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Christie's Auction Room in London, From 'A Microcosm of London' (1808), Thomas Rowlandson and Augustus Charles Pugin. Source: Wikimedia Commons

Does the art market need more regulation?

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As the art market becomes ever more international, does the trade need to be more carefully supervised, and whose interests are in need of the greatest protection?

Recent art market commentary presents a new and unusual crisis: too much money. At the World Economic Forum in Davos in January 2015, the American economist Nouriel Roubini made a well-publicised plea for greater regulation of the art market. Roubini's argument is straightforward enough: as 'a new and separate asset class', traded in what he argues is an opaque market with 'serious distortions' and 'shady behaviour', reform and regulation are needed. Roubini is not a lone voice in this. In the Deloitte Art and Finance Report 2014, the American lawyer Steven Schindler argues that the market 'still falls short of meeting the investing class, in terms of regulatory structure, information availability and clear title'.

In such a large global market, worth just over €51 billion in 2014, according to the TEFAF Art Market Report 2015, Roubini points out that private banks and financial institutions are lending money with art as collateral. Art investment funds proliferate, trading in a market with greater price transparency but without fundamental pricing models, creating a market subject to 'fads, fashions, manias – and potentially bubbles', which may or may not be about to burst catastrophically. So far, so familiar.

On the point of reform and regulation, Roubini stresses that the market remains opaque, despite relative improvement, with art 'used for both tax evasion and tax avoidance in the United States and abroad'. It similarly presents a readily accessible 'conduit for money laundering', with price opacity facilitating insider trading and outright manipulation, and few checks on the origins of payments for private treaty sales. The apparent contradiction regarding increasing price transparency requires some explanation. Looking at the availability of information over the past 20 years, there has been an exponential increase in both the amount of sale records accessible online and the volume of analysts examining art market data with increasingly scientific rigour. Anyone with an internet connection can trawl the artnet sales database, or similar resources, to check the auction price for a work, or prices for comparable pieces. In contrast, prices in the dealer segment of the market, which accounts for just over half, can be kept private and there is no legal obligation for a seller to reveal his or her financial interests in the work, or indeed the price paid for it. This has historically been the location of profit for dealers: buy low, sell high. It is true to say there is greater price transparency, relatively speaking, but that much still remains hidden.

Whichever way you look at it, there appears to be a growing consensus that the market is in a new phase of consolidation and escalation, with an unprecedented surplus of wealth at the top tier meriting special attention. Clare McAndrew's TEFAF report, The International Art Market in 2011: Observations on the Art Trade Over 25 Years, concludes that the market doubled during the period in question, growing over 575 per cent from its lowest point in 1991 to its peak in 2007. In January 2013 journalists Robin Pogrebin and Kevin Flynn penned an anxious article, 'As Art Values Rise, So Do Concerns About Market's Oversight', for the New York Times, focusing on calls for the New York State legislature to increase regulation of both gallery and auction sales. In more recent months, Cynthia O'Murchu offered a summary in the Financial Times of the circumstances surrounding Swiss art dealer Yves Bouvier's arrest in Monaco this February on charges of price fixing and money laundering. Like many journalists writing in the wake of Roubini's Davos intervention, O'Murchu highlights the use of freeports (storage facilities in tax-free zones) for discreet transactions, as well as quoting one anonymous dealer: 'If I think that the guy in front of me sells drugs or has blood on his hands that is where I draw the line…As long as art is not regulated why should I be the one to fix the rules?'

A recent public debate on 'The Art Market and Regulation', held at the DACS headquarters in London in April, is just one manifestation of growing clamour about the perceived need for greater regulation. While where you stand on the issue is likely to be informed by personal interests and experience, it is undeniable that the subject is currently enjoying a great deal of airtime. A related question is to what extent art market regulation becomes a hotter topic outside the industry, as major sales are reported by the mainstream press. Bombastic headlines often draw external commentators to condemn the market for perceived legal loopholes and/or lack of rationality.

If we can agree there is greater price transparency than ever, thanks largely to the internet, what else has changed in the modern era? Secrets of an Art Dealer (1938), an autobiographical account of the trade by James Henry Duveen (cousin of Lord Duveen), contains many endearing tales of art market criminality that might seem rather parochial in comparison to the global scale and girth of purported art-related crimes today. Describing the early decades of the 20th century, Duveen presents a market overrun with forgeries and outright fakes, overt criminal acts, profit-driven ethos and rampant smuggling. However familiar this may sound, the swashbuckling approach to quick profit was on a scale that seems modest by today's standards, restricted to a small number of dealers and clients in only a handful of cities.

But how much was the market regulated and controlled then? And to what extent is today's in comparison? A report compiled by the lawyer Pierre Valentin of Constantine Cannon LLP, at the request of the British Art Market Federation (BAMF), lists 167 laws and regulations (as of February 2015) that apply to the British art market in England and Wales, suggesting that a dealer active today operates in an unequivocally regulated market. With notable exceptions such as foreign laws that may apply, or laws governing general business practice, it includes laws, regulations and codes of conduct covering everything from Nazi loot to VAT, and from endangered flora and fauna to the protection of shipwrecks – many of which are effective laws not specifically aimed at the art trade.The International Art Market in 2011 report repeats anecdotal observations from dealers who cite the mushrooming of regulations and charges as one of the most significant developments of the past few decades.

Skimming the list of regulations, it swiftly becomes clear quite how many of them are relatively new – not only insofar as pre-war legislation has been in some cases more rigorously codified, but also with the introduction of innovations such as the Artist's Resale Right regulations of 2006. All the major international treaties aimed directly at the trade, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), occurred during or after the Second World War. Any gallerist, dealer or auction house operating in England and Wales is answerable to a wide range of English, EU and international laws, whether directly aimed at the trade or clearly applicable to it.

The most persuasive argument made in favour of increasing regulation is that buyers are frequently discouraged by the lack of a consumer rights organisation. Giving the customer greater recourse to a professionalised and standardised industry would bring more people to the market, boosting its overall health. This dovetails with the related observation that the title of 'art dealer' (or agent, consultant or advisor for that matter) is not protected. The International Art Market in 2011 report raised the same, significant concern: that there was a greater need for trade organisations and associations to vet and accredit dealers, most prominently through art fair participation.

The Deloitte Art and Finance Report 2014 made the related observation that with a possible downturn in the market greater attention will be paid to the otherwise 'legally vague fiduciary responsibilities' of advisors. In other words, what recourse is there for the collector who buys a painting at the behest of his or her advisor, the value of which subsequently tanks? Currently very little.

The auction houses have, in some cases, been quick to address the need for consumer confidence, and the price fixing scandal of the 1990s still casts a long shadow. They have had to be far more assertive about their propriety, demonstrating best practice at every possible moment. Sotheby's Code of Business Conduct and Ethics pamphlet, which is easily accessible on the company website, asks employees to be aware of phrases such as 'Everybody in the art world does it' or 'No one will find out'. And to think accordingly: 'What would this look like if reported on the front page of a major news publication?' Sotheby's maintains a 24-hour company hotline so that any concerned employee can report 'potentially illegal, unethical or questionable conduct'.

Sotheby's code of ethics makes for interesting reading – not least because it signals to shareholder, buyer and consigner alike that the auction house is acutely aware of the myriad opportunities for criminality available. It offers guidance to employees for navigating situations as diverse as conflicts of interest, giving or accepting gifts and entertainment, social media, securities and insider trading, antitrust and unfair competition, anti-money laundering/terrorist financing, and anti-corruption. While Christie's does not publish its code of conduct online, employees are bound by one that has a comparable reach to that of its major rival.

With so many potential pitfalls, how savvy does a buyer need to be? And does caveat emptor abide? The recent lawsuit brought by Ronald Perelman against Larry Gagosian, heard in the State Supreme Court in New York, established that buyers operating in the top price brackets should do their homework when spending $4 million on a Jeff Koons. Perelman alleged that Gagosian had exploited his position of trust as a long-time advisor to the billionaire, withholding information and hard-selling the work at an inflated price. Associate Justice David Friedman ruled in December 2014 that 'as a matter of law, these sophisticated plaintiffs cannot demonstrate reasonable reliance because they conducted no due diligence. They did not ask defendants, "Show us your market data."'

If anything, this shows that accusations of unfair knowledge 'asymmetry' are beginning to lose water. Yet we should view the top end of the market in perspective. The industry at large is still comprised of small- and medium-sized businesses, with only 3 per cent of dealers reporting 2014 sales in excess of €25 million, and the bulk (68 per cent) with turnover of less than €2 million (according to the TEFAF Art Market Report 2015). Most glaring of all, the top 1,530 lots sold at auction in 2014 represent 48 per cent of the value of the fine art market, but less than 0.5 per cent of the transactions. Such numbers present the disproportional weighting of the market in sharp relief, forming an irresistible argument for a tier-by-tier assessment of the case for greater regulation.

In the lower tiers of the industry, day-to-day legal issues tend to be more mundane than the possibility of encountering looted objects and insider trading. VAT is most commonly the bogeyman of any smaller enterprise. But daily VAT questions are compounded by the complication of sales tax and complex import/export regimes in China, America and beyond. Knowing how much and when to charge is frequently challenging, even with the most assiduous and law-abiding accountant to hand. Despite this, in a gallery operating in the primary market, at price points below £50,000 or even £100,000, business need not feel hampered by existing laws and regulations; though more are likely to apply in the secondary, fine arts and antiques markets. For all such business, numerous trade bodies and associations (such as LAPADA, SLAD and CINOA) offer advice and guidance; their existence also bolsters consumer confidence.

Even if we concede that the market at large may require greater policing, some practical challenges and basic considerations remain unsolved. Most pressingly, whose benefit will this be for? The taxman, the trade itself or the consumer? Do the headlines or intermittent scandals about the top end of the market affect the lower end? Should market reform comprise a greater formalisation of self-regulation through trade bodies and the like, or is an external, independent and international regulatory body required?

The outlandish top end of the market, in which vast sums of money change hands between a wide range of international players, is ripe for confusion between different tax regimes and responsibilities. New buyers and fledgling collectors must surely be thinking twice before entering the market, when the mainstream media is dominated by reports of high prices and legal cases surrounding title (such as Nazi-related restitution claims) and authenticity – especially now many authentication bodies such as the Keith Haring Foundation have ceased to offer this service. All the same, while a bad reputation for the industry is damaging all round, it is difficult to quantify how far any law suit contested between two billionaires might affect the sale of a £20,000 painting.

In terms of a regulatory body, perhaps notable trades at auction should be subject to spot-checking by a board of impartial legal and tax experts. Of course, implementing the same for private treaty sales would be much harder. The trade ultimately wants an easy life, and a fair profit. What nobody knows yet is how busy the courts might become once the feast is over, and speculator-collectors have assets with crashing values dropped on their toes.

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