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RESEARCH ARTICLE

Anti-money laundering regulation and the art market

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Abstract

Following concerns that the art market is being used to launder criminal money and fund terrorist activities, measures have recently been introduced to subject the market to the anti-money laundering (AML) regime – such as the EU 5th Money Laundering Directive (2018) and the US Illicit Art and Antiquities Trafficking Prevention Bill (2018). The expansion of the AML regime to include art dealers has been attributed to the failure of regulation and the vulnerabilities inherent in the market to laundering. This paper considers vulnerabilities to money laundering and examines the types of regulation that apply in the art market. The paper then goes on to analyse the application of AML criminal law and preventive measures in the UK context, demonstrating that art dealers can be criminally prosecuted for engaging in normal commercial activities. Even if dealers do comply with AML reporting rules, such compliance can significantly impact upon their business. These are important considerations given the government's emphasis on striking a balance between the burdens on business and deterring money laundering activities. Drawing upon the AGILE analytical framework, we remain sceptical about the continued expansion of the AML regime.

Keywords: art crime; art market; money laundering; regulation; Money Laundering Regulations 2017; 5th Money Laundering Directive; Illicit Art and Antiquities Trafficking Prevention Bill

Introduction

Crimes committed against and through works of art encompass a wide array of offences and offenders. The existing academic literature and practitioner strategies around prevention, detection, investigation and prosecution of art crime coalesce around three broad and principal subject areas: art theft and vandalism; art fraud and forgery; and the plunder, looting and destruction of antiquities. More recently, research on art crime has also included money laundering and terrorism financing in the art market.[1] The latter offences are not so much offences *against* art – as with vandalism, theft or looting; rather, they take advantage of art's potentially high value and lack of transparent trade practices and are therefore committed 'through' art. Another area that could be counted within this category is art fraud and forgeries, which has traditionally been researched under crimes against art. In addition to the classification problem, uncertainty and speculation continue to exist in regard to the definitional boundaries of art crime as well as its prevalence in different communities and settings. There furthermore continue to be uncertainties in relation to what 'art' itself is.[2] The aim of this paper is hence not only to assess recent developments in the context of anti-money laundering (AML) laws, but also to position the art market as a new specific field within money laundering research and art crime research and discuss which of these two areas is better suited to accommodate the specific challenges

[†]We would like to thank Peter Alldridge, Janet Ulph and Mark Walters for their helpful comments on a previous draft.
[1]In this paper, our use of 'art' encompasses antiquities.
[2]D Fincham 'How law defines art' (2015) 14 J Marshall Review of Intellectual Property Law 314.

of money laundering in the art market.[3] This focus is particularly important and timely now, as concerns are increasing that the vulnerability of the market is exploited to further the financing of terrorist groups and the laundering of proceeds of crime.[4] Indeed, in *Rachmaninoff v Sotheby's and Teranyi*, it was recognised that

> The public and the law have increasingly come to recognise the potential for abuse by criminals of works of art, and of those who deal in them (consciously or unconsciously), for money laundering, and for disposing of the proceeds of crime. The less the legal risks involved in committing a work for auction, the more attractive the market in works of art and manuscripts becomes for criminals.[5]

The art market is furthermore a newly regulated market, which opens opportunities for longitudinal research on the implementation and application of AML in this field and comparative studies with other markets in the future.

Against this backdrop, this paper critiques recent efforts to expand AML rules to art dealers, and establishes parameters that distinguish the art market from other markets falling under AML regulations. However, the study aims to equally draw out similarities between the markets that could make the present research findings applicable to AML regimes generally. A further aim of this study is to position money laundering through art as a crime within the existing art crime research that is mainly focusing on (four) crimes *against* art rather than crime *through* art.[6] This paper is concerned exclusively with a crime committed *through* art, which could in the future be included in art crime research, provided there are differences to other markets in the AML field (otherwise it would better be placed within the AML discipline). Another category worthy of being included in art crime research that can be labelled crime *through* art is that comprising the multiple ways of committing tax offences with art investments, import, export, etc. Crimes committed *through* art could hence become a distinct area of art crime research if the modi operandi were so distinct as to justify their categorisation as art crimes rather than crimes using art as a means to commit them.

While it is commonly believed that the art market is a legal void, the reality is that it is significantly regulated. A recent legal report notes that – as of February 2015 – there were 167 laws and regulations that applied to the British art market.[7] The market is today subject to deeper scrutiny than ever before, particularly in the context of increased concerns of money laundering and terrorist financing. While there is a long history of literature on regulating the art market,[8] this paper adds an important contribution on (preventing) art crime, by examining the expansion of AML rules to art dealers under the EU's Fifth Anti-Money Laundering Directive (Fifth AML Directive) (agreed in 2018)[9] and the (US) Illicit Art and Antiquities Trafficking Prevention Bill.[10] The UK government has announced that it will implement the Fifth AML Directive by 10 January 2020,[11] thus this paper goes on to analyse how such rules will impact upon art dealers by examining the Proceeds of Crime Act 2002 (POCA

[3]There are similar developments evident with counter terrorism financing (CTF) measures, both at international and national levels. Our focus in this paper is confined to AML laws, though the discussion can also be applied to the CTF regime.

[4]See, for example, the allegations concerning the use of Picasso's *Personnages 1965* to launder proceeds of crime: *US v Kyriacou and Others* Indictment No CR 18 0102, 28 February 2018 (Eastern District of New York).

[5][2005] EWHC 258 (QB), para 35.

[6]JE Conklin *Art Crime* (Praeger, 1994); N Charney 'Four art crimes and their effect on the art trade' in N Charney (ed) *Art Crime: Exploring the Dark Side of the Art World* (Praeger/ABC-CLIO, 2009).

[7]P Valentin 'The myth of the unregulated art market', presented at the Art Business Conference, 3 September 2015.

[8]See for example P Gerstenblith 'Picture imperfect: attempted regulation of the art market' (1988) 29 William and Mary Law Review 501.

[9]Directive 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

[10]HR 5886 – 115th Congress (2017–2018), introduced by Rep Luke Messer (Indiana).

[11]HM Treasury *Transposition of the Fifth Money Laundering Directive: Consultation* (April 2019) p 4.

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2002) and the UK Money Laundering Regulations 2017 (ML Regulations 2017),[12] bearing in mind the government's stated emphasis on achieving a proportionate balance between managing the burden on business and actively discouraging money laundering/terrorism financing.[13] While there is a developing literature on the influence of organised crime within the art market,[14] as well as analyses of the vulnerabilities of that market to money laundering,[15] this paper is the first to subject the AML regime to analysis in this context.

To date, much of the AML focus has been on sectors such as banks, lawyers, and estate agents,[16] with little attention on the art market. Apart from some notable exceptions,[17] the application of the AML regime to art dealers remains under-researched. Moreover, as art dealers have not been the target of law enforcement to the same extent as other sectors, this has inevitably created a gap that can be exploited by criminals. Indeed, the sector is not known for reporting suspicious activity.[18] Chappell and Hufnagel have criticised prosecutors' reluctance 'to utilise more flexible and modern rules designed to combat money laundering and organised criminality in the art crime arena'.[19] Ulph and Smith acknowledge, though, that '[m]oney laundering measures cannot be presented as a panacea for all problems'.[20] There are obvious difficulties in relation to obtaining (admissible) evidence and bringing a successful prosecution. There may not be sufficient motivation or inclination on the part of law enforcement authorities to pursue an investigation or prosecution. There may be a lack of resources available to police and prosecutors, particularly at a time when they are stretched and other priorities dominate (for example terrorism or drugs). Ultimately, prosecution of art dealers for money laundering (or failure to comply with AML obligations) does not appear to be a priority for law enforcement in the UK. Moreover, the AML reporting rules can prove problematic in practice, as they can negatively impact on business and/or relationships with clients. Against that backdrop, this paper asks: on what grounds has the AML regime been expanded to include art dealers? Furthermore, it explores how AML rules will impact upon art dealers, both through the criminal law offences contained in POCA 2002 and the preventive measures under the ML Regulations 2017.

Debates as to regulation in the market, and recent developments purporting to bring art dealers within the remit of the AML regime, thus provide the impetus for this paper. We first outline vulnerabilities in the market, before considering efforts to regulate the market. The failure of regulatory efforts thus far, including self-regulation, has resulted in state intervention and the extension of AML rules to art dealers.[21] We consider recent legislative developments in both the US and the EU

[12]Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692. Article 1(1)(c) of the Fifth AML Directive refers to 'persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more'. The UK government is consulting both on who should be included within the term 'art intermediaries' and how to define 'works of art' for AML purposes: HM Treasury, above n 11, p 22.

[13]HM Treasury, above n 11, p 4.

[14]S Mackenzie 'The market as criminal and criminals in the market: reducing opportunities for organised crime in the international antiquities market' in S Manacorda and D Chappell (eds) *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (Springer, 2011).

[15]J Ulph 'The impact of the criminal law and money laundering measures upon the illicit trade in art and antiquities' (2011) XVI Art Antiquity and Law 39.

[16]See for example A Verhage *The Anti Money Laundering Complex and the Compliance Industry* (Routledge, 2011); B Unger and J Ferwerda *Money Laundering in the Real Estate Sector: Suspicious Properties* (Edward Elgar, 2011).

[17]Such as PC van Duyne et al 'Money, art, and laundering: coming to grips with the risks' in JD Kila and M Balcells (eds) *Cultural Property Crime – An Overview and Analysis of Contemporary Perspectives and Trends* (Brill, 2014).

[18]Transparency International UK *Don't Look, Won't Find: Weaknesses in the Supervision of the UK's Anti-Money Laundering Rules* (November 2015) pp 60–62.

[19]D Chappell and S Hufnagel 'Case studies on art fraud: European and antipodean perspectives' in D Chappell and S Hufnagel (eds) *Contemporary Perspectives on the Detection, Investigation and Prosecution of Art Crime* (Ashgate, 2014) p 75.

[20]J Ulph and I Smith *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Hart Publishing, 2012) p 267.

[21]While discussion might also extend to others involved in the art market (such as restorers and import/export agents), our focus in this paper is the application of the AML regime to dealers.

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to illustrate the expansion of the AML regime globally. This paper goes on to analyse the twin-track approach to AML in the UK, namely criminal law (POCA 2002) and preventive measures (ML Regulations 2017), and how that relates to art dealers. This section demonstrates, first, that art dealers are exposed to criminal prosecution by virtue of normal commercial activities and, secondly, that if they do comply with the provisions of POCA 2002 such compliance can impact upon their business. It then considers the implications of the preventive obligations under the 2017 Regulations. The paper then utilises the AGILE framework to critique the expanding AML regime.[22] Ultimately, we remain sceptical as to the continued expansion of the AML regime which brings many unanticipated consequences.

1. Money laundering vulnerabilities in the art market

It must be acknowledged at the outset that money laundering does happen in the art market. While we do recognise that there are vulnerabilities, we do not attempt to assess the extent of money laundering in the market. Indeed, that would be almost impossible.[23] Our aim in this section is simply to outline the money laundering vulnerabilities in this market. Discussion deliberately extends beyond the UK: while the limits of the law are jurisdiction-specific, the techniques used in laundering can resonate across jurisdictions. An important caveat must be entered at the outset though: much of the discussion in this section draws upon cases of money laundering in the art market that have been successfully identified or have come to the attention of criminal justice agencies. It might be expected that other money laundering techniques have been utilised in the art world but have not yet attracted attention from law enforcement.

An obvious vulnerability seems to be the lack of AML rules in the art market, with many prominent commentators and officials voicing criticism in this regard.[24] Unlike other markets that are regulated by AML, in the art market '[y]ou can buy something for half a million, not show a passport, and ship it. Plenty of people are using it for laundering'.[25] There are many examples where the art market appears to have been used either for spending criminal proceeds or for 'cleansing' proceeds of crime.[26] For instance US authorities have alleged that money diverted from the 1Malaysia Development Berhad fund has been used to purchase items of art, including a $3.2m Picasso and a $9.2m Basquiat.[27] Another example is that of the founder and former president of Banco Santos (Brazil), Edemar Cid Ferreira, who was convicted of crimes against the national financial system and money laundering. Ferreira had accumulated a substantial art collection valued in the tens of millions of dollars, including *Hannibal* by Jean-Michel Basquiat.[28] There are also many examples of politically exposed persons (PEPs) using (allegedly) misappropriated funds to purchase art.[29]

Another vulnerability in the market is the emphasis on anonymity and/or a lack of transparency.[30] Indeed the courts have suggested that: 'There is a dark side to the confidentiality surrounding the

[22]N La Vigne 'Applying regulatory measures to address crime problems: an AGILE approach to enhancing public safety' (2018) The Annals of the American Academy of Political and Social Science 202.

[23]P Alldridge *What Went Wrong with Money Laundering Law?* (Palgrave, 2016) p 15.

[24]For a script analysis, see G Bichler et al 'Bad actors and faulty props: unlocking legal and illicit art trade' (2013) 14(4) Global Crime 359.

[25]J Gapper and P Aspden 'Davos 2015: Nouriel Roubini says art market needs regulation' (*Financial Times*, 22 January 2015), quoting the NYU economist Professor Nouriel Roubini.

[26]See eg M Lufkin 'Laundering drug money with art' (*Forbes*, 8 April 2003).

[27]See J Schectman and A Ananthalakshmi 'US acts to seize stolen assets, Picasso in probe of Malaysian fund' (*Reuters*, 15 June 2017).

[28]US Department of Justice, Press Release *Acting Manhatten US Attorney Announces Return of 95 Artworks Linked to Brazilian Money Laundering* (5 October 2017). The painting was subject to civil forfeiture proceedings in the US, see *US v The painting known as 'Hannibal' et al* 08 Civ 1511 (RJS) (10 May 2013).

[29]See eg M Roth 'Wir betreten den Kunstmarkt' (Dike Verlag, 2015) pp 20–21; J Burke 'French trial reveals vast wealth of Equatorial Guinean president's son' (*The Guardian*, 2 January 2017); 'Tunisia sells off Ben Ali's "ill-gotten gains" – in pictures' (*The Guardian*, 21 December 2012).

[30]According to a Deloitte survey 73% of wealth managers, 69% of collectors and 69% of art professionals see the lack of market transparency as one of the key issues within the market: Deloitte *Art and Finance Report 2016* (4th edn) p 143.

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identity of an auctioneer's principal'.[31] Stretching back to the eighteenth century, items would be sold without revealing the name of the seller (ownership was referred to simply as 'property of a gentleman' or 'property of a lady'). Gradually, such anonymity was extended to also include buyers, supposedly to protect them from becoming targets of theft.[32] Anonymous sales also had the effect of getting around the *nemo dat* rule.[33] Today, '[i]t is not unusual for one transaction to use several intermediaries, without disclosing the names of the buyer and seller'.[34] Attempts to challenge this before the courts have met with mixed responses.[35] Interestingly, in 2017 Christies amended its policy on anonymity and now requires agents to tell it the name of the owner they represent.[36] In 2018, the Fifth AML Directive emphasised the importance of transparency in the financial system: 'This Directive aims not only to detect and investigate money laundering, but also to prevent it from occurring. Enhancing transparency could be a powerful deterrent'.[37]

A third vulnerability relates to the provenance of a particular item, ie the history of ownership. A full history is valuable in transparency and title; in contrast, gaps in provenance might raise questions. Or, where provenance is traced to a particular source, this might give rise to doubt about the veracity of title or ownership.[38] It was emphasised, in *Kurtha v Marks*, that '[a] dealer in valuable works of art who pays in large amounts of cash, keeps no records, and asks no questions as to provenance of his supplier, exposes himself, and those who buy from him, to other very serious risks'.[39] The prospect of prosecution for money laundering offences was specifically identified by the court.[40] In *Davis v Carroll*, it was stated that '[i]t is a basic duty of any purchaser of an object d'art to examine the provenance for that piece'.[41] The above judicial comments can equally impact dealers and individuals (eg dealers can also be buyers at one point). While private and public policing mechanisms such as the Art Loss Register or the Interpol Stolen Works of Art database can prove useful, difficulties in ascertaining provenance persist,[42] and, as a result, full transparency is not always possible. In this way, the art market is attractive to criminal elements.

A fourth reason why art has become more attractive to criminals, and why the markets are vulnerable to money laundering, stems from the commoditisation of art.[43] For example, in 2016 'the overall value of all sales in the British art and antiques market was just under $12 billion (£9.2 billion)'.[44] Globally, art sales amounted to $63.8 billion in 2015.[45] As prices have increased, art has become a more desirable target of crime (including theft, forgery, and money laundering to give some examples).

[31] *Rachmaninoff v Sotheby's and Teranyi* [2005] EWHC 258 (QB) para 35.

[32] N Charney *The Art of Forgery* (Phaidon, 2015).

[33] In *Whistler v Forster* (1863) 143 ER 441 at 445 Willes J stated: 'the general rule of law is undoubted, that no one can transfer a better title than he himself possesses: Nemo dat quod non habet'.

[34] S Giroud and C Boudry 'Art lawyers' due diligence obligations: a difficult equilibrium between law and ethics' (2015) 22 International Journal of Cultural Property 401 at 403.

[35] *William J Jenack Estate Appraisers & Auctioneers, Inc v Rabizadeh* 2013 NY Slip Op 08373 [22 NY3d 470] (17 December 2013) Court of Appeals, Rivera, J (reversing *William J Jenack Estate Appraisers & Auctioneers, Inc v Rabizadeh* 2012 NY Slip Op 06211 [99 AD3d 270] (19 September 2012)).

[36] G Bowley and WK Rashbaum 'Has the art market become an unwitting partner in crime?' (*The New York Times*, 19 February 2017).

[37] Directive 2018/843, Preamble (4).

[38] In one case, Sotheby's was sued for not disclosing that an item – Louis-Michel van Loo's 'Allegorical Portrait of a Lady as Diana Wounded by Cupid' – had previously been owned by Hermann Göring: see *Brooks v Sotheby's*, 2013 WL 1156067. The claim was dismissed on the ground that the contract for sale specifically named the UK as having jurisdiction in any dispute.

[39] [2008] EWHC 336 (QB) para 140.

[40] Ibid.

[41] *Davis v Carroll* 937 F Supp 2d 390, 429 (2013) (US District Court, SD New York). See also *Porter v Wertz* 53 NY 2d 696 (1981) (Court of Appeals of the State of New York).

[42] This difficulty is particularly pronounced in situations where an item is from a time when few records of provenance were kept. Thus, perfectly legitimate items might not have a perfect ownership history.

[43] For discussion of such commoditisation see N Horowitz *Art of the Deal. Contemporary Art in a Global Financial Market* (Princeton University Press, 2014) p 10.

[44] British Art Market Federation *The British Art Market 2017* p 6.

[45] 2014 was the highest ever total value of sales, namely $68.2 billion. These figures are cited in Deloitte *Art and Finance Report 2016* (4th edn) p 26.

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Related to the above, and given portability of items, the art market is particularly vulnerable to trade-based money laundering (TBML). The 2017 National Risk Assessment defines TBML as 'involv[ing] the exploitation of the international import and export system to disguise, convert and transfer criminal proceeds through movement of goods as well as funds'.[46] In the art world, it is relatively easy to alter paperwork – most obviously in relation to the actual value of pieces of art. An example of where art has been moved across borders with a lower than actual valuation is that of Basquiat's *Hannibal*: the painting was declared as being worth US$100, yet was worth an estimated US$8m.[47] This is one type of activity that could be analysed within the fields of money laundering or tax offences or, if the alteration of value is specific to art objects, within art crime research. TBML is, of course, dependent on trade. It has been suggested that post-Brexit – as the UK seeks to increase trade with non-EU countries – the opportunities for TBML will increase.[48]

The final vulnerability that we mention here is the use of free ports. Amongst the most well-known free ports are those in Switzerland, Luxembourg, Hong Kong and Singapore.[49] While there have been efforts at regulating free ports,[50] for example by requiring that cultural goods transiting through them be declared to prevent trafficking in illicit cultural property, such requirements are almost impossible to enforce. Free ports have become important storage facilities and showrooms for art, whether legally obtained or otherwise but, as the FATF points out, the cloaked nature of free ports lends itself to potential use for money laundering.[51]

It is axiomatic that the art market has similar vulnerabilities as exist in other markets – such as the high-value dealer sector and the property market.[52] Indeed, that is expressly recognised by the UK government in its consultation on the Fifth AML Directive.[53] Yet, it is also stressed that

> there are potential money laundering risks that are more unique to the art trade; for example, paintings and drawings can be attractive to money launderers as they can be easier to store and transport. The value of artworks can increase rapidly, meaning that profit can be gained through the act of short term money laundering actions. There is also an element of opacity, or lack of transparency, that is often cited as an issue in relation to art transactions as well as problems in ascertaining the provenance of goods.[54]

Given the vulnerabilities to money laundering, it is perhaps unsurprising that policymakers have responded to expand the AML regime to encompass art dealers (though whether it is appropriate

[46]HM Treasury and Home Office *National Risk Assessment of Money Laundering and Terrorist Financing 2017* (October 2017) para 2.4. For a critique see K Murray '"Fake passports" – what is to be done about trade-based money laundering?' in C King et al (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave, 2018) p 210.

[47]E Kinsella 'Bad banker's $8 million Basquiat smuggled with shipping invoice for $100 returns home' *ArtNet News*, 19 June 2015, available at https://news.artnet.com/market/smuggled-basquiat-returned-brazil-309813.

[48]National Crime Agency *National Strategic Assessment of Serious and Organised Crime 2018* p 40.

[49]The FATF estimates that there are approximately 3,000 free trade zones (the term that they use) in 135 countries: FATF *Money Laundering Vulnerabilities of Free Trade Zones* (March 2010).

[50]See eg Loi no 444.1 of 20 June 2003, RO 2005 1869, 'LTBC', which entered into force on 1 June 2005. Cf KL Steiner 'Dealing with laundering in the Swiss art market: new legislation and its threats to honest traders' (2017) 49 Case Western Reserve Journal of International Law 351 at 357.

[51]FATF, above note 49, p 15.

[52]For consideration in the context of the property market, see L Shelley 'Money laundering into real estate' in M Miklaucic and J Brewer (eds) *Convergence: Illicit Networks and National Security in the Age of Globalization* (National Defence University Press, 2013). For wider considerations of how criminal money is invested, see E Kruisbergen et al 'Profitability, power, or proximity? Organized crime offenders investing their money in legal economy' (2015) 21 European Journal on Criminal Policy and Research 237.

[53]HM Treasury, above note 11, p 23.

[54]HM Treasury, above note 11, pp 23–24. Though it might well be argued that these very points could equally be applied to other markets.

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for the AML regime to be expanded in this way is an entirely separate question, not least given significant criticisms that have been levied against AML).[55] We now turn to consider regulation in the art market as well as recent developments in the context of AML.

2. Regulating the art market

(a) A failure of regulation?

Debates as to regulation in the art market have been ongoing for quite some time.[56] Such regulation[57] can take many forms, most notably state- or market-based. State regulation can include import/export restrictions[58] and the criminal law (whether generally applicable offences[59] or ones specific to, say, cultural property[60]). The market itself provides its own restrictions in how dealers operate, for example through contract or tort.[61] There have also been extensive debates as to the role of self-regulation in the art market. Most notable are the Basel Art Trade Guidelines which stressed: 'A so-called "self-regulation initiative" has the advantage of pre-empting and potentially influencing formal regulation that is increasingly likely to be introduced in view of the general tightening of regulatory frameworks in related matters'.[62] Notwithstanding, the market displayed 'a pronounced lack of interest' in implementing proposed guidelines, which led to the conclusion that the art market is not ready for self-regulation and that it may be for legislators and the courts to intervene and better regulate the art sector.[63]

It was noted, however, that 'in principle market operators agree on the need to take self-regulatory action …, under the condition however that such collective action does not directly undermine the commercial interests of their trade. In other words, what seems legally and morally appropriate continues, at least at this present time, to be seen as economically harmful'.[64] Although the Basel guidelines were proposed in 2012, no market participants have thus far agreed to implement them.[65] On the other hand, there are doubts as to whether state regulation is indeed appropriate to the art market:

> many would question whether regulation could effectively deal with many of the intricacies of the art market, let alone its global nature. As has been seen in other industries, more regulation inevitably imposes higher costs on companies, forcing them to shift resources towards meeting compliance requirements, arguably at the expense of other activities. This might not be a problem for the biggest and most powerful operators in the art market, but for the thousands of smaller companies and individuals, increased government regulation could make their business unviable.[66]

[55]See eg Alldridge, above n 23.

[56]Gerstenblith, above note 8.

[57]For detailed consideration of what 'regulation' is see J Black 'Critical reflections on regulation' (2002) 27 Australian Journal of Legal Philosophy 1; B Orbach 'What is regulation?' (2012) 30(1) Yale Journal on Regulation Online 1.

[58]See Department for Digital, Culture, Media and Sport Press Release *UK risks losing £2m modern art sculpture* (25 February 2016).

[59]Theft Act 1968, s 22 (handling stolen goods).

[60]Dealing in Cultural Objects (Offences) Act 2003, s 1; Cultural Property (Armed Conflicts) Act 2017, s 17.

[61]See *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch); *Thwaytes v Sotheby's* [2016] 1 All ER 423.

[62]T Christ and C von Selle *Basel Art Trade Guidelines: Intermediary Report of a Self-regulation Initiative* (Basel Institute on Governance, 2012) p 6.

[63]Ibid, p 23.

[64]Ibid, p 23.

[65]C von Selle Presentation at 3rd AHRC Network Workshop on 'Art, Crime and Criminals: Painting Fresh Pictures of Art Theft, Fraud and Plunder', 7–8 September 2017, Federal Ministry of Finance, Berlin.

[66]Deloitte *Art and Finance Report 2016* (4th edn) p 144. That report also stated: 'According to our latest survey of wealth managers, art professionals, and art collectors, the majority (two thirds) of opinions are in favour of self-regulation of the art market. However, a significant minority (36 percent) of wealth managers call for more government regulation of this market. The same trend is echoed by both arts professionals and art collectors, who believe that threats to the art market are best addressed from within the art industry itself rather than through government intervention': ibid, p 144.

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Against this backdrop, and in light of concerns relating to money laundering and terrorism financing, steps have now been taken to bring art dealers within the 'regulated sector'[67] of the AML regime, as discussed below. This development is further evidence of 'a tendency to see regulatory issues in terms of risks and to see control issues as questions of risk management'.[68] The rationales for application of the AML regime to the art market link back to traditional arguments in favour of 'market failure' regulation[69]: 'Regulation in such cases is argued to be justified because the uncontrolled marketplace will, for some reason, fail to produce behaviour or results in accordance with the public interest'.[70] Indeed many in the art market have argued in favour of greater self-regulation, or at least better behaviour by dealers, anticipating quite rightly that failure to do so would inevitably result in state intervention.

(b) The expansion of AML

The AML regime encompasses both a repressive (ie criminal law) and a preventive approach.[71] The criminal law provisions (detailed later) apply to all. The preventive approach only applies to those in the 'regulated sector'. There are two developments influencing why art dealers are now being brought within the sector. First, in relation to terrorist financing,[72] the UN, for example, has expressed concern that terrorist groups

> are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks.[73]

The UN has called upon states

> to introduce effective national measures at the legislative and operational levels where appropriate, and […], to prevent and counter trafficking in cultural property and related offences, including by considering to designate such activities that may benefit organized criminal groups, terrorists or terrorist groups, as a serious crime in accordance with article 2(b) of the UN Convention against Transnational Organized Crime.[74]

Second, in February 2018 criminal charges were filed alleging that *Personnages 1965* by Pablo Picasso was used in attempts to launder proceeds of crime. With an invoice price of £6.7 million, the potential for money laundering is obvious. In that case, it had been suggested that the art market was selected because it is 'the only market that is unregulated'.[75] Unsurprisingly, that indictment seems to have

[67]POCA 2002, Sch 9. The term 'regulated sector' is widely defined. For detailed treatment see M Sutherland Williams et al *Millington and Sutherland Williams on The Proceeds of Crime* (Oxford: Oxford University Press, 5th edn, 2018) para 21.08 ff.

[68]R Baldwin et al *Understanding Regulation: Theory, Strategy and Practice* (Oxford: Oxford University Press, 2nd edn, 2012) p 8. See also J Black 'The emergence of risk-based regulation and the new public management in the United Kingdom' (2005) Public Law 512.

[69]For further discussion see M Korotana 'The emergence of regulation: market failure, subversion of justice and inadequacy of private law' (2017) 28 European Business Law Review 615; H McVea, 'Financial services regulation under the Financial Services Authority: a reassertion of the market failure thesis?' (2005) 64(2) Cambridge Law Journal 413.

[70]Baldwin et al, above note 68, p 15.

[71]G Stessens *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) p 108.

[72]See H Willett 'Ill-gotten gains: a response to the Islamic State's profits from the illicit antiquities market' (2016) 58(3) Arizona Law Review 831.

[73]UN Security Council Resolution 2199 (2015) para 16. There has, however, been some scepticism as to the extent to which terrorist groups such as ISIS are raising funds through the sale of antiquities: see G Adam 'Antiquities: the spoils of war' (*Financial Times*, 11 March 2016).

[74]UN Security Council Resolution 2347 (2017) para 9.

[75]*US v Kyriacou and others*, Indictment No CR 18 0102, 28 February 2018 (Eastern District of New York) p 16.

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sparked a response in the US. The House Financial Services Committee held a closed-door session in April 2018, which specifically looked at the attempted money laundering allegations. Claims that the art market is used to launder criminal money or to finance terrorist activities inevitably have led to questions as to the *failure* of regulation[76] and calls for greater regulation in the market. To put this another way, to address under-regulation (whether actual or perceived[77]) the AML preventive regime is to be extended to art dealers.

The Illicit Art and Antiquities Trafficking Prevention Bill was introduced on 18 May 2018. While the Bill ultimately was not enacted by the end of the 115th Congress, it is expected to be brought back before the current Congress.[78] The Bill is sparse, simply providing that 'dealers in art or antiquities' are to come within the remit of AML obligations (ie the list of regulated financial institutions under the Bank Secrecy Act 1970).[79] If that Bill does pass into law, then art dealers would have to comply with AML obligations, such as: introducing compliance programmes; carrying out customer due diligence (CDD) checks on clients; establishing procedures for monitoring and reporting suspicious transactions; and developing a risk based approach. The proposed changes would bring art dealers into line with other sectors. According to the Representative who introduced the Bill,

> Terrorist organizations around the world continue trafficking art illegally to fund their criminal activity. This commonsense legislation will help reduce international money laundering and crack down on terrorist organizations like ISIS.[80]

Unsurprisingly, the Bill has attracted criticism, for example on the grounds that: 'the basic justification for this legislation – that art and antiquities are used to fund terrorism – is unproven. The premise for this legislation, and this is extremely important, is not based on fact but unfounded opinion'.[81] Others, however, have welcomed the Bill on the grounds that 'addressing money laundering in the art market and ensuring that dealers know their clients is a positive development in [a market] that is very resistant to regulations and transparency'.[82]

In the EU change is also evident. The Fifth AML Directive was agreed and entered into the Official Journal on 19 June 2018, for implementation by Member States by January 2020.[83] This Directive, inter alia, purports to bring art dealers within the remit of the regulated sector – in other words, once implemented in domestic law, art dealers will have to comply with AML obligations. Article 1 (c) provides that the following are to be added to the list of those who must comply:

> (i) persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more;
> (j) persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more.

[76]See generally C Hood 'Assessing the Dangerous Dogs Act: when does a regulatory law fail?' (2000) Public Law 282; PN Grabosky 'Counterproductive regulation' (1995) 23 International Journal of the Sociology of Law 347.

[77]Of course, as Baldwin et al note, 'Diagnosing why regulation fails is inherently about perceptions and (often implicit) models of the world, and therefore any reference to a theory of regulatory failure is linked to our beliefs on why and how particular regulatory interventions work': Baldwin et al, above note 68, p 73.

[78]M Carrigan 'US anti-money-laundering bill could reappear early next year' (*The Art Newspaper*, 11 December 2018).

[79]Illicit Art and Antiquities Trafficking Prevention Bill, s 2(a)(3).

[80]US Congressman Luke Messer, Press Release – Messer Introduces Bill to Curb Terrorism Financing (24 May 2018).

[81]CINOA (Confedération Internationale des Négociants en Oeuvres d'Art), Letter to Congressman Jeb Hensarling, Financial Services Committee Chair – *H.R.5886 – A Bill to apply the Bank Secrecy Act to dealers in art or antiquities* (nd).

[82]Z Small 'Art dealers could be under more financial scrutiny with new US bill' *HyperAllergic* Blog (25 June 2018), quoting Iris Tarsis of the Center for Art Law.

[83]Directive 2018/843.

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The rationale underpinning such changes can be traced to claims that cultural goods are a source of income for terrorist or organised crime groups.[84] A 2017 report from the European Commission noted that 'easily tradable "lifestyle" goods', such as cultural artefacts, are 'high-risk, because of weak controls'.[85] It continued: 'Specific concerns have been expressed about looting and trafficking of antiquities and other artefacts: looted artefacts could serve as a source of terrorist financing – or alternatively artefacts are attractive as placement for money laundering'.[86] The report specifically noted that there are 'current shortcomings in the art sector'.[87] A 2016 Impact Assessment equally stated that combating illicit trafficking in cultural goods 'would disrupt an important source of revenue for organised crime and terrorists and would, in general, protect world cultural heritage'.[88] As in the US, the EU developments have attracted criticism, the Confedération Internationale des Négociants en Oeuvres d'Art (CINOA) contending:

> The amendments are built on the false assumption that the European Union is subject to a high level of trafficking in cultural property that is funding illegitimate interests… Most art market businesses are SMEs with turnovers of well under €1m and this [legislation] would add a disproportionate burden to their time and expenses in administrative terms, while potentially losing them business.[89]

Moves to include art dealers within the AML framework are further evidence of a wider trend, in 'policing beyond the police'[90] or the 'responsibilization strategy',[91] whereby private actors act as 'front-line workers' in efforts to tackle money laundering.[92] In her study involving bank compliance officers, Verhage reports that 'compliance and AML can be seen as a type of outsourcing by the government'.[93] Indeed the UK AML/CTF Action Plan specifically emphasises that: 'The private sector forms the first line of defence against money laundering and terrorist financing'.[94] Given that private actors act as gatekeepers to the financial system, then – so the reasoning goes – they ought to be required to play a role in protecting the integrity of the financial system.[95] But is it really their responsibility? Banks and others have performed this role for over two decades but, as Verhage reports, there is no consensus as to whether AML is a private sector task.[96]

[84]European Commission *Communication from the Commission to the European Parliament and the Council on an Action Plan for Strengthening the Fight against Terrorist Financing*. COM (2016) 50 final (February 2, 2016) p 12.

[85]European Commission *Report from the Commission to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities*. COM (2017) 340 final (26 June 2017) p 7.

[86]Ibid, p 7.

[87]Ibid, p 13.

[88]European Commission *Inception Impact Assessment: Import of cultural goods* (17 November 2016). See also Deloitte *Fighting Illicit Trafficking in Cultural Goods: Analysis of Customs Issues in the EU. Final Report to DG TAXUD* (June 2017).

[89]Cited in L Chesters 'New money laundering regulation a "disproportionate burden" on art and antiquities businesses' (*Antiques Trade Gazette*, 27 April 2018).

[90]A Crawford 'Plural policing in the UK: policing beyond the police' in T Newburn (ed) *Handbook of Policing* (Willan, 2nd edn, 2008).

[91]D Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) p 124.

[92]See eg K Svedberg Helgesson and U Morth 'Client privilege, compliance and the rule of law: Swedish lawyers and money laundering prevention' (2018) 69(2) Crime, Law and Social Change 227.

[93]Verhage, above n 16, pp 79–80.

[94]Home Office and HM Treasury *Action Plan for Anti-money Laundering and Counter-terrorist Finance* (April 2016) p 12.

[95]See for example FATF *Chairmen's Summary of Outcomes from the Joint G20 ACWG / FATF Experts Meeting on Corruption* (17 October 2015) where it was said: 'As gatekeepers to the financial system, financial institutions play an important role in the fight against both corruption and money laundering', available at http://www.fatf-gafi.org/publications/corruption/documents/experts-meeting-october-2015.html.

[96]Verhage, above n 16, p 80.

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Before turning to consider the UK AML provisions, it is important to stress that the extension of the AML regime, to encompass yet more actors, is a political decision. Overlooked, however, are considerations of enforcement. One would be hard-pressed to suggest that the AML regime operates effectively or efficiently,[97] and this will be further exacerbated by extending the regime without taking into account enforcement issues.[98]

3. The UK AML regime

(a) Proceeds of Crime Act 2002: money laundering offences

Given the government's view that there should be a proportionate balance between managing the burden on business and actively discouraging money laundering/terrorism financing,[99] it is important to consider both the criminal law approach (POCA 2002) and the preventive approach (ML Regulations 2017). Of course, art dealers are already subject to the money laundering offences under POCA 2002. When the Fifth AML Directive is implemented in UK law, art dealers will also be subject to the ML Regulations 2017 (expected in January 2020).[100]

The money laundering provisions under Part 7 of POCA 2002 came into force on 24 February 2003.[101] The principal money laundering offences are: s 327: concealing, disguising, converting, transferring or removing from the jurisdiction criminal property; s 328: entering into or becoming concerned in an arrangement which she knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person; and s 329: acquiring, using, or having possession of criminal property. As is immediately clear, all three principal money laundering offences require conduct involving 'criminal property'. According to s 340:

> 'Property is criminal property if –
>
> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit'.[102]

It has been said that anti-money laundering efforts 'can only be truly effective if banks, financial institutions, and professionals […], are compelled to disclose suspicious transactions to law enforcement authorities'.[103] To this end, alongside the principal money laundering offences mentioned above, POCA 2002 also contains offences for 'failure to disclose' by a person in the 'regulated sector',[104] by a nominated officer in the regulated sector,[105] or by other nominated officers.[106] It is also an offence to 'tip off' that a disclosure has been made to relevant authorities.[107]

[97]Though see HM Treasury *UK takes top spot in fight against dirty money* (7 December 2018) following the UK's 2018 evaluation by the FATF.

[98]For consideration of enforcement challenges see R Baldwin and J Black 'Really responsive regulation' (2008) MLR 59. Indeed in June 2018 the CEO of HMRC floated the idea that HMRC might not be best suited to fulfilling the AML supervisory role that it currently undertakes: Jon Thompson, giving evidence at the Treasury Committee *The UK's economic relationship with the European Union* (5 June 2018).

[99]HM Treasury, above note 11, p 4.

[100]Ibid.

[101]Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003, SI 2003/120.

[102]POCA 2002, s 340(3). It is immaterial who carried out the conduct; who benefited from it; and whether the conduct occurred before or after the passing of POCA: POCA 2002, s 340(4).

[103]Sutherland Williams et al, above note 67, para 21.01.

[104]POCA 2002, s 330.

[105]POCA 2002, s 331.

[106]POCA 2002, s 332.

[107]POCA 2002, s 333A.

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At this point it is useful to consider how the POCA 2002 offences impact art dealers. As Ulph and Smith note, 'As the principal money laundering offences are triggered by normal commercial activities involving transferring, acquiring and possessing goods, money and other property, traders in art and antiquities and their professional advisers are at risk of prosecution'.[108] A straightforward illustration of how dealers can become involved in money laundering is where a client asks a dealer to 'mind' some money for a few days. If the dealer puts that money in a drawer in their office, then they are concealing the money.[109] If the client later asks the dealer to lodge the money in their company account and to then transfer that money to a bank account abroad and the dealer does so, then they have converted the money (for example from sterling to US dollars). Transferring the money also constitutes an offence, as does the removal to a foreign jurisdiction. Clearly, s 327 applies. There is involvement in a money laundering arrangement, so s 328 applies. And the acquisition, use or possession of criminal property is also evident here, thus s 329 also applies. This example is a relatively straightforward illustration of how the money laundering offences can apply. However, it might be expected that a money laundering scheme would be more elaborate. If the dealer were to create, say, various transactions – such as the sale and purchase of art – in order to give the impression that money comes from legitimate sources this would, again, constitute an offence.[110]

If a dealer holds money in their client account for the purposes of purchasing a painting, but later suspects[111] that that money might constitute proceeds of crime and goes ahead with the purchase, they can be held criminally liable, for example under s 328. To avoid criminal liability, the dealer would have to make an authorised disclosure (or demonstrate that they intended to do so but had a reasonable excuse for not doing so)[112] or request consent to proceed with the transaction.[113] And, of course, the dealer cannot say anything in this regard to the client due to the tipping-off offence.[114] If a dealer does request consent to proceed with a transaction[115] but, while pending a response from the NCA, the client instructs the dealer to purchase a particular painting immediately, the dealer will face a quandary.[116] If they proceed with the transaction without consent, then they can be held liable under s 328. If they do not, then they could face action from their client[117] (as well as potential loss of reputation if they are seen as incompetent in their dealings).

After making an authorised disclosure and requesting consent to proceed with a transaction, the dealer should wait either for consent or until the end of the 'notice period',[118] after which they can proceed with the transaction as normal. However, if consent is refused, a 'moratorium period' of 31 days commences,[119] which could present practical difficulties. Indeed, it has been said that: 'It

[108]Ulph and Smith, above n 20, p 105.

[109]The dealer would have to know or suspect that that money constitutes or represents benefit from criminal conduct: POCA 2002, s 340(3)(b).

[110]See the allegations in the Personnages 1965 indictment: *US v Kyriacou and others*, Indictment No CR 18 0102, 28 February 2018 (Eastern District of New York).

[111]POCA 2002, s 340(3)(b) provides that an accused must know or suspect. In relation to 'suspecting', see *R v Da Silva* [2006] EWCA Crim 1654 paras 16–17.

[112]POCA 2002, s 338. Note that where an authorised disclosure is made in good faith, no civil liability arises: Serious Crime Act 2015, s 37 inserting a new sub-s (4A) into POCA 2002, s 338.

[113]This defence applies to each of the principal money laundering offences. See, respectively, POCA 2002, s 327(2), s 328 (2) and s 329(2).

[114]POCA 2002, s 333A. See also *Jayesh Shah and Shaleetha Mahabeer v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB).

[115]'Appropriate consent' is defined in POCA 2002, s 335.

[116]See eg *NCA v N* [2017] EWCA Civ 253; *O'Brien v Irwin Mitchell LLP* [2018] EWHC 742 (Ch).

[117]But see *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039. See also *Jayesh Shah and Shaleetha Mahabeer v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB). It must be noted that the Serious Crime Act 2015, s 37 provides for civil immunity where an authorised disclosure is made in good faith.

[118]POCA 2002, s 335. The 'notice period' is seven working days: POCA 2002, s 335(5).

[119]POCA 2002, s 336(8). There is provision for the 31-day moratorium period to be extended: Criminal Finances Act 2017, s 10.

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would be a very rare occasion where a lengthy delay would not cause problems, including financial ones, for all the persons involved'.[120]

The money laundering offences do not only apply to money. If, for example, a person approaches a dealer to sell a painting and the dealer knows or suspects that the painting is stolen; or a person visits a dealer and brings some antique items that she wishes to be put up for sale and, say, that person is from a high-risk jurisdiction, or there are fresh dirt marks on the items, or the person is vague when asked about the provenance of the item, then the dealer should be on alert. In such scenarios, the dealer should report the matter to the authorities (and request consent to proceed) – assuming that they are willing to act for that person in selling the painting or antique items. Even if the dealer is not willing to accept this business, but the painting/items had been left with them overnight for examination, they could still be liable for an offence if they return the painting/ items the next day without doing more. In such circumstances, the dealer should make an authorised disclosure.

The breadth of the definition of 'criminal property' is noteworthy here. It has been said that this definition (set out above) is 'so widely cast that it encompasses all crimes, and extends to any direct or indirect "benefit" derived from criminal conduct'.[121] So, for example, if an art dealer learns that a client who runs a lorry-driving business has turned a blind-eye to his drivers ignoring so-called drivers' hours,[122] and the client is using money earned from that business to purchase a painting, then the art dealer must report this issue to the authorities (as the money in question represents criminal property) and request consent to proceed with the purchase.

Significantly, the Law Commission recently conducted a review of the AML/CTF 'consent' regime.[123] Their recommendation was that the consent regime be retained, albeit 'with improvements to render it more efficient and effective'.[124] It was acknowledged that there is a need for balance in how the disclosure regime operates.[125] It remains to be seen what impact – if any – the proposed reforms will have.[126]

(b) Money Laundering Regulations 2017

The ML Regulations 2017 were brought into force on 26 June 2017.[127] According to the 2017 National Risk Assessment, these Regulations 'place stringent requirements on relevant persons for the purpose of preventing and detecting money laundering and terrorist financing'.[128] Those subject to the ML Regulations 2017 have gradually expanded since 1991, when the first EU AML Directive was adopted,[129] and now a wide range of actors come within the remit of the current rules. To date, however, art dealers do not come within the remit – unless they fall within the definition of 'high value

[120]A Campbell and E Campbell 'Solicitors and complying with the anti-money laundering framework: Reporting suspicions, applying for consent and tipping-off' in N Ryder et al (eds) *Fighting Financial Crime in the Global Economic Crisis* (Routledge, 2015) p 124.

[121]S Kebbell, '"Everybody's looking at nothing" – the legal profession and the disproportionate burden of the Proceeds of Crime Act 2002' (2017) Criminal LR 741 at 742.

[122]These set out, inter alia, the number of hours that a person can drive before taking a break: see HM Government 'Drivers' hours', available at https://www.gov.uk/drivers-hours.

[123]Law Commission *Anti-Money Laundering: the SARs Regime* (HC 2098, June 2019).

[124]Ibid, p 29.

[125]Ibid, p 30. It was stated that: 'there is currently no means of ensuring that the burden of reporting is proportionate to the gravity of the offence, the value of the criminal property and the benefit to law enforcement agencies of this intelligence. This is problematic as resources are finite. The burden on those who are obliged to file reports is substantial. The burden on those whose accounts and transactions are frozen pending review is also very significant. It undermines the aim of achieving a truly risk-based approach' (p 30).

[126]Significantly, too, a 'SARs Reform Programme' is underway, led by the Home Office: National Crime Agency *Suspicious Activity Reports (SARs) Annual Report 2018* p 2 ('Statement by the Chair of the SARs Regime Committee').

[127]SI 2017/692.

[128]HM Treasury and Home Office *National Risk Assessment of Money Laundering and Terrorist Financing 2017* (October 2017) para 1.8.

[129]Council Directive 91/308/EEC of 10 June 1991.

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dealers'.[130] In a 2015 report, Transparency International (TI-UK) identified shortcomings in the art sector, including: no thematic reports on AML compliance within the sector; no known cases of enforcement action against auction houses or high-end art dealers; a low number of suspicious activity reports filed by the sector; limited knowledge of compliance issues due to a lack of information from HMRC; a general lack of awareness of AML obligations in the sector; and high value dealers are only required to carry out AML checks when items are paid for in cash.[131] Given that art dealers do not fall within the regulated sector, the money laundering 'weaknesses' identified by TI-UK could be swiftly rebutted. For example, it is not surprising that there is a low level of SARs emanating from the sector given that there is no obligation to file such reports – unless the dealer is classed as a 'high value dealer'.[132] It is trite to criticise the sector on these grounds given the absence of any legal obligation to comply with AML.

That, however, is soon to change. When the Fifth AML Directive is implemented in the UK, art dealers will become part of the 'regulated sector' and will have to comply with AML obligations under the 2017 Regulations. Some of the key changes[133] that will be faced by art dealers include carrying out risk assessments (reg 18);[134] establishing and maintaining policies, controls and procedures to mitigate risks (reg 19);[135] appointing a senior individual to ensure compliance, to screen employees, and to establish an independent audit function (reg 21); appointing a nominated officer (reg 21); establishing systems to respond to enquiries from financial investigators or law enforcement officials (reg 21); training and awareness requirements (reg 24); where classed as a high value dealer, requirements to be 'approved' as a beneficial owner, officer, or manager of a firm, or as a sole practitioner by the supervisory authority (reg 26);[136] doing CDD checks (reg 27);[137] ceasing transactions where CDD cannot be done (reg 31); doing enhanced CDD checks and enhanced ongoing monitoring, where transactions involve a person in a high-risk third country or a PEP (reg 33);[138] doing simplified CDD where there is low risk (reg 37); reliance on third parties (reg 39); and maintaining records (reg 40).

Failure to comply can result in a civil penalty and/or a public statement being issued censuring the dealer (reg 76). A penalty can also be imposed on an officer of the company for AML failures (reg 76). Supervisory authorities can suspend or remove authorisation to carry on business (reg 77), impose restrictions (reg 77), or impose prohibitions on management (reg 78). Part 8 also sets out, inter alia, powers that supervisory authorities have in AML information gathering and/or investigation, eg powers to require information (reg 66), entry, search and seizure (regs 69–70), and retention of documents (reg 71). The ML Regulations 2017 also set out criminal offences (regs 86–88, 92).

[130]Reg 14(1)(a) defines 'high value dealer' as 'a firm or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when the trader makes or receives, in respect of any transaction, a payment or payments **in cash** of at least 10,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked' (emphasis added).

[131]Transparency International UK, above n 18, pp 60–62.

[132]For example, Damien Hirst's piece *For the Love of God* supposedly sold for £50m in cash. In that type of situation, the dealer would fall within the definition of 'high value dealer'. See 'The mystery of the £50m skull: Is Hirst's record sale all it seems?' (*The Independent*, 2 September 2007).

[133]While some larger firms already have AML programmes in place, this appears to be the exception in the market as a whole. See also Basel Institute on Governance *Basel Art Trade Anti-Money Laundering Principles* (January 2018).

[134]Risk factors include: its customers; countries/ geographic areas that it operates in; its products or services; its transactions; its delivery channels.

[135]The obligation extends to any 'parent undertaking': reg 20.

[136]In effect, those with convictions of a relevant offence can be precluded from acting in such a role, or if they are later convicted of a relevant offence, they can be precluded subsequent to that conviction. The relevant offences are set out in the ML Regulations 2017, Sch 3.

[137]The relevant CDD checks are set out in reg 28. CDD checks must be done before the establishment of a business relationship or the carrying out of the transaction: reg 30.

[138]Reg 35 further requires 'appropriate risk-management systems and procedures' to be put in place to determine whether a person is, or is associated with, a PEP.

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One positive aspect of applying the AML requirements to the art market will be an increase in transparency, one of the stated aims of the Fifth AML Directive. Related to this is that being part of the regulated sector is itself an important change: as the 2018 Strategic Assessment of Serious and Organised Crime stated: 'The risk to regulated sectors from money laundering is heightened when interacting with the unregulated sector, where similar money laundering risks exist from a lack of due diligence and awareness'.[139] Thus, being part of the regulated sector might increase trust by customers and potentially increase business. However, there are also negative consequences. For example, given that many big dealers and auction houses are already complying with the AML regime,[140] the impact of new requirements will be disproportionately felt by small businesses. A further consequence, especially for small businesses, is that complying with AML obligations is not cheap and the costs will be borne by dealers.[141] There are obvious costs in terms of time, salary, training, implementing policies and procedures, IT, and access to relevant databases (though, of course, in many instances the costs of compliance are simply passed on to customers). In addition, there are unintended consequences of AML. So, for example, dealers might become more risk averse leading to 'de-risking'.[142] In other sectors, there is evidence of, inter alia, remittance firms being de-banked and correspondent banking accounts being closed due to banking sector concerns as to AML compliance.[143] A further consequence is that art dealers might end up engaging in KYCC (or, knowing your customer's customer)[144] – which might enhance transparency, but also increases costs. Given its impacts, any extension of the AML regime ought to be justified, yet, as we argue below, the AML regime fails in this regard.

4. AML: an AGILE response?

In terms of the repressive aspect of AML, in the UK art dealers are subject to the criminal law provisions under POCA 2002.[145] In other words, dealers can be prosecuted for money laundering offences – yet, the reality is that prosecutions of art dealers are rare. In terms of preventive aspects of AML, change is afoot. Art dealers are now to be added to the list of regulated sectors in both the US and the EU, reflecting a wider trend in the responsibilisation of private actors in combating money laundering. There are concerns with this expansion of the AML regime. It is not our intention in this paper to dispute that the art market is vulnerable to money laundering. Indeed following recent, and high profile, claims that the market is being used for money laundering and that antiquities are being sold to fund terrorist activities, it is perhaps unsurprising that the market is now facing regulation in this regard. The justifications are, nevertheless, not entirely convincing. Moreover, the continuing expansion of the AML regime and the list of actors/sectors subject to stringent requirements is difficult to justify, not least given sustained concerns as to efficacy.[146] To critique the expansion of AML, this section adopts La Vigne's analytical approach to regulatory measures against crime: AGILE (adaptable; germane; incentive-based; legitimate; and evaluated).[147] Applying this analytical approach, we argue that the extension of the AML regime is not justified.

[139]NCA, above n 48, p 38.

[140]See for example Christie's *Buying at Christie's*, available at https://www.christies.com/buying-services/buying-guide/financial-information/#anti-money-laundering.

[141]See Z Yen Ltd *Anti-Money Laundering Requirements: Costs, Benefits and Perceptions* (Corporation of London, 2005).

[142]See generally D Artingstall et al *Drivers and Impacts of De-risking: A Study of Representative Views and Data in the UK* (John Howell & Co Ltd, 2016).

[143]V Ramachandran et al 'De-risking: an unintended negative consequence of AML/CTF regulation' in King et al, above n 46.

[144]Such KYCC could operate both ways – ie dealers might do KYCC themselves to manage risk or they might be requested by other firms (eg other dealers or banks or solicitors, etc) to provide further information about their own clients.

[145]The 2018 FATF Evaluation rated the UK money laundering investigation and prosecution provisions as having 'a substantial level of effectiveness': FATF *United Kingdom: Mutual Evaluation Report* (December 2018) p 71.

[146]The 2018 FATF Evaluation rated the UK preventive provisions as having 'a moderate level of effectiveness': FATF, above note 145, p 122.

[147]La Vigne, above n 22.

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Regulatory responses must be *adaptable* to specific crime problems and their situational contexts. And regulators must also adapt to evolving contexts. The experience of AML illustrates the regime's adaptability over the past three decades, both in relation to displacement into different sectors and to the proceeds from different types of criminal activities. Initially the focus of efforts to follow the money centred on proceeds related to drug trafficking, and the laundering of such proceeds through banking institutions. Over time, the regime has expanded beyond banks to other financial institutions and designated non-financial businesses and professions (DNFBPs). Thus, today the regime extends to lawyers, estate agents, accountants, casinos and more. And, as this paper demonstrates, AML is now being extended to the art market. Further, AML is no longer concerned solely with proceeds of drug trafficking; in essence it encompasses all 'dirty money' (including, of course, proceeds of white collar crime). Thus, it can be seen that AML, globally, has proved adaptable, extending far beyond what could have been envisaged in 1989 when the FATF was established.

A successful regulatory response must also be *germane* to actors, places, and jurisdictional contexts. It is 'critical to identify the people who are best positioned to identify and implement regulations, along with the tools and resources they need to be successful'.[148] Debates about AML, its reach and effectiveness are attracting particular attention in this regard, most recently with suggestions that there is a need for an EU-wide AML body.[149] As Tom Keatinge of RUSI argues, 'despite the transnational nature of most money-laundering schemes … the global response remains trenchantly national'.[150] In terms of key (national) actors, most notable here is the role of law enforcement agencies (such as the National Crime Agency and the Metropolitan Police in the UK) and AML regulators (such as HMRC and the newly-established Office for Professional Body Anti-Money Laundering Supervision (OPBAS)). Those subject to the AML regime are also key, given that they are tasked with policing the front-line.[151] An oft-overlooked actor is the legislator or public official. La Vigne notes that these 'are the least proximate to crime problems and yet have the greatest means of developing new regulations to combat them, particularly in the context of organized crime'.[152] In the AML context, it is important to also mention the role of international authorities, most notably the FATF and the EU. The FATF Standards and the various EU AML Directives have directly influenced the continued – at times unrelenting – expansion of national AML regimes globally. And, crucially, these international authorities play a central role in monitoring and accountability, such as through the Mutual Evaluation Report (MER) process.[153]

While it might be self-evident to say that a successful AML regime demands coherence, if not cohesion, amongst these actors the reality is otherwise. It is no surprise then that AML is regarded by many as failing.[154] There is often limited coherence, or consistency, between different state actors (eg police and regulators); legislators (whether at the national or international level) appear steadfast in determinations to expand the AML (and CTF) regime too often with little consideration given to enforcement; private actors tasked with policing the front-line are all too often – and understandably – reluctant to take on such a role for a variety of reasons (eg financial costs; not regarding AML as properly being their role; not having the capacity or ability to undertake such a policing task); the law (in the form of both primary and secondary legislation) is often overly complex; too often the emphasis is on 'box-ticking' (eg for private actors, to comply or at least be seen to comply with their AML

[148]La Vigne, above n 22, at 204.

[149]'Europe needs a central anti-money laundering body' (*Financial Times*, 4 September 2018).

[150]T Keatinge 'We cannot fight cross-border money laundering with local tools' (*Financial Times*, 9 September 2018).

[151]See K Svedberg Helgesson 'Public-private partners against crime: governance, surveillance and the limits of corporate accountability' (2011) 8(4) Surveillance and Society 471.

[152]La Vigne, above n 22, at 206.

[153]See eg FATF, above note 145.

[154]Alldridge, above n 23. For discussion of 'implementation failure' see Grabosky, above note 76, at 359–360.

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obligations; for national governments, to satisfy the FATF MER process). Indeed, given that the objectives of AML are themselves unclear,[155] the lack of coherence should come as no surprise.

The next consideration is *incentivising* compliance. As La Vigne states,

> Regulations alone are toothless absent effective enforcement, but enforcing regulations is a labor-intensive and expensive undertaking. Understanding and responding to the underlying incentive structures of the actors that regulations aspire to influence can enhance the reach and effectiveness of such measures.[156]

Central here is who *ought* to undertake AML – law enforcement agencies or private actors. As noted earlier, there is significant dispute in the AML context as to the responsibilisation of private actors. And, it must be noted, there are benefits to AML compliance, such as preventing the firm being the 'victim' of money laundering activity; protection against reputational risks; preservation of integrity; use of compliance information in developing new services or marketing activities; and raising awareness of risks amongst employees and enhancing professionalism within the firm. On the other hand, there are significant drawbacks to AML compliance, such as scaring off clients; conflicts between compliance and other (profit-making) aspects of business; and the bureaucracy involved in compliance.[157] Moreover, it might be cheaper for a particular company to not comply with their AML obligations and to pay the subsequent fine if discovered. (Of course potential criminal prosecution is another consideration in such circumstances). Thus, some suggest, there may be a need for the state to incentivise compliance.[158] In the UK AML regime, however, there is no such incentivisation; rather the approach is to use the stick (ie the threat of sanction) to ensure compliance. Experiences to date would suggest that this approach is not working.[159]

It is well established that *legitimacy* is important in ensuring compliance,[160] however the term 'legitimacy' remains contested.[161] Essentially, legitimacy is concerned with questions of normative compliance with laws and rules, and whether the regulated people recognise those laws (and enforcement bodies) as being rightful and just. Ultimately, if laws and rules are not seen as legitimate, then people are unlikely to comply.[162] An empirical evaluation of the legitimacy of AML in the art market is beyond the scope of this paper, not least given that the AML preventive regime does not (yet) apply to most art dealers.[163] Instead, we focus on some ways that the AML regime has been counter-productive or has had unintended consequences. For example, as Grabosky states, 'A common outcome of regulatory policy is the tendency for non-compliance to be displaced into other areas within or beyond a

[155]In an EU-wide study, involving interviews with policy-makers, practitioners, and prosecutors, Ferwerda notes how there were a range of answers to the question: 'what is the goal of AML policy?' See J Ferwerda 'The effectiveness of anti-money laundering policy: a cost-benefit perspective' in King et al, above n 46.

[156]La Vigne, above n 22, at 207.

[157]Verhage, above n 16, pp 65–66.

[158]N Tilley 'Privatizing crime control' (2018) The Annals of the American Academy of Political and Social Science 55.

[159]There continue to be AML failures across different sectors, for example: FCA – Press Release, 'FCA fines Standard Chartered Bank £102.2 million for poor AML controls' (9 April 2019); BBC News 'Countrywide fined £215,000 over money-laundering failings' (4 March 2019); Gambling Commission 'Daub Alderney to pay £7.1m fine for anti-money laundering and social responsibility failures' (13 November 2018); 'Europe's biggest banks fined for money laundering' (*The Week*, 10 October 2018); J Garside and N Hopkins 'UK lawyers failing to report suspected money laundering, says watchdog' (*The Guardian*, 14 September 2018). Notwithstanding the positive report from the FATF (above n 145), it has been argued 'that '"effectiveness" in fulfilling FATF's IOs [ie Immediate Outcomes] in aggregate does not necessarily translate into real-world effectiveness in achieving the overarching objectives of an AML regime': T Keatinge et al *No Rest for the Wicked: Driving Change in the UK's Post-FATF Evaluation AML Regime* (RUSI, 2019) pp 12–13.

[160]T Tyler *Why People Obey the Law* (Yale University Press, 1990); D Beetham *The Legitimation of Power* (Palgrave Macmillan, 2nd edn, 2013).

[161]See WB Gallie 'Essentially contested concepts' (1956) 56 Proceedings of the Aristotelian Society, New Series 167.

[162]See T Tyler 'Psychological perspectives on legitimacy and legitimation' (2006) 57 Annual Review of Psychology 375.

[163]It is worth noting, however, that during numerous presentations of this article to market participants, the response was overwhelmingly against the proposed expansion of the AML regime to art dealers.

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regulatory jurisdiction or policy domain'.[164] As already mentioned, the initial focus of AML was on 'dirty money' in the banking sector. One of the effects of that emphasis was to displace money laundering to other sectors. Subsequently it was deemed necessary to extend the AML regime beyond banks, to also encompass DNFBPs. One effect was to infringe on legal professional privilege, where solicitors are now expected to report any suspicious transactions by their clients, an issue that has proved particularly controversial.[165] Even within the banking sector there have been unexpected consequences, such as the closing of accounts of remittance firms.[166] Inevitably, this impacts upon the market, with the potential for smaller remittance firms, in particular, being forced out of business or for firms having to open lower quality accounts elsewhere.[167] In other instances, there have been claims that banks have closed customer accounts on the basis of nationality.[168] Such consequences inevitably undermine the legitimacy of the AML regime.

Finally, it is important that the AML regime be subject to *evaluation*. We consider evaluation in two respects: first the value of cost-benefit analysis (CBA); and, then, the need for ongoing evaluation. The difficulties in measuring AML efforts must be acknowledged. Simply counting the number of suspicious activity reports received in a particular time period,[169] for example, is virtually meaningless. Too often, policy documents simply presume the need for, and value of, increased AML rules, often without any supporting evidence. Indeed, as noted earlier, one of the criticisms levelled against extending the AML regime to art dealers is that 'the basic justification for this legislation – that art and antiquities are used to fund terrorism – is unproven. The premise for this legislation, and this is extremely important, is not based on fact but unfounded opinion'.[170] One tool that can prove useful in evaluating state intervention is CBA,[171] and some commentators argue in favour of applying CBA to AML.[172] CBA does, however, have its detractors, on the basis of, inter alia, not everything is quantifiable; numbers don't tell us everything; there may be a lack of neutrality in analysis; how do you carry out a CBA when goals are not always clear; full and accurate data may not be available; it is difficult to include displacement effects in a CBA; and there are difficulties in measuring 'benefits' and 'costs'.[173] The difficulties of applying CBA in the AML context are starkly evidenced in the ECOLEF project (examining the legal and economic effectiveness of AML in 27 EU Member States).[174] Given the limited information available, and the wide variations even when statistics were available, a comprehensive CBA proved impossible. Instead, the authors conducted a CBA for a hypothetical country[175] based on the available statistics. Even then, they conclude, 'it is possible to estimate most of the costs, but hardly any of the benefits'.[176]

It scarcely needs reminding that ongoing evaluation is key in terms of 'feedback mechanisms, monitoring systems and contingency plans, in the event that negative consequences start to become

[164]Grabosky, above note 76, at 351.

[165]*Michaud v France* App No 12323/11 (06/03/2013); *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres* (C-305/05) [2007] CMLR 28.

[166]See *Dahabshiil Transfer Services Ltd v Barclays Bank plc* [2013] EWHC 3379 (Ch).

[167]See generally Ramachandran et al, above n 143.

[168]See S Kamali Dehghan 'UK bank accounts of Iranian customers still being closed, says law firm' (*The Guardian*, 21 April 2017).

[169]National Crime Agency *Suspicious Activity Reports (SARs) Annual Report 2018*.

[170]CINOA, above n 81.

[171]See C Sunstein *The Cost-Benefit Revolution* (MIT Press 2018).

[172]See for example R Barone and D Masciandaro 'Worldwide anti-money laundering regulations: estimating the costs and benefits' (2008) 10(3) Global Business and Economics Review 243, though the authors do acknowledge the lack of robust empirical studies on money laundering activities.

[173]See for example S Rose-Ackerman 'Putting cost-benefit analysis in its place: rethinking regulatory review' (2011) University of Miami Law Review 335.

[174]B Unger et al *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy* (Edward Elgar, 2014).

[175]With a population of 10 million and a price level of 100. The authors acknowledge, though, the deficiencies in such an approach.

[176]Unger et al, above note 174, at 218.

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apparent'.[177] Or, in the words of La Vigne, 'ongoing evaluation is paramount to assess implementation fidelity, identify backfires, and adapt regulations to minimize those unintended impacts'.[178] And this is evident in the FATF MER process, though not without strong criticisms.[179] Three decades after the FATF was established (1989), however, we cannot say with any certainty whether AML works or not.[180] This is perfectly summed up by Vettori: 'Although the international community began to focus its attention on money laundering a rather long time ago, there is still very little scientific knowledge about the effectiveness and efficiency of the countermeasures adopted to combat the phenomenon'.[181] And yet, the AML regime continues to expand. As Grabosky emphasises, 'interventions whose effects may not become apparent until after the significant passage of time are less amenable to corrective feedback'.[182] This is indeed true in the AML context, where – rather than taking a step back and re-visiting the AML regime itself – policymakers instead call for yet more regulation.

Conclusion

There are a number of important conclusions that can be drawn from this paper. First, we need to take account of the art crime literature and distinguish between crimes committed *against* art and crimes committed *through* art. The former have been addressed by a small but growing academic community, focusing in particular on vandalism and iconoclasm, art theft, fraud and forgeries and looting of art, antiquities and cultural heritage more generally.[183] Crimes committed *through* art, however, have rarely been analysed (with the exception of art fraud/forgery) and they could be considered within the literature on other crime areas in which art is being used as a means to commit the offence, such as money laundering or tax offences. One reason why art crimes are considered particularly heinous is that art and antiques are more than just a high-value good that can be replaced. It could even be considered that art knows no individual ownership and should be available to the public as it defines the identity of a particular culture and is therefore of value for both the individuals belonging to these cultures and anybody who wants to learn about them. Art also has a historical value that is not observable to the same extent in most other commodities. One might therefore even claim that art is not a commodity, and special considerations should apply as recognised in UN Conventions and other legislation protecting it.[184]

Applying this rationale to crimes *against* art such as theft, vandalism and iconoclasm or looting is straightforward. Applying it to crimes committed *through* art such as, eg, fraud and forgeries is, however, not so simple. Art fraud does not steal a piece of history or take away from a culture's heritage. If anything, it adds to those. In the literal sense, art fraud is a crime committed through art and not against art. Nevertheless, it has without fail been included in the art crime literature but rarely receives specific mention in fraud research. A justification for this categorisation can be found in the literature as art fraud alters art history and can be detrimental to an artist's oeuvre.[185] We suggest, however, that the reason it is included as an art crime is that its modus operandi is art specific and not easily comparable to any other type of fraud, at least not in the high-end sector where only unique forgeries are

[177]Grabosky, above note 76, at 364.

[178]La Vigne, above n 22, p 211.

[179]P van Duyne et al 'A "risky" risk approach: proportionality in ML/TF regulation' in King et al, above n 46. For criticism of the 2018 UK MER, see T Keatinge, 'Mission creep and a credibility crisis: Is the Financial Action Task Force still fit for purpose?' *Sussex Centre for the Study of Corruption blog* (1 February 2019).

[180]See generally Alldridge, above n 23.

[181]B Vettori 'Evaluating anti-money laundering policies: where are we?' in B Unger and D van der Linde (eds) *Research Handbook on Money Laundering* (Edward Elgar, 2013) p 474.

[182]Grabosky, above note 76, at 364.

[183]Conklin, above note 6; Charney, above note 6; see also the areas of art crime addressed in S Hufnagel and D Chappell (eds) *The Palgrave Handbook on Art Crime* (Palgrave, 2019).

[184]Such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

[185]Charney, above note 32.

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created. The distinguishing factor for determining that a crime falls within art crime is hence not that the crime is committed *against* art rather than *through* it, but that the modus operandi is art specific. To count other crimes committed *through* art as being part of the field of art crime it hence needs to be proven that they distinguish themselves clearly through the use of art for the commission.

However, distinguishing money laundering in the art market as art crime might detract from its qualities for comparison in the AML literature. As we have seen in this paper, art crime is not that specific and can be compared to other markets regulated by AML. And it is evident that using art for money laundering purposes is certainly not a crime *against* art. The fact that money laundering in the art market is comparable to other sectors, and AML regimes are being expanded to include art dealers, also shows that the crime is not art specific and belongs rather to AML research. All downsides of the AML regime that manifest in other sectors are now feared to apply to the art market, showing the high level of similarities between markets. These include the disproportionate burden of AML for smaller dealers, the straining of the relationship between dealers and customers and the subjectivity that will yet again be involved in the filing of STRs. The lack of efficiency that can generally be bemoaned in the application of the AML regime is hence very likely to also manifest itself in its implementation in the art market. It follows that this is a very important research area for AML at the moment, as due to the similarities with other markets, general lessons can be learned when observing how AML is now applied in the art market.

By contrast, we have pointed out that the art market and money laundering through art are different. It appears to be potentially even easier to commit money laundering offences through art than through other commodities, as the market has specific methods of trade that distinguish it from other sectors. Also, the mobility of art objects has specific consequences for money laundering and for crimes committed through art more generally. These differences might not be sufficient to distinguish money laundering in the art market as an art crime, but they are certainly helpful in comparison to other sectors for AML research and policy development. By following closely the implementation process and application of the legislation discussed above on the art market, valuable insights can be gained for AML within a contained and comparatively small sector. Due to similarities with other markets these will have the potential to be generalised and apply to other sectors. Due to their differences they will also give valuable insights into art crime research and the specifics of art market operations in relation to crime. Thus, this developing area offers significant scope for the study of implementation, and application, of AML in the art market from the outset, whether by AML or art crime scholars. Further, as evident in this paper, AML and art crime scholars might collaborate and cross some of their disciplinary boundaries.

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