complex process and there is still a big issue of information asymmetry. Therefore, I will now analyse the actual national and

<sup>30</sup> Grant, D. Secrets of the (High-End) Art Market. *Huffington Post*, Dec. 14, 2010, [http://www.huffingtonpost.com/daniel-grant/secrets-of-the-highend-ar\\_b\\_796356.html](http://www.huffingtonpost.com/daniel-grant/secrets-of-the-highend-ar_b_796356.html)

<sup>31</sup> Nastasijevic, A. Transparency in the Art Market. *WideWalls*, May 12, 2014

international regulation, with a specific focus of money laundering, as the art market is particularly vulnerable to it.

### 1.3 Regulating the art market: self- and hetero regulation (EU law and US law)

At first glance, the art market seems too opaque and not regulated, and in some sense, it is right. Despite that, the art market, as we will see below, is not unregulated. It is regulated both at an international and national level. Mainly, ethic-legal provisions apply to specific aspects of the art trade.

#### 1.3.1 National and international regulation

Regarding the international level, The Hague Convention of November 14, 1970 held in Paris, established the means of preventing and prohibiting the illicit import, export and transfer of ownership of cultural property. As article 5 of the UNESCO states:

“To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;

(b) establishing and keeping up to date, on the basis of a national inventory of

protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;

(c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . . ) required to ensure the preservation and presentation of cultural property;

(d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research;

(e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;

(f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;

(g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.”<sup>32</sup>

Moreover, another international instrument was created by the European Commission Directive 93/7 on the return of cultural objects unlawfully removed

<sup>32</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, *United Nations Educational, Scientific, and Cultural Organization*.

from the territory of a Member State (15 March 1993). This directive had been amended with the European Commission Directive 2014/60 to implement the concept of Internal Market Information System (IMI). In fact, as point 11 of the legislative procedure states:

“(11) The administrative cooperation between Member States needs to be increased so that this Directive can be applied more effectively and uniformly. Therefore, the central authorities should be required to cooperate efficiently with each other and to exchange information relating to unlawfully removed cultural objects through the use of the Internal Market Information System (IMI) provided for by Regulation (EU) No 1024/2012 of the European Parliament and of the Council (6). In order to improve the implementation of this Directive, a module of the IMI system specifically customised for cultural objects should be established. It is also desirable for other competent authorities of the Member States to use the same system, where appropriate.”<sup>33</sup>

Regarding the national regulations, most countries has its own legislation to protect cultural heritage and directives that regulates adequately the art market are scarce. For example, in Italy, there is the Legislative Directive No 42/2004 that regards the Code of Cultural Property and the Landscape. In particular, **article 87** concerns the illicit export of cultural goods:

“La restituzione dei beni culturali indicati nell'annesso alla Convenzione dell'UNIDROIT sul ritorno internazionale dei beni culturali rubati o illecitamente

<sup>33</sup> *European Commission*. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast).

esportati è disciplinata dalle disposizioni della Convenzione medesima e dalle relative norme di ratifica ed esecuzione.”<sup>34</sup>

Moreover, what I found interesting of the Italian legislation is the concept of “Diritto di Seguito”, that is to say, “the resale right”. The "resale right" (droit de suite), is the right of the author of works of figurative arts and manuscripts to receive a percentage of the selling price of the originals of his works on the occasion of sales subsequent to the first.<sup>35</sup> With the Law issued on March 1, 2002, n. 39 "Provisions for the fulfillment of obligations deriving from Italy's membership of the European Community-EU Law 2001", the Government had been delegated to issue the decree implementing Directive 2001/84 / EC on "resale right".

This happened with the Legislative Decree n.118 dated 13/2/2006 "Implementation of directive 2001/84 / CE, concerning the right of the author of a work of art on subsequent sales of the original" published in the G.U. general series n. 71 of 25/3/2006 and in force since 9/4/2006.

The fee is paid by the seller and is due for all sales subsequent to the first to which a professional in the art market participates as a seller, buyer or intermediary. Transactions of galleries, auction houses or art dealers will therefore be subject to it, while direct sales between private individuals will be excluded. The amount of the compensation will be in percentage, identified by brackets, on what was obtained for each sale.<sup>36</sup>

<sup>34</sup> *Gazzetta Ufficiale della Repubblica Italiana*. DECRETO LEGISLATIVO 22 gennaio 2004, n. 42

Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137. (GU Serie Generale n.45 del 24-02-2004 - Suppl. Ordinario n. 28)

<sup>35</sup> *Siae*. Diritto di Seguito.

Available at: <https://www.siae.it/it/autori-ed-editori/arti-visive-e-letteratura/diritto-di-seguito>

<sup>36</sup> *Ibidem*

The percentage due to the author is due only if the sale price is not less than € 3,000.00, and is calculated based on the sale price of the work (net of VAT) and is determined as follows<sup>37</sup>:

4% for the part of the sale price up to € 50,000.00;

3% for the part of the sale price between € 50,000.01 and € 200,000.00;

1% for the part of the sale price between € 200,000.01 and € 350,000.00;

0.5% for the part of the sale price between € 350,000.01 and € 500,000.00;

0.25% for the part of the sale price higher than € 500,000.00.

However, the total amount of compensation cannot exceed € 12,500.00. Also, this law does not apply to artists who deceased more than seventy years ago. After the death of the author, the resale right belongs to the heirs, according to the norms of the civil code. In the absence of successors within the sixth grade, the right is devolved to the National Social Security and Assistance Body for painters and sculptors, musicians, writers and dramatic authors (ENAP) for their own institutional purposes. This law safeguards the property rights of the artist and its heirs.

As we can imagine, this right raised many controversies. Mainly, the dilemma regards the question whether galleries, that operates the primary market, should pay the resale right. Still, there is not a clear answer from the SIAE (Società Italiana degli Autori ed Editori).

The same galleries, with the assistance of Avv. Silvia Stabile, together with the National Association of Modern and Contemporary Art Galleries (ANGAMC), have also set up a working table with the SIAE, the Permanent Advisory Committee for Copyright of the MiBACT (and its President Avv. Paolo Marzano)

<sup>37</sup> Orsi, F. Diritto di seguito e mercato dell'arte: conosciamo bene questi argomenti? *La mia finanza*, 25 Settembre 2018.

Available at: <https://www.lamiafinanza.it/arte/art-economics/56587-diritto-di-seguito-e-mercato-dell-arte-conosciamo-bene-questi-argomenti>



and the Revenue Agency which should, hopefully, shortly lead to the adoption of guidelines and a vademecum for tunnels with regard to the correct application of the law on resale rights.<sup>38</sup> Finally, also this is an example of the lack of correct guidelines that enables the art market to have a clear and transparent behavior.

It is important to analyse the current international and national legislation of the art market and understand its problems, so to understand where this lack of transparency comes from. As we can notice, the regulation of the art market is not adequate. Many collectors affirm that more regulation and transparency will make sure that the art market has a boost, as consumers will feel more protected.<sup>39</sup>

One of the main problems of the lack of regulation is the lack of records of ownership, as FBI's art and antiquities special agent Meredith Savona states. On one side, this phenomenon is due to protect the owner's privacy, and for reasons of security. On the other side, the buyer should have the right to know the ownership of the art piece, to have more transparency and safety in the transaction. Art market secrecy is definitely an issue, especially because it might lead to criminal activities such as money laundering.

### 1.3.2 The concept of Money laundering

One of the main problems of not having an adequate regulation of the art market is the issue of money laundering. Money laundering is the process of making large amounts of money generated by a criminal activity.<sup>40</sup> The subjectivity of art and

<sup>38</sup> Ibidem

<sup>39</sup> vedi nota 29

<sup>40</sup> Chen, J. "Money laundering", *Investopedia*, June 25, 2019.

Available at: <https://www.investopedia.com/terms/m/moneylaundering.asp>

the lack of a standardized pricing methodology makes its value somewhat speculative.<sup>41</sup>

As we saw, the US is one of the markets that expanded more rapidly. For this reason, it is important to discuss what kind of money laundering legislation they have (if any) and explain why high prices and new investment methods makes the art market sensitive to money laundering.

In the US, the two main pieces of legislation that act against money laundering are the MLCA (Money Laundering Control Act) and the BSA (Bank Secrecy Act of 1970).<sup>42</sup> However, there is no specific legislation that targets money laundering in the art market. In 2018, Congressman Luke Messer introduced an amendment to the BSA, that is the Illicit Art Act, that would add “dealers in art or antiques” to the list of financial institutions of the BSA.<sup>43</sup> As the act stated, in addition to reporting cash transactions over \$10,000, professional art intermediaries would also be responsible for at a minimum “(i) the development of internal policies, procedures and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test [programs].”<sup>44</sup>

As Congressman Messer stated, this act will mainly target those who purchase art works anonymously, so to prevent money laundering and criminal organizations. As we could imagine, the art world pushed back this amendment for several reasons. Mainly, dealers were concerned about the privacy of their clients and were worried about the costs of compliance with the BSA. Also, as Dagirmanjian states in her report of 2019 for the Fordham Intellectual Property, Media and Entertainment Law Journal, “pushback from the art market reflects the sentiment

<sup>41</sup> Dagirmanjian, A, “Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States”, Fordham Intellectual Property, Media and Entertainment Law Journal, Volume 29, Number 2, Article 7, 2019.

<sup>42</sup> *ibidem*

<sup>43</sup> *ibidem*

<sup>44</sup> *ibidem*

that art's inherent value and speculative pricing should exempt it from regulation as a commodity.”<sup>45</sup>

Differently from the US, the European Union introduced several legislations to prevent money laundering in the art world. On April 2018, as I already stated in the introduction, EU Directive 2018/1673 was established. This directive is an important step towards a more transparent market regulation. As the first point of the directive states:

*“(1) Money laundering and the related financing of terrorism and organised crime remain significant problems at Union level, thus damaging the integrity, stability and reputation of the financial sector and threatening the internal market and the internal security of the Union. In order to tackle those problems and to complement and reinforce the application of Directive (EU) 2015/849 of the European Parliament and of the Council (2), this Directive aims to combat money laundering by means of criminal law, enabling more efficient and swifter cross-border cooperation between competent authorities.”<sup>46</sup>*

Moreover, overviewing the UK regulation, we can see that they also established a law against money-laundering in 2017, ten years after Italy's Decree No 231/2007. In fact, in 2017 UK implemented the EU Fourth Money Laundering Directive and might apply it to business art too.

<sup>45</sup> Ibidem

<sup>46</sup> *Official Journal of the European Union*. DIRECTIVE (EU) 2018/1673 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 23 October 2018, on combating money laundering by criminal law.

### 1.3.3 Self-regulation

Everyone agrees that there should be a more regulated market to ensure economic growth and transparency, but how?

Some critics observed that self-regulation is a good idea to better serve the professionalism and standardization of the art market.<sup>47</sup> Self-regulation means no state intervention, and a process by which an organization adheres to its own legal, ethical and safety standards with no intervention from “outside”, such as the government. This concept of self-regulation was initiated in the US in the 1920s and in Europe became very famous among press organizations, to ensure freedom of speech.<sup>48</sup> The main problem is that self-regulation is not binding, and in some sense, is not a type of regulation at all.

Noteworthy, is the proposal of an international self-regulation initiated in 2012, created by the Basel Institute of Governance, called the Basel Art Trade Guideline. This guideline was created after the Art Trade Initiative Conference of 2009 held in Basel. In particular, Dr Thomas Christ and Claudia von Selle discussed “the role of the art market as a ‘refuge de valeur’ which may attract dubious players as well as art objects of doubtful origin and value.”<sup>49</sup> Moreover, they brought to light the fact that the art market players are very diverse with different ethical standards. Also, they operate in a market with high fluctuations of prices, that usually have inexplicable changes in value, and a greater risk of exposure. From these discussions, they understood there was a need of collective standards to ensure more transparency.

The purpose of the Basel Art Trade Guidelines (BAT) is to make the art market more efficient, and to safeguard its integrity and reputation.<sup>50</sup> These Guidelines

<sup>47</sup> Kaplan, “Should the Art Market Be More Heavily Regulated”, *Artsy*, 23 May 2016, available at: <https://www.artsy.net/article/artsy-editorial-should-the-art-market-be-more-heavily-regulated>

<sup>48</sup> Hans J. Kleinsteuber. *Self-regulation, Co-regulation, State-regulation*. available at: <https://www.osce.org/fom/13844?download=true>

<sup>49</sup> CHRIST, VON SELLE, *Basel Art Trade Guidelines*. Intermediary Report of sel-regulation initiative, Basel, 2012

Available at: [https://www.obstraffic.museum/sites/default/files/ressources/files/Basel\\_Art\\_Trade\\_Guidelines.pdf](https://www.obstraffic.museum/sites/default/files/ressources/files/Basel_Art_Trade_Guidelines.pdf)

<sup>50</sup> *ibidem*

apply to “all 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 ensure more transparency, the art market operators should “ensure full identification and documentation of the seller and the buyer (‘know your customers’ rule)” (Art. C.3.1). Moreover, the art operator should “invest sufficient time to research reasonable provenance and authenticity before finalising selling procedures.” (Art. C.4.2.2). To make sure there is no conflict of interest “An expert’s opinion is invalid if the professional independence of the expert is in doubt” (Art. C.4.2.3). The further articles regard many other important issues, such as: doubtful provenance, cash payments and after-sale responsibility. Finally, the implementation of the BAT Guidelines involves training programs, monitoring mechanisms and an advisory board.

As we already mentioned, self-regulation is not binding, and it can be hard to implement it. For this reason, it is not considered the best option to regulate the art market. On the further chapters, we will analyse different options, such as co-regulation, government intervention and competition law. In fact, competition law, could play an important role in preventing market manipulation.

## **Chapter 2: Art market's lack of transparency major concern for investors: the rise of the secondary market**

The art market is everyday more dynamic, efficient, and accessible. Despite that, as we have deeply analysed it still is not transparent enough. Understanding the market's dynamics is essential to have the knowledge of where, why and when this is happening.

For this reason, every year, Art Basel, UBS and Deloitte analyse and report the trend of this market and how this economy is changing. More precisely, the art market today requires increasingly precise, analytical and management tools to make up for the lack of standards and uniform regulations.

As the director of Art Basel, Marc Spiegler stated in 2018, "this year's report includes its first-ever stand-alone chapter on exhibitions and art fairs, alongside in-depth research on dealers, auctions, online developments, global wealth dynamics and the industry's economic impact."<sup>51</sup>

There are many variables that over the years influenced the art market deeply, such as technological change, with the rise of the internet and the online platforms. As far as we are concerned, this economy innovated and evolved more slowly than other industries. It is a time of change, extremely challenging, but at the same time a light of hope for a more transparent and regulated market.

Adriano Picinati di Torcello, global art and finance coordinator at Deloitte in 2017 stated that "the art market can absorb shocks faster than previously mainly because of globalization."<sup>52</sup> In fact, after the global crisis of 2008 it took only 18 months for the art market to recover. From 2000 to 2008 the art market started booming, and art became for many a pure investment. Moreover, at the question on whether the art market is changing and could become more regulated, Adriano Picinati di

<sup>51</sup> Spielger, M. Art Basel and UBS Report, 2018

<sup>52</sup> Una Meistere. The art market is increasing in transparency. *Deloitte*, 2017

available at: <https://www2.deloitte.com/ee/en/pages/finance/articles/art-market-increasing-transparency.html>

Torcello, answered: *“the increasing interest in art as an asset is definitely one of the main drivers. If you compare it with any other industries or business sectors, the art market was very small 20 years ago – a few billions, and in the hands of a happy few. In any industry, as you begin to develop and become more international, more global, more transactional, you need to become much more sophisticated, more transparent. Any sector that goes into different development phases has to adapt to size; the market itself has to adapt. Of course, more experienced collectors know what they are dealing with...they are used to the market, they know how to be advised, but there is a whole group of new collectors who are interested in the art market – it’s appealing, it’s cool, it’s trendy...”*<sup>53</sup>

## 2.1 Overview of art global sales and market share (Art Basel Report analysis and Deloitte report analysis)

In 2017 the global art market had high-performance following an exponential growth. In the last year there had been an uplift of 12% in sales in the global art market in comparison with 2016. Following two years of declining sales, it currently reached \$63.7 billion of sales, also due to the historic record in the auction sector of the painting of Leonardo da Vinci sold for \$450 million by Christie’s and the painting of Jean Michel Basquiat sold by Sotheby’s for \$110.5 million.

Growth between 2007-2017 had been negative and slow mainly due to the big financial crisis of 2009, but the art market had a fast recovery especially thanks to the big economic boost given by the Chinese art market, that is still today the leader together with the US.

<sup>53</sup> The art market is increasing in transparency. *Deloitte*, 2017, available at: <https://www2.deloitte.com/ee/en/pages/finance/articles/art-market-increasing-transparency.html>

In 2017, the volume of sales, that's to say the number of transactions, reached 39 million, that is the highest level since 2008.<sup>54</sup>

**Figure 2:** The Global Art Market, Value and Volume of Transactions  
Source: The Art Basel and UBS Report of 2018

**Table 1.1 | The Global Art Market: Value and Volume of Transactions**

Year	Value (\$m)	Volume (m)
2007	\$65,875	49.8
2008	\$62,020	43.7
2009	\$39,511	31.0
2010	\$57,025	35.1
2011	\$64,550	36.8
2012	\$56,698	35.5
2013	\$63,287	36.5
2014	\$68,237	38.8
2015	\$63,751	38.1
2016	\$56,948	36.1
2017	\$63,739	39.0
Growth 2016-2017	11.9%	8.0%
Growth 2007-2017	-3.2%	-21.7%
Growth 2009-2017	61.3%	25.8%

© Arts Economics (2018)

It is not difficult to imagine that the three countries with the largest market shares are the US, China and the UK, and these three countries accounted for 83% of total sales by values in 2017.<sup>55</sup> The US in particular is the world leader, with 42% of world sales by value mainly driven by the sales of Contemporary and Modern Art sector. Moreover, China is the leader in the Asian market with 21% of market share, overtaking UK's second place in the global scene making the UK slip in third place (UK market share is currently 20%), but still significantly less than the EU market that has 33%.

Overall, the UK market since 2009 had advanced by 45%, more than twice than the EU market, but significantly less than the US market (120% increase) and Chinese market (83% increase).

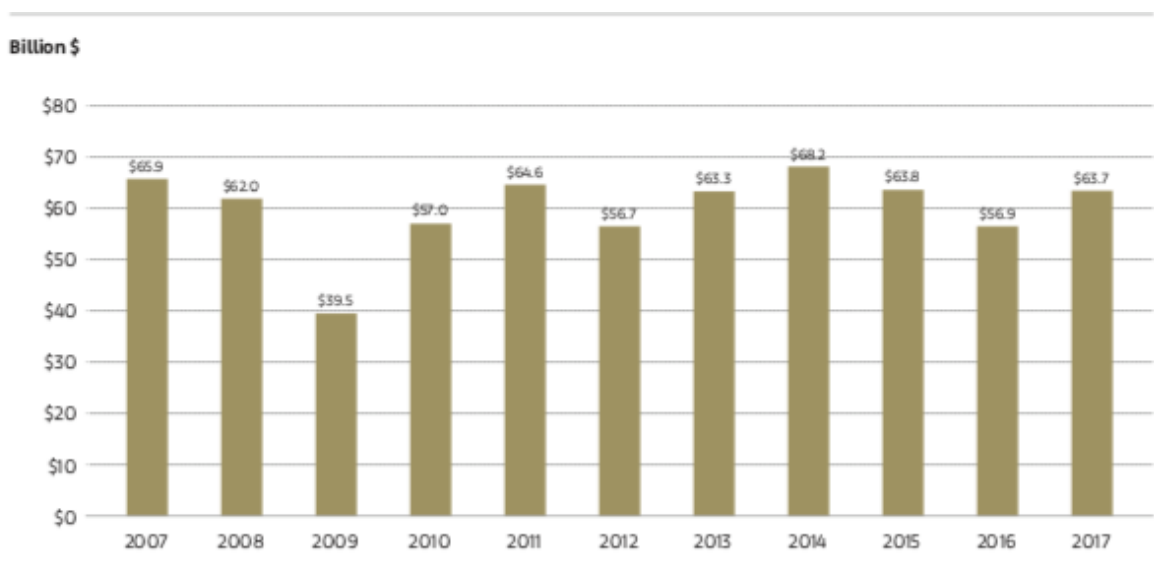
<sup>54</sup> Art Basel and UBS Report. The Art Market, 2018

<sup>55</sup> Ibidem



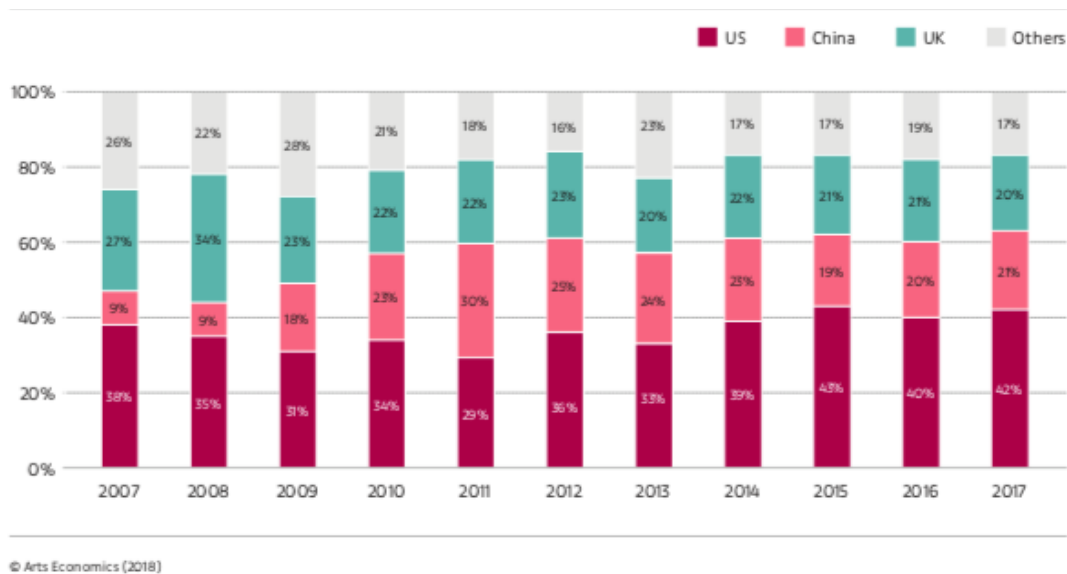
Interestingly, the Asian market is increasing every day, with a dynamic and vibrant art scene and a strong economy, that will make us believe that it might become a leader in the future. Therefore, the Chinese art market had a significant increase in sales of 14% in the last year, with transaction values reaching \$13.2 billion mainly due to auction sales. In fact, many new galleries are opening in Asia because of its radiant future. For example, David Zwirner, the famous contemporary art gallery in New York and London, opened in Hong Kong in a building of 11 floors. Moreover, new tenants include Pace, Tang Contemporary Art, Pearl Lam Galleries and Seoul Auctions.

**Figure 3:** Sales in the Global Art Market 2007-2017  
Source: The Art Basel and UBS Report of 2018



© Arts Economics (2018)

**Figure 4:** Global Market Share of the US, UK and China 2007-2017  
Source: The Art Basel and UBS Report of 2018



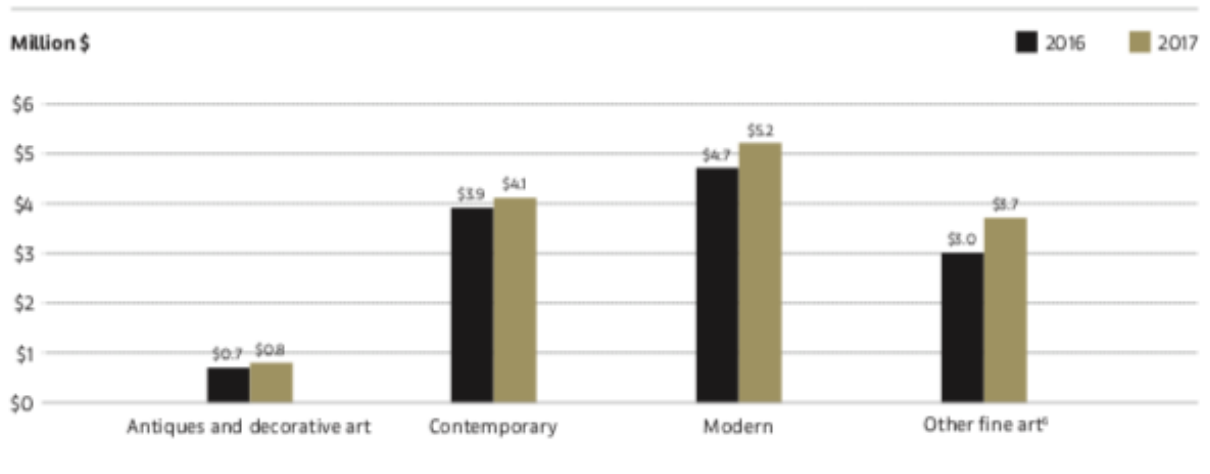
With regards to dealer sales, they are also growing 4% year-on-year, reaching an estimated \$33.7 billion. Differently from the auction houses, information on the dealer sales are very difficult to reach as there is no public source of data.<sup>56</sup> In fact, it is majorly composed of private sales, unknown buyers and dominated by small firms. For this reason, annually, there are surveys conducted by Arts Economics to make market research and collect all the data needed to have a more transparent overlook of the market. The last survey conducted by Arts Economics is the one of 2017 to 6,500 dealers from all around the world, that brought to light many interesting insights.

The respondents of the survey were divided in dealers that had turnover levels below \$500.000 and larger dealers that were in between of \$1 million and \$10

<sup>56</sup> Ibidem

million.<sup>57</sup> Also, the survey covered dealers in different sectors, but what emerged is the fact that the majority of the dealers sold Contemporary art and Modern art.

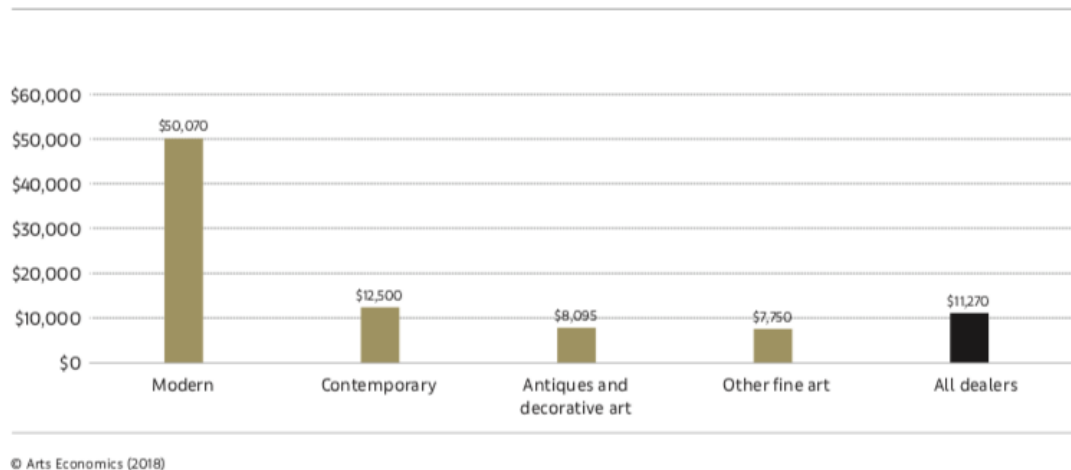
**Figure 5:** Average Sales by Sector 2016 and 2017  
Source: The Art Basel and UBS Report of 2018



When in the survey dealers are asked what they think about the future, they are generally very optimistic. In particular, the field where they see a major growth is the Contemporary Art sector. Also, China, the US and Europe in general were very optimistic in the future sales in their national markets. Despite that, there is some pessimism in large markets, such as, Germany, UK and France, that are considered by dealers to have declining sales of 20-25% in the next five years. The Modern art sector is the one that dealers report to have the highest prices, while decorative art and antiques are the one with the lowest average prices. Market prices are also divided geographically, with the highest prices in the US and some of the lowest in Europe.

<sup>57</sup> Ibidem

**Figure 6:** Median Price by Sector in 2017  
 Source: The Art Basel and UBS Report of 2018



The critical problems that dealers have are several. First of all, there are big entry barriers for new dealers and also for dealers who try to expand. Also, they have difficulties in accessing financing and credit, as there are long periods of volatile cash flows and running costs.<sup>58</sup> For this reason, the majority of dealers are self-financing themselves and organize their businesses around selling on consignment. In fact, 58% of sales in the dealer sector come from works on consignment.<sup>59</sup> To make it clearer, as the definition of Investopedia (2019) states, selling on consignment is “an arrangement in which goods are left in the possession of an authorized third party to sell. Typically, the consignor receives a percentage of the revenue from the sale (sometimes a very large percentage) in the form of a commission.”<sup>60</sup> This model just stated is very popular in the primary market and it is also becoming very used in the secondary one. As a matter of fact, dealers are starting to focus on reducing costs by focusing on fairs with solid returns. Dealers are starting to change their strategies to better survive in this complicated and “exclusive” market. They are boosting collaborations, enhancing

<sup>58</sup> Art Basel and UBS Report. “The Art Market”. Pg 58-59, 2018

<sup>59</sup> Art Basel and UBS Report. “The Art Market”. Pg 62, 2018

<sup>60</sup> available on <https://www.investopedia.com/terms/c/consignment.asp>

a better flexibility to adapt to the market changes and doing strong vertical integration. Dealers are using promotion and marketing that brings the highest returns and reducing costs in high-end entertaining in favour of a more rigorous academic publishing.<sup>61</sup>

Problems of lack of regulation in the art market can be seen also in the collaboration between dealers and galleries. There is the issue that there are no precise contracts between galleries and artists to ensure exclusivity and costs sharing. In fact, the concept of contracts in this field is still a matter of debate. For example, promoting new artists can be very costly. If a gallery invests in a new artist and spend a lot of money on him/her, the gallery wants to have the exclusivity of that artist. For this reason, if the artist is presented by more than one gallery the problem of “free-rider” might arise, so that some galleries may reduce the costs of promotion making advantage of the promotion made by other galleries. Also, when the relation between the artist and the gallery ends, these costs become sunk costs, that’s to say costs that cannot be recovered, and this is very problematic for small galleries.

As Art Basel stated in its 2018 Report, “solutions could be based around both defining and regulating the trading and ownership rights of galleries for the artists they represent, and structuring contracts to include the definition of what a gallery actually “owns” when they represent an artist and how they can be compensated for having these artists poached, be it an immediate financial obligation or a share of sales for a defined period.”<sup>62</sup> Obviously, it is not easy, as monitoring the party to ensure that they comply to the contract is extremely difficult and also litigation for breaking a contract would be expensive and potentially damaging for the reputation of both the gallery and the artist.

Regarding the auction sector, as we already stated, it is highly concentrated. The two main auction houses, Christie’s and Sotheby’s showed strong growth in 2017 and still dominates the market. In fact, based on their total sales the two houses

<sup>61</sup> Art Basel and UBS Report. “The Art Market”. Pg 94-95, 2018

<sup>62</sup> Art Basel and UBS Report. “The Art Market”. Pg 97, 2018

accounted 40% of the auction market. From 2016 Christie's had an uplift of 21% with total sales of \$6.6 billion, mainly thanks to the American market.<sup>63</sup> On the other side, Sotheby's total sales reached \$5.5 billion having a huge boost mainly in private sales (\$745 million, an uplift of 28% from 2016).<sup>64</sup>

## 2.2 Overview of how the European and the US political situation impacts the art market

Regarding the situation in Europe, the main countries that are leaders in the art sector and are increasing every year are UK (leader with a market share of 62%), France, Germany, Switzerland and Italy. As a matter of fact, the economy in general is strictly related to the political situation of a state. In fact, political stability is an important element in the growth of a market. The UK is for sure the third global leader in the art market and the first in Europe. Despite that, the deep uncertainty that the UK is facing due to Brexit might create several problems in terms of trade between the UK and the EU member states, creating uncertainty for the future art businesses. However, the UK art market is dominated by extra-EU sales, and for this reason it might not impact its value of sales. The most obvious effect of Brexit will be the reduction in size of the EU market, as UK had a big slice.

### 2.2.1 Focus on the US trade market:

As the political situation is deeply interconnected with the art market it is important to make a focus on the effects of termination of the Internal Revenue Code, section 1031 Like-Kind Exchanges tax policy in the US market, by the Trump administration, also because the US market is the leader of the whole art market. The 1031 Like-Kind Exchange (LKEs) is considered one of the best tax strategies

<sup>63</sup> Art Basel and UBS Report. "The Art Market". Pg 106, 2018

<sup>64</sup> Art Basel and UBS Report. "The Art Market". Pg 107, 2018

available for preserving the value of an artwork investment portfolio.<sup>65</sup> In fact, it is a tax-efficient method for investors to trade one investment for another investment sufficiently similar in kind.<sup>66</sup> As we can see from the name “Like-Kind Exchange” the artwork being sold must be of the same nature and character of the artwork being purchased. Mainly, it enables investors to make tax-free exchanges within a particular asset market where they will continue to participate. Moreover, “this regulation was used by collectors to defer capital gains taxes on the sale of art if the proceeds were used to fund a purchase of another artwork, creating substantial buying and selling activity, particularly at the high end of the market.”<sup>67</sup> It definitely encouraged investors to maintain their initial capital investment in the art market and diversify their investments. The elimination of this tax deferral mechanism will discourage the investment in art as it will be more expensive to sell it.

Nevertheless, the trade war initiated in July 2018 between the US and China due to the decision of the Office of the United States Trade Representative (USTR) to propose a 10% import duty to work of arts, is definitely bringing several problems to the trade of art.<sup>68</sup> In fact, before that, art could be imported to the US duty-free, and this policy during the years helped the US to become world leader in the art market. “The U.S. has built its position as an international trade hub by having one of the freest systems of importing and exporting in the world,” said Clare McAndrew, an economist and the author of the UBS and Art Basel report. “While a 10% tariff might not deter a determined individual buyer, it might put vendors off including Chinese works at sales in New York.”

Moreover, the tax “would make it less profitable to bring Chinese works of art to the U.S. for sale,” said Christopher Reynolds, a co-founder of Beijing’s INK Studio gallery, which focuses on Chinese contemporary ink art. “This is really a

<sup>65</sup> Goldstein, B., S. *Tax Deferred Exchanges of Artwork: Maximizing Profits for Art Funds*, 2010.

<sup>66</sup> Art Basel and UBS Report. “The Art Market”. 2018

<sup>67</sup> Art Basel and UBS 2018 Report. “The Art Market”.

<sup>68</sup> Art Market. *What the U.S.–China Trade War Means for the Art Market*. Anna Louis Sussman, July 23, 2018.

shame, as it would, of course, distance Chinese artists from America, diminishing the chances for commerce, interaction, and mutual understanding... Contemporary art, like intellectual exchange, is not useful fodder for trade disputes.”<sup>69</sup>

To conclude this brief parenthesis on the US trade restrictions, we can say that it is not healthy for any country to have restrictions in the trade of art, as free trade of art is considered not only as an investment but also as an exchange of culture and intellect. Also, restrictions with a country such as China that is growing exponentially in this particular market might not be a smart strategy.

Small, knowledge-intensive businesses and with highly educated employees is what characterizes the global art market. In 2017 the global art market generated \$64 billion in sales. On one side, it is quite small in comparison to the annual revenues of big multinational companies such as Google or Apple. On the other side, the art's market global impact on the economy is much greater than its revenues. “Art markets around the world make a very significant economic contribution through the direct support of knowledge-based employment, nurturing highly specialized skills and supporting a range of high-value ancillary industries, as well as generating fiscal revenues.”<sup>70</sup> Also, it is outstanding the role that the art market has in enhancing tourism around the world and promoting culture and social benefits.

The art market is now characterized by internationalized companies and individuals and it is highly conditioned by globalization and new technologies. For this reason, it is important to analyse the rise of the online platforms and the impact that globalization has in the need of a more transparent regulation.

<sup>69</sup> Art Market. *What the U.S.–China Trade War Means for the Art Market*. Anna Louis Sussman, July 23, 2018.

<sup>70</sup> Art Basel and UBS 2018 Report. “The Art Market”.



### 2.3 The impact of digitalization and globalization: the emergence of the secondary market, online sector and blockchain issue

Globalization and the rise of online platforms heavily altered the way that art works are traded, valued and consumed. The art world is undergoing big changes because of digitalization. In fact, social channels are now creating communities and the majority of the art institutions (such as artists, collectors and dealers) are using the internet to incorporate database for organizational, educational and marketing purposes.<sup>71</sup> We can talk about democratization of information, as the image of all art works, their prices, their provenance and so on are for the view of everyone worldwide.<sup>72</sup>

Both art galleries and auction houses were slow in the involvement of the internet compared to other creative industries. After a steady start, art galleries understood the power of the online channels. In fact, the majority of the museums started using online channels as a marketing page to involve more people they can. Nowadays museums have their own online pages that illustrates the artists they expose, the events they create and all you need to know about the museum history and prices. This phenomenon created the so called “participatory art” (Bischop 2012). The public is integrated in the artistic process and there is a greater connection between the artist and the viewer.

The internet is not only used for marketing purposes but also to buy and sell art works. “The global online art and antiques market was estimated to have reached a new high of \$5.4 billion in 2017, accounting for 8% of the value of global sales”, states Art Basel and UBS in the 2018 Report.<sup>73</sup> This total number of sales refers to the online sales of the traditional offline dealers and auction houses and the companies and platforms selling on their own accounts. It excludes the

<sup>71</sup> Arora, P., & Vermeulen, F. (2013). Art markets, In R. Towse and C. Hanke (eds) Handbook of the Digital Creative Economy Cultural Economics, Edward Elgar Pub

<sup>72</sup> Arora, P. and F. Vermeulen (2013), ‘The end of the art connoisseur? Experts and knowledge production in the visual arts in the digital age’, Information, Communication & Society, 16 (2), 194-214.

<sup>73</sup> Art Basel and UBS Report. The Art Market. Pg 230, 2018

intermediaries and third-party platforms that conduct e-commerce. The online sales increased majorly in the last five years (with an uplift of 72%).

### 2.3.1 The Online Auction Sector

Despite a slow start by the auction houses to enter the online sales, they are now investing a lot in these platforms to boost sales and to attract new buyers. The reasons that favored the success of online auctions as a sales channel are different, including the reduction of transaction costs related to transportation, to storage and display of goods and related expenses (savings on the press of catalogs, and on insurance costs), which translate into lower commission costs on the value of the exchange; the lack of material limits in terms of quantity and variety of the proposal, in which the goods are easily traceable thanks to the presence of search engines; the presence of a wider market for the seller, given the due to the convenience of not having to be physically present in the place of purchase. Ultimately, the almost total elimination of entry barriers for the buyers, determining the success of this particular type of auction. Back in 2013, Amazon already launched its “Amazon Art Platform” relying on platform’s advantages and user’s data traffic. This already created a huge attraction by consumers.<sup>74</sup>

Sotheby’s, for example, made a huge push online, offering a 0% buyer’s premium to all online-only sales to acquire new clients and enhance the platform. As it is stated in the Art Basel and UBS Report of 2018: “In online-only sales, 45% of the buyers were new buyers and 19% of the new clients acquired in online-only sales subsequently participated in live auctions. Sotheby’s held 16 online-only sales in 2016, increasing to 36 in 2017. The average price of a lot sold in an online-only sale rose to \$10,000, with the company reporting that prices routinely exceeded \$50,000.”<sup>75</sup> Also, the boost of online sales made by Sotheby’s can be seen in the

<sup>74</sup> Xiao Bo Wei. Problems and Countermeasures of Art E-commerce under the Background of Internet. School of business, Xijing University, Xi'an, Shaanxi, China. 2015

<sup>75</sup> Art Basel and UBS Report. The Art Market. Pg 234, 2018

partnership with eBay and Artsy, to create an online-oriented strategy, so that it could be helped by “third-parties” platforms.

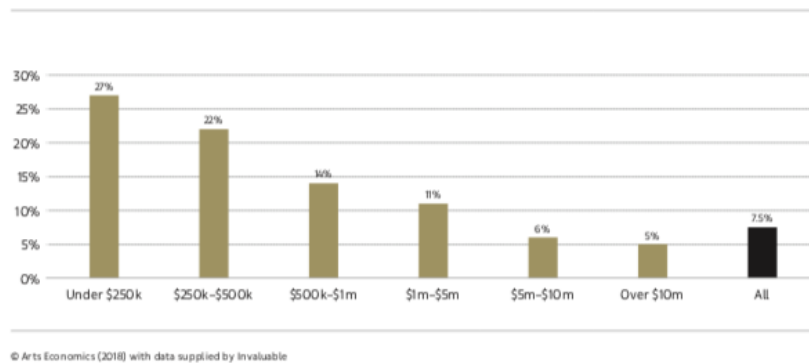
On the other side, Christie’s had a more independent strategy, launching Christie’s LIVE platform which allows bidding online in live sales. Despite this independent strategy, in 2017 Christie’s started to have a more open approach like Sotheby’s. In fact, it started a partnership with Artsy as well, to have a greater network of collectors and access to major technology.<sup>76</sup> Importantly, Christie’s started also to publish their online sales results, that is a very positive move in the sector as many auction houses and platforms still do not publish final prices. According to Art Basel and UBS 2018 Report: “The total value of online bids at Christie’s auctions via Christie’s LIVE in 2017 was \$144 million, down slightly from just under \$150 million in 2016. This brought their total sales online to \$214 million, against \$217 million in 2016. (This includes both pure online-only sales and online bidding.)”<sup>77</sup> The figure below, from the Art Basel and UBS 2018 report, shows how online sales are extremely important for the majority of auction houses. More precisely, the figure show that many businesses conduct a high percentage of online sales via Invaluable, especially those with a turnover of less than \$5 million.<sup>78</sup>

<sup>76</sup> Art Basel and UBS Report. The Art Market. Pg 235, 2018

<sup>77</sup> Art Basel and UBS Report. The Art Market. Pg 236, 2018

<sup>78</sup> Art Basel and UBS Report. The Art Market. Pg 237, 2018

**Figure 7:** Share of Online Sales (via Invaluable) by Auction House Turnover Level  
 Source: The Art Basel and UBS Report of 2018



Third-party platforms play a crucial role in this online game, especially for small auction houses that cannot develop themselves their e-commerce facilities. What is outstanding, is how these platforms creates behavioural technology to give to the users a complete experience. For example, these platforms segment the users based on prices, or users receive personalised email campaigns based on their interests, demonstrating the huge importance on innovative marketing tools.

To conclude, as we can imagine, the Chinese online market is one of the most technological. China has some of the most innovative digital platforms such as WeChat and Tmall. The value of China’s online sector reached almost \$400 million, and a further uplift is expected in the future.<sup>79</sup>

As we can imagine online platforms have their problems. As Xiao Bo Wei states in his research paper regarding *Problems and Countermeasures of Art E-commerce under the Background of Internet*, “The most important one (problem) is that the low degree of specialization. As a comprehensive business platform, it is not deep enough in understanding and researching the art industry for owning

<sup>79</sup> Art Basel and UBS Report. The Art Market. Pg 242, 2018

the variety of products. So, it cannot provide exclusive services for each specific art, and inevitably ignore the connotation of the product itself while promoting blindly. Thus, it is difficult to impress consumers to improve the conversion rate. As we have said China has one of the strongest and most valuable online sectors. Regarding regulation in the online sector in China, the current legal supervision is the Internet Transaction Law passed by the Twelfth National People's Congress in 2014 the Auction Law of the People's Republic of China amended in 2015. As Xiao Bo Wei states in his research paper, this regulation is not sufficient, and collusion and criminal behaviour might still arise in the internet world. What Xiao Bo Wei suggests is really interesting. That is to say combining online auctions with network platforms that has large traffic. Combining the high professionalization of auction houses with the tremendous traffic of some platforms can be a good move to better regulate the market. In this case, auction houses can use big data to classify and judge consumers. Moreover, what he suggests is the diversification of the online art trade. The focus should be shifted to the growth of artists, meet consumers need, the growth of art knowledge, and promote innovation and development of the whole industry. Thus, cultivation and absorption of relevant technologies and professional talents should also be emphasized to improve the soft and hard strength of the art e-commerce industry. Moreover, he believes that the rise of WeChat Group Platform is a unique and novel way to integrate the talents with the Internet.<sup>80</sup>

To conclude, relevant Regulations for Online Auction should be promulgated to strengthen unified supervision, guidance and standardize services. One of the most characteristics online platforms should have is a good reputation to gain trust of consumers. E-commerce and art online platforms are going to grow exponentially in the near future, and more regulation is required.

<sup>80</sup> Xiao Bo Wei. Problems and Countermeasures of Art E-commerce under the Background of Internet. *School of business, Xijing University, Xi'an, Shaanxi, China. 2015*

### 2.3.2 How Blockchain changed the art market

The art market has seen drastic changes in the last years. One of the most disruptive changes is the growing interest in blockchain. In 2018 several important summits, such as Etheral Summit, a global summit about blockchain technology, discussed whether blockchain could have a positive impact in the art world, creating more transparency and regulation.

Nowadays, everyone talks about blockchain but not everyone might know exactly what it is about. To explain it in the easiest possible way, blockchain is literally a chain of blocks made up of digital pieces of information.<sup>81</sup> These blocks are linked using cryptography. “It is an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way.”<sup>82</sup>

As Art Basel 2018 Report states, “Blockchain is a technology platform that acts as a public, digital ledger that records transactions that are made using cryptocurrencies such as Bitcoin. The main principle behind the technology is that users can execute online transactions without the need of an intermediary (such as a bank) to verify, authenticate and record the transaction. It allows continuous access to a large decentralized database of digital transactions, allowing verification when making transactions. Its decentralized nature also offers greater security than if these were centered in one database that could be potential hacked.”<sup>83</sup>

As we have discussed previously in this thesis, the art market has problems of transparency. For many, the introduction of blockchain in the art world can

<sup>81</sup> <https://www.investopedia.com/terms/b/blockchain.asp>

<sup>82</sup> Jansiti, Marco; Lakhani, Karim R. (January 2017). *"The Truth About Blockchain"*. *Harvard Business Review*. *Harvard University*. Archived from the original on 18 January 2017. Retrieved 17 January 2017. The technology at the heart of bitcoin and other virtual currencies, blockchain is an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way

<sup>83</sup> Art Basel and UBS Report. The Art Market. Pg 246, 2018

broaden the market's transparency, track ownership and provenance, and stabilize the market.<sup>84</sup>

In 2018 Christie's held its first Art+Tech Summit, to explore the blockchain issue. In November 2018, Christie's New York made art world history when it partnered with blockchain-secured registry Artory. A transaction of \$318 million sale of Barney A. Ebsworth was entirely held via blockchain.<sup>85</sup> What is outstanding is the fact that Artory's registry tracks histories, provenance and archival material, and this increases buyers and seller confidence. As we discussed in chapter one, provenance and authenticity are the two main aspects to value an art work, and it is what makes a buyer confident to buy. This is a huge innovation for the art market, making it more transparent and regulated, as transactions are controlled and protected. In fact, one of the problems of the digital art market is replication and fraud. Blockchain is the answer to make sure this does not happen in the digital market, by issuing a limited number of copies and linking them to unique blocks so that authentication and ownership is recorded on blockchain.

This process is used for digital art, but many company's goal is to make it possible also for physical artworks. Some companies that are trying to make this possible are Verisart, Artbyte, Artlery and Ascribe. Also, a startup founded in 2016, called Artory, created a public archive where records and certificated are safely stored online.<sup>86</sup>

The key potential of the use of blockchain in the art market is the fact that provenance and ownership is tracked by protecting the privacy of individuals.

As far as we are concerned, blockchain also has its negative sides. First of all, the anonymity of cryptocurrencies could create a black market of dubious transactions, financing crime.<sup>87</sup> Secondly, tracking provenance of Old Masters paintings is very difficult. The reason is that not always it is clear the right attribution of the artwork.

<sup>84</sup> Zohar, E. How Blockchain changed the art world in 2018. *Forbes*, 17 December 2018. Available at: <https://www.forbes.com/sites/zoharelhanani/2018/12/17/how-blockchain-changed-the-art-world-in-2018/#6558038a3074>

<sup>85</sup> Ibidem

<sup>86</sup> Art Basel and UBS Report. "The Art Market". Pg 247, 2018

<sup>87</sup> Art Basel and UBS Report. "The Art Market". Pg 249, 2018

An example is the common vague attribution “from the School of Leonardo”. The problem is that blockchain does not allow later amendments, and so many art works cannot be given the right attribution in a second moment.<sup>88</sup>

More importantly, in order for blockchain to succeed, regulation must be implemented. Otherwise, there are more negative effects such as black money and fraud, than positive ones.

<sup>88</sup> Ivi ,p.247



### **Chapter 3: The outcome of antitrust litigation in the art market**

Competition law is a law that seeks to maintain market competition by regulating anti-competitive conduct by companies, and it is implemented by public and private enforcement. Regarding public enforcement, antitrust rules are enforced by public authorities vested with special powers in order to investigate an infringement through administrative procedures. Decisions of antitrust authorities are subject to judicial review and their main purpose is the protection of the public interest in ensuring competitiveness of the market. Regarding private enforcement, it protects individual legal positions damaged by the anticompetitive conduct of undertakings.

“The main task of competition enforcement is to ensure that markets remain open and competitive and that new entrants and innovative undertakings have a fair opportunity to compete with incumbents on an equal footing”, states Renato Nazzini, in the Italian AntiTrust Review Journal, in 2018.

Due to its opacity and lack of regulation, the art market has such conditions that create incentives to coordinate price manipulation and other anti-competitive behaviours. This manipulation mainly arises in the secondary market. In fact, even though the secondary market regards art sold at auction houses, that is only a small part of the market, it determines the prices of artworks at a larger scale.<sup>89</sup> For this reason, collusion might arise in this sector. In this section, I will analyse which factors brings to anti-competitive behaviour in the art market with some interesting cases in the US regarding the dominant position authenticators can have while evaluating artworks, through a study of the Authentication Boards.

<sup>89</sup> Horowitz, N. Price fixing the priceless? Discouraging collusion in the secondary art market. *Hastings Law Journal*, Vol 66, 2015

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

As we have previously discussed, the art market is mainly dominated by two auction houses: Christie's and Sotheby's. Being the international market peculiarly divided in two, anti-competitive conduct might happen. As a matter of fact, the first case we will analyse regards the phenomenon of price fixing. As Will Kenton states in Investopedia, "price fixing is setting the price of a product or service, rather than allowing it to be determined naturally through free-market forces."<sup>90</sup> It is difficult to detect, as many companies might offer similar services and product at a similar price and it is not only about setting the same price, but also offering the same discount or shipping terms.

#### 3.1.1 Case 1: 1993 Christie's and Sotheby's price fixing scandal

In 1993 Christie's and Sotheby's made an anti-competitive agreement (i.e., cartel), which is illegal both under US and EU competition laws. What happened is that, to reduce the fierce competition between them, they agreed to increase the commissions paid by auction sellers.<sup>91</sup>

Regarding the US law, Section 1 of the Sherman Act, *"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a*

<sup>90</sup> Kenton, W. Price Fixing. *Investopedia*, September 16, 2019

<sup>91</sup> Arnaudo, L. Art at the Bar: Competition Law and Civil Liability in the Art Market Regulation. 2019

*corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”<sup>92</sup>*

Likewise, in EU law, Art 101 TFEU:

*1. The following shall be prohibited as incompatible with the internal market: 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, and in particular those which:*

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

*(b) limit or control production, markets, technical development, or investment;*

*(c) share markets or sources of supply;*

*(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

*2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

*3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

*- any agreement or category of agreements between undertakings,*

*- any decision or category of decisions by associations of undertakings,*

*- any concerted practice or category of concerted practices,*

*which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

<sup>92</sup> [http://www.linco.org/sherman\\_txt.html](http://www.linco.org/sherman_txt.html)

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.<sup>93</sup>

Going more in depth in this anti-competitive case between Christie's and Sotheby's in 1993, it is important to underline that in those times competition between these two auction houses was very fierce. They would drastically cut commission rates paid by sellers, make donations to sellers' favourite charities and extend financial guarantees to sellers. At one point, in 1993, Christie's announced that it will charge sellers a fixed, non-negotiable commission on sale price, and, interestingly, one month later, Sotheby's made the same decision. This sudden change was due to price fixing conspiracy.<sup>94</sup>

By admission, the conspiracy involved Christopher Davidge, Christie's Chief executive, and Diana Brooks, Sotheby's Chief executive, who also involved their respective chairmen, Anthony Tennant and Alfred Taubman. The venue of this price-fixing conspiracy is interesting. Tennant and Taubman met twelve times in New York and London. The exact details of this price fixing were decided during a meeting lasted fifteen minutes between Davidge and Brooke in Davidge's car in a parking lot in New York.<sup>95</sup>

In 1996, soon after the publication of their commission tables, the authorities were concerned of the identical commission rates, and started an inquiry against them believing they were in violation of Britain's Fair-Trading Act of 1973 and the Competition Act of 1980.<sup>96</sup> In 1997 the US Justice Department demanded all documents since 1992 that relate to communication between the two auction houses. In 1999 Christie's lawyers started to uncover evidence of conspiracy. At

<sup>93</sup> <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

<sup>94</sup> Ashenfelter, O, Graddy, K. Anatomy of the rise and fall of a price fixing conspiracy: auctions at Sotheby's and Christie's. *Journal of Competition law and Economics* 1(1), 3-20, 2005.

<sup>95</sup> Ibidem

<sup>96</sup> Id.

this point, Davidge was replaced by a new Chief executive, and was convinced to cooperate with the government.

#### The Criminal Settlement:

The case progressed in the following way: Davidge testified for the US government and was granted amnesty together with Christies'. Moreover, Tennant could not be extradited because at the time price fixing was not a criminal offence in the UK. Diana Brooks, former Chief executive of Sotheby's, decided to cooperate and was sentenced three years' probation, including six months home detention, 1000 hours of community service and a criminal fine of \$350,000. Taubman was convicted of price-fixing and sentenced to one year in jail and ordered to pay a fine of \$7.5 million.<sup>97</sup> Finally, Sotheby's agreed in paying a \$45 million fine over five years, while Christie's was not prosecuted thanks to their cooperation.

#### The Civil Settlement:

After Christie's and Sotheby's admitted their price-fixing conspiracy, they had to face class actions brought up by art buyers and sellers during those times of collusion. In September 2001, Christie's and Sotheby's decided to pay respectively \$256 million to their plaintiffs. The class in this lawsuit comprised everyone who bought or sold items through Christie's and Sotheby's during the period of 1992 and 2000.

As we can imagine, this price scandal brought significantly down their reputation, and they had to work hard to re-build buyer's and seller's trust. Trust is the pillar of the functioning of this market.

<sup>97</sup> Ibidem

### 3.1.2 Case 2: The “Auction Rings”- anti-competitive behaviour between dealers

Antitrust case-law does not tackle only price fixing. In fact, there are different anti-competitive behaviours that can arise in the art market. Another issue antitrust tackle is anticompetitive behaviour between dealers. These cases are called “auction rings”. What happens is that dealers agree not to compete against each other during auctions in order to artificially deflate the price of the artwork. After the auction, they conduct a second private auction, where the higher bidder gets the artwork, at the lowest possible price, eliminating competition.<sup>98</sup>

This antitrust case-law was investigated by the Dutch Competition Authority in 2011 where they started to realise about the phenomenon of “price-fixing” between dealers that restricted competition. This phenomenon contributed to make regulatory developments in the UK regarding pre-auction agreements and auction rings. The Enterprise and Regulatory Reform Act 2013 provides that dealers that make legitimate agreements must give details of the contract to the auction house, as for example the names of the parties. This reform made it easier to persecute dealers who acted illegally.<sup>99</sup> The Liability under the Enterprise and Regulatory Reform Act requires that there is an agreement amongst potential bidders to the effect that one or some of them will abstain from bidding or that they will bid in a certain way. The effect of such an agreement is to distort competition, hence the offence. The sanctions are a fine and/or imprisonment up to five years.<sup>100</sup>

### 3.2 The dominant position of the Authenticator – Authenticity in the Art Market

Authentication in the secondary market is essential to provide certainty in the value of an artwork. “[Stylistic] authentication is the process by which art experts—academic or independent art historians, museum or collection curators, art dealers,

<sup>98</sup> Ibidem

<sup>99</sup> Ibidem

<sup>100</sup> Bidding Practices at Auction. *Withersworldside*, August 2006

auction house experts—attribute a work of visual art . . . to a particular artist.”<sup>101</sup> As we have already analysed in the first chapter, authentication requires different tools such as the catalogue raisonné. As Lindsay Lovern, a professional at online auction database Artnet, states, “[t]here is a general consensus that the catalogue raisonné is the bedrock of the art market.”<sup>102</sup>

Sometimes the catalogue raisonné is not enough to authenticate an artwork as it might not be represented in it or it might take years for a foundation to update the catalogue raisonné with a new artwork as there must be the verification process that requires a long time and a deep knowledge.

For this reason, authentication boards are created to correctly authenticate the artwork, so far as if it is not inside the catalogue.

Authentication boards are created by individuals who have scholarly interest in an artists’ work. They wield a lot of power in the market because their certification of authentication will give the possibility to an individual to enter the market and to be part of the future foundation’s catalogue. Anti-competitive behaviour can arise also when there is the need to authenticate an artwork. It consists of a unilateral conduct of the authenticator, who holds a dominant position in the relevant market. The authenticator, to make sure that a certain market is not composed by too many players, can deny a certificate of authentication, restricting the market and going against competition law.

There have been many cases in the US law regarding this phenomenon. In particular, we will analyse *Simon Whelan vs. Andy Warhol Board* and *Bilinski vs. Keith Haring Foundation*.

<sup>101</sup> Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16, 23 (N.Y. App. Div. Dec. 1, 2009) (citing Ronald D. Spencer, Introduction to THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS xi (Ronald D. Spencer ed., 2004)), appeal denied, 15 N.Y.3d 703 (2010).

<sup>102</sup> Schechtner, H. (2016). Can the New York Legislature Bring Back Authentication Boards?. *The Columbia Journal of Law & the Arts*, 40(1), 141-163.

### 3.2.1. Case 1: Simon Whelan vs. Andy Warhol Authentication Board

In 1989, the art collector and film producer Joe Simon-Whelan bought a self-portrait of Andy Warhol for \$195,000. Seventeen years later he tried to sell it, but it had to pass the authentication test at the Andy Warhol Authentication Board Inc., a non-profit organization controlled by the Andy Warhol Foundation, founded in 1995.<sup>103</sup>

It is important to underline the fact that Andy Warhol is famous for making artworks in series. That is to say, that he used to create for example ten artworks representing the same topic. In this case, a person who has nine artworks of that particular series that value \$1 million each, and the tenth is sold by another individual for \$500 thousand, would not be happy about it as all of his nine artworks will be immediately undervalued. It is important to raise this issue as this is one of the reasons why market manipulation might arise.

Going back to Simon-Whelan case, the painting was considered not authentic two times by the board. Joe Simon-Whelan stated that the board had artificially reduced the number of works in the market, in violation of Section 1 of the Sherman Act (trade restraint) and had an anti-competitive behaviour to monopolize the market. In fact, because his painting was denied two times, Joe Simon-Whelan could not participate as seller in the Warhol artworks market. After a long and expensive legal battle, Joe Simon-Whelan decided to settle his claim.

Simon-Whelan made two antitrust claims that sounded in tort. Firstly, he alleged a conspiracy between the Board and the Foundation to raise the price of the Foundation's Andy Warhol's artworks. As Section One of the Sherman Act states, "plaintiff must allege (1) a contract, combination or conspiracy between two legal distinct entities, (2) in restraint of trade, (3) affecting interstate commerce."<sup>104</sup> In this case, there are two distinct legal entities (Andy Warhol Board and Andy

<sup>103</sup> Ibidem

<sup>104</sup> Schechtner, H. (2016). Can the New York Legislature Bring Back Authentication Boards?. *The Columbia Journal of Law & the Arts*, 40(1), 141-163.



Warhol Foundation) that have financial interests. Secondly, the plaintiff alleged an anticompetitive conduct to monopolize the market going against Section Two of Sherman Act, that states, “plaintiff must allege (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>105</sup> Finally, the plaintiff alleged that “that, unlike other authentication boards, which are composed of well-qualified and well-known independent experts, the Board is populated by individuals who lack expertise in the authentication of Warhol works and who are not independent of the Foundation.”<sup>106</sup>

This case represents the power authenticators can have in excluding potential competitors from the market. To make sure this behaviour does not occur, authentication procedure should be public and transparent, and should involve third parties. The procedure should be supported by scientific methods of analysis, based on objective authentication standards. It is true that authenticity certifications are not legally binding, so the artwork can still be sold, but the lack of authentication can have an anti-competitive effect, as the majority of auction houses and individuals require an authentication certificate to buy or sell the artwork.

Finally, even though authentication is not mandatory, it is usually necessary to enter a market. For this reason, the authenticator cannot refuse to evaluate an artwork, as it will be anticompetitive, and both EU and US law try to prohibit these situations. A denial of authenticity that prohibits a collector from selling his or her painting can constitute a sufficient antitrust injury against the Sherman Act. Art authentication is likely subject to the “rule of reason”, that is an ad hoc analysis of market restraint, in case the court does not find per se antitrust violation. All courts focus on some of the following factors: (1) the severity of the restraint; (2)

<sup>105</sup> Ibidem

<sup>106</sup> Ibidem

defendant's market power; and (3) defendant's intent. First of all, the court analyses the weight of the market restraint. For example, regarding price fixing it will be considered unlawful. Secondly, the court will consider whether the defendant has significant market power. That means, a dominant market share of a specific product in a specific geographical market. Market power is usually measured by dividing the sales in the relevant market with total sales. Thirdly, the court will analyse that unlawful intent will not violate the rule of reason in case of lack of anticompetitive effects. For example, if the committee who made the decision to deny an authentication of an artwork also sells in the same relevant market, it might have anti-competitive behaviour to reduce competition in that market.

Simon-Whelan case is the first antitrust case and created a precedent in the art world. It is the starting point for the art market to become more transparent. Thanks to this case, which is the first one to survive a motion of dismissal, a frightening precedent has been created for authenticators who fear antitrust litigation.

### 3.2.2 Case 2: Bilinski vs. Keith Haring Foundation

Another interesting case of the dominant position of art authenticators regards the case of Elizabeth Bilinski against Keith Haring Foundation. In 2007, Elizabeth Bilinski submitted an application to the Keith Haring Foundation to authenticate her collection. The foundation stated that Ms. Bilinski's artworks were not authentic.

Keith Haring Foundation was founded in 1989, one year before Keith Haring death. It supports non-profit organizations that mainly works for education, research and care for AIDS as it was the disease Keith Haring died of.

In 2011, Keith Foundation had \$25 million value of Haring artworks. The foundation is responsible for any issues of copyright. In May 2014 two painting of Haring were sold at Sotheby's at \$9.4 million.

Most auction houses require a certification from Keith Haring Foundation to sell Haring's artworks. For this reason, their authentication certificate is essential to enter the market.

Going back to the case *Bilinski vs. Keith Haring Foundation*, Bilinski gathered letters of provenance to demonstrate the authenticity of the artworks. The foundation responded by rejecting the works as "non-authentic".

Moreover, on February 2008, Bilinski was accused from the foundation from still trying to sell her artworks at Sotheby's, even though she was already being warned the artworks were not authentic. In 2010, a representative of Sotheby's believed Bilinski's artworks were authentic, but was not able to sell them without a certification from the Keith Haring Foundation. Also, in 2012, Bilinski commissioned forensic analysis of two of the works, which confirmed that the works were created during the same period in which Keith Haring was working.

At this point, Bilinski and other owners decided to sue the Foundation. In their lawsuit, they accused Keith Haring Foundation of abusing of its dominant position in the market by monopolising it, going against Section 1 and 2 of the Sherman Act.

In 2015 the District Court of New York dismissed all claims. Regarding the claim of trade restriction, the court stated that the claimant had failed on providing sufficient evidence of conspiracy on restricting trade of Harings's artworks.

As the court stated, "the decision by any individual entity not to sell artwork that may not be authentic is an act consistent with lawful, independent action".

Regarding the monopolisation claim, the court stated that the fact that the Foundation exercises an intellectual-property-rights-based monopoly over the market for Keith Haring's artworks does not establish per se unlawful dominant power.

The Bilinski case is different from the *Simon Whelan*. In Bilinski, the plaintiff alleged there was conspiracy between Keith Haring Foundation and the various art dealers, differently, as we have seen, in *Simon Whelan* case the conspiracy was between the Foundation and the independent authentication board. Moreover, the

Keith Haring Foundation, differently from Andy Warhol Foundation, did not publish a catalogue raisonné, it only authenticated artworks. Differently, in the Simon Whelan case, the defendants controlled both the Board and the catalogue raisonné and had complete control over the Andy Warhol Authentication Board. The Bilinski case is an important case of antitrust cases, because even though it does not change the precedent set by Simon Whelan, it establishes that the existence of an artist foundation with an authentication board does not constitute an antitrust violation. To conclude, the Bilinski case underlines the necessity to provide more protection for foundations that publish catalogue raisonnés and releases authentication certificated, from antitrust claims. As we will illustrate above, Bill S1229SA is one of the first steps toward a more protected market also for authenticators.

### 3.3 Solution to authenticator's liability issues: BILL S1229SA

Art authenticators are highly exposed to liability issues, as it is difficult to understand if they are having an anticompetitive behaviour or not. Many authentication boards started to close to avoid the costs of defending lawsuits. In fact, it is not the liability per se that scares authentication boards, as they have rarely been held liable for their work, but the costs of defending themselves that are extremely high. This brought to the attention of the effect of liability on art authenticators. These cases in the art market are very complicated and require great knowledge, therefore, the New York legislation decided to enact a Bill to also protect the authenticator. In fact, because antitrust cases in the art market are complicated to define, the authenticator must have a certain level of safety. On April 11, 2016, the New York Senate passed Bill S1229A and delivered it to the New York Assembly. The Bill is described as “an act to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and

authorship of works of fine art.”<sup>107</sup> The Bill was highly sponsored by Senator Betty Little and George Latimer due to the fact that they believe that in recent years authentication boards have come under pressure because of meritless lawsuits.

Bill S1229A (before Bill S1229) changes the Arts and Cultural Affairs Law in three main ways: (1) it precisely defines “authenticator” to delineate who is protected under the Bill, (2) it requires that plaintiffs in actions against authenticators plead with particularity in their complaints, and (3) it allows judges to award costs and fees to authenticators for “good and just cause.”<sup>108</sup>

Bill S1229 (now Bill S1229A) was introduced at the beginning of the 2015 legislative session (January 9, 2015), and was referred to the Committee on Cultural Affairs, Tourism, Parks and Recreation. Various actors in the art community strongly supported the Bill as it drew attention to the chilling effect in the art market, and the need for expert opinions to “maintain the integrity of the art market for fine art, but also for the advancement of art historical knowledge and public education in the arts.” They also “highlighted the proposed Bill’s potential to discourage frivolous lawsuits and to encourage reluctant authenticators.”<sup>109</sup> The changes to Bill S1229 (converting it to S1229A) mainly regards the discouraging meritless suits, and in making authenticators less wary of potential litigation costs.<sup>110</sup>

To conclude, the main problem of this Bill S1229A is that usually claims brought up by plaintiffs against authenticators are ruled by federal law. For example, Simon-Whelan opened the door for both state and federal antitrust litigation against artist foundations and authentication boards. Federal law is not bounded by states statutes. The Bill could lessen the fear on suits based on Bill S1229A but not those susceptible to the Sherman Act.

<sup>107</sup> N.Y.S ASSEMB. 238, MEMORANDUM IN SUPPORT OF A1018, Reg.Sess. (N.Y.2016)

<sup>108</sup> Schechtner, H. (2016). Can the New York Legislature Bring Back Authentication Boards?. *The Columbia Journal of Law & the Arts*, 40(1), 141-163

<sup>109</sup> Ibidem

<sup>110</sup> ibidem

Authentication boards were once seen as an answer to improve the market's situation, as they allowed experts to get risks and to come to a solution when evaluating art. Today, the boards are dissolving due to the liability issues they face. The closure of these boards makes a hole in the market, as many collectors have not the help needed to sell or buy an artwork at the appropriate price. Foundations, even though are also exposed to greater liability now, are continuing to exist and to create catalogue raisonné. If they would also decide to stop publishing catalogue raisonnés, the market will become even less stable.

Finally, if the New York Legislation wants to better tackle the issues authenticators face every day, Bill S1229A needs to be amended and assure a greater compensation to authenticator boards, to cut time spent in court, and disincentives pointless plaintiffs. Bill S1229A does provide a certain level of protection to authenticators, but not sufficiently to make the authentication boards come back to the market. Bill S1229, the un-amended original version of the Bill, better protects the authenticator thanks to two main characteristics that Bill S1229A do not have. First, the fact that the prevailing authenticator is entitled to the cost and fees of a suit. This means that it will deter many plaintiffs to pursue weak or not true claims, and the authenticator will have a compensation. Secondly, it provides that in any actions brought against an authenticator for giving his opinion with respect to an artwork, "the claimant shall prove the elements of such a claim or claims by clear and convincing evidence."<sup>111</sup> This is a higher burden of proof to have a more clear and convincing evidence of the claim. Meritless claims will decrease, and authenticator boards might reappear.

<sup>111</sup> Ibidem

### 3.4 Interview to Scientific Director of MondoMostre-Skira: Thomas Clement Salomon

To better understand the art market and its problems, I had the opportunity to interview Thomas Clement Salomon, the Scientific Director of MondoMostre-Skira. Not only it was an interesting discussion of what are the art market's strategies and trends, but we also discussed the rise of the online sector, digitalization, democratization of art and regulation.

An interview to Thomas Clement Salomon- Scientific Director of MondoMostre-Skira.

Scientific Director of the MondoMostre-Skira group, Thomas Clement Salomon has two specialized degrees in the History of Art and in Law. At first, he deals with the Law of Cultural Heritage, in particular the criminal protection of the national archaeological heritage and collaborates with a Roman law firm. In 2014 he joined MondoMostre, a leading international company in the production of major art exhibitions, and then became Scientific Director of the MondoMostre-Skira group, in charge of cultural planning and exhibition offices in Rome and Milan. In recent years he has curated exhibition events in Italy and abroad and has assisted the curators in designing, obtaining loans for works of art and creating dozens of exhibition events including: Georges de La Tour L'Europe of light (Milan, Palazzo Reale, 2020); Picasso Metamorfosi (Milan, Palazzo Reale, 2019); Impressionism and avant-gardes Masterpieces from the Philadelphia Museum of Art (Milan, Palazzo Reale, 2018); Dentro Caravaggio (Milan, Palazzo Reale, 2017), Picasso Between Cubism and Classicism (Rome, Scuderie del Quirinale, 2017)

Manet and modern Paris (Milan, Palazzo Reale, 2017), Salvador Dalí Surreal and Classic (Fabergé Museum, St. Petersburg, Russia, March 2017). As a scholar and enthusiast, he carefully follows the art market with particular attention to large auction houses and purchases by museum institutions.

When planning an art exhibition do you make cultural strategies and consider the “trends” of the moment?

*There are many aspects to consider: the potential of a specific exhibition venue to obtain the consent of the lenders and welcome thousands of visitors, the responsiveness of the public in a given city and the potential interest that a specific project or artist in a particular country can arise. Concretely, a major exhibition of Roman art in the United States could be more successful than in Rome, where the archaeological collections are numerous. These are not actual "trends", each exhibition resulting from a scientific project that proposes new aspects of an artist has reason to exist and is useful, but those called "blockbusters" that in most cases, attracting hundreds of thousands of visitors take you back to the great economic investment, they are only those dedicated to the "usual suspects" Caravaggio, Rembrandt, Leonardo, Raphael, Michelangelo, Monet, just to name a few.*

Is marketing promotion an important task when a new art exhibition is launched?

*Marketing and communication are fundamental. It is useless to put together 30 works by Botticelli if nobody knows where, how or why and everything is not proposed as a unique and unmissable opportunity. We arrive to invest € 200,000 in an exhibition for communication and marketing.*

How do you negotiate a loan or purchase terms?



*It is one of the most fascinating goals of my work. The world of big exhibitions is a jungle, almost all cities want big exhibitions, from Japan to the United States, to Europe and all on the same names, to have a great return of public and economic. The game is played on the quality of personal relationships with the heads of museum institutions worldwide, on the strength of the scientific project reason for the exhibition, on the prestige of the site hosting the project and on several other factors.*

*The competition is maximum and international. When you have to convince 20 different museums to lend you for 4 months 20 paintings of Caravaggio that are each worth 30 to 150 mil. €, rather than loans, we are talking of "extradition".*

In your opinion, who buys art does it mainly for personal pleasure or with a special consideration to investment returns?

*Those who buy works of art do so mainly for three reasons:*

- 1) Authentic and passionate interest in the work of an artist, a movement or a specific collector type.*
- 2) Social accreditation. Surrounding yourself with works of art contributes to providing a cultural and intellectual image. This category of collectors is formed mainly by those who, not coming from a cultural or aristocratic environment, find themselves holding positions of power.*
- 3) Investment or speculation.*

*The first category is the preferable one. We must buy works of art out of pure interest or love for them. If then a series of acquisitions lead the collector to raise his social position and to make good investments, they are welcome and deserved consequences of sincere interest, of understanding and buying them.*

*Difficult and not ideal that the opposite will happen, without a serious knowledge and a disinterested interest in art it is unlikely to make investments.*

Do collectors have a social responsibility in the art market?

*I do not think we should talk about responsibility. The market is free, as fashion and trends should be free. Any effect of such purchases cannot be attributed to the purchaser in terms of "responsibility".*

Do you think that the art market has been more regulated in the last years?

*Surely the market is increasingly under the eyes of the media and consequently of the legislator. In the different countries, quite different regulations are in force. There are more liberal countries such as the United Kingdom where, in fact, the market is healthy and more conservative countries, such as Italy, where the market has its hands tied and important operations are practically non-existent.*

Some critics observed that self-regulation is a good idea to better serve the professionalism and standardization of the art market. In reality, it is not binding and really difficult to implement. Could an international body created ad hoc for the art market improve its transparency?

*I find it difficult to imagine a supranational body with such functions. States are currently unable to find common visions on much more relevant issues. There may be cooperation, but I do not believe that regulation is shared and equal for everyone. Each country has different needs in terms of protection, conservation and export of works of art.*

The Art market in the last 20 years saw a revolution from the point of view of the internet and globalization. Historically, the art market was focused on the US and Europe, now it is definitely global with China overcoming the UK. Is there more competition?

Can we talk about a “4.0 art market” due to a secondary market more digitalized? Does this bring benefits to the market? Also, because of that, should it be a reason to make the market even more transparent and regulated?

*The Asian market is the big news of the last years of globalization.*

*Important masterpieces of European art are purchased from oriental tycoons, mainly Chinese and Japanese.*

*The Internet makes everything faster and the possibilities of buying exponentially increase, it remains a very powerful tool, but always a tool for supply and demand.*

*The regulation can only be crossed between the one that protects the norms of the countries where transactions take place and the inherent one of the internet "means".*

Can we talk about “art democratization”, more accessible to everyone? Is this a positive side? Are people really having intellectual benefits from this democratization or no-one really cares?

*Certainly, we can talk about "democratization" of the art market. Today anyone can buy minor works, graphics, multiple of works of art and anyone who is able to capitalize can buy works of art and search for free information on the artistic landscape on the internet.*

*In the past, art was mainly in the hands of political power, aristocracy, works created for them or for the glory of the state. Today anyone, even if they do not have large vehicles, can get a great culture and maybe even make some purchases in the art world.*

Is there still a problem of information asymmetry? (collectors and the provenance of art works are still a secret in many cases) (lack of record of ownership)

*If the origin of a particular sculpture or a specific painting is not known, it is strongly advisable not to proceed with the purchase. Galleries, merchants and auction houses are required to disclose information regarding the lawful origin of the works offered on the market.*

Does the political uncertainty of this period affect the art market? (ex: trade restrictions- case of US and China, Brexit and so on).

*Not for million-dollar transactions. In a particular economic situation, small collectors will tend to make fewer purchases. The millionaires in these times prosper and take advantage of it to buy, even at a lower price, what the mid-range collectors can no longer afford.*

What do you think about the Abu Dhabi Culture and Tourism Centre buying the “Salvator Mundi” of Leonardo da Vinci for \$450 million? Was it a wise move? Is there a red line in terms of price for a single artwork that will not be crossed?

*I don't think it can be called a "red line" of price beyond which not to go. Although today the subtle intuition of one of the greatest historians of the twentieth-century, Federico Zeri, may appear archaic, who argued that any work of art would be absurd worth more than 1 billion lire. According to Zeri, any painting, even the Monna Lisa by Leonardo, being a furnishing element of a house, should not be worth more than a dwelling itself, but it is known, today finance has taken over. The purchase of the "Salvator Mundi" attributed to Leonardo for the sum of \$ 450 million for the sole fact that the attribution is not universally recognized and that the conditions of conservation of the painting are so compromised as to prevent the attribution with certainty to the hand of Leonardo. This result is the result of an extraordinary marketing operation. Believing that that painting is by Leonardo is an act of faith, we must believe it.*

Several different points emerged from this interview. Firstly, the important role that marketing has in the art market. As Thomas Clement Salomon stated, big amounts of money are spent for marketing initiatives. Thanks to this, art became more global and more democratic, as everyone now knows when why and where an art exhibition is. Secondly, it is also interesting the conception of Mr. Salomon regarding regulation. He believes that an international body that regulates the art market is impossible, as each state has its own regulations and protection norms. Also, state intervention might eliminate the freedom of this market of having creative initiatives. As an example, Mr. Salomon, compares the English market to the Italian one. The former is a more liberal market, whilst the latter often has its hands tight due to strict government intervention. What is clear, is that good knowledge of this market prevents information asymmetry and criminal behaviors.

## Case Study on Salvator Mundi by Leonardo da Vinci – a story full of mystery and intrigues

**Figure 8:** Salvator Mundi by Leonardo da Vinci  
Source: Google Images



The painting “Salvator Mundi” (Savior of the World), presumably made by Leonardo da Vinci, is surrounded by intrigues, lack of transparency and huge amounts of money. There are multiple reasons for the stir that this painting created. Many believe that the painting has been wrongly attributed. Others were shocked by the huge price paid for a painting that was in terrible conditions. It is very complex to reconstruct precisely all the story of this painting, because of its turbulent history.

The starting point is June 25, 1958, when Minnie Stanfield Kuntz purchased the Salvator Mundi, in those times attributed to Giovanni Boltraffio, for \$45, during

an auction at Sotheby's.<sup>112</sup> The painting, bought in London, was then brought in her house in New Orleans. After her death, the painting started to have different owners. The daughter of Minnie's nephew, Susan Hendry Tureau, sold the painting at Christie's New York for \$750 to Robert Simon and Alexander Parish. These two men hired a specialist of the Metropolitan Museum of Art, Dianne Dwyer Modestini, to work at the painting, to clean it, repair it, and mainly, study it.<sup>113</sup> The 500 years old work of art was restored by Modestini in six years. At this point, some connoisseurs started believing it was a painting of Leonard da Vinci, while others believed it was of "the school of" da Vinci. The painting was publicized at the National Gallery in 2011, and in May 2013 it was sold to a Swiss businessman, Yves Bouvier for \$83 million. Immediately after purchasing the painting, Bouvier sold it to his client, Dmitry Rybolovlev, a Russian oligarch, for \$127.5 million, \$44 million more than his had purchased for it.<sup>114</sup>

The circumstances regarding the private deal between Bouvier and Rybolovlev are very obscure and full of mystery. Dimitry Rybolovlev and Yves Bouvier first met in 2002 when the Russian billionaire purchased a painting of Marc Chagal, "*Le Cirque*". For Dimitry Rybolovlev, who made his fortune like many other Russians thanks to the privatisation of infrastructure and natural resources, art was mainly an investment, a way to diversify his portfolio and a safe transferable asset. Rybolovlev purchased many different masterpieces by Bouvier, such as paintings of Gauguin, Klimt, Degas, Giacometti, Picasso, Monet and many others. As we could imagine, being a businessman in Russia in those times was not easy, and the majority payed professional criminals to protect themselves. To protect himself, Rybolovlev went with his family in Geneva, in the Spring of 1995, and travelled often from Geneva to the Ural region for business. During one of those trips in 1996, he was arrested for having murdered a business partner, Evgeny

<sup>112</sup> Albertson. L. *Salvator Mundi: a tale of power, intrigue, betrayal and seemingly immeasurable sums of money*. January 12, 2019. Available at: <http://art-crime.blogspot.com/2019/01/salvator-mundi-tale-of-power-intrigue.html>

<sup>113</sup> Ibidem

<sup>114</sup> Ibidem

Panteleymonov. After eleven months of incarceration he was released for one billion ruble. As we could imagine, Dimitry Rybolovlev is not exactly a saint. His wife, Elena after the divorce, wrote several times to the Geneva prosecutor, stating that she was very scared of her own life, and that Rybolovlev was a dangerous man. Moreover, while a ferocious legal battle between them started after divorce, Rybolovlev started expanding his growing galaxy of tax shelters. On July 16, 2008, he bought 62,000 square-foot beach-side mansion, named “*Maison de l’Amitie*” in Palm Beach, Florida. The property was purchased from owner Donald Trump for a reported \$95 million. In September 2010, Rybolovlev bought controlling shareholder interest in the Bank of Cyprus, which he registered in the Virgin Islands. Rybolovlev's investment in the Cyprus bank once consisted of deposits at the BoC and €500 million euro in shares, and was reportedly lost by June 2013. In 2014, President Trump's Secretary of Commerce, Wilbur Ross, became the Cyprus bank's chief shareholder. By 2011 he moved from Geneva to Monaco and bought the majority of football club AS Monaco FC and became its president.

Rybolovlev saw the Salvator Mundi in New York in 2013 for the first time. The visit was arranged by Sotheby's, through Sam Vallette. What is not clear, is the reason why Rybolovlev decided to wait and to acquire the painting later through Bavier, at a higher price. Interestingly, in 2014 Rybolovlev started a civil litigation against Bouvier, accusing him of defrauding him of over \$1bn over the lifespan of their business relation. On October 2, 2018, Rybolovlev accused also Sotheby's with a \$380 million lawsuit of having “materially assisted the largest art fraud in history” regarding the sales orchestrated by Yves Bouvier. In 2018, the civil litigation between Bouvier and Rybolovlev still continued under several jurisdictions, such as Monaco, Hong Kong, France and New York. There are obviously many obscure points in all this story, as for example the unusual relation between Rybolovlev and Bouvier.

Now we arrive to our days, when in 2017, Rybolovlev sold the Salvator Mundi via auction to Saudi Prince Badr bin Abdullah bin Mohammed bin Farhan al-Saud. As



far as we are concerned, it was publicly announced that the painting was of property of the United Arab Emirates and it was supposed to go to the Abu Dhabi Louvre, but it never happened.

As the Embassy of the Kingdom of Saudi Arabia in Washington DC issued in the following statement:

*"Due to the media reporting on the da Vinci's Salvator Mundi purchase, the Embassy of the Kingdom of Saudi Arabia in Washington, D.C. inquired from His Highness Prince Badr Al Saud's office on the details related to the art piece's purchase. Upon reaching out, the Embassy learned through information conveyed by His Highness's office that the art work was acquired by the Abu Dhabi Department of Culture and Tourism for display at the Louvre Abu Dhabi in the United Arab Emirates and that HH Prince Badr, as a friendly supporter of the Louvre Abu Dhabi, attended its opening ceremony on November 8th and was subsequently asked by the Abu Dhabi Department of Culture and Tourism to act as an intermediary purchaser for the piece."*

Noteworthy, in the same period of this transaction by the Saudi Prince, the journals noted something that might not be a coincidence, that is to say, the fact that the Saudi Prince, just one week later, bought a yacht for \$450 million.

Professor Pierluigi Panza, a famous Italian writer, analyses the story of the Salvator Mundi in his book "L'ultimo Leonardo – storia, intrighi e misteri del quadro più costoso del mondo" (Utet, 2018). Professor Panza does a meticulous investigation, often focusing on some facts that may seem marginal or mere curiosity, when instead they are all elements of a puzzle.<sup>115</sup>

Professor Pierluigi Panza, not just by chance, talks several times about the Salvator Mundi as a bond, foreshadowing a new course in the market and the art world, a new dimension made of hyper-shared and high-tech media communication, where the sensational aspects push the values of history and historical truth into the

<sup>115</sup> Pirrera. C. La storia del "Salvator Mundi" nel libro di Pierluigi Panza, *Artribune*, 26 novembre 2018

background. According to the critic, in fact, even in the world of art, an "ephemeral construction of consensus" is now underway.<sup>116</sup>

The starting point of Professor Panza is the fact that there are no documents that attribute the painting to Leonardo da Vinci.<sup>117</sup> For this reason, Professor Panza decided to reconstruct all the story starting from the first document available, that it dates back to Charles I of England in 1600. He tries to understand why this Leonardo's painting was in England and what happened before.

A topic that is important to cover regarding all this case is the role of marketing. As Chief marketing officer at Christie's, Marc Sands was vital in the campaign behind the auction sale of the *Salvator Mundi*. "As part of a multi-faceted campaign, Sands collaborated with former contemporary art head Loïc Gouzer to ensure proper authenticity and provenance measures in courting some of the world's biggest collectors and buyers", states Leonidas Kalai in an article for *ArtCritique*.<sup>118</sup> Christie's was very good at describing the *Salvator Mundi* as the "Last Leonardo", making a marketing operation that created huge interest and made its value reach the stars.

No doubt the decisive turning-point occurred when it was placed at the center of a contemporary art auction and toured as a circus animal alongside Warhol's *Sixty Last Suppers* and exhibited in Hong Kong, San Francisco, London and New York: thus the *Salvator Mundi* has attracted queues of so-called experts and crowds of art lovers a-la page in every city. In the theatrical exhibition in Hong Kong - one of the new financial centers of the elite art market - there has been screams, shrieks and blinding flashes in front of the canvas from the controversial attribution to the genius of da Vinci. In New York, instead, the staging chosen for the exhibition suggested a dark and solemn atmosphere, from consecration in a *sancta sanctorum*,

<sup>116</sup> Ibidem

<sup>117</sup> Panza, P. *L'ultimo Leonardo – storia, intrighi e misteri del quadro più costoso del mondo*. Utet, 2018.

<sup>118</sup> Kalai, L. The marketing genius behind the 'Salvator Mundi' switches gears. *ArtCritique*, April 7, 2019

to underline that intriguing and esoteric dimension as the only stylistic figure of Leonardo: a creation suddenly emerged from a parallel universe. The fact that the reaction of the general public has played a fundamental role in this aggressive promotional campaign is also revealed by the assignment entrusted to the most discussed and famous auction house in the world - Christie's - and by the online publication of a compelling signature video of Bill Viola on people's reactions to the view of the Salvator Mundi.<sup>119</sup> The Salvator Mundi had for sure a creative and continuous marketing campaign that enhanced the popularity and the value of the painting, before the auction sale.

As Federico Varese states in an article for “The Times Literary Supplement”, “the buying and selling of works of art – a global turnover estimated at \$63.8 billion in 2015 – is frequently an opaque process. Martin Kemp – lapsing from his habitual understatement – has himself described the art market as “an unregulated jungle”. Transactions are almost invariably conducted through trusts based in offshore tax havens. Bouvier’s contracts for the pictures he bought for Rybolovlev were drawn up by a leading and respected Swiss law firm, but he operated through a company registered in Hong Kong, and the buyer acted through a trust registered in the name of his daughter. Furthermore, the auction houses are not legally obliged to establish the identity of a work’s true owner – often indeed they do not know themselves. In the documentation, a vendor is described generically as, say, “a European collector”.<sup>120</sup>

There are still many questions regarding this unusual art transaction. Who bought it? Why? Do we have the certainty that this painting is of Leonardo da Vinci? Why should a Muslim buy a painting figuring Christ? How could a painting with

<sup>119</sup> Capanni, L. Leonardo Scomparso: Il caso Salvator Mundi. *VideoDromeNews*, May 5, 2019, available at: <https://videodromenews.com/article/leonardo-salvator-mundi>

<sup>120</sup> Verese, F. Asset Management- Federcio Varese on “Salvator Mundi” and the unreality of the art maket. *The Times Literary Supplement*, August 13, 2019

uncertain attribution achieve such quotations? For sure, marketing is becoming a powerful tool for the explosion of valuation of art works.

## **Conclusion**

“Art is not what you see, but what you make others see”

Edgar Degas

The art market is a complicated and interesting market. For many, it is a fascinating market that permits you to make dreams come true by buying an artwork that can raise deep emotions. Nevertheless, it is also a huge investment, as the art market is a healthy market that every year reaches dizzying figures.

According to the study conducted by the founder of Arts Economics, in 2018 the global art market reached a total value of 67.4 billion dollars, marking a + 6% on 2017. The year that has just ended would therefore be the second in a row with positive sign. But above all, 2018 marked the second-best result ever, given that it confirms the excellent state of health of this economic sector which sees auctions weigh for 46% and the galleries sector for 54%. But that is also increasingly in the hands of very few operators. As a matter of fact, out of 296,550 active companies, 50% of the market is in the hands of only 5% of the players.

The art market is not only an interesting and emotional market, it is also a dynamic, fast-growing sector. Thanks to this rapid raise, also competition at the top end of the market has intensified. In this highly competitive market, a very small number of artists, and the dealers and auction houses with access to their works, continue to drive the bulk of sales values, while others struggle to survive. This so-called “superstar phenomenon” is pervasive in the art market and has been discussed in previous Arts Economics reports.

The art market contributes enormously to the global economy and it has a positive impact by creating cultural and social benefits. It is made by small and knowledge-based businesses and highly educated people. The continuing globalization of art

sales and buyers, and the dynamism with which this market works, it protected from downside risk and from crisis.

Yet, it is clear to everyone that the art market is also characterized by market manipulation, lack of transparency and conflicts of interest. Competition law enforcement and international law has been scarce so far in providing an effective regulation of the market to prevent criminal behaviour.

The role of Competition law in the art market is scarce, and it plays majorly a role of sentinel. The reason is that in suspected infringements it is required to have a very high knowledge of the market and also because it usually involves high volumes of commercial transactions.

It is true that competition law is limited, but it is also true that such limited intervention had a two-fold impact on the art market and its regulation.

First of all, European and national competition authorities had successfully intervened in both the physical and digital dimension thanks to third market players that reported suspected practices. Third players, with high knowledge, help the authorities to reduce costs and to successfully intervene. More importantly, once investigations are initiated, undertakings have an incentive to offer reasonable commitments to maintain their reputation intact.

Secondly, because of this lack of regulation, big auction houses and online platforms started self-regulatory initiatives to prevent unlawful behaviours.

Also, potential sellers of artworks are the most efficient enforcers of competition law as they have a high interest to intervene and their information costs are low. In fact, as we have already deeply analysed, lack of expertise is the main barrier for competition law authorities.

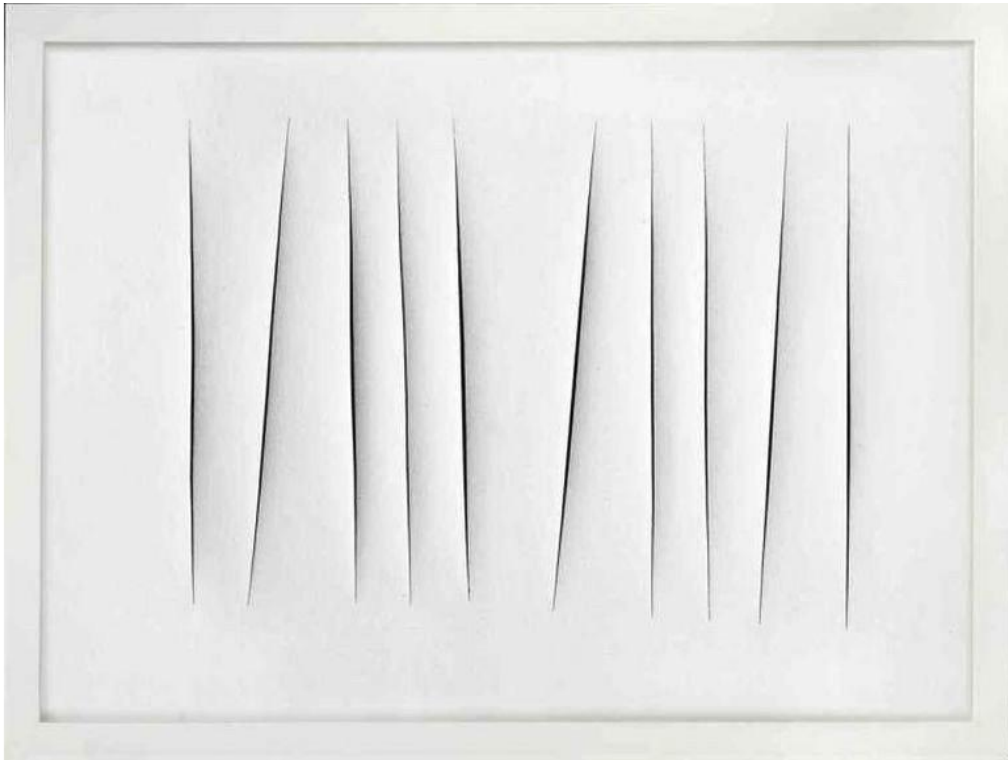
From the analyzes conducted and from all the in-depth analyzes carried out the first thing that catches the eye is that the art market is a sector where experience plays a role of fundamental importance. The expert investor in the sector is master of the situation and is capable to understand all rotating mechanisms around this sector. Thanks to its knowledge, the investor is informed of how to make the best

use of all financial instruments, data and indices. He knows the artists, gallery owners and auction house managers directly, with which he interacts and continually compares. Due to this lack of transparency and precise rules to follow, this experience becomes the main element for the investor to decide which choice to make.

Obviously, this type of experience is rare and usually of a small niche of people and for this reason, the common investor who wants to enter the art market because attracted by the news of millionaires or record auction results or with the sole purpose to diversify his or her portfolio, might do big mistakes due to the information asymmetry that characterizes this market.

Regarding the possibility of self-regulation to better regulate the market, as we have analyzed on Chapter one, it is not possible as an answer to the problem. The main issue is the fact that self-regulation is not binding, and for this reason it is not enough to make the market more transparent. Notwithstanding, these guidelines, if followed by all players in the market, are an important regulating tool.

To conclude, trust is the main characteristic of the art market, especially regarding the contemporary one, as it is the most complex to evaluate. Competition law, if well implemented with the help of specialized third parties, can really improve transparency in the art world. Undertakings will not easily conduct criminal behavior if they know that their reputation in the market might be destroyed. Asking for more government intervention has its pitfalls. Usually, when the government intervene for certain problems, the market slows down and the freedom to do new, innovative projects is tighten up. In my opinion, in some way, this makes everything more mysterious and attracting. A painting of Lucio Fontana, such as “Spatial Concept”, might be only a slash for someone, but for others it might represent the infinite.



**Figure 9:** Concetto Spaziale,  
Attese, di Lucio Fontana  
(1965)  
Source: Widewalls



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# **Summary: The Art Market's lack of regulation and transparency**

## Introduction

The aim of this thesis is to stress out the absence of an effective regulation in a market that is becoming every year more important and valuable: the art market.

Art has always had great importance in the history of humanity. In fact, since ancient times, art had been a testimony of change, evolution, and development of our society. Art has always been followed with interest and passion from different generations and has been preserved and curated in every angle of the world.

In the mid-18<sup>th</sup> century, art began to be object of economic importance and a real market started to grow exponentially until our days. This market evolution started in the UK and then expanded in all the world, mainly in the US and China. The market is characterized by two main auction houses, Christie's and Sotheby's.

Nowadays art is not seen just as something beautiful that can raise emotions, but buying and selling paintings, either from young artists or from the Masters, is an activity that is considered to have high rate of returns on this investment. ArtTactic and Deloitte in 2017 investigated on the reasons why collectors buy art. The survey showed that the majority of the art collectors buys art for passion but with an investment view.

The art market is a dynamic economic sector. On 15<sup>th</sup> November 2017, everyone in the world was astonished by the *Salvator Mundi* of Leonardo da Vinci, sold by the auction house Christie's for 450 million US dollars. It is the greatest art transaction until now and it was made by Saudi Prince Badr bin Abdullah bin Mohammed bin Farhan al-Saud. This case is full of mysteries and intrigues. Therefore, nobody knows where the "Salvator Mundi" is and who really bought it.



How can artworks achieve such values? The way art is evaluated is very complicated, as there is a need of great knowledge and there is not a defined guideline to follow.

This thesis is divided in three parts. The first part analyses the structure of the art market, how art is valued and the problems that characterizes this market, such as information asymmetry and the national and international regulation that tries to tackle these problems. The second part makes an overview of the art market global sales and market share, illustrating how the economic and political situation of a state influences the art market. Also, it examines the rise of the secondary market in particular regarding the development of online platforms and blockchain. The third and last part of this thesis studies the outcome of antitrust litigation in the art market. Mainly, the role of competition law in this sector and how competition law might be the answer to a more regulated market. To conclude, an interesting interview with Thomas Clement Salomon, MondoMostre-Skira Scientific Director, makes us have a deep professional view of how this fascinating market really operates.

### Chapter 1: The structure of the art market

The structure of the art market today consists of a primary and a secondary market. The primary market is composed by artists, agents, galleries and collectors. In particular, the primary market is when a painting, and its price, enters the market for the first time. In other words, the paintings available for purchase comes directly from the artist's studio. This means that the primary market regards production and private sale. Also, prices in the primary market are usually lower than in the secondary market, as they are not inflated by the auction houses.

The secondary market is ruled by the auction houses. This means that if a person that bought an art piece in the primary market wants to sell it, it enters the secondary market. More precisely, the secondary market regards resale and

collection. The prices of artworks on the secondary market are determined by different factors, such as condition, provenance and the importance of the artist. In fact, auction houses play a determinant role in the formation of selling prices and in the insurance that these transactions are reliable and transparent.

Nowadays, the structure of the art market is in continuous change thanks to the raise of digitalization and globalization, and as we analysed in the second part of this thesis, the online platforms and the Blockchain are deeply changing this market.

Sotheby's created 10 criteria in evaluating art: Authenticity, Condition, Rarity, Provenance, Historical Importance, Size, Fashion, Subject Matter, Medium and Quality. All these criteria are interdependent one to another and are all equally important. Moreover, to be even more specialized and sophisticated in evaluating art, in 2016 Sotheby's acquired the Mei Moses Art Indices. The Mei Moses Art Indices, today known as Sotheby's Mei Moses, is a precise analytical tool to evaluate and measure the art market. The Index was developed by two Professors of the New York University in 2000: Jianping Mei and Micheal Moses. It measures the performance of art through the analysis of repeated sales, that means to analyse the sales of the same object in different moments of time to trace the changes in value.

It is not only important for Sotheby to examine trends and value, but mainly to its clients that can have all the information needed when they decide to buy an art piece. Despite that, many critics raised the issue that Mei Moses analyses only repeated sales, and it is limited to a sample that is too small and not representative of the complexity of the market. In fact, private sales and individual sales are missing in the analysis. Furthermore, the index is based only on sales of Christie's and Sotheby's, not considering the rest.

Because of the complexity of valuation of art, one of the main issues of the art market is information asymmetry between buyers and sellers. Akerlof (1970)

analysed the phenomenon of asymmetrical information where seller of assets (such as art works) knew more about the asset than did buyers. In this case, poor quality assets might have a price that is not fair, making buyers do a “bad investment”. Differently, some art owners might know very little about the value of their artwork, undervaluing the asset, so that the buyer will buy it at a non-realistic price. This information asymmetry is typical of the contemporary art market, where the product traded is configured as a trust good, whose quality is not easy to be understood by the buyer neither before nor after purchase because of its lack of technical and cultural knowledge, which is available only to a specialist (for instance, a critic).

Economic theory, thanks to Joseph Stiglitz (1987), came to the general conclusion that the law of demand has no rational foundation when buyers evaluate the quality of a good from its price. What happens is that, a potential collector, due to lack of information, estimates the quality of the work of art based on its price. That is to say, the higher the price, the higher the quality perceived of the artwork.

As we have deeply discussed, evaluation of art is very complicated. For this reason, the buyer might not have all the information needed to understand if he or she is making a right investment. For example, a collector might buy an artwork that had been stolen or acquired under dubious circumstances, such as money-laundering. Also, information asymmetry mainly lies in the provenance and ownership of the artwork. On one side, the right of secrecy of private owners is perfectly legitimate for people who want to protect themselves. On the other side, this secrecy makes everything even more opaque, permitting criminal behaviours.

Are there national and international regulations that supervise the art market? At first glance the art market might seem un-regulated, but, it is regulated both at international and national level.

First of all, at an international level, article 5 of the UNESCO ensure the protection of cultural property against illicit import, export and transfer of ownership.

Moreover, another international instrument created by the European Union is Commission Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State. This directive had been amended with the European Commission Directive 2014/60 to implement the concept of Internal Market Information System (IMI), to increase cooperation between Member States.

Secondly, at a national level, most countries have its own legislation to protect cultural heritage. For example, in Italy there is the Legislative Directive No 42/2004 that regards the Code of Cultural Property and the Landscape. In particular article 87 is on the return of cultural objects stolen or unlawfully exported. What is interesting of the Italian legislation is the concept of “Diritto di Seguito”, that is to say, “the resale right”. The "resale right" (*droit de suite*), is the right of the author of works of figurative arts and manuscripts to receive a percentage of the selling price of the originals of his works on the occasion of sales subsequent to the first. With the Law issued on March 1, 2002, n. 39 "Provisions for the fulfillment of obligations deriving from Italy's membership of the European Community-EU Law 2001", the Government had been delegated to issue the decree implementing Directive 2001/84 / EC on "resale right".

This happened with the Legislative Decree n.118 dated 13/2/2006 "Implementation of directive 2001/84 / CE, concerning the right of the author of a work of art on subsequent sales of the original" published in the G.U. general series n. 71 of 25/3/2006 and in force since 9/4/2006.

These right safeguards the property rights of the artist and its heirs.

As we have seen art market secrecy is a big issue, and the national and international regulation is not moving enough towards more precise laws. In fact, one of the many problems of not having an adequate regulation of the art market is the issue of money laundering. Money laundering is the process of making large amounts of money generated by a criminal activity. The subjectivity of art and the lack of a standardized pricing methodology makes its value somewhat speculative. the

European Union introduced several legislations to prevent money laundering in the art world. On April 2018, EU Directive 2018/1673 was established. This directive is an important step towards a more transparent market regulation.

Everyone agrees that there should be a more regulated market to ensure economic growth and transparency, but how?

Some critics observed that self-regulation is a good idea to better serve the professionalism and standardization of the art market. Self-regulation means no state intervention, and a process by which an organization adhere to its own legal, ethical and safety standards with no intervention from “outside”, such as the government.

Noteworthy, is the proposal of an international self-regulation initiated in 2012, created by the Basel Institute of Governance, called the Basel Art Trade Guideline. This guideline was created after the Art Trade Initiative Conference of 2009 held in Basel. They brought to light the fact that the art market players are very diverse with different ethical standards. Also, they operate in a market with high fluctuations of prices, that usually have inexplicable changes in value, and a greater risk of exposure. From these discussions, they understood there was a need of collective standards to ensure more transparency.

The purpose of the Basel Art Trade Guidelines (BAT) is to make the art market more efficient, and to safeguard its integrity and reputation. These Guidelines apply to “all 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 ensure more transparency, the art market operators should “ensure full identification and documentation of the seller and the buyer (‘know your customers’ rule)” (Art. C.3.1). Moreover, the art operator should “invest sufficient time to research reasonable provenance and authenticity before finalising selling procedures.” (Art. C.4.2.2). To make sure there is no conflict of interest “An expert’s opinion is invalid if the professional independence of the expert is in doubt” (Art. C.4.2.3).

Even though the BAT Guidelines are extremely precise and tackles the main problems the art market faces, self-regulation is not binding, and it can be hard to implement it. For this reason, it is not considered the best option to regulate the art market.

## Chapter 2: Art market's lack of transparency major concern for investors: the rise of the secondary market

The second part of the thesis makes an overview of art global sales and market share, analysing the rise of the online auction sector and Blockchain.

The art market is everyday more dynamic, efficient, and accessible. Despite that, as we have deeply analysed it still is not transparent enough. Understanding the market's dynamics is essential to have the knowledge of where, why and when this is happening.

For this reason, every year, Art Basel, UBS and Deloitte analyse and report the trend of this market and how this economy is changing. More precisely, the art market today requires increasingly precise, analytical and management tools to make up for the lack of standards and uniform regulations.

Based on Art Basel and UBS 2018 Report, in 2017 the global art market had high-performance following an exponential growth. In the last year there had been an uplift of 12% in sales in the global art market in comparison with 2016. Following two years of declining sales, it currently reached \$63.7 billion of sales, also due to the historic record in the auction sector of the painting of Leonardo da Vinci sold for \$450 million by Christie's and the painting of Jean Michel Basquiat sold by Sotheby's for \$110.5 million. It is not difficult to imagine that the three countries with the largest market shares are the US, China and the UK, and these three countries accounted for 83% of total sales by values in 2017. The US in particular is the world leader, with 42% of world sales by value mainly driven by the sales of Contemporary and Modern Art sector. Moreover, China is the leader in the Asian market with 21% of market share, overtaking UK's second

place in the global scene making the UK slip in third place (UK market share is currently 20%), but still significantly less than the EU market that has 33%.

Overall, the UK market since 2009 had advanced by 45%, more than twice than the EU market, but significantly less than the US market (120% increase) and Chinese market (83% increase).

Globalization and the rise of online platforms heavily altered the way that art works are traded, evaluated and consumed. The art world is undergoing big changes because of digitalization. In fact, social channels are now creating communities and the majority of the art institutions (such as artists, collectors and dealers) are using the internet to incorporate database for organizational, educational and marketing purposes. The global online art sector represents 8% of the value of global sales.

Christie's and Sotheby's, the two main auction houses, understood the role that online platforms had, and started to implement those channels. Sotheby's, for example, made a huge push online, offering a 0% buyer's premium to all online-only sales to acquire new clients. Sotheby's held sixteen online-only sales in 2016, increasing to thirty-six in 2017 and acquiring 45% of new buyers. On the other side, Christie's started a partnership with Artsy, to have a greater network and access to major technology. Also, it launched Christie's LIVE, a platform which allows bidding online in live sales. The total value of Christie's LIVE auction sales was \$144 million in 2017.

Online channels are not the only revolution in the art sector, but also the blockchain brought to enormous changes. Blockchain is a digital platform that records transactions that are made using cryptocurrencies such as Bitcoin. The main characteristic is that it offers greater security as it allows verifications when making transactions and it is almost impossible to hack it. For many, the introduction of blockchain in the art world can broaden the market's transparency, track the ownership and provenance and stabilize the market.

As far as we are concerned, blockchain also has its negative aspects. Firstly, the anonymity of cryptocurrencies could create a black market of dubious transactions,

financing crime. Secondly, tracking the provenance of Old Masters is very complicated as many times the attribution of the artwork can be vague as “from the school of Leonardo”. The problem is that blockchain does not allow later amendments, and so many artworks cannot be given the right attribution in a second moment. More importantly, in order for blockchain to succeed, regulation must walk at the same speed of it.

### Chapter 3: The outcome of antitrust litigation in the art market

The third and last part of this thesis analyses a very interesting concept, that is to say the role of competition law in the art market.

Competition law is a law that seeks to maintain market competition by regulating anti-competitive conduct by companies, and it is implemented by public and private enforcement. Due to its opacity and lack of regulation, the art market has such conditions that create incentives to coordinate price manipulation and other anti-competitive behaviours. This manipulation mainly arises in the secondary market. In fact, even though the secondary market regards art sold at auction houses, that is only a small part of the market, it determines the prices of artworks at a larger scale. For this reason, collusion might arise in this sector.

In particular, this thesis analyses four different cases. The first one regards price manipulation, the second one tackles the problem of “auction rings” and the last two cases regards the dominant position authenticators can have in the art market. The first case regards Christie’s and Sotheby’s price fixing scandal of 1993. What happened is that, to reduce the fierce competition between them, they agreed to increase the commission paid by auction sellers. In fact, in 1993, Christie’s Chief Executive, Christopher Davidge, and Sotheby’s Chief Executive Diana Brooks, met several times between New York and London to decide together their strategy of price fixing. The authorities, who were concerned of the identical commission rates, started an inquiry against them. At this point, Davidge decided to cooperate and gave to the authorities all the required documentations. This anti-competitive



behaviour goes against article 101 of TFEU, that prohibits any agreement between undertakings, decisions by associations of undertakings and concerted practices that restricts or distorts competition.

Also, this case went under a criminal settlement and a civil settlement. Regarding the criminal settlement, Davidge testified for the US government and was granted amnesty together with Christie's. Diana Brooks cooperated and was sentenced three years' probation, including six months home detention, 1000 hours of community service and a criminal fine of \$350 thousand. Sotheby's agreed in paying \$45 million fine over five years. Regarding the civil settlement, Christie's and Sotheby's had to face class actions brought up by art buyers and sellers during those time of collusion. Both auction houses agreed to pay \$256 million to their plaintiffs.

As we can imagine, the most difficult part of this scandal was the difficulty for both auction houses to re-build their reputation.

The second case analyses another issue that antitrust tackle: anticompetitive behaviour between dealers. These cases are called "auction rings". What happens is that dealers agree not to compete against each other during auctions in order to artificially deflate the price of the artwork. After the auction, they conduct a second private auction, where the higher bidder gets the artwork, at the lowest possible price, eliminating competition. After discovering this kind of anti-competitive behaviour, UK law decided to better tackle this problem. The Enterprise and Regulatory Reform Act 2013 provides that dealers that make legitimate agreements must give details of the contract to the auction house, as for example the names of the parties. This reform made it easier to persecute dealers who acted illegally. The Liability under the Enterprise and Regulatory Reform Act requires that there is an agreement amongst potential bidders to the effect that one or some of them will abstain from bidding or that they will bid in a certain way. The effect of such an agreement is to distort competition, hence the offence. The sanctions are a fine and/or imprisonment up to five years.

The last two cases regard the dominant position that authenticator boards can have when they need to authenticate an artwork. It consists of a unilateral conduct of the authenticator, who holds a dominant position in the relevant market. As we have already analysed in the first section of this thesis, authentication is an essential characteristic when evaluating an artwork. Most of the times, thanks to the catalogue raisonné, the specialist can authenticate the artwork with no difficulties. Other times, the artwork is not in the catalogue raisonné, and Authentication Boards steps in.

The two cases illustrating the dominant position held by Authentication Boards are *Simon-Whelan vs. Andy Warhol Authentication Board* and *Bilinski vs. Keith Haring Foundation*. In both cases, the collectors had to pass the Authentication Boards to receive the authenticity certificate to be able to re-sell the artworks. In both cases, the artworks were denied from the Authentication Boards, excluding them from the market.

In the case of *Simon-Whelan vs Andy Warhol Authentication Board* case, the painting was considered not authentic two times by the board. Joe Simon-Whelan stated that the board had artificially reduced the number of works in the market, in violation of Section 1 of the Sherman Act (trade restraint) and had an anti-competitive behaviour to monopolize the market. In fact, because his painting was denied two times, Joe Simon-Whelan could not participate as seller in the Warhol artworks market. After a long and expensive legal battle, Joe Simon-Whelan decided to settle his claim.

In the case of *Bilinski vs. Keith Haring Foundation*, in 2015 the District Court of New York dismissed all claims. Regarding the claim of trade restriction, the court stated that the claimant had failed on providing sufficient evidence of conspiracy on restricting trade of Haring's artworks.

As the court stated, "the decision by any individual entity not to sell artwork that may not be authentic is an act consistent with lawful, independent action". Regarding the monopolisation claim, the court stated that the fact that the Foundation exercises an intellectual-property-rights-based monopoly over the

market for Keith Haring's artworks does not establish per se unlawful dominant power.

These cases represent the power authenticators can have in excluding potential competitors from the market. To make sure this behaviour does not occur, authentication procedure should be public and transparent, and should involve third parties. The procedure should be supported by scientific methods of analysis, based on objective authentication standards. It is true that authenticity certifications are not legally binding, so the artwork can still be sold, but the lack of authentication can have an anti-competitive effect.

Authentication boards are highly exposed to liability issues, as it is difficult to understand if they are having an anticompetitive behaviour or not. On April 11, 2016, the New York Senate passed Bill S1229A and delivered it to the New York Assembly. Bill S1229A (before Bill S1229) changes the Arts and Cultural Affairs Law in three main ways: (1) it precisely defines "authenticator" to delineate who is protected under the Bill, (2) it requires that plaintiffs in actions against authenticators plead with particularity in their complaints, and (3) it allows judges to award costs and fees to authenticators for "good and just cause. They also "highlighted the proposed Bill's potential to discourage frivolous lawsuits and to encourage reluctant authenticators." The changes to Bill S1229 (converting it to S1229A) mainly regards the discouraging meritless suits, and in making authenticators less wary of potential litigation cost. In reality, Bill S1229A is still not sufficient in protecting authenticators. Bill S1229, the un-amended original version of the Bill, better protects the authenticator thanks to two main characteristics that Bill S1229A do not have. First, the fact that the prevailing authenticator is entitled to the cost and fees of a suit. This means that it will deter many plaintiffs to pursue weak or not true claims, and the authenticator will have a compensation. Secondly, it provides that in any actions brought against an authenticator for giving his opinion with respect to an artwork, "the claimant shall prove the elements of such a claim or claims by clear and convincing evidence."

This is a higher burden of proof to have a more clear and convincing evidence of the claim. Meritless claims will decrease, and authenticator boards might reappear

In the final part of this thesis, I had the opportunity to interview Thomas Clement Salomon, Scientific Director of MondoMostre-Skira. This interview was held on May 17, 2019, in his office in the centre of Rome. Thomas Clement has a high professional background in this field, and his point of view is necessary to understand this complicated, yet fascinating, market.

Several different points emerged from this interview. Firstly, the important role that marketing has in the art market. As Thomas Clement Salomon stated, big amounts of money are spent for marketing initiatives. Thanks to this, art became more global and more democratic, as everyone now knows when why and where an art exhibition is. Secondly, it is also interesting the conception of Mr. Salomon regarding regulation. He believes that an international body that regulates the art market is impossible, as each state has its own regulations and protection norms. Also, state intervention might eliminate the freedom of this market of having creative initiatives. As an example, Mr. Salomon, compares the English market to the Italian one. The former is a more liberal market, whilst the latter often has its hands tight due to strict government intervention. What is clear, is that good knowledge of this market prevents information asymmetry and criminal behaviors. He underlines the importance of Authentication. As a matter of fact, he suggests to never buy or sell an artwork without the appropriate certification, as this might enable criminal behavior. Finally, he admits the existence of the problem of lack transparency in the art world. To overcome this opacity, there is the need of many players. All of us play a role in the art market. To start, we should never buy an artwork that has not been analyzed by a specialist and that dose not have the right certification.

## Conclusion

To conclude, trust is the main characteristic of the art market, especially regarding the contemporary one. Competition law, if well implemented with the help of specialized third parties, can really improve transparency in the art world. Undertakings will not easily conduct criminal behavior if they know that their reputation in the market might be destroyed. At the same time, with a strong regulation as the un-amended Bill S1229, claims that do not have sufficient evidence will be discouraged. Asking for more government intervention has its pitfalls. Usually, when the government intervenes for certain problems, the market slows down and the freedom to do new, innovative projects is tightened up. In my opinion, in some way, this opacity makes everything more mysterious and attracting. What is thrilling of the art world is the subjectivity that lies behind it. A painting of Lucio Fontana, such as “Spatial Concept”, might be only a slash for someone, but for others it might represent the infinite. For me, it is the infinite, and the first time I looked at it, it was magic.