



# Auctioneers vs. *commissaires-priseurs*: The carnival mirror of profession regulation in the international art market

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## Abstract

This paper is a comparative analysis of the recent evolution of the French and the Anglo-Saxon profession regulations of auctioneers in terms of entry barriers and exercise of the profession. Firstly, following Stephen and Love's (1999) framework of the regulation of legal profession, we highlight the differences between regulations focussing on different levels (entry restrictions, advertising, fees, fee contracts, and organisational form). We show that French commissaire-priseurs and Anglo-Saxon auctioneers are bounded to quite opposed rules, relating to both the level of regulation (licensing against registration or certification) and the scope of this regulation. Secondly, we try to assess the success of these regulations in terms of economic efficiency by comparing the international markets shares of French and Anglo-Saxon auctioneers. We further highlight how a weak regulation can disturb prices mechanisms and, in some cases, favour speculation. The discussion of some emblematic scandals highlights distortions provoked by a strong, as well as a weak regulation.

JEL: J44, L43, Z11, D44

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## 1. Introduction

In the early 1960s the overall turnover of the French auctioneer Etienne Ader was twice as much that of Christie's and Sotheby's combined worldwide. Nowadays, the turnover of French auctioneers altogether is less than one half of Christie's or Sotheby's alone. In 2010 the total annual revenue from the sale of art and collectibles was, including fees, €3,366 millions for Christie's, and €3,308 millions for Sotheby's. For the 345 French auction houses it summed up to €1,528 millions, where the turnover of the first French house was €102 millions.

Could the 1556 royal edict on French auctioneers' status have some responsibility for such a decline. In 1556, a royal edict by King Henry II had established in each town "formal and permanent offices for chattels official appraiser, so that they could manage the valuation, the appraisal, the sales and the dispersal of chattels, to stop abuses, fraud, malpractices and other embezzlement" (Quemin 1997: 28). This monopoly went on more than four hundred years. During this period, French auctioneers have been subject to an array of censorious rules and regulations, while their main competitors in Great Britain and, later, in the United States, seem to have benefited of a relatively minimal and liberal system. This paper aims to analyse these differences, and to discuss whether, as a possible outcome of them, during the 1970s French auctioneers have been sheltered from competition to the advantage of their Anglo-Saxon counterparts. In addition, our analysis contributes to shed light on the growing rivalry between Christie's and Sotheby's on an internationalised art market, and their leadership based on expanded activities, new business practices, management, and contractual rules.

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The recent reform of the French auction market has introduced some liberalisation and put the public-officer status of French auctioneers (*commissaires-priseurs*) more in line with that of their Anglo-Saxon private counterparts. Such a reform took place in two steps. First, a 2000 decree, implemented in 2001, suppressed the monopoly of *commissaires-priseurs* on volunteer sales at public auctions.<sup>3</sup> Fees were partially liberalised, and rules of conduct were loosened. In this new legal framework, auctioneers have been allowed to adopt a wider range of market strategies and to choose more freely the formal organisation of their business. The law also set up a new institutional body, the Council of Voluntary Sales (*Conseil des ventes volontaires*), to control the behaviour of auctioneers and auction houses. Second, on July 6th, 2011 the French parliament approved a draft bill, which transposed the European Directive on Services and established the principle of free practice of public auctions. Since then, *commissaires-priseurs*'s model has basically adhered to the Anglo-Saxon one. After centuries of separate history, and, more recently, of antagonism, the mirror images of *commissaires-priseurs* and Anglo-Saxon auctioneers finally look alike.

The purpose of profession regulation is to lower asymmetrical information between professional quality and consumers, and to incentivize professional human capital (Kleiner 2006). The Anglo-Saxon and French models respectively position themselves rather at the extremes of profession regulation, which corresponds to three increasing levels of entry barriers and profession discipline: registration, certification and licensing. Registration is being included in professional lists, usually compiled by professional associations. Certification adds examination requirements, usually performed by academia, professional associations and/or government agencies. Uncertified individuals can still exercise the profession, though at a lower level. Licensing imposes that all professionals are tested on given requirements. In particular, Anglo-Saxon auctioneers are subject to registration and certification (depending on countries and states), while French *commissaires-priseurs* are typically bounded by licensing. In terms of efficiency, certification's advantages toward licensing may include labour market differentiation, lower monopoly and hence lower costs for consumers (Friedman 1962). On the other hand, only licensing would foster trust, and hence demand and supply, and welfare, differently from weaker forms of regulation (Arrow 1963).

The comparison between the Anglo-Saxon and the French regulations on art auctions also constitutes a stimulating illustration of the general debate on regulation policy in economic theory. To some extent, the French regulation of the auctioneer profession can be interpreted following a logic of neutrality, as modelled by Walras (1874) in his analysis of market pricing. Additionally, it can be interpreted in a logic of intermediary, arbiter, or middleman, as in the liberal or libertarian Austrian framework. Hence, possible causes of market failure, such as informational asymmetries and intermediaries' opportunism, would be reduced, at the benefit of those buyers unable to discern the true quality of offered goods, and those sellers compelled by personal contingencies to sell their assets. Conversely, the Anglo-Saxon loose-regulation model is rather reflected in Stigler's (1971) 'capture theory', where regulation is considered worse

<sup>3</sup> In France, *commissaires-priseurs* have detained the monopoly on judiciary, as well as voluntary sales at auctions. Notice that the suppression of the monopoly on voluntary sales has been just theoretical, since the obligation to request the authorisation of public sale to the Council of Voluntary Sales before each sale is often given just some days or hours before the sale.

than the failures it fights, since it would protect the interests of politically stronger groups.

The Anglo-Saxon argument would be supported by some evidence about French commissaires-priseurs' behaviour during the nineteenth century. Guillaumin (1886) provides curious examples of the about-faces of some commissaires-priseurs, just to prove their loyalty to the political establishment, and personal links between major auctioneers and political leaders. For instance, after the 1830 revolution, some commissaires-priseurs removed the bust of King Charles X from their offices, and voted a FF4,000 credit in favour of the families of those citizens "gloriously dead for freedom". When King Luis Philip II was restored in power, commissaires-priseurs immediately asked for an audience, and on August 20, 1830 the president of the auctioneers' (public) chamber made a praise of the monarchy.<sup>4</sup> On the other hand, the Anglo-Saxon system has also given rise to dysfunctions, as in the case of the huge collusion scandal between Christie's and Sotheby's in 1995.

This paper provides a comparative analysis of profession regulation of art auctioneers in France and the UK and, later, the US, before the recent French reform, and its impact on the market in terms of economic efficiency. In addition to typical entry barriers imposed by licensing with respect to registration and certification, we also study the professional rules shaping the way to exercise the profession. For this purpose, we apply Stephen and Love's (1999) framework of legal professions regulation. After introducing the early establishment of the status of commissaires-priseurs in France in 1556, we focus on the recent development of the profession from the nineteenth century on, when the monopoly of commissaires-priseurs took place in Paris in 1801.<sup>5</sup>

In the next Section, we compare the Anglo-Saxon regulatory model with the French one through the main competition aspects of entry barriers, advertising, applied fees, fee contracts and organisation forms. In Section 3, for the two models, we consider efficiency effects in terms of observed market shares, and price-distortion and speculative effects, also illustrated by judicial cases on key scandals. Section 4 concludes the paper.

## 2. Auctioneers and commissaires-priseurs: Two names and two regulations for one activity

In France, the profession of auctioneer has been the steady and specific object of licensing, opening up to liberalisation only in recent years. Commissaires-priseurs are gathered in regional companies, each being supervised by a regional disciplinary chamber, depending on a national chamber (Chambre disciplinaire des commissaires-priseurs), established by the French Ministry of Justice. The latter controls this quite stratified network, especially for concerns of conflict resolution.<sup>6</sup> On the contrary, in

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<sup>4</sup> After the early twentieth century, auctioneers kept regular links with politicians. For instance, the auctioneer Jacques Tajan used to have lunch with President François Mitterrand, while President De Gaulle was a personal acquaintance of the auctioneer Maurice Rheims. In particular, personal links might lead to the lobbying in favour of the profession. For instance, after the Rueff Report denounced the archaism of the profession in 1959, the common stipend was finally abrogated thirty years later. Was this abrogation and the friendly links between an auctioneer against the stipend and a senator just a coincidence (Quemin 1997: 389)?

<sup>5</sup> And in 1816 in the rest of the country.

<sup>6</sup> This hierarchy is still in force for judiciary commissaires-priseurs.

Great Britain and, later, in the United States, this profession has been relatively free or self regulated, only subject to registration or certification, hence bound to general commercial law.

Stephen and Love's (1999) framework of legal professions regulation is particularly useful to compare the Anglo-Saxon and the French auctioneers' regulatory models. According to this framework, public authorities usually intervene at five main levels of the organisation of the profession: Entry restrictions, advertising, fees, fee contracts, and organisational form. As we show in the four subsections below, for each of these levels, the rules for French commissaires-priseurs and Anglo-Saxon auctioneers diverge considerably. In particular, we can observe a dichotomy in terms of self vs. government regulation, and scope of regulation.

## 2.1 Entry barriers

The French profession has been the object of a quite early licensing, where the public authorities fixed entry barriers, including geographical, financial, social (including nationality), and competence ones. The underlying rationale was that a French auctioneer had to be an arbitrator between the seller and the buyer, his regulated function being to bring all the required information (appraisals) to the market before transactions took place.<sup>7</sup> To Anglo-Saxon public authorities, instead, auctioneers have merely represented a profitable economic sector to be expanded, to significantly contribute to the national economy. Therefore, no particular entry barriers have been imposed here, if not endogenously, such as the social ones. Registration and, in some cases, certification have been the rule.

In France, during twentieth century, entry barriers for commissaire-priseurs have been twofold, socio-economic and education barriers, and geographical barriers (constraining the exercise of the profession to a certain area). License conditions imposed to applicants included, among others, a minimum age of 25, French nationality, and morality (being married for a long time, and also good family father). In particular, in order for applicants to prove their competences, they had to pass a written and oral test in Paris, in front of a commission of four commissaires-priseurs, named by the Disciplinary Chamber and chaired by a magistrate named by the first president of the appeal court of Paris (Law of November 2, 1945). By Decree of June 19, 1973 formal academic requirements were also added. However, the most restrictive condition for entering the profession remained the purchase of the office. Since its price was quite high (between 20 and 50 millions of French francs), it was often passed on through generations within the same family. Hence rich families dominated the profession, in spite of the permission of creation of professional civil societies in 1969 (Quemin

<sup>7</sup> Notice after the publication of the Edict in 1556, and until the beginning of the nineteenth century, various types of public and private officers (private priseurs-vendeurs, public notaries, bailiffs, clerks of court and jurés-priseurs), and with different roles (from inventories to appraisals and private commercial sales) were involved in or in connection with auction sales. Abuses were far from rare (see, for instance, Gordon, 2007 for regulations in the initial period, trying to avoid some abuses; and Marandet, 2007 for examples of complaints). In 1801, by law of March 18, Napoleon conferred the monopoly of judicial and private sales to auctioneers in Paris, where eighty offices of commissaries-priseurs were established. The law also stated that it was forbidden for public officers to work in the business of commercial sales, namely private. Fifteen years later, a similar law was voted for the rest of France. After 1820, and before 2000, no substantial changes occurred in the regulation of the profession (Quemin 1997).

1997). Nowadays commissaires-priseurs are still authorised by ministerial decree to the practice of judicial and legal sale, and if any of them wants to cease his activity, a new decree must be issued.

The exercise of the profession was also subject to legal and geographic barriers in France. The commissaire-priseur held the monopoly of sales and appraisals in the municipality where his office was established. A commissaire-priseur was also not allowed to organise sales in a French municipality located outside his jurisdiction (*département*).<sup>8</sup> In 1991 rules slightly changed, and commissaires-priseurs were exceptionally allowed to conduct sales outside their own jurisdiction in France. Still nowadays the Minister of Justice decides on the number of commissaires-priseurs offices and their locations. Since the beginning of the nineteenth century, in order to further control commissaires-priseurs, the Disciplinary Chamber also requested sales to be concentrated in a given area of a jurisdiction or municipality. For instance, in 1780 the famous Hotel Bullion opened in Paris, and by 1817 the most important auctioneers of the city gathered there. In spring 1852, Paris auctioneers were moved to the current Hotel Drouot.<sup>9</sup>

In Great Britain and, later in the United States, auctioneers have only been subject to certification, or just mere registration, the existing barriers for entering and exercising the profession having been only social, and endogenously formed within the profession. Indeed, the only rules applied by the government aimed at raising revenues and thus taxes, rather than regulating transactions per se. The British government settled the first rules on auctions in 1845 through the approval of the Auctioneers Act. Under this act, every auctioneer in any part of the country had to pay £10 to purchase the licence, which was renewable annually. If an auctioneer failed to produce a valid licence on demand, he was liable to a fine of £100, or one month of prison. The Act also aimed at limiting malpractices, and it obliged the auctioneer, before commencing any sale, to clearly post a sign at the place of sale, displaying his full "Christian" name(s), surname and place of residence. Only this last condition remains in the current British law.

Career paths in the Anglo-Saxon countries have crucially depended on the social class, milieu and provenance, that is, aristocracy in Great Britain, and middle-high bourgeoisie in the United States. As Watson (1998: 108) describes it for Sotheby's, if "people came from the right background they would start as porters, to introduce them to the objects, or maybe, if they were women, they would be put at reception, where they were felt to be more presentable. But this was only for a short time, after which they would be promoted on a fast track directly to the specialist departments, as

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<sup>8</sup> Nowadays there are 96 departments in Metropolitan France. Notice that in his jurisdiction, but outside his town, the commissaire-priseur shared the monopoly of appraisals with other judicial officers, such as notaries. Moreover, they were allowed to manage sales abroad, for example in the Principality of Monaco or in Japan.

<sup>9</sup> Even when the influent commissaire-priseur Guy Loudmer asked the Disciplinary Chamber to move his office elsewhere to a private building in 1878, he was denied. However he started to advertise that, for the first time since 1852, an independent place for sales existed in Paris. The Disciplinary Chamber reported Mr. Guy Loudmer to the Court of Justice. The Chamber finally won the trial on the grounds that only one place was allowed for public sales in Paris. Nevertheless, around the end of the 1980s commissaires-priseurs increasingly obtained exemptions for the organisation of sales outside Drouot. The inauguration of the location of Drouot Montaigne by the Ministry of Finances in 1987, reserved to prestigious millionaire sales, was rather part of a promotional strategy targeting the international market.

cataloguers, prior to becoming junior experts. The ‘right background’, in this context, meant first and foremost being born into an aristocratic family. This, it was felt, gave people the right sort of preparation for dealing with the owners of great works of art, who, as often as not, were members of those same families. It also helped to have attended one of about a dozen public schools (Eton, Stowe, Radley Harrow, Winchester, etc.) where a good education was supplemented by the opportunity to form fast friendships with the offspring of other wealthy, art-owning families. Finally, a degree from a good university was preferable, though not strictly necessary.”

In terms of regulation, in Anglo-Saxon countries, the profession is governed by the general commercial regulation. Public authorities have never taken a position in settling specific rules for the organisation of this profession (except for the auctioneers’ obligation to display their name and residence), even when, in the US, different movements against auctions have denounced malpractices and presented petitions to the Congress.<sup>10</sup> Notice that the specific rules governing the profession, such as a minimum education and the self-ethical code, have been progressively settled by private professional associations, such as the National Auctioneers Association, founded in the US in 1949.

## 2.2 Advertising

The contrast between the French and the Anglo-Saxon regulation models is strengthened in the case of advertising, and in particular in its persuasive component, rather than in its neutrally informative one. In France, because of the public status of judicial officers, personal advertising has been forbidden until recently. Conversely, in the UK and in the US, advertising has been exploited from quite the beginning.

In Great Britain, as early as in 1735, one of the first modern auctioneers, Christopher Cock, put ads in newspapers, using capital letters to stress the important features of the sale, and specifying the social status of ‘gentlemen’ of previous owners of the offered goods. Later on, in 1796 Harry Phillips was renowned for “the art of the superlative adjective to new heights”.<sup>11</sup> (Learmont 1985: 57). Advertising looked even more strategic for James Christie, the founder of the famous auction house. He inaugurated his first auction of paintings in 1767, publicizing the minutes of the sales in the two main newspapers, the Morning Chronicle and the Morning Post, in both of

<sup>10</sup> The relatively loose regulation of the Anglo-Saxon profession has seemingly allowed different malpractices. For instance, some British merchants denounced “imperfect merchandise being offered for sale, and with insufficient time allowed to view and judge the quality, or lack of it” (Learmont 1985: 94). In order to prevent these problems, market players tried to set up rules through anti-auction protest movements in Great Britain and in the United States. In the latter, different anti-auction groups presented petitions to the Congress, especially in 1829, but, ultimately, they had no impact. In England, a pamphlet against auctions was published in 1812. Even if the anti-auction movements coincided with a period of general recession in the economy, some of the claims against auctioneers were fair, as “it was usual that exaggerated descriptions of merchandise were published, that spurious items were ‘got up for sale’, paintings were falsely signed and house sales rigged. It is also true that auctioneers were allowed to shelter behind conditions of sale, drawn up by themselves for their own convenience” (Learmont 1985: 99).

<sup>11</sup> In 1801 the Morning Post posted advertisements stating that all the furniture and effects for sale were invariably ‘neat’ or ‘valuable’, ‘elegant’ or ‘fashionable’, ‘superb, genteel, unique’, but above all ‘genuine’. Moreover, all those remarkable goods were at least ‘the property of a gentleman’ of a ‘person of rank’ or even ‘gentleman retiring to the country’.

which he owned stocks. Notice that London auctioneers also maintained close links with journalists writing on auctions sales.<sup>12</sup>

The role of advertisement in Sotheby's and Christie's strategies became particularly important in the 1960s, during the rise in competition between the two houses. For prestigious sales, contracts between sellers and auctioneers used to include advertisement, in addition to other sale conditions.<sup>13</sup> Advertising and promotion have not been confined to sales alone, as auction houses have used it to overall promote their name and image.<sup>14</sup> Alfred Taubman represents perhaps the best emblem of the importance of advertising and promotion at the Anglo-Saxon auction houses. When he bought Sotheby's in 1983, Mr. Taubman came from the commercial world "and brought to Sotheby's the know-how he developed previously in his famous shopping centers which 'seemed to spring up everywhere always larger, always more lavish, devouring corn patches and wheat fields. As his malls became more prolific, he became known as a trendsetter in the industry. His centres were the first to offer fountains, waterfalls, shrubbery, restaurants, elevators and prestigious anchor stores such as Neiman Marcus, which attracted deep-pocketed shoppers'" (Mason 2004: 17). However, Sotheby's smuggling scandal enhances how auction houses' "glossy" press releases may cover auctioneers' real "social and moral character" (Watson 1998: 86-87). Another, most recent scandal, of collusion, has been fatal to Mr. Taubman.<sup>15</sup>

In France, advertising was still prohibited in the 1980s. In 1987, the necessity to communicate to the public started to be permitted, even if the word "advertising" was a taboo. Practices began to change with the development of jet-set evening auctions and charity sales with high social visibility. At the same time, articles on how to buy at Drouot appeared in newspapers. Still, rules on advertisement remained strict. For instance, at the beginning of the 1990s it was forbidden to advertise after-sale results, or

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<sup>12</sup> For instance, Sotheby's partner Geoffrey Hobson wrote the following letter to a reporter of the Daily Telegraph in May 1917: "One word of congratulations and opinion for your admirable article published today. You learn me to wait a lot from you, but I've been surprised by the form and the substance of your note about Wilson treasure. The information provided on Montmorency himself and the recent sales of armors was extraordinarily interesting and written with your sure sense concerning what is picturesque and timely. The Telegraph would be really proud working with such contributor" (Lacey 1998: 77).

<sup>13</sup> For instance, for the sale of the Goldschmidt collection at Sotheby's, London, in 1958, tight conditions were imposed by the consignor to the auction house, including a high marketing budget, a late timing of the auctions schedule and an evening dress code. The most influential dealers in the world attended the auction, and a record price of £220,000 was fetched for Cezanne's painting "Boy in a red vest". The year before, on the occasion of the sale of the Weinberg collection, the consignment contract stipulated that Sotheby's should ask for the service of a professional qualified in advertising and public relations. The London office of an American advertising company stroke the deal, obtaining a surplus of £100 for each very important invited person attending (Lacey 1998). In summer 1957 Queen Elizabeth II privately visited New Bond Street to admire the Van Gogh on sale, besides showing interest in a Degas's painting. The day of the sale there was such a demand for invitations that Sotheby's had to arrange a private television network in the salesroom. That day total sales fetched the record of £326,520.

<sup>14</sup> For instance, in 1961 Sotheby's director Peter Wilson commissioned to the best-selling writer Harold Robbins a James Bond novel on sex and power taking place at the house's premises in London. The novel was published in the yearly magazine Art and Auction, to showcase the trendiness of the auction house (Lacey 1998: 163).

<sup>15</sup> See Section 3.3 below.

future sales in the media. When the famous commissaire-priseur Maurice Rheims tried to introduce advertising in his business, he was condemned by the Disciplinary Chamber.<sup>16</sup> Remarkably, until quite recently conditions of sales were rarely translated in English in Drouot catalogues.

While in France the only way to promote the business on the internal market has depended merely on private networks relations, diners and professional links established with notaries and bailiffs, in the Anglo-Saxon countries auctioneers have been able to reach a larger population thanks to advertising and a wider variety of promotional tools. Obviously, these differences might have quite diverse consequences on competition.

### **2.3 Fees and fee contracts**

Auction houses draw the majority of their revenues from commission applied on the hammer price to sellers (“seller’s commission”) and/or buyers (“buyer’s premium”). This is crucial for the competition between auction houses, since the higher the commissions, the higher is houses’ income. On the other hand, lower commissions attract more sellers, thus increasing their competition and bids.

In Anglo-Saxon countries, seller’s commission and buyer’s premium have generally been unregulated, constituting a main factor of competition between Sotheby’s and Christie’s. Sotheby’s sharp rise in profits at the beginning of the 1920s can be greatly attributed to the reduction of their seller’s commission from 12.5% to 7.5%, in addition to other factors, including advertising. While in 1926-27 Sotheby’s profits were less than a half than Christie’s (£27,000 compared to £59,000, current currency), just one year later they were quite similar (£63,000 for Sotheby’s and £70,000 for Christie’s) and kept a more similar path (Lacey 1998: 86). Notice that until 1975 auction houses’ revenues depended on seller’s commissions only, since no buyer’s premium was at stake. In 1975 the two houses introduced a buyer’s premium almost at the same time (Learnmount 1985; Lacey 1998).<sup>17</sup>

In France, commissaires-priseurs have been bound to a stipend based on regulated commissions.<sup>18</sup> At first, the role of the stipend was to sell new posts and to increase the royal budget. But for commissaires-priseurs this professional brotherhood contributed to reduce the competition between them. Since 1696, every two months a percentage of the total revenues collected by commissaires-priseurs was divided into equal parts between all the commissaires-priseurs in the same municipality.<sup>19</sup> Basically,

<sup>16</sup> “I had been reprimanded by my peers: the first time because I published a colored reproduction of a Rembrandt’s painting in a sale catalogue – according to the custom, reproductions have to be black, even when famous artworks are concerned. The second time because my photo and an interview were published in the magazine *Réalités* – according to the tradition, a commissaire-priseur must not draw attention” (Rheims 1993: 47). The public debate continued to increase, also by means of the specialised press, such as in the art magazine *Connaissances des arts* in 1986 (Quemin 1997).

<sup>17</sup> The British Antique Dealers Association charged them with collusion, but they were cleared because of lack of proofs.

<sup>18</sup> The Decree of March 24, 1993 fixed buyer’s premium at 9% plus VAT. According the same Decree, seller’s commissions can be instead negotiated, but within certain thresholds. However for judiciary sales, that commissaires-priseurs are obliged to hold, law imposes commissions.

<sup>19</sup> Commissaires-priseurs had to pay half of their sales fees to the stipend, on the basis of overall revenues. The stipend was established in 1696, halved in 1985 and suppressed by on December 19, 1989.

this stipend (which ranged from €40,050 in 1987, to €45,700 in 1988, and more than €53,400 in 1989) added a rent to less successful, or less active, commissaires-priseurs, and conversely constituted a cost for most successful, or active ones (Moulin 1994: 180). Since the revenue of small-medium or outside-Paris auctioneers depended on the shared stipend, incentives to develop their activity were limited.<sup>20</sup> The stipend was suppressed in 1989, after many years of resistance in the profession.<sup>21</sup> Notice that less active auctioneers mainly worked with judiciary sales, and their regular activity resulted from business brought by correspondents, such as notaries. Only major Parisian offices were involved in prestigious sales involving high fetched prices, revenues and competition. Since the revenue of small-medium or outside-Paris auctioneers depended on the shared stipend, incentives to develop their activity were limited.<sup>22</sup>

## 2.4 Organisational form

French regulation does not only deal with the relationship between auctioneers and sellers and buyers, but also with the organisational form of the intermediation. Conversely, in Great Britain and in the United States, the organisational structure of auctioneers lays under general commercial law, similarly to other professions.

Because of their public status, French auctioneers have been forbidden to open to external capital. The aim of such a rule has been to ensure the independence of professionals and to prevent their activity from the influence of powerful financial groups. When some commissaires-priseurs showed their interest to purchase Parke-Bernet in the 1950s, the French Ministry of Justice judged inconceivable they could be involved in trading societies, particularly abroad. It was only by a law of 1990, enforced in 1992, that commissaires-priseurs were allowed to establish a public company, provided that this has a civil objective. This condition was quite restrictive and prevented any association with Anglo-Saxon auctioneers, given the commercial purpose of the latter. French offices have remained quite small in size. In 1994, 49% of them employed just one auctioneer, 40% two, 6% three, and 5% four, the maximum (Quemin 1997).<sup>23</sup> As mentioned, the purchase of an office has always been quite expensive. Furthermore, since 1991, it requires at least 40% of cash, in order to limit the risk associated with common responsibility and solidarity. After the 2000 reform and the opening of the French market, some commissaires-priseurs have been able to establish strategic alliances, or to get substantial external-capital investment.<sup>24</sup> However, despite

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<sup>20</sup> Of course, the most competitive auctioneers were against the stipend and in 1979 one of the most important commissaires-priseurs of Paris, Maître Ader lowered his contribution to the stipend and published many critical articles in the press. The withdrawal of the stipend in 1989 allowed Maître Ader's office to save FF5 millions (Quemin 1997: 386).

<sup>21</sup> For instance, this stipend was denounced in Rueff Report in 1960. In order to maintain it, the profession accepted to reduce it by half in 1985, before it completely disappeared by Law of December 19, 1989.

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<sup>23</sup> Christie's and Sotheby's employ, respectively, about 2,000 and 1,500 staff worldwide (see christies.com and sothebys.com).

these recent trends, French auctioneers are still far less open than their foreign competitors.

Arguably, Sotheby's emblematic expansion benefited a lot from the openness of its legal status in the UK and, then, in the US. Founded by London bookseller Samuel Baker in 1744, in 1924 Sotheby's became a limited company with open capital, and adopted the new name of Sotheby's & Co. In the 1960s, the company grew rapidly, from one single sale room New Bond Street, to branches in different part of the world and differentiated business ten years later. Notably, in 1964 it acquired Parke-Bernet of New York, the largest art auction house in the US at that time. As a result of this development, in 1977 Sotheby's-Parke-Bernet Group Ltd. was floated on the London stock exchange. The group went back private in 1983, when Alfred Taubman and a small group of investors bought it and saved it from a hostile takeover. Its legal status was transformed into a company of limited liability. In 1988 Sotheby's went public again, and its shares are listed on the New York Stock Exchange since. The evolution of the organisational form of Christie's has been quite similar.<sup>25</sup> Nowadays, Sotheby's and Christie's are each represented by a broad network of more than one hundred offices, more than forty salerooms and "hundreds of experts" seeing "a million of objects every year" (Watson 1998: 290) all over the world, allowing for a good and outreach to national and regional business opportunities.

### **3. Regulation and economic efficiency**

A lower regulation in Anglo-Saxon countries has allowed auctioneers to develop more competitive strategies and hence to increase their international market share. The more bidders at an auction, the higher is the expected price, and thus the subsequent sale procurement, in terms of quality, quantity and revenues (Klemperer 2002). Thanks to the freedom of advertising and the choice of their organisational form, Anglo-Saxon auctioneers have been able to expand internationally and to attract more bidders. Moreover, this expansion has been benefiting from self-reinforcing effects because of positive externalities.

Conversely, the strict rules of the French system have prevented commissaires-priseurs to develop their market. Because of the interdiction to exploit advertising, they encountered more difficulties to attract international bidders. Moreover, because of the regulation of their fees and notably the existence of a stipend, French commissaires-priseurs have had few incentives to develop their market. The ban on looking for external capital has impacted in a similar way.

The lack of incentives induced by the French regulation has resulted in a weaker position of commissaires-priseurs on the art market. However, a lower regulation has also contributed to the presence of bias and speculation in the Anglo-Saxon market, to which auction houses seems to be more exposed than in the French one. For instance, during major market downturns, such as at the end of the 1990s and in 2008, French auction houses showed a lower volatility in turnover than the Anglo-Saxon ones. In particular, between 1986 and 1989, when the speculation was at its peak, the total

<sup>24</sup> One of these is Francis Briest, a leading Paris auctioneer in modern and contemporary art. He recently struck up a partnership with an organiser of trade fairs and owner of an art gallery. A cash infusion from the aeronautics company Dassault has allowed them to create Artcurial-Briest, a company that organises trade fairs, auctions and private sales of art objects.

<sup>25</sup> Christie's was listed on the stock exchange on November 15, 1973.

turnover of Parisian auctioneers was 7 to 9 times less than Sotheby's and Christie's, while in 1990, during the turndown, it was just 2.9 times less, and similarly for the 2008 crisis.

The analysis of the market shares of the different auctions houses gives us some clues of the impact of regulation on competitiveness, as examined in Section 3.1 below. It appears that the relative freedom of Anglo-Saxon auctioneers in choosing the organisational form and diversifying their business beyond public sales has allowed them to develop contractual practices that favour the increase of their market share, showing a greater efficiency of the system. Nevertheless, these practices may have also lead to market disruption, bias in price fixation, and speculation, and hence a negative impact on welfare.

It is relevant to complete the assessment of the efficiency of the two systems also from a legal perspective. In Section 3.2 we consider two major lawsuits in which, respectively, French and Anglo-Saxon auctioneers have been involved. The analysis of these judicial cases will shed more light on the ability of the two systems to prevent and to control abuses. Whereas the entry barriers to the profession and the status of judicial officer in France have not succeed in preventing auction sales from opportunism and abuses, Anglo-Saxon higher competition has not been more efficient either, as shown by the collusion scandals of Sotheby's and Christie's.

### 3.1 Competitiveness vs. speculation

Through the relative freedom and competition incentives, Anglo-Saxons auctioneers have developed various practices and services to attract their clients, achieving great performance during the twentieth century. In 1975 total auction sales at Sotheby's and Christie's were 3.2 times higher than Parisian auction houses all-together. In 1980 they were 6.3 times higher, to attain the peak in 1986, with a proportion of 9.1 to 1 (Gaillard et al. 1991). The data available for the last ten years show the steady decline of the French market relatively to the international one. For instance, in 2003 the French market share was 9.3% (the US one 41.6%, and the UK 28%); four years later it decreased to 6.3% (Artprice 2003 and 2007).

Caution should be taken in holding profession regulations the entire responsibility for such a decline. Various French official reports (Aicardi 1995; Chandernagor 1998) suggest it might be partially due also to differences in transaction costs caused by the application of VAT on arts sales, together with the introduction of Artists' Resale Rights (*droit de suite*) in France and other continental European countries. However, academic studies have shown that the differences in taxation and copyrights have played a secondary role in the relatively weaker position of France.<sup>26</sup> We can thus attribute the

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<sup>26</sup> VAT has been enforced in France (as well as in other continental European countries), but not in Great Britain until 1994. In 1994, the European Union's 7th Directive on VAT harmonised the tax to 5.5% for imported second-hand goods, including works of art. That applied to all member states, with the exception of the United Kingdom, which obtained derogation until 1999 with a lower rate of 2.5%. In 1999 the European Commission commissioned an independent study in order to assess the impact of the European 7th Directive on VAT on the international art market, and the relevance of derogation in the case of the UK. This study does not allow us to infer any direct effect on the decline of the French art market caused by VAT. The study rather concludes that the VAT impact has been quite neutral. This neutrality has been partly ascribed to the exception of temporary imports, including also art objects. In addition, notice that despite the sale taxes increase from 0% to 2.5% in the UK between 1993 and 1997, sales there augmented more than the worldwide average (50% in UK vs. 36% worldwide). Sales taxes are generally applied also in United States, including New York, a major place in the international art

weaker position of France mainly to the lack of incentives to French auctioneers, whom the long-lasting regulation excessively protected and precluded from an international expansion. The rapidity with which Sotheby's and Christie's have been able to earn market shares in France since the opening of its market in 2000, offers another evidence of the difference of competitiveness conditions between the French and foreign auctions houses. Since the Anglo-Saxons held their first auctions there in 2002, their combined business has grown in France by 273%. Moreover, the average price fetched by Drouot (€550) on the same market is substantially lower than those by Christie's (€24,237) and Sotheby's (€40,000).<sup>27</sup>

Notice that some practices only recently allowed in France, but rather traditional in Anglo-Saxon countries – such as guaranteed prices and loans – may have favoured speculation. Before 1985, Sotheby's occasionally accepted staggered payments. But then they introduced credit to buyers as a financial service, which became a major way of borrowing, and a legitimate way to pay a work of art for buyers. The new financial department of Sotheby's could finance up to 40% of the appraisal value.<sup>28</sup> Ancillary financial services have been used by auction houses also to attract sellers by offering guarantees and interest-free, non-recourse loans.<sup>29</sup> By offering these financial services, auction houses bear an even stronger interest in the sale result. It becomes more difficult for them to maintain neutrality in protecting the interests of both sellers and buyers. Indeed, guarantees and credits may induce auction houses to manipulate bids upward and, more in general, to develop an opportunistic behaviour.

On the one hand, auctioneers' revenue depends on the hammer price, not only through the applied commissions, but also through financial interests from loans. On the other hand, auctioneers' profits can be threatened by the risk of insolvency of buyers and exaggerated guarantees offered to sellers. If bids do not reach the guarantee,

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market. Similarly, the Artist's Resale Right does not seem responsible for a low competitiveness of the French market. This right consists in a royalty payable to a qualifying artist, or her heirs, each time a work of her is re-sold during the artist's lifetime and for a period up to generally 70 years following her death. This right has been in force in France since 1920. The 2001/84/EC directive has uniformed its adoption in the European Union, with the exception of, once again, the UK. Here it was lately introduced in 2006, and until January 2012 it only applied to the works of living artists. In their study on the impact of the introduction of the Artist's Resale Right in the UK market between 1993 and 2007, Banterghansa and Graddy (2011) conclude that the Right has had no significantly negative impact. Notice also that in the US this right has been in effect only in California.

<sup>27</sup> In 2010 Sotheby's and Christie's accounted together for one quarter of the French market of art and collectibles (i.e. mainly fine arts, and wine and spirits), similarly to their combined 30.7% share of the global market (Conseil des ventes volontaires 2010).

<sup>28</sup> Dealers were outraged by this practice, and Christie's president further criticised it in his 1985 report: "We will resist to the temptation of developing associate financial services, as it could induce unsuitable changes in demand and artificially raise art prices" (Lacey 1998: 270). However, because of the high competition between the two auction houses, at the same time Christie's was financially assisting buyers, by putting them in contact with financial brokers. In France such practices were totally forbidden for commissaires-priseurs.

<sup>29</sup> For instance, in 1989 Sotheby's offered a guarantee of \$110 millions for the estate of the heir of Campbell's Soup, John T. Dorrance, in order to obtain the consignment. In October 1989 the sale of the estate fetched \$123.4 millions, contributing considerably to Sotheby's turnover of that year. Christie's offered guarantees too. In May 15 of the same year, five paintings from the estate of the collector Robert Lehmann were estimated between \$40 millions and \$60 millions. Christie's chairman Davidge refused to reveal the amount of the guarantee, even if he admitted it was within the estimate bracket (Mason 2004: 84).

the auction house has to pay the seller the amount of the guarantee, with the consignor still owning the work of art. Therefore, credit and price guarantees can favour biased behaviour and fictive bidding.<sup>30</sup> Remarkably, this practice is widespread in all countries and is considered legal as far as fictitious bids are below the reserve price. Even if practices like fictitious bidding were widespread in all countries, the introduction of credit and guarantees has risen the incentives for their development, disrupting the price mechanism.

One of the most famous illustrations of the possible bias induced by ancillary financial services is given by the sale of Vincent van Gogh's "Irises" (Reif 1989). The painting was sold at auction for an absolute record of \$53.9 millions at Sotheby's, New York in 1987. Sotheby's lent the buyer of the painting, the Australian financier Alan Bond, half of the purchase price, against the guarantee of the same painting and other paintings of the collector. The term of the loan was one year, and it was accorded to the buyer the day before the sale, followed by the signature of the agreement. After the sale, the painting was not delivered to the purchaser, but it was kept in a secret place under Sotheby's control. The story became even more intricate, once it became evident that Mr. Bond was not able to pay the loan back. The painting was eventually re-sold in 1990 by Sotheby's to the J. Paul Getty Museum in Los Angeles, without disclosing the price. This shows that the 1987 price cannot be considered a true price.

### **3.2 Rent seeking and scandals in both regulated and unregulated systems**

In order to complete our analysis of regulations of auctioneers vs. commissaires-priseurs, and related market efficiency, we focus on the direct efficiency of regulations and how the two systems effectively have achieved their respective goals. In particular, we look at how the French regulation has been able (or not) to prevent auctioneers' fraudulent behaviour and to protect sellers and buyers from opportunism. We also look at how the competition favoured by the less-regulated Anglo-Saxon system has been profitable, or not, for both sellers and buyers.

In December 2009 a major scandal, known as of "cols rouges", exploded in France. Cols rouges, so called because of the uniform they wear, are auction porters. They were accused of stealing furniture during its transportation from and to clients, which was possible because of auctioneers' carelessness in compiling their inventories. Cols rouges subsequently used to sell the stolen lots at the same Drouot, with the compliance of some auctioneers not caring about provenance. It seems that at least 36 auctioneers have been involved occasionally in the sale of the stolen merchandise (Deléan 2010: 209). Among them, four legal auctioneers were investigated. Still under judicial review, they are legally forbidden to practice their activity forever. One of these auctioneers – formerly decorated Chevalier de la légion d'honneur by the French president, and a franc mason – had been appointed by the Ministry of justice and was a candidate president of the Council of Voluntary Sales (Conseil des ventes volontaires). This scandal shows the severe gaps of the French system, and in particular that the

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<sup>30</sup> When an auction does not warm up, it is a common practice for auctioneers to call a fictitious name or "from the chandelier" or "from the order book". If no bids were forthcoming a sale in London, the auctioneer would call out "Carruthers" or "Pickering", giving the impression the lot has found a buyer (Mason 2004: 57). At Sotheby's "Worthingtons" are rather called out (Lacey 1998).

status of judicial officer is not immune from fraudulent behaviour.<sup>31</sup> Stealing was possible just because auctioneers were not careful in doing their inventory and were aware of the fact that the merchandise consigned by auction porters may well not be their own property.

In this scandal, both sellers and buyers were damaged, because of the furniture theft and the financial loss associated. The magnitude of the sellers' loss can be derived from the amount of extra income made by auction porters through their fraudulent behaviour.<sup>32</sup> Table 1 reports official and "extra" illegal income of five of them between 2006 and 2009. The investigation also showed that most of 110 cols rouges were involved in the illegal practice, even if to different extents.

Table 1: Legal and illegal income of cols rouges (€).

Col-rouge	Before-tax Income (legal)	Extra illegal income, 2006	Extra illegal income, 2007	Extra illegal income, 2008	Extra illegal income, 2009*
A	30,000	42,242	51,158	36,894	35,105
B	50,000	47,032	146,332	121,498	77,025
C	45,000	69,430	99,969	86,494	52,866
D	50,000	18,757	140,157	87,990	10,561
E	40,000	66,569	112,201	134,887	46,272

Note: \*for 2009, a period of six months only (from January to June) has been considered.

Source: Deléan (2011: 100-104).

The trial also revealed that everybody (experts, auctioneers, etc.) at Drouot was aware of the undergoing trafficking. Further damage was caused by cols rouges hiding different parts of the items put up for sale, which thus appeared of lower quality and less attractive. These same items were subsequently sold at good prices by careless auctioneers to merchants who compensated cols rouge with bribes.

This scandal offers an emblematic demonstration of the difficulties, or even the failure, of the French regulation in achieving its goals. The array of regulation settled by the French government has not been able to prevent fraudulent behaviour and other cases have been discovered over the twenty past years. Nevertheless, they did not have the same extension and gravity as the cols rouges, they were the consequence of individual frauds perpetuated by single auctioneers.<sup>33</sup> Furthermore, on different occasions the French system and the strict rules it imposed on auctioneers led those who attempted to perceive efficiency to overstep the rules, as in the Binoche case. This commissaire-priseur sold at a private sale three artefacts he had not succeed to sell at auction. Even if the auctioneer was not judged of dishonesty and bad will, the tribunal

<sup>31</sup> Yet, in 1984 the famous French magazine *Le canard enchaîné*, revealed how fraudulent practices are widespread at auctions. "One could give many examples of these fraudulent anecdotes, as it is common practice; everybody (or almost) know them, though everybody has decided to turn a blind eye. These practices are even named 'the little wine of the auction porters'" (Deléan 2010: 139). The article of the satirical newspaper stresses auction porters' fraudulent behaviour, since auctioneers complied – and in some cases favoured – these activities.

<sup>32</sup> Notice that most of the 110 porters employed at Drouot have no diploma and earn officially between €4,000 and €7,000 per month.

<sup>33</sup> Three examples are offered by the cases of, respectively, Giacometti, Baude, and the priest of Annecy.

sentenced that the auctioneer should have put up the pieces at auction again, since commissaires-priseurs have been allowed to freely manage private sales only very recently.<sup>34</sup>

The Anglo-Saxon auction system is also concerned with affairs, the most famous being Sotheby's and Christie's price fixing scandal. In 1995 Christie's, shortly followed by their rival, announced the introduction of fixed non-negotiable commissions to the sellers.<sup>35</sup> The trial in 2001 publicly revealed this was a secretive agreement proposed by Sotheby's chairman Taubman to his rival equivalent Tenant, also involving the two CEOs, Brooks and Davidge of Sotheby's and Christie's respectively.<sup>36</sup> Ashenfelter and Graddy (2005) explain that this collusive behaviour injured sellers but not buyers. In fact, because of the private value theory, buyers might have simply adjusted their highest bids to the new premium. The resulting lower hammer price damaged, instead, the sellers. Furthermore, price fixing may have excluded potential sellers and buyers from the market.

Ashenfelter and Graddy concede for possible limitations to the application of the private value theory. In fact, in front of an elastic supply, sellers might decide to consign less objects to the auction houses, because of seller's commission. That would increase buyers' competition on consigned objects, and thus higher fetched prices. Finally, the correlation between the bidders' values might increase their reservation values. Notwithstanding, Ashenfelter and Graddy find exaggerated to refund buyers \$512 millions. They also estimate a total increase in profits from five years of collusion between \$100 and \$150 millions, concluding that plaintiffs were overcompensated.<sup>37</sup>

The thrust of this scandal is quite different from the French one. Indeed, in this case it is not an imperfect regulation that has induced collusion but the other way around: Once a possibility of collusion has become evident, regulation has been

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<sup>34</sup> Notice also that if the "burned" goods were to be put up for auction sale again, they would attain lower prices than in the private sale.

<sup>35</sup> Until 1995 Christie's and Sotheby's harshly competed against each other for consignments. Measures in order to attract sellers included the lowering or even the elimination of commissions to the sellers, guarantees, and even donations to their favourite charities.

<sup>36</sup> The American antitrust authority estimated that sellers were overcharged 1% of the hammer price, and buyers 5% of the hammer price. While the degree of looseness of market regulation is similar in the UK and the US, price fixing is considered a felony only in the US, while in the UK is just a civil offence, consequently with no extradition or trial. Therefore, the lower gravity of conspiracy in the UK involved lower punishment costs and higher incentives to collaborate with the American justice for the British Christie's, compared to the American Sotheby's. Christie's obtained not to be prosecuted in exchange of collaboration. Brooks pleaded guilty and promised to collaborate. Eventually, Sotheby's was condemned to apply a fixed seller's commission, to pay a fine of \$45 millions, and Mr. Taubman was sent to jail. Even if the trial could not demonstrate collusion also in buyer's premium fixing, both auction houses agreed to pay \$256 millions each to buyers and sellers.

<sup>37</sup> Sotheby's CEO Diana Brooks, a key testimonial in the trial and, before, in the investigations, testified that Taubman proposed to collude also on pre-sale estimates, but that it would be impossible to have the complicity of auction houses experts in that. Ashenfelter and Graddy (2005) consider the possible drivers of auction houses experts in such a delicate economic operation of fixing pre-sale estimates. According to the theory, auction houses are generally truthful in their pre-sale estimates, even if over- or underestimates have been observed compared to fetched prices. These errors may be explained by experts' inefficiency, and, more precisely, limited rationality in processing the information about the artworks and the incompetence of the buyers. Pre-sale estimates ranges may reflect price variance and uncertainty.

enforced. Moreover, by its general legal framework, this regulation affects any commercial activity also beyond auctions. Therefore, by itself, the price-fixing scandal cannot be considered as a failure of the Anglo-Saxon profession regulation. Nevertheless, if we look at the different scandals that have affected the Anglo-Saxon auction history in the last thirty years, we find at least a couple of great scandals due to the lack of regulation.<sup>38</sup> Also, it is quite difficult to find data in order to compare the prejudices induced by fraudulent behaviours such as robberies, fakes, etc. in the French, as well as in the Anglo-Saxon systems. However, if we refer to the number of important scandals and their duration as proxies for driving conclusion, then the Anglo-Saxon system results worse than the French one from this point of view.

#### 4. Conclusions

In 2011 the draft bill approved by the French parliament terminated a four centuries process of strict regulation of French commissaires-priseurs. Until then, the French and the Anglo-Saxon regulations of auctioneer's profession have been quite opposite, corresponding to a model of registration or certification for the Anglo-Saxon ones, and of licensing for the French one. In addition to typical entry barriers imposed by licensing with respect to registration and certification, we have further discussed the professional rules on the conduct of the profession itself. In the French case, regulation intervenes *ex ante* trying to prevent rent seeking behaviour, though with contradictory results. In the Anglo-Saxon case, instead, regulation intervenes *ex post*, to correct experienced rent seeking behaviour, operating as a safeguard. Despite both systems favour professionals' rent seeking, the Anglo-Saxon regulation may seem more successful than the French one. Such an assumption is validated by comparing the power of the two systems in attracting more buyers, which is one of the main conditions for auction efficiency. Because of the relative freedom, Anglo-Saxon auctioneer have been more stimulated to build large business networks, becoming thus very successful in expanding their market shares. Conversely, the French regulation has proved not to be a stimulus for commissaires-priseurs, and the whole French art market. Furthermore, it has also failed its main goal, namely protecting sellers and buyers from opportunistic behaviour, as shown in the great scandal of cols rouges, and other serious troubles and fraudulent behaviours. However, we have also highlighted how the Anglo-Saxon picture is not all bright, since the Anglo-Saxon regulation is not exempt from avoiding pernicious behaviours by auctioneers, possibly favouring speculation and disruption in the market price mechanism.

<sup>38</sup> A major scandal found that between the 1980s and the 1990s Sotheby had smuggled antiquities from, among others, India, Italy and France, to be auctioned in London. In this case, the relatively free global expansion of the Anglo-Saxon auction houses has highlighted some possible problems connected with the illegal exploitation of such international networks, fostering the trafficking of looted artefacts (and even the commissioning of such looting) (Watson 1998). In 2010 Christie's, together with other important auction houses worldwide, was discovered to have sold more than 30 twentieth-century forged paintings for at least £30 millions. Forgeries were considered of 'gold standard'. After the scandal was disclosed, the panic was so acute that collectors were even seeking refunds on unquestionably genuine works (Alberge 2010).

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