



# Anti-money laundering legislation meets the art market

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The art market is often described as the last unregulated market. Even if that is true, it is set to change in the next couple of years, with the market being brought firmly within the ambit of European Union anti-money laundering legislation.

## The current situation in England

Anti-money laundering legislation has been coordinated across the EU through a series of directives over many years. In England, these have been implemented through Part 7 of the Proceeds of Crime Act 2002 (POCA) and subordinate legislation, most recently, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the ML Regulations). These fall into two sections for those outside the “regulated sector” and those within the “regulated sector”.

Those outside the regulated sector may commit a money laundering offence if they deal with the benefit of a crime<sup>1</sup> while knowing or suspecting that it is such a benefit (subject to certain defences). Those in the regulated sector (eg, banks and other financial institutions, lawyers and accountants) have additional obligations. In particular, they must:

- be registered with a regulator for anti-money laundering purposes
- put in place “know your client” (KYC) or “customer due diligence” (CDD) measures to ensure that they know the identity of their customer or client and monitor their money laundering risks

- train their staff on money laundering risks
- report to the National Crime Agency (NCA) any knowledge or suspicion of money laundering via a nominated officer (typically called the money laundering reporting officer (MLRO)), and
- not “tip off” their customer or client that any report has been made.

Over 18 months to March 2017, the NCA received over 600,000 reports of potential money laundering, demonstrating that this is a significant source of information for law enforcement.

However, the art market has not generally fallen within the regulated sector to date. Although dealers (including auction houses) accepting cash payments of €10,000 or more fall within the regulated sector, most stay outside the regulated sector by refusing to accept cash payments near or at that level.

## Change is in the air

In April 2018, however, the European Parliament approved the Fifth Money Laundering Directive (5MLD), which will have the effect, in England, of extending the regulated sector to include art and antiquities dealers and intermediaries (including auction houses) who sell art for

## Any comments or queries?

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1. England is relatively unusual in the EU in applying money laundering legislation to the benefits of any crime, and not a smaller group of more serious offences defined in EU directives. As a result, even quite minor offences can give rise to money laundering.

€10,000 or more, regardless of the method of payment. This obligation also applies to linked transactions with an aggregate value of €10,000 or more. In addition, 5MLD adds “cultural artefacts and other items of archaeological, historical, cultural and religious importance” to the list of factors evidencing a higher money laundering risk.

In part, 5MLD is prompted by the 2016 Panama Papers scandal, and the 2015 and 2016 Paris and Brussels terrorist attacks. ISIS strongholds in war-torn areas containing a large number of unique and high-value antiquities have raised fears that the sale of looted artworks and cultural goods may be funding terrorists. In 2017, this prompted the European Commission to announce a crackdown on the illegal import of cultural goods used to finance terrorism and, in turn, update the existing European anti-money laundering framework.

While the art market has been critical of the European Commission’s assumption that the art market is a high-risk sector for money laundering purposes, and has suggested that 5MLD will divert “vital resources away from where they are needed”, that is, drugs, weapons and other “real” financial sources of terrorism,<sup>2</sup> it seems unlikely that this will sway legislators, and the European art market should prepare itself to join the “regulated sector”.

### Practical issues

Regardless of the reasons for its implementation, 5MLD indisputably raises a number of practical issues. For example:

- These new (to the art market) rules will mean more paperwork in a sector that is famously unbureaucratic. While major auction houses may already have dedicated compliance officers, this new administrative burden will likely be felt most by smaller businesses or sole dealers that do not currently have the resources to comply with the new regulatory obligations.
- On a day-to-day level, this is likely to be most acute in the requirement to verify the identity of a customer. It is a common misconception that art is only bought by wealthy individuals. It is frequently used as a form of investment by companies, trusts and other bodies. The paperwork required to verify a company or trust can be more burdensome than that for an individual – especially for those located overseas – and can delay transactions, as those in the financial sector will be all too aware. As well as the resources needed to conduct this due diligence, all parties involved in a sale will need to become more patient, as the due diligence process will inevitably add to the time taken to complete a sale.
- Dealers and auction houses will also have to be clear who their “customer” is, as that is the person whose identity must be verified. On the current formulation of the ML Regulations, where dealers are acting as agents, this is arguably only the party for whom they are acting (ie, typically the seller). However, the ML Regulations expressly state that an estate agent is treated as having both the buyer and seller of land as its clients, and it seems likely that the art market will be dealt with in the same way.
- Many sales of art now take place over the internet rather than in the traditional auction house or dealer’s showroom. This means that the intermediary usually never meets the buyer in person, which may make identity verification problematic. While not impossible (think about opening a bank account online), it may require internet platforms to invest in identification databases and software.

2. International Confederation of Art and Antique Dealer Associations Position Paper (April 2018) on the proposed revision of the Fourth EU Anti-Money Laundering Directive.

## Help!

The ML Regulations allow for industry guidance as to what anti-money laundering controls are appropriate for that sector to be approved by the United Kingdom Government (the Government). That guidance then sets the benchmark for what is expected of a given sector. For financial institutions, for example, the guidance produced by the Joint Money Laundering Steering Group has become the touchstone for institutions' individual procedures. The British Art Market Federation (BAMF) has said that the Government will engage with the market to discuss the best ways of dealing with any issues that the introduction of 5MLD has raised. We may therefore see some debate around implementation, and it is to be hoped that this will result in approved guidance as well to mitigate the risk to art businesses.

In the meantime, there are a number of existing guidelines. The Basel Art Trade Anti-Money Laundering Principles, issued in January 2018, are addressed to "art market operators", which includes art dealers and intermediaries. The principles suggest that operators take a risk-based approach by establishing the identity of the client, provenance of the art object and origin of the buyer's funds involved in the transaction, alongside suggestions on how to do so. There is also a list of example red flags that might indicate increased money laundering risk. The Responsible Art Market initiative takes a similar approach. BAMF has also issued anti-money laundering guidelines for its members, while the International Confederation of Art and Antique Dealer Associations has a suggested code of conduct. The art market may need to develop definitive guidance to cope with the demands of 5MLD, but the foundations for this certainly do exist.

## Time to take stock

Importantly, there is enough time to do so; 5MLD does not come into force immediately, but rather must be implemented into Members States' law by January 2020.<sup>3</sup> If the UK leaves the EU in March 2019, as is currently timetabled and subject to any transitional arrangements, it is possible that 5MLD might not ever come into force in England. However, similar developments are taking place elsewhere in the world. For example, the United States is considering adding "dealers in art and antiques" to a list of businesses that must abide by stricter anti-money laundering rules. In the face of these global developments, it seems likely that the UK will follow suit, even if it does not mirror 5MLD precisely.

The art market should therefore prepare to comply with the new rules. While 5MLD will inevitably throw up issues as described above, other sectors, such as law, accountancy and estate agents, already observe UK anti-money laundering legislation. Within these sectors, there are a large number of smaller businesses that are coping (more or less) with the demands of anti-money laundering legislation, and there is no reason why, with detailed guidance, training and patience, those in the art sector should not be able to do the same.

*This article was first published by the IBA's Art, Cultural Institutions and Heritage Law Committee in September 2018.*

3. Eighteen months after its publication in the Official Journal on 19 June 2018.

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