



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION DECISION

of 30 October 2002

**relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the
EEA Agreement**

COMP/E-2/37.784 FINE ART AUCTION HOUSES

(Only the English text is authentic)

(Text with EEA relevance)

**Business secrets and data regarding certain individuals have been identified in
the text by the following sign: [...]**

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(Case No COMP/E-2/37.784 FINE ART AUCTION HOUSES)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty¹ as last amended by Regulation (EC) No 1216/1999², and in particular Article 3 and Article 15 thereof,

Having regard to the Commission decision of 19 April 2002 to open a proceeding in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty³,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the report of the Hearing Officer in this case,

WHEREAS:

¹ OJ L3, 21.2.1962, p. 204/62.

² OJ L 148, 15.6.1999, p. 5.

³ OJ L 354, 30.12.1998, p. 18.

1. INTRODUCTION

(1) From 30 April 1993 and lasting at least until February 2000, Christie's International plc (hereinafter: Christie's) and Sotheby's Holdings, Inc. (hereinafter: Sotheby's), the two main world-wide competitors for the sale on commission by auction of so-called fine art objects, antiques, furniture, collectibles and memorabilia (hereinafter also generically referred to as: fine arts), entered into and participated in a continuing agreement and/or concerted practice contrary to Article 81(1) of the Treaty and Article 53 of the EEA Agreement, relating to prices and other conditions of sale for auctions. The companies agreed, amongst others, to adopt identical commission structures for vendors, to move to a non-negotiable scale of vendor commission rates (replacing the previously negotiable commission), to increase vendor commission charges and refrain from granting special conditions to sellers. They also fixed certain other terms and conditions of business, thereby preventing or restricting competition between them in the fine arts auction business. Furthermore they introduced a monitoring mechanism to ensure their agreement and/or concerted practice was being respected.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The parties

2.1.1. *Christie's*

(2) Having opened in 1766 in London as an art auction house, Christie's remained in private ownership until 1973 when it was publicly floated on the London Stock Exchange.

(3) The Group's international operations are controlled by the Board of the holding company Christie's International plc, with its headquarters located in London. The (non-executive) Chairman of the Board during the larger part of the period to which this procedure relates was Sir Anthony Tennant. He joined the Board of Christie's International plc on 1 January 1993 and officially took over as Chairman in May 1993⁴. Sir Anthony Tennant stood down as Chairman in June 1996 and resigned from the Board two years later. The day-to-day management of the group is vested in a Chief Executive Officer; at all material times this position was held by Mr C.M. Davidge, who resigned with effect from 31 December 1999.

(4) Individual subsidiaries, each with their own Managing Director, are established in the United Kingdom and Continental Western Europe, North and South America and the Asia/Pacific region. Christie's is represented in some 40 countries across the world. In the EEA, it has representative offices in Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and Norway. However, auctions take place at a more limited number of locations. The most important salerooms of Christie's are in London (King Street) and New York. Within the EEA, Christie's has, apart from the King Street location, salerooms in London (South Kensington), Amsterdam, Paris, Milan and Rome. Besides its activity as an auction house for fine arts, Christie's provides a range of related activities, including valuations, private treaty sales, art storage and residential real estate agency.

⁴ Announcement made on 17 September 1992, see Commission's file page 04334.

(5) In the Financial Year ending 31 December 1999, the group's total auction sales were nearly GBP 1 400 million (EUR 2 255 million/ exchange rate of 31.12.1999). In the Financial Year ending 31 December 2000, the group's total auction sales were nearly GBP 1 600 million (EUR 2 544 million⁵/ exchange rate of 31.12.2000). In 1998, Christie's was acquired by the French undertaking Artémis SA. Since 1999, its financial data are consolidated with those of Artémis, and data other than the above are not publicly available.

2.1.2. *Sotheby's*

(6) Sotheby's was also established in London in the 18th century. Having originally specialised in rare book sales, Sotheby's expanded its activities in the 19th century to cover all areas of fine and decorative arts. In 1955 it made inroads into the US by acquiring the New York fine art auction house Parke Bernet in 1964.

(7) The company was floated on the London Stock Exchange in 1977 and a majority of its shares, at least in terms of voting rights, were acquired in 1983 by an American entrepreneur, Alfred Taubman (its Chairman at all material times). In 1988 it was refloated as a public company and is now quoted on the London and New York Stock Exchanges as Sotheby's Holdings, Inc. Its Head Office is now located in New York, but it has a substantial presence in Europe. The most important salerooms of Sotheby's are located in New York and London (Bond Street). Within the EEA, other salerooms are located in the United Kingdom, France, the Netherlands and Italy. Furthermore, there are representative offices in most of the Member States and in Norway. In addition to both live and internet auctioneering, the auction segment of the company is engaged in a number of related activities, including the purchase and resale of art and other collectibles and the brokering of art and collectible purchases and sales through private treaty sales. The company also markets and brokers luxury residential real estate sales through its Real Estate segment, conducts art-related financing activities through its Finance segment and is engaged, to a lesser extent, in fine arts insurance brokerage and art education activities⁶.

(8) The Chairman throughout the period of the infringement as described in the current decision was Mr A. Alfred Taubman. The President and Chief Executive Officer of the Sotheby's Group throughout most of the relevant period was Mrs Diana Dwyer ("D.D.") Brooks, who was appointed to the position in April 1994. From March 1993 until April 1994 she had been the CEO of the world-wide auction business. During this earlier period, the group President and CEO to whom she reported, was Michael Ainslie.

(9) In the year ended 31 December 1999, auction sales for Sotheby's Holdings, Inc., together with its subsidiaries, totalled USD 2 259 million (EUR 2 250 million), an increase over the previous year of 16%. Total revenues (turnover) were USD 443 million (EUR 441 million), of which auction sales came to USD 390 million (EUR 341 million / exchange rate of 31.12.1999). In 2000, Sotheby's auction sales were at USD 1 936 million (EUR 2 056 million / exchange rate of 2000), with auctions commissions and related revenues at USD 398 million (EUR 423 million / exchange rate of 2000). In the year 2001, Sotheby's auction sales were at USD 1 620 million (EUR 1 819 million / exchange rate of 2001), with auctions

⁵ See Christie's press release of 14 March 2000, Commission's file page 01296.

⁶ See Sotheby's 10 K 405 SEC filing (annual report) of 12 March 2002, at: <http://www.shareholder.com/bid/edgar-get.cfm?document=823094/0000950117-02-000492&CompanyID=BID&header=0&footer=0>

commissions and related revenues at USD 336 million (EUR 377 million / exchange rate of 2001)⁷.

(10) At the end of 2001, Alfred Taubman announced that he was intending to dispose of his majority stake (in terms of voting rights) in Sotheby's. So far, no change of ownership of Sotheby's has taken place⁸.

2.2. Description of the market

2.2.1. Fine arts auction services

(11) Fine art objects, antiques, furniture, collectibles and memorabilia are commonly put up for sale at auctions. There is no particular limit as to what sort of items may be sold at auction, nor is there any particular minimum value that the goods must have. For instance, Sotheby's is offering property through its world-wide auction segment in approximately 90 collecting categories, among them paintings, decorative arts, jewellery and rare books. To illustrate the diversity of items that may be sold at auction, Sotheby's has in the past auctioneered Russian space capsules, a Tyrannosaurus Rex fossil and a piece of 60-year-old wedding cake⁹. In terms of price, items can range between just a few hundred Euros (for, for instance wines) to objects costing millions of Euros (such as impressionist paintings).

(12) Auctions may be conducted of a particular individual collection, or centred around a particular theme, category of merchandise or period or type of art. For example, the estate of Jacqueline Kennedy Onassis was sold by Sotheby's at auction in 1996 as a collection, whereas auctions also take place of categories such as "Old Master Paintings" or "Jewellery" (many other categories exist, both for Christie's and Sotheby's).

(13) The principal fine art auction locations for both houses are in London and New York, but regular auctions are held in centres like Geneva, Zurich, Amsterdam, Rome, Milan, Hong Kong and Melbourne. The major fine art sales are planned and conducted as glamorous and exclusive social events frequented by wealthy individuals.

(14) Sales are arranged well in advance according to an international "season". The main sales are traditionally conducted in the spring and autumn; revenues and operating income of the auction houses therefore peak in the second and fourth quarters.

(15) The owners of the goods who wish to sell "consign" the merchandise to the auction house, which provides selling expertise, arranges the auction, produces a catalogue, arranges advance publicity and viewing opportunities. Goods are usually offered for sale as individual items (so-called lots). Even items that form part of an entire collection are usually split up for sale into individual lots. The auction house sells the property as the agent of the consignor, billing the buyer for the goods purchased and remitting to the consignor the monies received after deduction of commission, expenses and taxes. The percent commission charged to the consignor/seller is commonly referred to as the "vendor's commission" (or: "seller's commission")¹⁰; this commission is usually calculated on the "hammer price", the price at which the merchandise is knocked down to the final bidder.

⁷ See Sotheby's Annual Report for the year 2001.

⁸ See Financial Times, 8 January 2002.

⁹ See Sotheby's history at: http://www.sothebys.com/about/corporate/as_corphistory.html

¹⁰ Throughout this document, the terms 'vendor' and 'consignor' are used as synonym for 'seller'.

(16) Persons buying at auctions are also charged a percentage of the hammer price (known as the “buyer’s premium”). The auction houses first introduced the practice at their main sale rooms in 1975 within a few weeks of each other. In November 1992, Sotheby’s changed its buyer’s premium fees effective as from 1 January 1993, to be followed by Christie’s, who adopted a nearly identical scheme to that of Sotheby’s, effective from 1 March 1993. Sotheby’s made further alterations to its buyers’ premium scheme in July 1993, adapting it fully to that of Christie’s¹¹. The auction houses also have other commercial activities – including making loans against the security of works of art - but derive the bulk of their revenue from the buyer’s premium and the vendor’s commission. The specific parameters of competition are discussed in more detail in section 2.2.

2.2.2. *The relevant market for the purpose of this proceeding*

2.2.2.1. The Commission’s market definition in the Statement of Objections

(17) In the Statement of Objections (hereinafter also referred to as “SO”), the Commission, whilst noting that there may be some degree of competition between auction houses and art dealers (or collectors and museums), distinguished fine arts auctions as a separate product market from other means of selling or buying fine arts for the purpose of the assessment in this case, based on the following grounds:

(18) Firstly, an important reason for clients to consider selling items at auction is that they are able to achieve a high level of publicity for the item. Secondly, the system of selling through auction often results in the consignor obtaining the highest possible price for the item, given the direct ‘competition’ between the potential buyers (hence, an item may generate a higher price than the estimated value of the item). Given these distinctive features of fine arts auctions, this way of performing a sale is, from a demand side (that is, for the vendors seeking the auction services), a business separate from the other possibilities that may exist for vendors to sell their property. Such other possibilities are, as mentioned, sale or consignment to, or private brokerage by, an art dealer, or a private sale to a collector or museum without the use of an intermediary. Hence, the Commission considered that from a demand side, fine art auction services belong to a different market than other means of selling fine arts.

(19) In addition to the above distinguishing features relating to the demand side of selling through auctions, the Commission considered the submissions by the parties as suppliers, made in the course of the administrative proceeding up to the SO. That information showed that Christie’s and Sotheby’s, the two most important suppliers of fine arts auction services, consider each other as the single most important source of competition in the market place (see section 0). That indicates that they are operating on a market distinct from the dealers market and distinct from other smaller auctioneers that operate on a national or local scale. Further, the Commission relied on the submissions by Sotheby’s, which in fact stated positively that the product market to consider is that for fine arts auction services¹². Hence, also for supply side considerations, the Commission concluded in the SO that fine arts auction services constitute a separate relevant product market.

¹¹ See testimony of Mr. Ainslie, former CEO of Sotheby’s, trial transcripts in the case USA v A. Alfred Taubman et al, at page 1414, Commission’s file page 02308.

¹² See Sotheby’s submission of 6 November 2002, Commission’s file pages 00519-00520, non-confidential version pages 07689 – 07690.

(20) As regards defining the relevant geographic scope of the market, the Commission listed the following elements in the SO. Firstly, customers (sellers and buyers) at auctions of Christie's and Sotheby's may come from all around the world, regardless of the actual location of the auction¹³. Secondly, Christie's and Sotheby's both conduct their fine art auction businesses as a single coherent global operation. Thirdly, for those items for which clients may be attracted internationally, and which generate most revenues, sales of particular items generally do not depend on where the customer (seller or buyer) is located, but rather at which auction they will sell best, which in turn is determined by where the clientele is likely to be situated or to be willing to appear at a particular time. The most important auctions for both Christie's and Sotheby's take place in New York and London. A relevant factor for deciding where goods are sold in, is the taking place of a concurrent auction by the other auction house. Both houses often plan their auctions taking into account the announced auction of similar collections/items by the other auction house, so the maximum amount of (international) clients are drawn.

(21) Given the above, and to illustrate the truly international scope of the business in which Christie's and Sotheby's operate, the Commission stated in the SO that a geographic allocation of turnover relating to the place where an auction has taken place bears no direct relation to the importance of the auction house in the particular geographic area where the auction occurred. (Items that were consigned in the EEA were often sold in the US, and *vice versa*). It is noted in this respect that there appear to be several ways to assess the geographic allocation of turnover: one would be to base it on the place of the actual auction, another would be to consider the geographic location of the representative office that consigned the item for sale (that is, a consignment made by Christie's London and sold in New York would be counted as turnover in London), another would be to consider the location of the customer who consigns the items to the auction house (that is, a consignment sold in London but consigned by a client located in Germany would be counted as turnover generated in Germany). For this reason, the Commission stated that the activities of both houses are to be assessed on a truly global scale. The Commission concluded in the SO that in view of all of the above arguments, the appropriate relevant market, as a tool to assess the facts in the current case, is world-wide in nature.

2.2.2.2. The arguments of the parties in reply to the SO as regards market definition

As regards the product market:

(22) Christie's raised a number of issues as regards the definition of the market. It stated that it was 'sceptical' as to the conclusion that art dealers should be excluded from the market. It argued that persons wishing to sell fine art objects avail themselves of the services of both dealers and auction houses and the characteristics identified by the Commission were insufficient to indicate that there is a separate auction services market. Christie's submitted that over the period January 1996-June 2002 it [...] lost consignments to dealers, some [...] in total with an aggregate value of EUR [...] million. Christie's also argued that even when only considering auction services, the market comprised a great number of market participants, smaller auction houses, throughout the EEA, whose throughput is substantial. Christie's did, however, allude to the existence of a separate sector of the market for the auctioneering of

¹³ See also testimony of [name] in the case *USA v A. Alfred Taubman et al.*, transcript pages 821 *et seq.* (Commission's file page 02129 *et seq.*) where she explains that sellers and buyers were located all over the world.

‘high value items’. It stated that higher value items are targeted at a wealthier and more discriminating buyers’ market: *“The expertise necessary for identifying and valuing high value items is crucial, and will usually not be found in the smaller auction houses either within or outside London. The service element is key. It is in this sector of the market that competition is narrower”*¹⁴.

(23) Sotheby’s did not formally contest the Commission’s findings on the relevant product market¹⁵.

As regards the geographic market

(24) Christie’s submitted that it is not possible to say that the fine arts auction services market as a whole is world-wide. This is due, according to Christie’s, to factors such as transport costs and regulation. Rather than being a single market of international size, it considered the market to be one composed of local markets, which may be national or regional in scope. It stated, however, that “some sort of truly international market” may exist for items “of exceptional value or importance” (such as Impressionist paintings), without indicating any (financial) threshold for items that would fall into that category. The reason why high value items may attract a different audience is, according to Christie’s, due to the fact that a) at this level competition is restricted; b) the cost of transport will usually not be significant in relation to price; and c) the prospective buyers are likely to be found in either London or New York (or, in the case of jewellery, Geneva), since buyers will be willing to communicate with either office or incur the travelling cost for the sake of the object. Furthermore, Christie’s argued that although the arrangements between Christie’s and Sotheby’s extended throughout the Community and the EEA, they would not have extended equally to all parts of the EEA. Notably in France, until 2001, Christie’s and Sotheby’s were not permitted to hold auctions. Christie’s, in order to illustrate their point, submitted two reports regarding art sales in Europe together with its reply to the SO¹⁶.

(25) Sotheby’s stated in its reply to the SO that for the purposes of this proceeding it does not contest the Commission’s geographic market definition¹⁷. Nevertheless, Sotheby’s has reiterated its position that the geographic scope of the market could be described as local or broader (and not as world-wide), depending on the nature of the item for sale (but also without giving any criteria as to why an item would belong to one market or the other). It restated that it considered the market not to be wider than Europe.

2.2.2.3. Conclusions regarding the relevant product and geographic market

(26) The Commission, having ascertained the arguments by the parties on the market definition, considers the following as regards the appropriate market definition for the assessment in this case.

(27) As a preliminary observation in reply to the arguments of the parties, the Commission notes that, as stated above in paragraph (19), notably Sotheby’s, one of the (two) largest auction houses world-wide, referred to the existence of a ‘market for fine arts auctions’ in

¹⁴ See the reply of Christie’s to the SO of 5 June 2002, at pages 25-27 and Annex 2.

¹⁵ See the reply of Sotheby’s to the SO of 19 June 2002.

¹⁶ *The European Art Market in 2002, A Survey*, by the British Art Market Federation, and *The European Art Market 2000*, prepared for the European Fine Arts Foundation.

¹⁷ See page 21, in footnote 25, of Sotheby’s reply to the SO of 19 June 2002.

their submissions to the Commission in the course of these proceedings (see Sotheby's submission of 6 November 2000, page 3). As regards Christie's, it is noted that in its initial submission of 27 January 2000, it referred to a breach of Article 81 of the EC Treaty, through which it has itself implied that there was an impact of its (joint) behaviour on a given market EEA market. The behaviour, as demonstrated in this decision, concerned only auction services, and had no relation to services provided by dealers. Furthermore, Christie's, in its reply to the SO, only submitted that it was "sceptical" about the exclusion of art dealers from the market and raised the issue about the inclusion of other national or regional auction houses in the market.

(28) As a further initial observation as regards the requirement of the Commission to define the market in the case of an infringement of Article 81 of the Treaty, it should be noted that the judgment of the Court of First Instance of the European Communities in Case T-62/98 *Volkswagen AG v Commission*)¹⁸, stated that (paragraphs 230 and 231):

"As regards the scope of the Commission's obligation to define the relevant market before finding an infringement of the Community competition rules, the Court points out that the approach to defining the relevant market differs according to whether Article 85 [now article 81 EC] or Article 86 (now Article 82 EC) of the Treaty is to be applied. For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. On the other hand, for the purposes of applying Article 85, the reason for defining the relevant market, if at all, is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 74). Consequently, there is an obligation on the Commission to define the market in a decision applying Article 85 of the Treaty where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 European Night Services and Others v Commission [1998] ECR II-3141, paragraphs 93 to 95 and 105)."

(29) The Commission considers that the effect on trade between Member States and the establishment of a restriction of competition are demonstrated in this decision (see section 0).

(30) The arguments presented by the parties will nonetheless be addressed.

(31) The Commission notes, first of all, that the conclusion that a relevant market for fine arts auction services exists that is world-wide in scope logically follows from the mere fact that Christie's and Sotheby's: a) considered it worthwhile to enter into a collusive scheme

¹⁸ Not yet published

with the aim of raising and/or maintaining prices for their major salerooms and generating higher revenues, and b) were able to sustain the implementation of their collusive scheme over a considerable period of time without facing any significant loss of business to sales through means other than auction or through smaller auction houses. Indeed, if the case were that the parties were faced with considerable competition from third parties, such as art dealers and/or other (national or local) auctioneers, any attempt to create a successful understanding on price increases and/or price maintenance would have been futile. In such a case, any possible rise in prices based on an agreement would have been neutralised as a result of customers resorting to dealers or other auction houses. This would have necessarily led both auction houses to depart from the agreed scheme, which did not occur to any significant extent, as is demonstrated further below in this decision. On the contrary, both companies were able to obtain considerable income from the illicit agreement. The impetus to come to an arrangement that restricts competition between these two players must have been that they mutually considered each other to be the main source of competition, which indeed the parties themselves have stated in their submissions (see section 0). In this respect it can be noted that contemporaneous documents (originating from Christie's) regarding the analysis of the market show, under the heading 'market share', only Christie's and Sotheby's are listed (with a combined market share of 100%)¹⁹.

(32) More specifically, as regards the product market definition and the inclusion of dealers in the relevant product market, for the reasons described in paragraph 2, although dealers may also be in the business of buying and selling art objects, the specific type of service rendered by an auction house, attempting to maximise revenue for a client by selling through auction, is considered sufficient to distinguish them from selling and buying fine arts via an art dealer. That assertion is not altered by the argument of Christie's that a high level of publicity can also be attained when selling through an art dealer. Firstly, this has not been listed as the only determining factor. Secondly, and more important, even if publicity were the only element to assess, the Commission considers that although art dealers may be able and indeed willing to provide publicity, the means that they have at their disposal are generally far more restricted than those of Christie's and Sotheby's, who, for example, often produce glossy and expensive catalogues for their upcoming sales. (Sotheby's, for instance, noted in its 1999 Annual Report a spending of some USD 85 million in promotional activities²⁰). The same difference exists as regards auctioneers that only operate on a national or local level.

(33) The Commission further notes, in reply to the assertion that dealers are part of the same market, the fact that the auction houses often have dealers as their clients, either as sellers or buyers. They even have special vendor's commission rates applicable for dealers (see for instance the scheme for the vendor's commission that Christie's included in its submissions to the Commission provided in early 2000²¹). This illustrates the fact that the auction houses perform a distinct commercial role in the distribution chain for fine arts, and that their services are of a different nature than those provided by dealers. Moreover, in the industry reports submitted by Christie's in its reply to the SO²², a distinction is made within the art sector between sales via art dealers and via auction houses, and separate statistics are presented for both markets. Even though these reports have not been written with the perspective of a market definition under EC competition rules, certain statements are relevant.

¹⁹ See, for instance, page 04365 and 04367 of the Commission's file.

²⁰ See page 286 of the 1999 Annual Report of Sotheby's, 08163 of the Commission's file.

²¹ See page 00233 of the Commission's file

²² *The European Art Market 2000*, prepared for the European Fine Arts Foundation, e.g. at pages 12 *et seq.*

For instance, one of the reports (by the European Fine Art Foundation) states: “*Besides being separated into dealer and auction businesses, trade practices in the art sector may vary widely from country to country.*”²³ (Emphasis added). These elements, taken from information submitted by Christie’s in its reply to the SO, confirm that even within the art trade itself, sales via auction are regarded as separate from sales through dealers. Furthermore, the data that Christie’s has submitted as regards sales lost to dealers are inconclusive according to the Commission. Over the period analysed (see paragraph (22)), the value of items sold by Christie’s was of some EUR [...] million per year, that is, some EUR[...] million over the whole period of 6.9 years that the infringement lasted. Christie’s claims that some EUR [...] million of sales was lost to art dealers. This represents only some [...] of total art sales over the period concerned, which the Commission considers may in fact indicate the contrary to what Christie’s has aimed to demonstrate. Indeed, this indicates that art dealers are not perceived by sellers as a close substitute to auction houses and provides a further ground for excluding art dealers from the relevant product market.

(34) Regarding the existence of separate product markets according to the type of item sold, one might consider, as Christie’s has done, that a distinction should be made according to value, ‘high value’ items forming a particular category. However, there exists no clear demarcation or cut-off point in terms of value of items that are sold at auction. Christie’s has not been able to indicate what ‘high value’ items are. However, objects of high value (for instance impressionist paintings that may generate a hammer price of several millions of Euro at auction), can be sold by only very few auction houses, for the reasons Christie’s has itself indicated. In this respect, the Commission notes one of the industry reports provided by Christie’s which states that only Christie’s and Sotheby’s are suppliers on a ‘global market’ (“*Until the end of 2000, the global art auction market could have been characterised as a duopoly comprised of Christie’s and Sotheby’s. {...}.*”²⁴) [Emphasis added] The Commission therefore maintains that a market for higher value items that are sold internationally exists and that Christie’s and Sotheby’s, as auctioneers that operate on an international basis, are particularly strong in this market. But even if account were taken of all other national or local auction houses, the parties would still have a considerable market share in the EEA of approximately 45%²⁵. Moreover, it is noted that the collusive scheme was applicable across the board, irrespective of the value of the item sold. (In this respect, reference can be made to information submitted by Christie’s consisting of a handwritten note by [name] of Christie’s about his discussions with [name] of Sotheby’s (quoted in paragraph (93) of this decision), which speaks of “maximising the vendor’s commission on low value lots”.

(35) To conclude on the definition of the relevant product market for the assessment in this case, it is the market for international fine art auction services, whose characteristics distinguish it from other selling methods that are not perceived by sellers or by the industry as significantly close substitutes.

(36) As regards the geographic scope of the market, it is noted that, as pointed out above, although Christie’s and Sotheby’s may both be present in nearly all EEA countries for ‘buying’ (consigning) property; their ‘selling’ (auctioning) takes place in only few countries within the EEA. This implies that the market for auction services that Christie’s and Sotheby’s operate is at least EEA wide. Furthermore, it is reiterated that buyers at auction in

²³ *The European Art Market in 2002*, prepared for the European Art Market Foundation, at page 11

²⁴ *The European Art Market in 2002*, prepared for the European Fine Arts Foundation, at page 9.

²⁵ *The European Art Market in 2000*, prepared for the European Fine Arts Foundation, at page 14.

London or other EEA salerooms may be, and often are, non-EEA residents, while a significant part of items sold originate from non-EEA located sellers. The same applies for auction in New York, Geneva or other auction locations. Hence, the services provided by Sotheby's and Christie's have a world-wide character, as a result of which the relevant geographic market is considered to be world-wide.

(37) As a result of all the above, for the purpose of the assessment in this case, the market for international fine arts auctions constitutes a distinct market of a world-wide dimension or in any case is at least EEA wide.

2.2.3. *Market positions*

(38) The Commission stated in the SO that the market for fine art auction has very few players in it. Christie's and Sotheby's are the world's two leading auction houses. According to Sotheby's financial reports, "{...} *The company's primary auction competitor is Christie's*"²⁶. Public data on the market shares of the players on the market do not exist. However, between them Christie's and Sotheby's are said to control some 90% of the world-wide fine art auctions market with combined auction sales of around USD 3.5 - USD 4 billion annually²⁷. (Market shares figures are based on the overall value of the sales at auction, rather than on the basis of the turnover achieved through commissions.) The most significant remaining competitor is the undertaking Phillips, De Pury & Luxembourg, but it has no more than a few percentage points in terms of market share.

2.2.3.1. The arguments of the parties as regards their market position

(39) Christie's stated that if a market for auctions were to exist that excludes art dealers, then, based on one of the above referred to industry reports²⁸ referred to in paragraph (24), the share of the auctions market in Europe of Christie's and Sotheby's taken together could not be more than some 40%. Hence, Christie's concluded that either the defined market ought to be larger, that is, including many more auctioneers than Christie's and Sotheby's, or that the market definition ought to be narrower, since a market share of 90% could only be attributed on the basis of a much narrower market definition (which Christie's had already contradicted).

2.2.3.2. Conclusion of the Commission regarding market position

(40) In reply to the points raised notably by Christie's, the Commission first of all reiterates the point that the two houses consider each other as the main source of competition. This is confirmed by internal documents submitted by Christie's as part of its application for leniency in this case: contemporaneous documents from the period of the infringement in relation to the calculation of market shares show only Christie's and Sotheby's as market players for various categories of art, where the combined share of the two is 100%²⁹. Secondly, the Commission stated in the SO that the parties were reported to have a share of the international art auction market of around 90%. That figure, taken from a public source (see footnote 27), is likely based on sales of items and collections of international appeal only, and to include figures of the main residual competitor Phillips. These data, according to the Commission

²⁶ See Sotheby's so-called 10-K form filed in the US for the financial year 1995.

²⁷ See section 2.1; see also Financial Times of 5 February 2000 ("*Auction houses face legal action*").

²⁸ *The European Art Market 2000*, prepared for the European Fine Arts Foundation,

²⁹ See Commission's file, page 04267

illustrate the very strong combined position of the parties on the market for international fine arts auctions.

(41) But even if the markets were restricted to the EEA, and regard were had to auction houses that operate on a national or local scale, the parties would still have a combined market share of at least 45%³⁰. As a result, even on that basis, any agreement as regards the competition between the houses may be considered to have had an appreciable impact in the EEA, as further described in section 5.3.5..

2.2. The parameters of competition in the fine arts auction business

(42) Auction houses principally compete to attract the most interesting sellers and property. The overall cost for a prospective seller to sell its property is the most important factor in this respect. The larger part of the total costs for sellers is commonly the 'vendor's commission'. But other elements can play an important role as well, such as:

- guarantees given to the vendor by the auction house for the achievement of a minimum sales price;
- advances paid to sellers based on the expected result of a sale;
- loans provided to sellers, based on the expected auction revenue, using the sales items as collateral; these loans were sometimes 'non-recourse' loans, meaning that no restitution had to take place. Such loans therefore became a form of guarantee;
- insurance at the expense of the auction house on items offered for sale;
- charitable donations made from the revenue on particular consignments. (In certain high-profile sales the auction house may offer to make a donation of a certain part of the proceeds to a charity of the consignor's choice, sometimes conditional on the sale total exceeding a specified sum.)

(43) A further parameter of competition consists of the payment of an introductory commission paid to a third party (usually a dealer) for bringing in new customers (also referred to as a "finder's fee").

(44) Sometimes sales on behalf of a third party were made via so-called 'trade vendors' or 'dealers', who would act as intermediaries. In such cases, these dealers would receive an introductory commission from the auction house for bringing in consignments. This finder's fee for traders would usually be a percentage of the hammer price.

(45) In choosing between the two leading auction houses, prospective sellers would normally seek to obtain the most favourable conditions in terms of the amount of commission, availability of advances, loans, etc.

(46) Even though one of the main sources of income for the fine art auction houses is the vendor's commission, prior to 1995 it was frequent practice for an auction house to agree special terms and sometimes even charge the vendor 0% commission in order to obtain a sale;

³⁰ See paragraph (34)

the vendors were adept at pitting one against the other to secure the best conditions. This was especially the case for the high value items, where the auction houses would in any event secure considerable income from the buyers premium.

(47) Competition for prospective buyers is less intense, in the sense that apart from obtaining attractive items and aiming to achieve high sales, there is not much that can be done to attract more buyers, certainly not in financial terms. The buyer's premium is a fixed amount on which no negotiation is possible. Indeed, varying the buyer's premium between customers would lead to a form of discrimination, since one customer would be able to spend more than another customer on an item at the same auction, given the difference of the premium that they would have to pay in the end. (In fact, according to some commentators, the buyer's premium is in reality a levy at the expense of the vendor; anyone intending to spend EUR 2.000 for an item when there is a 15% buyer's premium would stop bidding at EUR 1.700, thus bringing in less money for the vendor than would be the case without the buyer's premium).

3. PROCEDURE

(48) Towards the end of 1999, the management of Artémis S.A., the parent company of Christie's, concluded that they should terminate the contract of [name] of Christie's, for reasons apparently unconnected with the antitrust proceedings.

(49) On 24 December 1999 an agreement was reached between Christie's and [officer of Christie's] terminating his employment with effect from 31 December of that year. It was a term of the severance agreement that he would co-operate with Christie's in respect of the Grand Jury anti-trust investigation that had been initiated by the US Department of Justice (hereinafter also referred to as: US DoJ) in May 1997³¹.

(50) Following the termination of his service agreement the US lawyers of [name] delivered to the lawyers representing Christie's in the Grand Jury investigation in the US a file of documents, identified by Christie's with so-called Bates numbers 51001-51462. According to the attorney of [name], the file of documents had been assembled by his client in anticipation of a meeting with his legal advisers. Pursuant to outstanding Grand Jury document subpoenas issued by the Grand Jury in May 1997 in relation to possible antitrust violations, the US lawyers for Christie's delivered the file (hereinafter also referred to as the '[name] documents') to the US DoJ apparently on the day after they had themselves received them from the attorney of [name] at the end of December 1999 or in January 2000.

3.1. Contacts with Christie's

(51) On 24 January 2000 Christie's approached the Commission via its legal advisers and announced its intention to seek the benefit of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases³² (the "Leniency Notice").

³¹ See for instance Sotheby's SEC filing (annual report) of 12 March 2002, at: <http://www.shareholder.com/bid/edgar-get.cfm?document=823094/0001047469-99-011596&CompanyID=BID&header=0&footer=0> at p. 2.

³² Pages 00002-00003 of the Commission's file, non-confidential version, pages 08961-08962.

(52) On 28 January 2000 Christie's provided the Commission with a short corporate statement regarding its participation with Sotheby's in an infringement of Article 81(1) of the EC Treaty in relation to vendor commissions from 1995³³. Christie's stated that the documents it had delivered to the Commission constituted "decisive evidence" of the existence of a cartel in terms of the Leniency Notice³⁴. Christie's stated that the documents proved that Christie's and Sotheby's had acted in breach of Article 81 and notably that:

- exchanges of information took place with Sotheby's during the 1990's on a wide variety of topics;
- Christie's and Sotheby's discussed a variety of agreements in breach of Article 81(1), the most important of which concerned the movement from variable vendor's commission to fixed commissions with effect from September 1995.

(53) Subsequently Christie's legal advisers provided the Commission with a selection of the [name] documents on 4 February 2000³⁵. (Parts of these documents were already submitted to the Commission on 28 January 2000.) A full set of the [name] documents, identical to that which had been provided to the United States Department of Justice by Christie's legal representatives, was provided to the Commission on 24 July 2000³⁶.

(54) On 18 February 2000, Christie's provided the Commission with a further memorandum ("Background note for the European Commission"), in which it provided explanations regarding the Grand Jury investigation in the US and regarding the circumstances of the infringement³⁷.

(55) On 23 May 2000 the Commission sent Christie's a letter under Article 11 of Regulation No 17, asking for a number of clarifications relating to the documents that had been delivered to the Commission³⁸. On 20 and 22 June 2000, Christie's wrote to the Commission requesting an extension of the deadline for a reply, which was granted³⁹.

(56) On 21 July 2000, Christie's submitted certain documents requested in the Article 11 request of 23 May 2000⁴⁰. A meeting with Christie's representatives took place on 24 July 2000. On 19 October 2000, Christie's supplied the remainder of the written answers to the request for information of 23 May 2000⁴¹, as well as further material that had been handed to the US DoJ by [officer] of Christie's in New York⁴².

³³ Document dated 27 January 2000, Commission's file, pages 00007-00013, non-confidential version, pages 09076 - 09083.

³⁴ For the documents Commission's file, pages 00014-00032, non-confidential version, pages 09084 - 09107.

³⁵ Commission's file, pages 00033 – 00035, non-confidential version, pages 08966 – 08967 and pages 00036 - 00220.

³⁶ Commission's file, pages 04324 – 04786.

³⁷ Commission's file, pages 00221 – 00237, non-confidential version, pages 09111 – 09125.

³⁸ Commission's file, pages 00248 – 00255.

³⁹ Commission's file, pages 00238– 00243, non-confidential version, pages 08978 – 08981.

⁴⁰ Commission's file, pages 00265 – 00387, non-confidential version, pages 08983 – 08984 and 09126 – 09144.

⁴¹ Faxed copy Commission's file, pages 00391 – 00411, originals with annexes Commission's file, pages 00412– 00431, non-confidential version, pages 09527 – 09547.

⁴² Commission's file, pages 00432 – 00489, non-confidential version, pages 00895 – 00896, pages 09584 – 09550, page 08861 and pages 08906 – 08959.

(57) On 29 June 2001, Christie's provided the Commission with a waiver to exchange information with the US DoJ⁴³. A further Article 11 request was sent to Christie's on 18 July 2001, relating foremost to clarifications needed on some of the [name] documents as well as other documents Christie's had submitted. A reply was received on 16 August 2001⁴⁴. On 17 August 2001, Christie's sent the discovery requests that it had received in the US civil court proceedings, together with related materials⁴⁵. A meeting between the Commission and Christie's representatives took place on 10 September 2001. Following this meeting, Christie's supplied further information to the Commission on 21 September 2001, notably redacted interview notes and further materials from the civil trials in the US⁴⁶. On 30 January 2002, the Commission issued a further request based on Article 11 of Regulation 17, through which the undertaking was asked, amongst others, certain further questions on documents in the file and in which the company was requested to deliver non-confidential versions of its correspondence with the Commission. An answer was received on 8 March 2002, with a supplementary answer being supplied on 23 March 2002 and on 27 March 2002⁴⁷. Furthermore, Christie's submitted various clarifications to certain documents⁴⁸. On 19 April 2002, the Commission initiated proceedings in this case and adopted an SO against the undertakings to which this decision is addressed. The Commission met with Christie's representatives on 15 May 2002. On 5 June 2002, the Commission received the reply of Christie's to the SO.

3.2. Contacts with Sotheby's

(58) Sotheby's first contacted the Commission by telephone on 4 February 2000 regarding a possible infringement of the competition rules, following information it had received that the US DoJ had been put in possession by Christie's of relevant materials. At this time it indicated to the Commission its willingness to fully co-operate with the Commission. It contacted the Commission in writing on 22 February 2000⁴⁹, on which date it communicated to the Commission that [officer of Sotheby's] had stepped down as Chairman of the board and that there had been other changes at senior management levels.

(59) Further contacts, by fax and telephone took place on 15 and 20 March 2000, but these were merely to assess, at the request of Sotheby's, the usefulness of a meeting between Sotheby's and the Commission, which did not take place at that time. On 9 June 2000, Sotheby's informed the Commission in writing⁵⁰ that it had not been in a position to obtain access to the information in the possession of the US DoJ and that two of the individuals involved were being investigated by the US DoJ and had stepped down from their executive positions in the company. Hence, Sotheby's could not confirm or deny any of the charges at that point in time. It expressed its willingness to "keep open a co-operative communications channel" and would "co-operate fully with the Commission as a matter of principle". On 25

⁴³ Commission's file, page 01443, non-confidential version, page 09008.

⁴⁴ Commission's file, pages 01449-01547, non-confidential version, pages 09025 – 09028 and pages 09552 – 09632.

⁴⁵ Commission's file, pages 01548-01812.

⁴⁶ Commission's file, pages 02536 – 02912, non-confidential version, pages 08900 and 09631, pages 02913 – 03425, non-confidential version pages 08901 and 09632, and pages 03453 – 03905.

⁴⁷ Commission's file, pages 10425 – 10426.

⁴⁸ Included in Commission's file, pages 10515 – 10568.

⁴⁹ Commission's file, pages 00490 – 00495.

⁵⁰ See letter of 9 June 2000 by J.A. Lawrence, outside legal counsel for Sotheby's. Commission's file, pages 00498 – 00499.

September 2000, the Commission received a copy of a press release from Sotheby's in which it indicated that the board of directors of the company had agreed to approve settlements in the civil anti-trust lawsuit against it and in the shareholder class action law suit (see section 3.4.2). Also, it had reached an agreement with [officer of Sotheby's] on potential claims between Sotheby's and its former [function] (see also section 3.4.2). On 6 October 2000, Sotheby's informed the Commission of the fact that it had reached a settlement with the US DoJ regarding criminal proceedings against it in the US⁵¹.

(60) On 18 October 2000 Sotheby's contacted the Commission in order to announce that submissions by Sotheby's would be made on 6 November 2000⁵². On that date Sotheby's provided a submission to the Commission, including a detailed memorandum with annexes and an application under the Leniency programme⁵³. In the Memorandum Sotheby's admitted having been involved in "various agreements, arrangements, understandings or concerted practices" between it and Christie's which infringed Article 81 of the EC Treaty. More particularly, as regards its relationship with Christie's in connection with the setting of vendor commission rates announced in 1995, it admitted to:

- participating in meetings and conversations with Christie's in the United States and in Europe to discuss seller's (vendor's) commissions;
- agreeing to raise prices by fixing seller's commissions;
- agreeing to publish non-negotiable seller's commission schedules;
- agreeing to the order in which each conspirator would publish its non-negotiable seller's commission schedule;
- issuing seller's commission schedules in accordance with the agreements reached;
- exchanging customer information for the purpose of monitoring and enforcing adherence to the non-negotiable seller's commission schedules;
- agreeing not to make interest-free loans on consignments from sellers; and,
- agreeing not to make charitable donations as part of the pricing to sellers.

(61) On 6 March 2001, Sotheby's submitted further documentation to the Commission regarding vendor's commission and buyers' premium issues, as well as financial data⁵⁴.

(62) On 18 July 2001, the Commission sent a request based on Article 11 of Regulation 17 to Sotheby's⁵⁵ to which it replied on 31 August 2001⁵⁶. The request related to the earlier

⁵¹ Commission's file, pages 00508 – 00514.

⁵² See fax of 2 November 2000 from legal counsel for Sotheby's, Commission's file page 00515.

⁵³ Commission's file, pages 00516 – 00560, 07687 - 07730. Annexes, Commission's file, pages 00654 – 01171, non-confidential version, pages 07731 - 08248.

⁵⁴ Commission's file, pages 01181 – 01240, non-confidential version, pages 08249 – 08310.

⁵⁵ Commission's file, pages 01241 – 01312.

⁵⁶ Commission's file, pages 01315 – 01442, non-confidential version, pages 08311 – 08428.

information provided by Sotheby's and to the information that Sotheby's had submitted or had obtained in the civil trials relating to its participation in the cartel.

(63) On 7 November 2001, Sotheby's provided a further submission to the Commission, relating to the operation of the business in the course of 1994 and 1995, notably as regards certain conditions for vendors⁵⁷. On 11 December 2001 Sotheby's provided the Commission with the transcripts of the trial against its former chairman, A. Taubman⁵⁸. On 30 January 2002, Sotheby's received a further letter from the Commission under Article 11 of Regulation 17, through which the undertaking was asked, amongst others, certain supplementary questions on documents in the file and in which the company was requested to deliver non-confidential versions of its correspondence with the Commission. A reply was received on 22 February 2002⁵⁹. Supplementary information to this answer was submitted on 27 March 2002 and 4 April 2002. Following a meeting with Sotheby's representatives on 12 March 2002, Sotheby's sent a supplementary submission to the Commission on 18 March 2002, on Vendor's Commission and Buyer's Premium issues⁶⁰. Furthermore, various clarifications were submitted to the Commission in relation to documents referred to above⁶¹.

3.3. The adoption of Statement of Objections and subsequent procedure

(64) On 19 April 2002, the Commission initiated proceedings in this case and adopted an SO against the undertakings to which this decision is addressed. On 19 June 2002, Sotheby's sent its reply to the SO. In that reply, Sotheby's made further admissions, in view of the elements of the infringement as they had been defined by the Commission in the SO. In relation to the vendor's commission, Sotheby's admitted to:

- agreeing introducing a new 'sliding scale' for the vendor's commission;
- agreeing to the terms applicable to the scale, including making the scale non-negotiable, that is, to allow no exceptions (save as expressly permitted);
- agreeing the modalities as well as the timing of the scale's introduction;
- agreeing to monitor the adherence to the scale by exchanging lists of permitted exceptions ('grandfather lists') in order to monitor the implementation of the agreement and to deter and discuss any deviation.

Furthermore, Sotheby's admitted to the following elements as infringements that reflected an agreement as to the objective to be attained:

- ceasing the practice (for particular auctions) of making charitable donations on behalf of consignors in order to obtain their businesses;
- not to make loans below LIBOR⁶²;

⁵⁷ Commission's file, pages 01813 – 01849, non-confidential version, pages 08429 – 08445.

⁵⁸ Commission's file, pages 01850 – 02535.

⁵⁹ Commission's file, pages 04955 – 06464, non-confidential version, pages 06465 – 07686.

⁶⁰ Commission's file, pages 10427 – 10457, non-confidential version pages 10458 – 10488.

⁶¹ Included in Commission's file, pages 10490 – 10514, 10569 – 10594 and 10596 – 10600.

⁶² Loans below LIBOR: this refers to the standard London inter-bank interest (offer) rate. Advances made by auction house would normally bear interest, to be paid by the consignor to the auction house. The lower

- not to give vendors at auction guarantees as to the minimum price without sharing the ‘upside’ where the goods were sold for more than the guaranteed price;
- not to make advances on single lots;
- not to pay introductory commissions in excess of 1% on consignments where there was a 0% vendor’s commission.
- to limit the vendor’s commission paid by trade vendors/dealers (nothing better than 5%) and restricting the practice of providing insurance for trade vendors.

(65) Both parties were granted access to the file, in the form of a CD-ROM containing the complete accessible case file. Both parties replied to the SO within the time accorded. Neither party materially contested the existence of the infringement as described in this Decision. Further, neither Christie’s nor Sotheby’s requested an oral hearing. Following the submission of their reply to the SO, a meeting with Sotheby’s took place on 13 September 2002.

3.4. Proceedings in the United States

3.4.1. Prosecution by the US Department of Justice

(66) As mentioned above, a Federal Grand Jury was convened in May 1997 to investigate (*inter alia*) suspected agreements contrary to Section 1 Sherman Act among certain art dealers and major auction houses, including Christie’s and Sotheby’s, relating to auctions in New York.

(67) In the circumstances explained in paragraphs (48)-(50), the US DoJ was put in possession of the [name] documents. As a result of this, on 26 January 2000, Christie’s obtained a conditional grant of leniency, namely of full immunity from criminal prosecution, from the US DoJ.

(68) On 5 October 2000 Sotheby’s agreed to plead guilty in the federal United States District Court for the Southern District of New York, to a charge of conspiracy to fix the vendor’s commission and to pay a fine of USD 45 million (over a five year period).

(69) [Information regarding US legal proceedings]. On 6 December 2001, A. Taubman was found guilty in a trial by jury in the Federal District Court of the Southern District of New York. He was found guilty, in violation of section 1 of the Sherman Act, of having been involved in a conspiracy for his role in fixing the vendor’s commission that was applicable in the period 1995 and 1999. In the trial against Taubman, the so-called [name] documents were used as evidence, as well as testimonies by, amongst others, [name] and [name]. The sentencing of A. Taubman has in the meantime taken place and he is to serve a jail sentence of a year and a day and pay a fine of USD 7.5 million. D.D. Brooks was sentenced to house arrest for a period of 6 months.

the interest rate, the more advantageous the situation would be for the customer. Hence the agreement not to go below the LIBOR interest rate level.

3.4.2. *Private civil actions in the US*

(70) Apart from prosecution by the US DoJ, both companies were facing civil claims for triple damages of private plaintiffs who had purchased items at Sotheby's and Christie's during the period 1 January 1993 and 7 February 2000, and private plaintiffs who had sold items through Sotheby's and Christie's between 1 September 1995 and 7 February 2000. The complaints were consolidated before the District Court for the Southern District of New York into what are referred to as 'class action' law suits. Both Christie's and Sotheby's reached settlements with private plaintiffs on 24 September 2000. Christie's and Sotheby's each agreed to pay USD 206 million in cash, and USD 62.5 million as discount certificates. Of that amount, [name] funded USD 165 million in cash on behalf of Sotheby's⁶³.

(71) Beginning in August 2000, three other class action law suits were filed before the US District Court for the Southern District of New York.

(72) One case is pending before the Superior Court of the State of California, alleging violations of California's antitrust legislation. The case has been brought by six independent purchasers. All discovery in that case was stayed until 10 January 2002. On 2 May 2002, the putative class action plaintiffs and the auction houses reached an agreement to settle the litigation which was based on the State of California's Business and Professions Code and Unfair Competition Act. Pursuant to certain conditions and court approval, the auction houses have agreed to pay USD 192,500 each, totalling USD 385,000, to a settlement fund.

(73) The other two actions concern the shareholders of Sotheby's and were brought before the District Court of the Southern District of New York. The first one is based on the impact of the failure to disclose the alleged agreements. The action was directed at Sotheby's, but also at A. Taubman, D.D. Brooks and certain other (former) officers. A settlement was reached on 24 September 2000 and finally approved by the District Court on February 16, 2001. Sotheby's agreed to pay USD 30 million in cash and more than 2.2 million in shares. [Name] funded the USD 30 million dollar cash payment. The other case (or group of cases) are referred to as so-called 'shareholder derivative' cases, and were filed with the same District Court as well as in a Michigan court against Sotheby's and some of its former directors. In July 2001, settlements were reached in these cases as well.

3.5. **The main evidence relied on**

(74) The principal documentary evidence relied upon consists of the documents submitted by the parties to the Commission, including the transcripts and exhibits from the file in the court case against A. Taubman in the US. The most important documents are:

⁶³ Christie's and Sotheby's decided to appeal, given the refusal of the District Court to include in settlement a release provision relating to foreign auctions. At the same time, certain plaintiffs submitted cross-appeals. A separate class-action was lodged in relation to auctions having taken place outside the US. This case is generally referred to as the *Kruman* case. In March of 2002, after an initial order by the District Court that the Sherman Act was not applicable to foreign auctions, an Appeals Court reversed that decision and remanded the case to the District Court for a determination of whether the case should be dismissed on different grounds, namely a lack of standing or improper venue. Both Christie's and Sotheby's have filed an appeal with the United States Supreme Court, which was pending at the time of preparation of the current decision.

- The statement of Christie's dated 28 January 2000 and annexes⁶⁴;
- Christie's background note of 18 February 2000 and annexes⁶⁵;
- The so-called [name] documents⁶⁶;
- Christie's reply of 21 July 2000 to Article 11 request and annexes⁶⁷;
- Sotheby's memorandum of 6 November 2000 on Vendor's Commission and Buyers' premium issues and annexes⁶⁸;
- Sotheby's submission of 6 March 2001 on Vendor's Commission and Buyers' premium issues⁶⁹;
- Sotheby's reply of 31 August 2001 to the Commission's article 11 request of 18 July 2001 and annexes⁷⁰;
- The transcripts of trial of A. Taubman in the US⁷¹;
- Sotheby's supplementary submission of 18 March 2002⁷².
- The replies of Christie's and Sotheby's to the SO, of 5 June 2002 and 19 June 2002 respectively.

4. DESCRIPTION OF EVENTS

4.1. Elements of the cartel

(75) As will be demonstrated below, Christie's and Sotheby's entered into a common plan with a view to restricting competition on a number of competitive parameters. These were foremost related to the conditions applicable to sellers, but also included conditions for buyers as well as other elements. In more detail, the agreement and/or concerted practices between Christie's and Sotheby's contained the following elements:

(76) Regarding the vendors:

- agreeing to introduce a new "sliding scale" for the vendor's commission⁷³;

⁶⁴ See Commission's file pages 09076 - 09089.

⁶⁵ See Commission's file pages 09111 – 09125.

⁶⁶ See Commission's file pages 04324 – 04786.

⁶⁷ See Commission's file pages 08983 – 08984 and 09126 – 09144.

⁶⁸ See Commission's file pages 07687 – 08248.

⁶⁹ See Commission's file pages 08249 – 08310.

⁷⁰ See Commission's file pages 08311 - 08428

⁷¹ See Commission's file pages 01850 – 02535.

⁷² See Commission's file pages 10457- 10488

⁷³ A sliding scale means that the percentage that is charged to sellers as a commission on the sale is changed at certain thresholds. In practice, the higher the price obtained for a consignment, the lower the percentage that a seller has to pay.

- agreeing to the terms applicable to the scale, including making the scale non-negotiable, that is, to allow no exceptions (save as agreed) to the scale;
- agreeing the modalities, as well as the timing of its introduction;
- agreeing to monitor the adherence to the scale by exchanging lists of the permitted exceptions ("grandfather lists") in order to monitor the implementation of the agreement and to deter and discuss any deviations.
- agreeing not to give vendors at auction guarantees as to the minimum price;
- agreeing on a formula for the sharing with vendors of the "upside" benefit where goods are sold more than the guaranteed price:
- agreeing to make no advances to vendors on single lots;
- agreeing and/or concerting on the terms and conditions of advances for particular auction sales;
- agreeing the minimum interest rate for loans ("no loans below LIBOR");
- agreeing to limit the commission paid to trade vendors/dealers ("nothing better than 5%") and to restrict the practice of providing insurance for trade vendors;
- agreeing on limiting the payment of introductory commission (to 1% of the buyer's premium in cases where there was no vendor's commission);

As regards buyers:

- agreeing to limit credit terms to trade buyers to 90 days.

Other elements:

- agreeing to limit their marketing efforts (avoiding claims/statements regarding market share or claiming "leadership" in the art market or in a particular segment).

(77) Furthermore, in order to implement and/or modify the agreements as required, the parties concerted and exchanged information during regular meetings or (telephone) contacts on any subject or matter (auctions, vendors, dealers, buyers) which might give rise to or encourage competition between them or otherwise conflict with or endanger their agreement not to compete.

4.2. The origin of the cartel

4.2.1. Economic situation

(78) In the beginning of the 1990s, the international art market was in a period of recession that affected both Christie's and Sotheby's. The companies were not achieving the desired revenue levels⁷⁴. In order to address that situation, and because the services for buyers had

⁷⁴ Christie's submission of 18 February 2000, at page 5, Commission's file page 00227, non-confidential version, page 09115

increased over the years without an increase in fee, Sotheby's decided, on 30 October 1992⁷⁵, to increase the buyer's premium from 10% to 15% on the first GBP 30.000 (USD 50.000) of the hammer price, effective on 1 January 1993. Christie's announced shortly afterwards that it would introduce a similar scale rates in its principal sale rooms with effect from 1 March 1993. (The differences that remained on the buyer's premium were ironed out by Sotheby's through an adaptation to its scheme on 19 July 1993, so that both houses had identical rate applicable to buyers from that moment on.)

(79) However, the increase in the buyer's premium did not have the desired effect. According to Christie's, the 5% increase in the buyer's premium was not expected to significantly enhance profitability. Hence, the companies were considering other ways to secure income.

4.2.2. *The initial contacts between the [functions in the company] of Christie's and Sotheby's*

(80) In September 1992, [name] was hired by Christie's to become [function]. [Name] effectively joined the board of Christie's on 1 January 1993, first officially as [function], but then as [function] from May 1993 onward until May 1996, and then as a [function] until September 1998. [Name], was an acquaintance of [officer of Sotheby's] and they knew each other socially from the period before [name] joined Christie's⁷⁶.

(81) [Officer of Sotheby's] and [officer of Christie's] agreed to meet to discuss the difficult market situation and to consider how things could be improved. One of the first meetings between Messrs. [officer of Sotheby's] and [officer of Christie's] took place on 3 February 1993 in London, followed by another meeting on 1 April 1993 in New York⁷⁷. According to [officer of Christie's], these were not the first two meetings between the [functions], and earlier meetings had taken place. However, no particular dates of those meetings were known to him⁷⁸.

(82) One of the things the [functions] did during these contacts was to review particular client contracts. Christie's had allegedly given non-recourse loans, in a manner that was regarded as unfair competition by Sotheby's and, according to [officer of Sotheby's], not in conformity with New York legislation. According to [officer of Christie's], he was asked by [officer of Christie's] to provide information regarding these particular client contracts that [officer of Christie's] had been discussing with [officer of Sotheby's]. This list of clients was noted down in hand-written form by [officer of Sotheby's] assistant [Name] and had been given to [officer of Christie's] at one of his first meetings with [officer of Sotheby's]⁷⁹. This same list was then passed on to [officer of Christie's]. It appears in the copy of the '[Name] documents' submitted by Christie's to the Commission. It was originally contained in a file (with separators) that [officer of Christie's] had at that time prepared for [officer of Christie's]

⁷⁵ Sotheby's submission of 6 November 2000, annex 4, Commission's file page 00717, non-confidential version, page 07794.

⁷⁶ This was confirmed in testimonies at the trial against A. Taubman, see pages 287 and 1292 of transcripts in the case USA v A. Alfred Taubman et al., testimony of L. Marcuse and R. Larson, Commission's file pages 01948 and 02263.

⁷⁷ Defence Exhibit 470 in the case USA v A. Alfred Taubman et al., Commission's file pages 04834 – 04947.

⁷⁸ See transcripts in the case USA v A. Alfred Taubman et al., at page 528, Commission's file page 02021.

⁷⁹ See transcripts in the case USA v A. Alfred Taubman et al., at page 306, Commission's file page 01953. See also Commission's file page 04376.

for his next discussion with [officer of Sotheby's]⁸⁰. According to [officer of Christie's], [officer of Christie's] had asked him to provide information on each of the items listed, including the list of contracts containing non-recourse loans. Other issues on the list were the poaching of personnel (paragraph 1 on the list), allegedly critical comments and false claims that had been issued in the press, notably about market share (paragraphs 2, 4 and 5), the fact that the two companies had tried to 'steal' each other's contracted clients (paragraph 8). Also, information on particular clients was prepared (paragraph 3) and the rebate policy of both companies (paragraph 9). Furthermore, an issue of Sotheby's stock (paragraph 7) was on the list, possibly a reference to a comparison of stock value or an issue of stock options for personnel. The list reads:

1. *Curiel – Claudia Dwek – S&Co Milan*
2. *Wall Street Journal*
3. *Jacob Rothschild. Accept comment - CA?*
4. *Old Masters – market share*
5. *Critical comments – S&Co*
6. *Non-recourse loans – New York authorities*
7. *S&Co no stock*
8. *Never break existing contract*
9. *Rebates*

(83) On 30 April 1993, another meeting took place, during which [officer of Christie's] made notes which he later handed to [officer of Christie's]. The 'April 30th' paper⁸¹ lays down the fundamentals of a wide anticompetitive agreement between the two auction houses.

(84) According to [officer of Christie's], he received the note from [officer of Christie's] shortly after the latter's meeting with [officer of Sotheby's]. There are ticks made in his ([officer of Christie's]) writing plus various other annotations – including the initials "[xxx]" – or words underlined. [Officer of Christie's] says he made these markings in preparation for his own subsequent meeting with [officer of Sotheby's] which was a follow-up of the agreement between the two [functions]⁸².

4.3. The substance of the initial agreement

(85) The first part of the notes of April 30th written by [officer of Christie's] is in quotation marks and ends with the remark (outside the quotation marks) "*This copied verbatim*".

⁸⁰ See transcripts of testimony of [name] in the case USA v A. Alfred Taubman et al., at page 311 et seq., Commission's file page 01954 et seq.

⁸¹ See Commission's file pages 04419 – 04424. The paper, which contains handwritten notes, appears to consist of four pages. Although the date 'April 30' is mentioned on the first page, it is not certain that all notes refer to the meeting of that date.

⁸² See Christie's reply of 19 October 2000, Commission's file page 00404, non-confidential version, page 09541.

[Officer of Christie's] explained that the notes reflected a conversation at a breakfast meeting between [officer of Christie's] and [officer of Sotheby's]⁸³. The words as written are therefore to be attributed to A. Taubman. The document firstly makes a reference to an agreement that the two would refrain from making disparaging remarks about each other in the media or to customers. The paper continues by indicating that the two companies would stop competing on a range of competitive parameters and marks the assurances that [officer of Sotheby's] gave to [officer of Christie's] on what Sotheby's would do:

{...} "We {Sotheby's} have ceased making claims to the media about market share.

As from Sept 93 we{Sotheby's} will give no straight guarantees, make no advances on single lots, make no loans below LIBOR and offer trade vendor no better than 5% with vendor paying his own insurance.

We {Sotheby's} will not offer more than 90 days credit to trade buyers.

Introductory commissions to third parties will not exceed 1% of the premium where there is no vendor's commission.

We will not make any offers to trade vendors already contracted by signed agreement to you {Christie's} (We {Sotheby's} do not do this anyway)"

In the area outside the quotation marks, A. Tennant noted:

This copied verbatim. Accompanied by verbal assurance that we {Christie's and Sotheby's jointly} would like to go further if we can make satisfactory progress. {...}

And further on:

All points in written piece verbally agreed. {...}

{...}My date of September makes sense, but let's try and act earlier because big stuff for the autumn is fixed July/August

{...}A schedule exists. We should get back to it. 15% downwards on a sliding scale. At 1 bn sales we would each make \$50m+. 100 industries, banks etc. all do it without talking about it. We should set up our own schedules. They do not have to be identical but they could be, provided that we do not say that we match one another. It is easier for us than for people dealing in goods which can be priced exactly. With a sliding scale based on value there should be no legal problem, because you cannot price fix a unique object.

They {Sotheby's} are now considering publishing a scale as with the buyer's premium. They {Sotheby's} are considering 4% or 5% vendors commission over \$100.000 with 1 point less to the trade up to \$1 m. Over \$1 m 3% with 2% for the trade."

⁸³ See transcripts in the case USA v A. Alfred Taubman et al., testimony of [name], at pages 331 and 332, Commission's file page 01959.

{...}They [Sotheby's] would never made interest-free non-refundable advances. If anyone wants to bargain the scale they {Sotheby's} will tell them to go elsewhere.

{...}Everything shall be monitored and checked back if need be.

He and I shall now withdraw but stay in touch with a view to seeing how things go and intervening from on high if need be"

(86) The references above concern an agreement to end various incentives which if practised by one but not the other could give the former a competitive advantage and make it more attractive to a potential customer. Most of the references to parameters of competition are self-explanatory or have been explained above (see explanations in section 2.2), but some are further explained hereunder:

- No straight guarantees: it was a frequent practice to offer a consignor a guaranteed price for a lot; if it fails to make that price at auction, the auctioneer makes up the difference. In many cases, if the property was sold for more than the guaranteed price, the difference would still go to the consignor/vendor. Hence the term 'straight' guarantee. In some cases, the auctioneer and the consignor agree to "share the upside", that is, to share, on the basis of a pre-agreed formula, how the amount exceeding the guarantee would be divided between the seller and the auction house.
- Advances on single lots: when a consignment is received for sale, the auction house may advance a loan to the consignor of a proportion (commonly 50%) of the estimated hammer price. The advance is secured on the consigned property. It enables consignors to receive funds shortly after consignment for an auction that will occur weeks or months in the future. If the loan is secured on only a simple item of property (a single lot), the risk for the lender is higher.
- Loans below LIBOR: this refers to the standard London inter-bank interest (offer) rate. Advances made by auction house would normally bear interest, to be paid by the consignor to the auction house. The lower the interest rate, the more advantageous the situation would be for the customer. Hence the agreement not to go below the LIBOR interest rate level (already explained in paragraph (64), footnote 62).
- limiting the minimum commission paid by trade vendors/dealers ("nothing better than 5%") and the vendor "paying his own insurance": trade vendors paid a commission to the auction house which was lower than that for private individuals. Obviously trade vendors would place their business with whichever auction house would offer the lower charge. Also, it was standard practice that consigned items were automatically insured by the auction house, even in the case of trade vendors, who often have their own insurance policy anyway. The insurance charge is not included in the 5% commission. It is in fact normally cheaper for a vendor to arrange his own insurance.

(87) The two [functions in the companies] discussed the subject of the vendor's commission and outlined the basis for an agreement on this issue also ("A *schedule exists* {for the vendor's commission}. *We should get back to it* {etc.}"). [Officer of Sotheby's]confided

to [officer of Christie's] that Sotheby's was "*considering publishing a scale as with the buyer's premium*".

(88) Furthermore, [officer of Sotheby's] confirmed that it was discussed that the new scale was to become non-negotiable. ("*If anyone wants to bargain on their {Sotheby's} new scale they will tell them to go elsewhere*").

(89) [Officer of Sotheby's] and [officer of Christie's] decided that now the main features of the agreement between the auction houses had been set, the execution and further implementation of the agreement was to be handed over to [officer of Sotheby's] and [officer of Christie's]. ("*He and I should withdraw, but stay in touch with a view to seeing how things go and intervening from on high if need be*"). The fact that the execution of the agreement would be left to [officer of Christie's] and [officer of Sotheby's] also becomes apparent where [officer of Christie's] noted: "*This copied verbatim. Accompanied by verbal assurance we would like to go further if we can make satisfactory progress... [initials] and [initials]*"⁸⁴ *know. Now to be [initials] only. Given [initials]*⁸⁵ *home number. To call Tues or Wed evening*".

(90) In summary, the document of 30 April 1993 hence shows that through the exchange of information about the intended commercial behaviour of the respective auction houses and the discussion on the (joint) future market conduct, both auction houses restricted competition between them on a number of competitive parameters. The agreements and/or concert of action that followed from the discussions between [officer of Christie's] and [officer of Sotheby's] are summarised below:

Regarding the vendor's commission:

- agreeing to introduce a new scheme for the vendor's commission and concerting on the scale that should be used;

Regarding other conditions for vendors:

- agreeing not to give vendors at auction guarantees as to the minimum price;
- agreeing to make no advances to vendors on single lots;
- agreeing and/or concerting on the terms and conditions of advances for particular auction sales;
- agreeing the minimum interest rate for loans ("no loans below LIBOR");
- agreeing to limit the minimum commission paid by trade vendors/dealers ("nothing better than 5%") and to restrict the practice of providing insurance for trade vendors;
- agreeing to limit the payment of introductory commission to 1% of the buyer's premium in cases where there was no vendor's commission (0%);

⁸⁴ "[initials]" is [name]. "[initials]" is [name], [name] predecessor as [function] and [function] of Sotheby's Holdings Inc., whom [xxx] replaced in April 1994.

⁸⁵ These are the initials of [officer of Christie's].

As regards buyers:

- agreeing to limit credit terms to trade buyers to 90 days;

Other elements

- agreeing to limit their marketing efforts (avoiding claims/statements regarding market share or claiming "leadership" in the art market or in a particular segment).

4.4. Further meetings between [officer of Sotheby's] and [officer of Christie's]

(91) In spite of the fact that [officer of Christie's] and [officer of Sotheby's] had agreed that they would withdraw and only step in when circumstances required, data obtained by the Commission from the trial against [officer of Sotheby's] showed that they met on at least another nine occasions between September 1993 and October 1996⁸⁶. According to [officer of Sotheby's]' testimony at the trial against A. Taubman, [name] would usually receive a call from [officer of Sotheby's] before another meeting with [officer of Christie's] was to take place⁸⁷. The meetings between [officer of Sotheby's] and [officer of Christie's] took place either in London or in New York, mostly at the private residences of either of the two. The [name] documents contain at least one further page that is proof of another meeting having taken place probably in 1996, or at least in 1995, since it contains notes about the exchange of 'exceptions to the new rates', that is, the new vendor's commission introduced in the course of 1995 (see sections 4.6). The dates and places for at least a number of the meetings between the [functions in the companies] can be deduced from the various diary entries in the different diaries that were kept by and for [officer of Sotheby's], including the recorded flight data of [officer of Sotheby's]'s jet aeroplane that belonged to the [officer of Sotheby's] company⁸⁸. The other 9 meetings that took place occurred on:

7 September 1993,
12 January 1994,
9 March 1994,
23 June 1994,
28 November 1994,
19 June 1995,
19 October 1995,
11 April 1996, and
31 October 1996.

⁸⁶ Exhibit 470 (listed by the defence) in the case USA v A. Alfred Taubman et al., Commission's file page 04834.

⁸⁷ See testimony of [officer of Christie's] in the case USA v A. Alfred Taubman et al., at page 895, Commission's file page 02147.

⁸⁸ See Commission's file page 04789.

4.5. Implementation and widening of the initial agreement: meetings between [officer of Christie's] and [officer of Sotheby's]

(92) [Officer of Sotheby's] and [officer of Christie's], following the initial contacts between [officer of Christie's] and [officer of Sotheby's] and after having received instructions from [functions in the companies], established a first contact by telephone within a week after 30 April 1993. A first meeting took place between them some six weeks later⁸⁹.

(93) [Officer of Christie's] prepared a note as the agenda for the first telephone conversation between him and [officer of Sotheby's]. Amongst the points that were to be discussed between them, the following items appeared:

“{...} 2. *Terms : maximising vendor's commission on low value lots.*

3. *Trade Terms : Selling – hold to 5-6% especially in UK
Buying – restricting to 90 days for exceptional clients unless
terms supported/requested by the vendor.*

{...}”

The first item (with the number 2 on the list) relates to the possibility of ensuring that on low value consignments, a higher commission would be obtained. The third item relates to the special conditions that dealers received, firstly as regards the vendor's commission (which was lower for dealers than for private customers), and as regards the payment terms, in case they were acting as buyers.

(94) [Name] recorded his first contact with [name] as an aide-mémoire for reporting back to [name]⁹⁰. The note states, referring to the information that [name] had provided:

“1. Market share – confirmed that we shall both cease to provide the press with corporate market share figures but accept that they can still calculate our combined figures.

2. Guarantee – confirmed neither company will give as of now {...})

3. Trade Commission – Accepts that lower trade commission terms have been given, especially in London, and will research if these arrangements can be undone.

4. Introductory commission – The (sic) do give up to 3% taken from premium. Reluctant to give this up as had happened on a regular basis. Will endeavour to phase out over time.

5. Vendors commission – Was expecting us to issue a minimum price list.

(95) {...} This document shows that the two [functions in the companies], were exchanging information related to the adherence to the agreement that their [functions in the companies], had put in place in April 1993 and also shows that on other points a final agreement had been

⁸⁹ Confirmed by the testimony of [officer of Christie's] in the case USA v A. Alfred Taubman et al., at page 353, Commission's file page 01964.

⁹⁰ Confirmed by the testimony of [officer of Christie's] in the case USA v A. Alfred Taubman et al., at page 357, Commission's file page 01965.

reached. On one item, the change in the vendor's commission, details still had to be worked out in the future. The document makes clear that:

- no guarantees would be provided to vendors as of the date of the meeting;
- special conditions to trade vendors (dealers) would be restricted by Sotheby's;
- introductory commissions would be restricted and phased out by Sotheby's.
- vendors commission: [name] made clear that the new scale was to be proposed by Christie's

(96) After this first meeting, the [functions in the companies], [officer of Sotheby's] supplanted [officer of Sotheby's] and became [function] and [function] in 1994) held regular meetings or were in telephone contact to exchange information. [Officer of Sotheby's] and [officer of Christie's] met or contacted each other on numerous occasions to discuss the implementation and control of the various aspect that they agreed upon, co-ordinate commercial policy and collude on the conduct of specific sales and deals. Sotheby's provided the Commission with copies of the diaries of [officer of Sotheby's] and phone records, that showed that contacts between [xxx] and [officer of Christie's] took place regularly between September 1993 and January 1997⁹¹. Christie's stated that the two met on some 20 occasions⁹².

(97) The notes, memoranda and aide-mémoires made by [officer of Christie's] of various meetings and conversations (often headed "S + Co") have been supplied to the Commission by Christie's. These documents (often undated) are included in the [name] documents, in a section labelled "Notes re topics discussed" and provide evidence on the contents of these contacts and meetings⁹³. They contain references to the various conditions of sale applied in general by both houses, clients names and the conditions applied to them, references to planned sales, etc, etc,. Also, it is clear from these documents that [officer of Christie's] and [officer of Sotheby's] had discussed possible changes to the vendor's commission (see e.g. document with Bates number 51252).⁹⁴

4.6. The implementation of the agreement relating to the vendor's commission

(98) As stated above, the vendor's commission was one of the main sources of income of the auction houses and it was in this area of the commissions that provided the most scope for competition between the two. Before 1993 both Christie's and Sotheby's already issued published lists of vendor's commission charges, with a flat rate of 10% for most items (for Christie's it was on property worth USD 7.500 or more) and higher rates of 15% or 20% for low-value items. Trade commissions were set at 6%. However the specialists in the various departments of Christie's and Sotheby's had considerable flexibility to agree special deals and to attract major business. They frequently made special deals or even waived charges. Hence,

⁹¹ Sotheby's submission of 6 November 2000, on pages 11-13 and in annex 3 (Commission's file pages 00527 – 00529, non-confidential version 07697 - 07699 and 00664 – 00712, non-confidential pages 07741 - 07789).

⁹² Christie's reply of 19 October 2000, Commission's file page 00404, non-confidential version page 09540.

⁹³ See Commission's file pages 04563-04786. A specific example of such a note is page (with Bates number) 51266, Commission's file page 09321.

⁹⁴ See Commission's file pages 04576.

although both Christie's and Sotheby's had a set rate of vendor's commission of 10% in most cases and 6% for the trade, traditionally there was broad scope for bargaining with their customers. In effect the commissions were up for negotiation and each auction house undercut the other's prices in order to get the business of a major sale.

(99) Having put in place a number of the elements of the agreement reached between Messrs. [officer of Sotheby's] and [officer of Christie's] in April 1993, one of the main elements that needed finalisation by [officer of Sotheby's] and [officer of Christie's] was the new vendor's commission scheme. Discussions were held between Christie's and Sotheby's, notably between [officer of Christie's] and [officer of Sotheby's] during 1994, which would lead to a new sliding scale structure for the vendor's commission to be adopted by both auction houses in 1995⁹⁵. It had been agreed at a prior stage, as is reflected in the note that [officer of Christie's] prepared for [officer of Christie's] in June 1993⁹⁶, that Christie's would go first and that Sotheby's would follow⁹⁷.

(100) The documents in the [name] files show some of the internal discussions at Christie's relating to the new scheme. The profits of the auction business in the early 90's were judged not to have provided a satisfactory return to shareholders. At Christie's, profit as a percentage of sales had languished at only 1.1-2.2% since 1990; profit as a percentage of net assets was 5-11% in this period, and the 1995 budget held no prospect of improvement. In late 1994 "the attention of Christie's senior management focused on ways of increasing revenue to satisfy shareholder expectations"⁹⁸.

(101) An internal memorandum written to [officer of Christie's] dated 16 January 1995⁹⁹ dismisses market growth and cost cutting as a possible solution to the problem: "*We must therefore find ways of increasing our revenue*".

(102) According to the above referred memo, the answer to enhance revenues was an increase in the vendor's commission; here the possible permutations were "endless", but Christie's estimates of the effect were much less accurate largely because "*we don't know how successful we will be in sticking to the scale*". That, of course, depended on the possible competition from Sotheby's and on that point [officer of Christie's] knew that an agreement had already been reached.

(103) A sliding scale based on lot value was proposed to replace the then "fixed" (but invariably disregarded for important sales) commission rate. (The example given corresponds to the scale actually introduced).

⁹⁵ As confirmed by Sotheby's in their submission on vendor's commission and buyers' premium issues of 6 November 2000, see Commission's file at page (non-confidential) 07697.

⁹⁶ Commission's file 04613.

⁹⁷ See also testimony of [officer of Christie's], trial transcripts in the matter of USA v A. Alfred Taubman et al, page 344, Commission's file page 01962.

⁹⁸ Christie's background note for the European Commission of 18 February 2000, Commission's file pages 00221 – 00237, non-confidential version pages 09111 - 09125.

⁹⁹ Commission's file page 04772 et seq., non-confidential version page 09503 et seq.

<u>Lot value</u>	<u>Commission</u>
Up to \$100,000	As now*
\$100,000 - \$250,000	8% (Trade 6%)
\$250,000 - \$500,000	6%
\$500,000 – \$1,000,000	5%
\$1,000,000 - \$2,500,000	4%
\$2,500,000 - \$5,000,000	3%2% * that is, 10% in most cases (6% trade) but retaining existing higher rates for very low value lots.
\$5,000,000 +	

(104) An analysis of the estimated impact of the changes was set out in an appendix to the memorandum. Christie’s financial experts projected that:

“if fully adhered to, this would raise an additional £23m (\$35m) of revenue, of which over £12m (\$18m) would come from Park Avenue and over £5m (\$8m) from King Street”¹⁰⁰.

(105) In practice, the analysts conceded that they would probably have to give discounts on major consignments which would reduce the additional profit from GBP 23m to GBP 18m.

(106) The success of the scheme therefore depended upon it being “non-negotiable”, namely on there being no “exceptions”, which in turn was dependent upon the same scale being introduced, and rigidly applied, by Sotheby’s.

(107) At the beginning of 1995, the introduction by Christie’s of the new scheme was imminent. The Commission’s file contains a memorandum from [officer of Christie’s] to [officer of Christie’s] of 6 January 1995¹⁰¹ reporting that on the occasion of a “chance meeting”, [officer of Sotheby’s] (referred to as “your friend” and as “[xxx]”) had indicated to him ([officer of Christie’s]) that the time was propitious for increasing rates of vendor’s commissions:¹⁰²

“On further thought about what you told me yesterday afternoon about your friend and C.¹⁰³, it seems to me his report on our chance meeting gives her the opportunity I hoped it would.

¹⁰⁰ Commission’s file page 04773.

¹⁰¹ Even though the note only mentions “6/1” as a date, [officer of Christie’s] declared that this is 6 January 1995. See trial transcripts in the matter of USA v A. Alfred Taubman et al, page 773, Commission’s file page 02099.

¹⁰² Sotheby’s, in its reply to the SO, denies that [officer of Sotheby’s] was present at any meeting referred to. However, the reference to ‘your friend’ and to the word “she”, in the view of the Commission indicate that the person involved was [officer of Sotheby’s].

¹⁰³ The [initial] is most probably a reference to [name], who had become a director at Sotheby’s.

Her response:

- 1. No need for dangerous organised meeting as C. suggests because they now have clear indication we will act.*
- 2. She can therefore put in hand analysis of how we might act and plan their response.*
- 3. (optional) Likelihood is that we will announce action with our figures. She will therefore delay their figures a week to give time to put final polish on her decisions.*

A.”

(108) On 8 February 1995 - just before Christie’s was about to adopt the new vendor’s commission structure - [officer of Christie’s] flew to New York to meet with [officer of Sotheby’s] at J. F. Kennedy airport. In the back of her company car, [officer of Christie’s] showed to [name] the proposal on the new vendor’s commission structure that would be submitted to the Christie’s Board of Directors on 9 February 1995 and which was prepared on the basis of their mutual discussions¹⁰⁴. [Name] also received from [officer of Christie’s] a number of internal Christie’s documents, being the draft announcements to the press, an internal announcement to staff, a list of questions and answers that would be distributed to the respective press offices in the world and a summary of the internal financial benefits to Christie’s of the finalised schedule for the vendor’s commission¹⁰⁵.

(109) On 9 March 1995 Christie’s publicly announced¹⁰⁶ that it would be instituting a new sliding scale of rates based on the value of the property sold. It was made clear that under the new policy scale commission would be non-negotiable. The new charges were to apply from 3 April 1995 for property scheduled for auction at Christie’s salesrooms world-wide beginning 1 September 1995 when the new auction “season” opened.

(110) The announcement of the rate increase was made by Christie’s on the day it published its financial results for 1994¹⁰⁷. A confidential briefing note¹⁰⁸ was prepared (which [officer of Christie’s] had shown to [officer of Sotheby’s] at Kennedy airport) to help directors to field any questions from the press about the new commission structure and in particular the likely reaction of Sotheby’s. If journalists asked, the prepared (though untruthful) answer was to be “*With this new policy change, as with all other changes in the way we conduct business, we determine what we believe will best serve our clients and shareholders – not our competitors. We expect our competitors will read the news in tomorrow’s papers and don’t intend to speculate on their reactions*”.

(111) On 13 April 1995 Sotheby’s duly followed. In the internal discussions, [officer of Sotheby’s] had proposed that the increase in Christie’s tariffs be matched. The commission scale that was introduced was nearly identical to that of Christie’s. No mention was made in

¹⁰⁴ Trial transcripts in the matter of USA v A. Alfred Taubman et al, pages 859-862, see the Commission’s file at pages 02138 - 02139.

¹⁰⁵ Trial transcripts in the matter of USA v A. Alfred Taubman et al, pages 373 and 374, Commission’s file page 01970 - 01971; For the documents, these are contained in Commission file pages 04640 – 04776.

¹⁰⁶ For the (draft) press releases see Commission’s file pages 04661 – 04666.

¹⁰⁷ Commission’s file page 04667 – 04674.

¹⁰⁸ Commission’s file pages 04670 – 04679.

Sotheby's press release of the announcement previously made by its competitor. The new rates, which would be "effective immediately" would apply to all future consignments for the full auction season, beginning 5 September 1995¹⁰⁹.

(112) To demonstrate that Sotheby's was "following suit", [officer of Sotheby's] faxed Christie's with a copy of internal instructions given to staff confirming the strict new practice: all commissions are minimum rates and may not be waived or reduced¹¹⁰. The instructions made clear that the new tariffs would be non-negotiable – something that was not stated in Sotheby's press release.

(113) The non-negotiability of the new commission structure was strictly implemented. Staff at Sotheby's would sometimes complain about the rigidity of the non-negotiable vendor's commission structure. In Amsterdam, *inter alia*, the Sotheby's people feared they would (together with Christie's) lose business to other auction houses. There were also fears that Christie's would not adhere to "the agreed commission structure"¹¹¹. A proposal to adapt the commissions was firmly rejected by headquarters, despite the alarming messages from the Amsterdam office. Instead, they received instructions to clearly follow the instruction set out by [officer of Sotheby's] on the new vendor's commission¹¹².

(114) Although such problems appear to have occurred at several offices, the new rates were generally applied. Sotheby's submits that some of its personnel across Europe commented when interviewed by Sotheby's outside legal counsel that they had had a "feeling" that the introduction of the fixed vendor's commission structure may have arisen out of some sort of understanding with Christie's. Such suspicions were supported

"by the fact that London had given strict instructions (i) not to depart from the published commission structure (ii) to assemble and forward data regarding clients to whom Sotheby's had already made oral or written commitments at lower rates (so-called "grandfather lists") and (iii) to monitor and report any discounts offered by Christie's in contravention of its published rates to senior management in London. (From the point of view of London, these measures were mandated by [officer of Sotheby's] as part of the new Vendor's Commission structure)"¹¹³.

(115) In May 1995, after having studied the variations of Sotheby's to the scheme that Christie's had announced in March, Christie's made some further changes to its scheme, so that both new schemes, becoming effective in September 1995, were identical.¹¹⁴

4.7. The exchange of "grandfather lists"

(116) Both press releases of Christie's and Sotheby's made it clear that property already consigned for future planned sales would not be affected by the new sliding commission scales.

¹⁰⁹ Commission's file pages 04634 – 04636.

¹¹⁰ Commission's file page 04537.

¹¹¹ See Sotheby's submission of 6 November 2000 at page 22, Commission's file page 07708

¹¹² See Annex 7 to Sotheby's submission of 6 November 2001, Commission's file at pages 07849 – 07865.

¹¹³ See Sotheby's submission of 6 November 2000 at paragraph 3.41, page 19, Commission's file page 07705.

¹¹⁴ Testimony of [name] in the matter of USA v A. Alfred Taubman et al, see trial transcripts pages 381 and 382, Commission's file pages 01971 and 01972.

(117) This obvious exception however opened the door to “cheating” by the two auction houses. They could not trust each other not to offer attractive terms in getting a particular high profile sale, on the basis that this followed from past obligations. In order to ensure that neither took on new business at the old rates or at no commission, the two [functions in the companies], exchanged lists of “grandfathered” clients. These lists identified the customers with whom conditions had been agreed, prior to the announcement of the new scale.

(118) The “grandfather” lists that were provided by Sotheby’s were kept by [officer of Christie’s] in his files¹¹⁵ as were the copies of the grandfather lists that he provided to [officer of Sotheby’s]. The first time the two [functions in the companies], exchanged these lists was approximately in the summer of 1995, a few months after the announcements of the new vendor’s commissions¹¹⁶. The original lists were periodically updated and exchanged. For instance, the [name] files contain lists of 29 April 1996¹¹⁷.

4.8. Further contacts between the two auction houses after the introduction of the vendor’s commission scheme.

(119) After the introduction of the new scale of commission charges, [officer of Sotheby’s] and [officer of Christie’s] continued to oversee the operation of the collusive scheme. The [name] documents contain a note (undated) made in [officer of Christie’s]’s handwriting which he apparently handed over to [officer of Christie’s] on his standing down as [function] in 1996, although it appears to relate to the previous year when the seller’s commission was increased. (Christie’s has been unable to clarify the occasion of the contact to which the note relates)¹¹⁸. It reads:

"We have said non-negotiable.

They have left open opportunity for deals at top level.

Concern registered. Taken on board.

Price war could restart.

Stock market believes it will."

(120) {...} [Officer of Christie’s] identified an unintended risk that could arise if the two auction houses adhered rigidly as agreed to the commission sales with no chance to undercut on price; their department chiefs would vie with each other to get quality business by making excessive estimates of what items would fetch: *"If no price competition, pressure to get best stuff will result in overestimating"*. (If the estimates were excessive, it would increase the risks attached to guarantees and loans).

(121) To avoid this problem, [officer of Christie’s] suggested on a formal procedure for estimates with three signatures required over a certain amount. He continued with a reference to the "grandfather" lists: *"Did you get all needed list of exceptions to new rates?"*.

¹¹⁵ See e.g. Commission’s file at pages 04461 – 04496 and 04507 – 04524.

¹¹⁶ Testimony of [officer of Christie’s] in the matter of USA v A. Alfred Taubman et al, see trial transcripts pages 383 *et seq*, Commission’s file page 01972 *et seq*.

¹¹⁷ Commission’s file pages 04507 – 04525.

¹¹⁸ Commission’s file page 04429.

(122) A suggestion was made for ensuring the co-operation worked even better to the mutual benefit of the two companies, which could lead to a form of market sharing: *"Maybe we shouldn't chase the same big stuff every time"*.

(123) According to [officer of Christie's]'s note, [officer of Sotheby's] had again raised the question of fixing the vendor's commission:

"Mrs B raised issue in December, Fisher¹¹⁹ did not want to wait ...

They were all agreed (good newish finance director a good MD in London) No disagreement at any stage.

They thought our results would have been better and speculated on what we would do and expected something. They would have gone if we hadn't".

(124) In a reference to the attitude of Sotheby's most senior executives towards the possibility of detection by the authorities, [officer of Christie's] noted: *"They are worried not about risk but about top management time that would be tied up in investigation"*.

(125) The document further contains a reference to the adherence to the agreement from 1993 not to make statements about market share in the press. It says, first referring to Sotheby's and then to Christie's: *"'The Americans' are worried about market share whatever they say. They noticed our restraint over the last months"*.

(126) The [name] documents contain evidence on contacts between the companies until 1997. The last meeting between [officer of Sotheby's] and [officer of Christie's] for which documentary evidence exists was at the end of January or the beginning of February 1997¹²⁰. It is unknown if following that date further contacts occurred. The lack of further contacts or evidence thereof may be explained by the following circumstances. Firstly, since nearly all elements of the infringement had been agreed upon and put into place, there was less of a need for regular contacts. Secondly, the 'grandfathered' contracts, namely those which related to consignments where special conditions had been agreed before the implementation of the new vendors commission, had been phased out over time. Therefore, discussions on particular clients were also less necessary. Thirdly, in May 1997, the US DoJ had started its investigation, which in all likelihood made the companies (and the individuals concerned) especially cautious as to establishing any further contacts with one another.

(127) Nevertheless, in spite of the fact that there may have been less frequent contacts, the agreement and the market behaviour that followed from the conspiracy continued to be applied by both companies. This was confirmed by [officer of Sotheby's] who stated in [xxx] testimony at the trial of A. Taubman that the agreement as regards the vendor's commission (which was the subject matter of the accusations against A. Taubman) was adhered to until February 2000¹²¹. Furthermore, in the plea agreement that Sotheby's reached with the Department of Justice, Sotheby's admitted that the infringement defined therein (which

¹¹⁹ Max M. Fisher, then aged 86, a private investor and Vice-Chairman of Sotheby's since 1986.

¹²⁰ See Sotheby's submission of 6 November 2000, Commission's file page 07697 about a meeting occurring in January 1997 and Commission file page 08951.

¹²¹ Testimony of [officer of Christie's] in the matter of USA v A. Alfred Taubman et al, see trial transcripts pages 888, Commission's file page 02146.

included the fixing of the vendor's commission) started at least as early as April 1993 and lasted until at least December 1999¹²².

4.9. The success of the agreement between the auction houses, notably regarding the vendor's commission

(128) According to one trade press report, selling at auction had been *"as close to a free ride as a businessman gets in 1995. As of the beginning of September {1995 }, however, the free ride came to a halt. Both Christie's and Sotheby's instituted new commission structures, effective as of this season, that pass some of those marketing costs onto the sellers, making the entire proposition more expensive from the trade's viewpoint, and far more remunerative for the auctioneers"*¹²³.

(129) Within Sotheby's, the changes as regards the interest-free advances, charitable donations, introductory commissions and non-refundable advances was important for the short and long term benefit of the company¹²⁴. Christie's financial planners had estimated that the change in commission rates in 1995 could bring in an additional USD 35 million of revenue if strictly adhered to (see paragraph (104)).

(130) The original draft of the explanatory guide issued to Christie's staff had said the effect of the new commission structure would be *"to improve the commission income by many millions of pounds"* (in a later version, "many" was deleted)¹²⁵.

(131) The financial data of both Christie's and Sotheby's that are reflected here below, show that following the implementation of the various aspects of the agreement, their financial situation improved considerably, and especially after the introduction of the new vendor's commission.

(132) At Christie's, profit before tax of the group rose by [...] million from [...] million in 1994 to [...] million in 1995 (N.B.: the commission increase was effective only from September); it then jumped in 1996 to [...] million; [...] million in 1997; [...] million in 1998 and [...] million in 1999.

(133) According to Christie's 1996 Annual Report (Chairman's Statement, p. 5):

"In addition to the benefit of the 9% increase in sales, the full year effect of the new commission structure introduced in September 1995 has made a welcome contribution to this improvement ...".

(134) In his review of the year, C. Davidge explained that: *"Auction revenues increased by 12.5%, reflecting the full year effect of the new commission structure which was introduced in September 1995. The new structure has been accepted by clients; they appreciate the clarity it*

¹²² See Commission' file page 07801.

¹²³ Rapaport Diamond Report, 6 October 1995.

¹²⁴ See Sotheby's minutes of the board of director's meeting of 22 June 1994.

¹²⁵ See Commission's file pages 04639 *et seq.*

*offers... The growth in sales and the increase yield from the full year effect of the new commission structure have produced an increase of 69% in auction operating profit"*¹²⁶.

(135) Sotheby's auction revenues (commissions) rose from USD [...] million in 1993 to USD [...] million in 1994 and to USD [...] million in 1995. Net income increased from USD 20.26 million to USD 32.6 million over the same period, a [...] % increase.

(136) The 1995 Annual Report states that *"We continued to build a foundation for the future by instituting in September 1995 an important pricing change – a non-negotiable seller's commission that is a fixed scale of charges which are applicable to all consignors We hope this change will have an important impact on future earnings"*.

(137) The following year, 1996, Sotheby's net income totalled USD [...] million, a rise of 26% compared with 1995. This performance represents a doubling of profits in two years on a 20% increase in the value of auction sales. The increase in commission from USD [...] million in 1995 to USD [...] million in 1996 *"was largely due to the positive impact of the Company's new seller's commission schedule"*.¹²⁷

¹²⁶ See p. 9 of Christie's 1996 Annual Report.

¹²⁷ Sotheby's 1996 Annual Report at page 29, Commission's file page 07977.

5. THE EC TREATY AND THE EEA AGREEMENT

5.1. Relationship between the EC Treaty and the EEA Agreement

(138) Although most of the sales in the EC of both Christie's and Sotheby's take place in London, they have representative offices in about all the EC/EFTA Member States and the goods sold in London and other locations can originate from all the EC/EFTA Member States.

(139) The restrictive arrangements set out above therefore applied to all countries in the EEA, namely all the present EC member states together with Norway, Liechtenstein and Iceland. The arrangements in question covered Austria, Sweden and Finland prior to their accession to the EC on 1 January 1995.

(140) The EEA Agreement, which contains provisions on competition analogous to the EC Treaty, came into force on 1 January 1994. The present decision therefore includes the application as from that date of those rules (primarily Article 53(1) EEA) to the arrangements to which objection is taken.

(141) Insofar as the arrangements affected competition in the Common Market and trade between EC Member States, Article 81 EC is applicable; as regards the operation of the cartel in EFTA States which are part of the EEA and its effect upon trade between the EC and EEA States or between EEA States, this falls under Article 53 of the EEA Agreement.

5.2. Jurisdiction

(142) If an agreement or practice affects only trade between Member States of the EC, the Commission retains competence and applies Article 81(1) of the Treaty. If, however, an agreement affects only trade between EFTA/EEA states, then the EFTA Surveillance Authority (ESA) is alone competent and will apply the EEA competition rules, in particular Article 53(1) of the EEA Agreement. When the effect on trade is "mixed", that is, affecting trade between the Community and the EFTA/EEA states, the Commission will be the competent authority (and may apply both Article 81 EC and Article 53 of the EEA Agreement) where the agreement or practice has an appreciable effect on trade between the Member States and on competition within the Community.

(143) In the present case the Commission is the competent authority to apply both Article 81(1) and Article 53(1) EEA on the basis of Article 56 of the EEA Agreement since the cartel had an appreciable effect on trade between EC Member States and competition in the Common Market.

5.3. Application of the Competition Rules

5.3.1. Article 81(1) of the Treaty and Article 53(1) EEA

(144) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or 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 common market, and in particular those which directly or indirectly fix purchase or selling prices or any other

trading conditions, limit or control production and markets, or share markets or sources of supply.

(145) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However the reference of Article 81(1) to trade "between Member States" is replaced by a reference to trade "between contracting parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by ... (the EEA) Agreement".

5.3.2. *Agreements and concerted practices*

(146) Article 81(1) of the Treaty and Article 53(1) EEA prohibit agreements, decisions of associations and concerted practices.

(147) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

(148) In its judgement in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, the Court of First Instance stated (at paragraph 715) that "it is well established in the case law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".

(149) Although Article 81(1) of the Treaty¹²⁸ distinguishes between "agreements between undertakings", "concerted practices" and "decisions by association of undertakings", the object is to bring within the prohibition of that article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition (Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619).

(150) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. (Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663).

(151) Thus conduct may fall under Article 81(1) of the Treaty as a "concerted practice" even where the parties have not explicitly subscribed to a common plan defining their action in the

¹²⁸ The case law of the Court of Justice and Court of First Instance in relation to the interpretation of Article 81 applies equally to Article 53 of the EEA Agreement. References in this text to Article 81 therefore apply also to Article 53.

market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour. (See also judgement of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991] II ECR 1711, at paragraph 256).

(152) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period.

(153) It is not necessary, particularly in the case of a complex infringement of long duration, for the Commission to characterise it as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 EC lays down no specific category for a complex infringement of the present type – see again judgement of the Court of First Instance in Case T-7/89 *Hercules v Commission*, at paragraph 264. In its PVC II judgement (see paragraph (148)), the Court of First Instance stated (at paragraph 696) that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 81 of the Treaty”.

(154) An “agreement” for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. The fact that in law an infringement of Article 81(1) is complete as soon as the unlawful agreement is made, does not mean that the “agreement” cannot be continuous; as long as it is being performed, it remains in being until it is terminated. As the Court of Justice (upholding the judgement of the Court of First Instance) has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*¹²⁹ at paragraph 81, it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

(155) A complex cartel may thus properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of

¹²⁹ [1999] ECR I-4125.

actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

(156) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may even occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

(157) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk (Judgement of the Court of Justice in *Commission v Anic*, at paragraph 83).

5.3.3. *Single, continuous infringement*

(158) For the period starting 30 April 1993 and lasting at least until 7 February 2000, when Christie's made changes to its schemes for the vendor's commission, the evidence referred to in this decision shows the existence of a single and continuous collusion in the market for fine art auction services between Christie's and Sotheby's, which are the two main players in this market. The focal point of that collusion was the increase of and the strict adherence to the vendor's commission. Indeed, the parties expressed, through their respective [functions in the companies], and [functions in the companies], their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct in many areas where they could compete, including the one of the most important, the commission charged to vendors. The agreement to enter into this global plan with a view to restrict competition can therefore be dated back at least to April 1993. The collusion was in pursuit of a single anti-competitive economic aim: preventing competition on price and/or other conditions of trade by agreeing on most parameters of competition in the market for fine art auction services.

(159) The collusion started with the initial agreement between [officer of Sotheby's] and [officer of Christie's] as described in section 4.3 and following and was subsequently developed and implemented, through a complex of collusive arrangements, (sub-)agreements and/or concerted practices, pursuing the same common purpose of eliminating competition between them (see section 4 as a whole). The participants in this unlawful conduct knew that it was part of an overall plan in pursuit of that common unlawful object.^{130 131}

¹³⁰ Reference is made to par. (85), in particular to the notes of [officer of Christie's] that read: "100 industries, banks, etc. all do it without talking about it. We should set up our own schedules. They do not have to be identical, but they could be, provided that we do not say that we match one another. It is easier for us than for people dealing in goods which can be priced exactly. With a sliding scale based on value, there should be no legal problem, because you cannot fix the price of a unique object". Furthermore, the [name] documents show that prior to the introduction of the vendor's commission, [officer of Christie's] sought legal advice so as to limit the risk of discovery by the authorities of the orchestrated

(160) Given the common design and common objective of eliminating competition in the fine art auction services, the Commission considers that the complex of collusive arrangements mentioned above has as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) EEA. These arrangements are described in detail in the factual part of this decision. The conduct in question constituted therefore a single continuing infringement of Article 81(1) of the Treaty and Article 53(1) EEA.

5.3.4. *Restriction of competition*

(161) The infringement had the object and effect of restricting competition. Article 81(1), which applies not only to the sale of goods but also the provision of services, expressly mentions as restrictive of competition agreements which

- directly or indirectly fix selling prices or any other trading conditions;
- limit or control production, markets or technical development;
- share markets or sources of supply.

The list in Article 81(1) is not exhaustive.

(162) These are the essential characteristics of the horizontal arrangements and concerted practices in the present case. The collusive arrangements and mechanisms adopted by the two auction houses were all ultimately aimed at an inflation of the price to their benefit and above the level which would be determined by conditions of free competition.

(163) The prohibition of Article 81(1) covers agreement not only on "prices" in the narrow sense, but also on discounts, rebates, payment and credit terms: see e.g. Joined Cases 209 to 215 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125.

(164) The principal aspects of the infringement which can be characterised as restrictive of competition are:

As regards vendors:

- agreeing to introduce a new "sliding scale" for the vendor's commission;
- agreeing to the terms applicable to the scale, including making the scale non-negotiable, that is, not to allow exceptions (save as agreed) to the scale;
- agreeing the modalities, as well as the timing of its introduction;
- agreeing to monitor the adherence to the scale by exchanging lists of the permitted exceptions ("grandfather lists") in order to monitor the implementation of the agreement on the introduction of the new scale and to deter and discuss any deviations;

nature of the increase of the vendor's commission. Also, the Commission's file shows that [name] had suggested an anti-trust lawyer for [officer of Christie's] to consult. (see Commission's file page04583.)

¹³¹ See Cement Cases (T-25/95 and al.), 15 March 2000, paragraph 2430.

- agreeing not to give vendors at auction guarantees as to the minimum price;
- agreeing on a formula for the sharing with vendors of the "upside" benefit where goods are sold more than the guaranteed price;
- agreeing to make no advances on single lots;
- agreeing and/or concerting on the terms and conditions of advances for particular auction sales;
- agreeing the minimum interest rate for loans ("no loans below LIBOR");
- agreeing to limit the commission paid to trade vendors/dealers ("nothing better than 5%") and to restrict the practice of providing insurance for trade vendors;
- agreeing to limit the payment of introductory commission to 1% of the buyer's premium in cases where there was no vendor's commission (0%).

As regards buyers:

- agreeing to limit credit terms to trade buyers to 90 days.

Other elements

- agreeing to limit their marketing efforts (avoiding claims/statements regarding market share or claiming "leadership" in the art market or in a particular segment).

(165) Furthermore, in order to implement and/or modify the agreements as required, the parties concerted and exchanged information during regular meetings or (telephone) contacts on any subject or matter (auctions, vendors, dealers, buyers) which might give rise to or encourage competition between them or otherwise conflict with or endanger their agreement not to compete.

(166) It is not necessary, given the manifestly **anti-competition object** of the agreement, for an adverse effect upon competition to be demonstrated.

(167) Sotheby's presented arguments in their reply to the SO on the classification of certain elements of the agreement as infringing Article 81. These are discussed below.

(168) As regards the element of the infringements that relates to marketing efforts and the claims regarding market share, Sotheby's submitted that the SO does not contain sufficient evidence as regards this element of the infringement. It argues that the only relevant reference that can be found is to the memorandum of April 30 1993 by [name]. (*"We have ceased making claims about the media about market share"*).

(169) In paragraph 63 of the SO, reference is made to the notes made by [officer of Christie's] for [officer of Christie's], in which the *"Wall Street Journal"* is mentioned. The Commission has explained that this referred to claims in the press about market shares. Furthermore, in paragraph 78 of the SO, the Commission referred to the aide-mémoire that [officer of Christie's] wrote to [officer of Christie's] (*"Market share – confirmed that we shall both cease to provide the press with corporate market share figures ..."*). Then in paragraph 113 of the SO (paragraph (125) of the current decision), a reference to another note from

[officer of Christie's] is made regarding market share ("...*The Americans {Sotheby's} are worried about market share whatever they say. They noticed our restraint over the past month*").

(170) The evidence therefore shows that this element of the infringement, which amounted to limiting the marketing efforts (avoiding claims/statements regarding market share or claiming "leadership" in the art market or in a particular segment), is proven.

(171) Sotheby's subsequently makes the point that even if such an agreement existed, it would not constitute an infringement of Article 81, given the aim of creating transparency in the market about the 'correct' market shares (or the avoidance of making false claims).

(172) The Commission considers, however, since clients were often attracted on the basis of image and reputation (especially where commissions and other charges to vendors were the same or very similar for both auction houses) and the market share was often used as a tool to impress clients (about being the 'market leader'), it was a relevant tool in the competition that did exist between Christie's and Sotheby's. It is for that reason that the Commission, regarding limiting the market share information passed to third parties, referred to this practice as: agreeing to *limit marketing efforts*.

(173) Another element which Sotheby's has considered unsubstantiated is the point made in paragraph 154 of the SO (see paragraph 165 of this decision) about the information that was exchanged during regular meetings or (telephone) contacts on any subject or matter (auctions, vendors, dealers, buyers) which might have given rise to or encouraged competition between them or otherwise conflicted with or endangered their agreement not to compete. The Commission notes, however, that this is not listed as a separate element of the infringement, but as a means to secure implementation of the agreement reached between the parties. This becomes clear when reading the first words of Paragraph 154 of the SO (paragraph 165 of this decision): "Furthermore, in order to implement and/or modify the agreements as required....[emphasis added].

5.3.5. *Effect upon trade between Member States and between EEA Contracting Parties*

(174) The continuing agreement between the producers had an appreciable effect upon trade between Member States and between contracting parties of the EEA Agreement.

(175) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) EEA is directed at agreements which undermine the realisation of a homogeneous European Economic Area.

(176) According to the case law of the Court of Justice "in order that an agreement may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law that it may have influence, direct and indirect, actual or potential, on the pattern between Member States" (paragraphs 47 and 48 in Joined Cases C-215/96 and C-216/96, *Bagnasco* [1999] ECR I-135). In any event, Article 81(1) of the Treaty "does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect" (judgment in Case C-306/96 *Javice* [1997])

ECR, paragraphs 16 and 17; see also paragraph 136 of the judgment in Case T-374/94, *European Night Services*¹³².

(177) The application of Articles 81(1) EC and 53(1) EEA to a cartel is not, however, limited to that part of the members' sales which actually involve the physical transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States (see the judgement in Case T-13/98, *Imperial Chemical Industries v. Commission* [1992] ECR II-1021, at paragraph 304).

(178) In the present case, the cartel covered virtually all trade throughout the Community and EEA in the fine art auction market. Both Christie's and Sotheby's have substantial sales in the EEA. The items sold at auction, notably in London, are often purchased and sold by clients located throughout the EEA. According to Sotheby's annual reports, Sotheby's turnover in Europe represents some 40% of its overall business. For Christie's as well, a substantial amount of their auction turnover is also derived from operations in Europe. The agreement covered the auction business of both houses on a world-wide scale, and therewith the EEA, and the conditions of sale that formed part of the infringement were applicable for auctions in the EEA. The existence of price-fixing mechanisms must have resulted, or was likely to result, in the diversion of trade patterns from the course they would otherwise have followed (see the judgement in Joined Cases 209 to 215 and 218/78, *Van Landewyck and others v. Commission* [1980] ECR 3125, paragraph 170).

(179) Sotheby's indicated in its reply to the SO that in view of the application for leniency it made and its earlier admissions about the infringement, it did not intend to take issue with the Commission about the Commission's assertion. In addition in its statement made in the submission of 6 November 2000, it declares on page 26: "*Sotheby's will not seek to argue, {...}, that the arrangements did not have an appreciable effect on competition {...} or that there was no effect on inter-state trade*").

(180) The Commission will develop the following considerations only as subsidiary arguments. In its reply to the SO, Sotheby's alleged that price fixing could not have the 'automatic' effect on inter-state trade, as alleged by the Commission in the SO, and it claimed that the circumstances of the case were such that the collusion did not affect the pattern of trade between Member States, given that that flow of trade is not determined by the level of the vendor's commission. The Commission considers that once prices of products or services that are traded on a cross border level within the EEA are affected or intended to be affected by a cartel agreement, inter-state trade is necessarily affected. As mentioned in paragraphs (4), (20), and (36) within the EEA, auction houses attract property for sale from any Member State or EEA country, to be sold in another (sales taking place foremost from London). The property that is consigned is subsequently offered for sale to a clientele that can originate from any Member State or EEA country, and that in principle has to be present at location of the auction in order to participate at the sale. Their services therefore have a clear cross-border element.

¹³² [1998] II-3141.

5.3.6. Provisions of competition rules applicable to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden

(181) The EEA agreement entered into force on 1 January 1994. For the period prior to that date during which the cartel operated, the only applicable provision for the present proceedings is Article 81 EC; insofar as the cartel arrangements covered Austria, Finland, Iceland, Norway and Sweden (then EFTA Member States), they were not caught by that provision.

(182) In the period 1 January to 31 December 1994, the provisions of the EEA agreement applied to the EFTA Member States which had joined the EEA; the cartel thus constituted a violation of Article 53(1) EEA as well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in these five EFTA states during this one year period falls under Article 53(1) EEA.

(183) After the accession of Austria, Finland and Sweden to the EC on 1 January 1995, Article 81(1) of the Treaty became applicable to the cartel insofar as it affected those markets. The operation of the cartel in Norway remained in violation of Article 53(1) EEA.

(184) In practice, it results from the above that insofar as the cartel applied to Austria, Finland, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

6. ADDRESSEES OF THE PRESENT PROCEEDINGS

(185) Article 81(1) of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision. (Case T-352/94 *Mo Och Domsjö AB vs Commission* [1998] ECR II, at paragraph 87). Both Christie's and Sotheby's fulfil the criteria of the notion of undertaking as defined by the Court of First Instance.

(186) When an infringement of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement is found to have been committed over a given period of time, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time of the infringement so that it can be made answerable for it (see PVCII judgment).

(187) It appears from the facts established in the present decision that Christie's International plc and Sotheby's Holdings, Inc. have directly participated in the cartel regarding fine arts auctions. The infringement was planned and executed by the most senior officers of both holding companies. Hence the current decision is addressed to these two companies.

7. DURATION OF THE INFRINGEMENT

(188) Both parties made observations as regards the duration of the infringement in their reply to the SO. Although both acknowledge the existence of the infringement, they have arguments as regards the more limited duration of certain elements of the infringements, but these arguments, which relate to the implementation of the cartel, will be dealt with in section 8.2, paragraphs (203) et seq.

(189) Christie's argues ¹³³ that the collusion diminished in the course of 1997. In any event, it admits that the collusion ended in December 1999, when the illicit practices were notified to the US DoJ, or, at the latest on 7 February 2000, when its vendor's commission was altered. Since December 1999, Christie's states that it has had no contact whatsoever with Sotheby's regarding the commercial aspect of their business.

(190) Sotheby's, in its reply to the SO (on page 34) did not object to the conclusion of the Commission in the SO that the infringement took place between 30 April 1993 and 7 February 2000.

(191) It is concluded that the infringement started no later than 30 April 1993 and lasted at least until 7 February 2000. The period to take into account for the setting of the fines will be 30 April 1993 – 7 February 2000.

8. REMEDIES

8.1. Article 3 of Regulation No 17

(192) Where the Commission finds there is an infringement of Article 81 it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

(193) On 7 February 2000, Christie's announced its new vendors commission scheme, replacing the one in place throughout the infringement. However, the Commission has no evidence to conclude that the infringement has definitively ended. The undertakings to which the present decision is addressed should therefore be required to bring the infringement to an end (in so far as they have not already done so) and henceforth to refrain from any agreement or concerted practice which might have the same or similar object or effect.

8.2. Article 15(2) of Regulation No 17

(194) Under Article 15(2) of Regulation No 17, the Commission may by decision impose upon undertakings fines of from EUR1000 to EUR 1 million, or a sum in excess thereof not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(195) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation 17.

(196) The role played by each party to the infringement will be assessed on an individual basis. In particular, the fine imposed will reflect any aggravating or mitigating circumstances and the Commission will apply the principles set out in the Leniency Notice, where appropriate¹³⁴.

¹³³ Christies' answer to the SO dated 31 May 2002, at pages 27-29.

¹³⁴ OJ L 207/4 of 18 July 1996.

8.2.1. *The basic amount of the fine*

(197) The basic amount of the fine is determined according to the gravity and duration of the infringement.

Gravity

(198) In assessing the gravity of the infringement, the Commission will take account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Nature of the infringement

(199) The cartel constituted a deliberate infringement of Articles 81(1) EC and 53(1) EEA. With full knowledge of the illegality of their actions, the participants combined to set up a secret and institutionalised illegal scheme designed to prevent competition between the two most important fine arts auction houses.

(200) It follows from the facts set out above that this infringement consisted mainly of price fixing practices, which are by their very nature the worst kind of violations of Article 81(1) of the EC Treaty and 53(1) of the EEA Agreement.

(201) The cartel arrangements involved major operators world-wide and in the EEA and were conceived, directed and encouraged at the highest levels in each participating company. By its very nature, a cartel agreement of the type described above leads to an important distortion of competition, which is of exclusive benefit to the companies participating in the cartel and is highly detrimental to customers.

(202) The Commission therefore considers that this infringement constituted by its nature a very serious infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

The impact of the infringement within the EEA

(203) The infringement was committed by the two most important undertakings on the market for fine arts auctions and applied to all their sales in the EEA. The common plan to increase revenues was implemented by both companies. Given the high market shares of the companies involved and the fact that the agreement covered all sales in the EEA by the companies, it had an actual impact on the market.

(204) The parties have submitted arguments aimed at showing that the extent of the collusion was more limited than suggested in the SO, since certain elements of the agreement were not implemented at all, only implemented to a limited degree, or only implemented for a short duration.¹³⁵ This, according to the parties ought to be taken into account by the Commission when establishing the fine.

(205) In particular, the parties refer to the fact that the new vendor's commission scheme was actually introduced only in 1995 and that the agreement was less adhered to from 1997 onward. Also, Sotheby's submitted that the actual implementation of other elements of the

¹³⁵ See Sotheby's reply to the SO, page 46 and annex 1.

cartel (other than the vendor's commission) that had been agreed between the auction houses did not take place until mid-1994, when the changes in Sotheby's policy that were based on the agreement were reflected in the minutes of a board meeting.

(206) The Commission reiterates that the vendor's commission is the main constitutive element of the overall anti-competitive plan. As the parties allege, the vendor's commission scheme was not implemented between 30 April 1993 and March/April 1995, when the new vendors' commission entered into force¹³⁶. However, it was implemented during May 1995 until 7 February 2000. This circumstance is taken into account by the Commission when fixing the fine given that effects of collusion on prices could be taken into account when determining the level of fines.

(207) With regard to the parties' argument that the implementation gradually diminished since 1997, since fewer contacts took place and the auction houses started to deviate from the agreed terms, it is not demonstrated that the agreement was no longer being applied. The Commission notes that, whilst it is possible that regarding certain larger consignments the agreement was sometimes deviated from and that, in other words, a certain amount of cheating took place, the agreement did remain in force until 7 February 2000. That conclusion is not altered by the fact that the parties to the agreement may have deviated from the agreement to their own benefit over the course of time. Indeed, the available evidence shows (see paragraph (119)) that certain deviations were to be expected for "deals at the top level". Moreover, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (Case T-308/94 *Cascades SA vs Commission* [1998], ECR II-925, paragraph 230).

(208) In relation to the point submitted by Sotheby's that any impact could only have occurred from mid 1994 onward, the Commission refers to the notes by [officer of Christie's] which date from mid 1993, and which contradict the assertion that no implementation had taken place until 1994 (see paragraph (94) – 2. *Guarantee – confirmed neither company will give as of now {...}*).

(209) Furthermore, the parties argued that the impact of the agreement mainly occurred in the US and to a much lesser extent in Europe (given that most high value sale took place in New York) and that this should have a bearing on the appreciation of the impact on the EEA market. In this respect Sotheby's submitted that its gains from the new scheme for auctions in the EEA actually did not show a considerable increase following the introduction of the new vendor's scheme.¹³⁷

(210) First, if the participation of a company in an infringement of very serious nature such as the one in this case has been proven, the Commission does not consider that the fact that it did not gain from its participation in the cartel should be a factor justifying an adaptation of the fine.

(211) Second, higher sales volume in the US do not constitute evidence about the impact in the EEA. The Commission notes furthermore that by measuring the impact only on the basis of the sales results from auctions in the EEA, the outcome is not necessarily accurate in terms of establishing the volume of business that relates to the EEA market, given that turnover may

¹³⁶ Both companies publicly announced the entry into force of the new vendor commission schemes in March and April 1995 respectively.

¹³⁷ See Sotheby's reply to the SO, page 47.

be assessed on a different basis, for instance by taking account of where an item was consigned (instead of where it was auctioned) (see paragraph (21)).

The size of the relevant geographic market

(212) The cartel covered the whole of the common market and, following its creation the whole of the EEA. Every part of the common market and the EEA was under the influence of the collusion. For the purposes of calculating gravity, the Commission therefore considers the entirety of the Community and, following its creation, the EEA to have been affected by the cartel.

Conclusion of the Commission on the gravity of the infringement

(213) Taking into account the nature of the behaviour under scrutiny, its actual impact on the fine arts auction market, in particular of the circumstances described in paragraph (206), and the fact that it covered the whole of the Common market and, following its creation, the whole EEA, the Commission considers that the undertakings concerned by this Decision have committed a very serious infringement of Article 81(1) of the EC Treaty and 53(1) of the EEA Agreement, and thus sets the starting amount of the fine at EUR 25.2 million.

Duration of the infringement

(214) The Commission considers that the duration to be taken into account is from 30 April 1993 until 7 February 2000. The duration of the infringement therefore comprises a period of 6 years and 9 months.

(215) The parties have provided substantive arguments as regards the ‘actual duration of the agreement as implemented’, notably in relation to the introduction of the vendor’s commission.

(216) The Commission considers that there is ample evidence that an agreement that violates Article 81 of the EC Treaty was reached in April 1993. Any arguments regarding its (non-) implementation have been considered above under the heading ‘impact of the infringement within the EEA market’¹³⁸.

(217) The Commission concludes therefore that the duration to take into account for the purpose of this decision is 6 years and 9 months. As a result, the infringement can be classified as one of long duration, leading to an increase of the amount established for gravity of 65%.

Conclusion on the basic amounts:

(218) On the basis of the above, the Commission sets the basic amount of the fine as follows:

- Christie’s: EUR 41.58 million

- Sotheby’s: EUR 41.58 million

¹³⁸ In this regard reference is made to the notes by [name] that date from mid 1993: – 2. *Guarantee – confirmed neither company will give as of now {...}*).

8.2.1.1. Aggravating circumstances

(219) The Commission does not consider that any separate aggravating circumstances apply in this case.

8.2.1.2. Attenuating circumstances

(220) Both parties provided submissions to the Commission regarding fines. In this regard, they requested the Commission to consider the, according to them, limited implementation of different elements of the agreement. The Commission has already considered them in section 8.2 and it has already reflected the fact that the vendor's commission was only implemented as from 1995 in the starting amount of the fine.

(221) As regards these points, the Commission otherwise considers that given that the infringement at stake is single and continuous in nature, the fact that one or the other element was not or only partially implemented does not warrant consideration as an attenuating circumstance. Indeed, the fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in a manner agreed with its competitor(s) is not a factor which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. As stated, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (Case T-308/94 *Cascades SA v Commission* [1998], ECR II-925, paragraph 230).

(222) Sotheby's furthermore requested the Commission to take account of the following elements as attenuating circumstances:

- the scope of the infringement was more limited than suggested in the SO;
- the infringement is Sotheby's first;
- the knowledge and participation within Sotheby's was limited to two individuals;
- Sotheby's has already paid substantial compensation;
- Sotheby's has co-operated fully with the Commission in relation to its investigation.

(223) The Commission's reply to these points is as follows:

- the claim that the scope of the infringement was more limited than suggested in the SO has to be rejected based on the reasoning provided in sections 0 and 8.2.
- the fact that this is the first time that the Commission establishes an infringement against a company is not taken into account when considering attenuating circumstance.
- the fact that only two persons were involved in the infringement is also not an attenuating circumstance, since, firstly, the anti-competitive policy covered the commercial policy of the whole company, and secondly, these were the two most senior executives in the company;

- the fact that Sotheby’s already paid substantial penalties in the US cannot be held to be an attenuating circumstance. This is further explained in section (94).
- the level of co-operation of Sotheby’s in the investigation will be reflected below in the considerations relating to the application of the Leniency Notice.

(224) Furthermore, Sotheby’s submitted that ‘a light hand’ in relation to the setting of fines would be justified because:

- The cartel had a limited impact in the EEA;
- Sotheby’s (in)ability to pay fines;
- Sotheby’s would qualify for leniency.

(225) The first of these three points has been dealt with in section 8.2. The second and third point will be dealt with in sections 8.2.1.3 and (94).

(226) The Commission concludes therefore that there are no aggravating or mitigating circumstances that could justify an increase or a reduction in the fines in this case. Given that the amount thus calculated for Sotheby’s (EUR 41.58 million exceeds 10% of world-wide turnover of Sotheby’s in the year prior to this Decision, the basic amount for Sotheby’s will be limited to EUR 34.05 million (cf. Article 15(2) of Regulation 17/62). The result on the basic amounts is therefore:

- Christie’s: EUR 41.58 million
- Sotheby’s: EUR 34.05 million

8.2.1.3. The application of the Leniency Notice¹³⁹

(227) The addressees of this Decision have co-operated with the Commission at different stages of the investigation into the infringement for the purpose of obtaining the favourable treatment set out in the Leniency Notice. In order to address the legitimate expectations of the undertakings concerned as to the non-imposition or reduction of the fines on the basis of their co-operation, the following sections consider whether the parties concerned satisfied the conditions set out in the Leniency Notice. Given that the applications for leniency were made in the year 2000, under the Leniency Notice then applicable, it is the 1996 Leniency notice that applies to this case, as opposed to the revised Leniency Notice adopted in 2002.

Non-imposition of a fine or a very substantial reduction of its amount (“Section B”)

(228) Christie’s has submitted that it meets the conditions set out in section B of the Leniency Notice. The Commission considers that Christie’s does meet the relevant conditions. It was the first to inform the Commission of the existence of the cartel and to adduce decisive evidence (constituted by the [name] documents), without which the cartel might not have been disclosed. At the time of disclosure of this information, the Commission had not undertaken an investigation nor did it have in its possession sufficient information to establish the existence of the cartel. Further, Christie’s had ended its involvement in the

¹³⁹ Commission Notice on the non-imposition or the reduction of fines in cartel cases, OJ C 207 of 18.7.1996.

cartel, by confirming to the Commission that no contacts with Sotheby's were taking place in relation to the reported conduct and by issuing its public announcement about the new vendor's commission scheme only a few days after submitting the evidence to the Commission. Furthermore, it has continuously co-operated with the Commission and it has not been determined that it has compelled Sotheby's to take part in the cartel or played, as compared to the participation of Sotheby's, a determining role in the cartel.

Significant reduction in a fine ("Section D")

(229) Sotheby's has submitted that it meets the conditions set out in section D and requested the maximum 50% reduction available under section D. It accepts that it would not satisfy the conditions of section B as it was not the first to produce evidence of the cartel. One reason for that would have been the lack of documentary available at Sotheby's.

(230) The Commission notes that Sotheby's has fully co-operated with the Commission in the course of the investigation. Furthermore, it provided the Commission with information and evidence that materially contributed to establishing the existence of the infringement, such as lists of meetings or contacts between [officer of Christie's] and [officer of Sotheby's]. It did not materially contest the facts on which the Commission bases its allegations. It admitted the existence of a number of elements of the infringement as described by the Commission in this decision. Sotheby's therefore meets the condition of section D, first and second indent, of the Notice.

Conclusion as regards the application of the Leniency Notice

(231) In conclusion, with regard to the nature of their co-operation and in the light of the conditions set out in the Leniency Notice, the Commission will grant to the addressees of this Decision the following reductions of the respective fines:

- to Christie's: 100%
- to Sotheby's: 40%

8.2.1.4. Sanctions imposed in other jurisdictions

(232) Sotheby's submitted that the Commission should take account of fines already paid in other jurisdiction(s), in establishing the penalties imposed under the Regulation No 17.

(233) This argument should be rejected. The Commission does not consider that fines imposed in other jurisdictions, including the US, have any bearing on the fines to be imposed for infringing European competition rules. The exercise by the United States (or any other third country) of its jurisdiction over cartel behaviour can in no way limit or exclude the Commission's jurisdiction under Community competition law. It is noted that by virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 of the EEA Agreement is limited to restrictions of competition in the EEA market. In the same way, the US antitrust authorities only exercise jurisdiction to the extent that the conduct has a direct and intended effect on United States commerce.

8.2.1.5. Ability to pay

(234) Sotheby's has presented arguments relating to the ability to pay. It has claimed that [...]

(235) In answer to the arguments by Sotheby's, the Commission considers, first of all, [...]

(236) Furthermore, after careful examination of Sotheby's arguments, the Commission has concluded that Sotheby's [...]

(237) The Commission concludes, therefore, that it is not appropriate to adjust the amount of the fine in the present case.

8.2.1.6. The final amounts of the fines imposed in these proceedings

(238) In conclusion, the fines to be imposed, pursuant to Article 15(2)(a) of Regulation No 17, are to be as follows:

- Christie's International plc: EUR 0 million
- Sotheby's Holdings Inc.: EUR 20.4 million.

HAS ADOPTED THIS DECISION:

Article 1

Christie's International plc and Sotheby's Holdings Inc. have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a complex of agreements and concerted practices in the sector of fine arts auction services.

The duration of the infringement was from 30 April 1993 until 7 February 2000.

Article 2

The undertakings named in Article 1 shall immediately bring to an end the infringement referred to therein, in so far as they have not already done so. They shall refrain from repeating any act or conduct referred to in Article 1, and from any act or conduct having equivalent object or effect.

Article 3

The following fines are imposed on the undertakings named in Article 1 in respect of the infringement referred to therein:

- Christie’s International plc: EUR 0 million
- Sotheby’s Holdings Inc.: EUR 20.4 million.

Article 4

The fine shall be paid within three months of the date of the notification of this Decision to the following account:

Account N° 642-0029000-95 (IBAN Code: BE76 6420 0290 0095, SWIFT Code: BBBVABEBB) of the European Commission with:

Banco Bilbao Vizcaya Argentaria (BBVA) S.A.

Avenue des Arts/Kunstlaan, 43B-1040 Bruxelles/Brussel

After the expiry of that period, interest shall automatically be payable at the rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3.5 percentage points, namely 6.78 percentage points.

Article 5

This Decision is addressed to:

- Christie’s International plc
8 King Street
St. James's
UK – London SW1Y 6QT
- Sotheby’s Holdings Inc.
1334 York Avenue
New York
USA – New York 10021

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels

For the Commission

Member of the Commission