



AiA Art News-service



PERSPECTIVES

POSITION PAPER (APRIL 2018) ON THE PROPOSED REVISION OF THE 4TH EU ANTI MONEY LAUNDERING DIRECTIVE

CINOA position paper

concerning the 20 December 2017 provisional agreement resulting for inter-institutional negotiations on the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

3 April 2018

CINOA

CINOA is the **principal international confederation of art & antique dealer associations** (www.cinoa.org). Established in 1935, CINOA is the global leader in representing the international art and antiques trade, setting benchmark standards for the industry including the worldwide adoption of [the CINOA Code of Ethics](#). Affiliated dealers – from **19 European leading dealer associations** plus associations from the United States, South Africa, Australia and Russia – cover a wide array of specialties from antiquities to contemporary art.

CINOA actively represents the interests of the industry, while working hard on **improving standards** further in the interests of **best practice, transparency and consumer protection**. No other industry body within the international art and antiques market offers such an extensive reach or one-stop access to the world's first rank of trade professionals. CINOA responds proactively to dealers' concerns and offers international support to the CINOA dealer associations. Members benefit from shared knowledge and an international network of experts on art, antiques and related matters.

CINOA's reaction to the proposed revision of the 4th Anti Money Laundering Directive which has an impact on all European art & antique dealers and about which stakeholders have not been consulted

The European institutions, without reference to art & antique stakeholders – either in the market itself or among at least a reasonable number of Member States – have proposed a compromise to revise the 4th Anti Money Laundering Directive (AMLD4). CINOA and its members were surprised to discover that the compromise text for the revision of the 4th Anti Money Laundering Directive (AMLD4) targets specifically in its Article 1 (1) (ha) “persons trading or acting as intermediaries in the trade of the work of art”. CINOA members have been applying for years the anti-money laundering obligations concerning payments in cash of 10,000 euros and above but would now be required to comply with anti-money laundering obligations for all other payment methods.

Even more surprisingly, the proposed revision specifically adds to the list of factors and types of evidence of potentially higher risks (Annex III of AMLD4) “cultural artefacts and other items of archaeological, historical, cultural and religious importance”.

Both those amendments to the text have an enormous impact on the European antiques, art and antiquities market by creating an unacceptable burden on the art market business. The proposed 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. This unsubstantiated assumption will have a disproportionate impact on dealers in works of art.

Measures are disproportionate to the risk

Following the terrorist attacks in Europe, CINOA understands the context in which the proposed amendment to AMLD4 has been put forward. CINOA condemns money laundering and supports sensible and proportionate measures that will prevent the financing of terrorism. Its members comply with the existing anti-money laundering regulations at both EU and national levels. CINOA has put in place a Code of Conduct, which acts as a benchmark for the sector.

However, it appears that the proposal has been built on the false assumption that terrorism financing relies on transactions involving the art market within the EU. Recital 22 of Directive 2015/849 states that “the risk of money laundering and terrorist financing is not the same in every case. Accordingly, a holistic, risk-based approach should be used.”. Recital 2 of the compromise text for the revision of the 4th Anti Money Laundering Directive (AMLD4) underlines that “it is important to note that the measures taken must be proportionate to the risks.”

A recently published independent report commissioned by the European Commission¹ underlines the absence of recurring evidence of terrorism financing arising from transactions involving the art market within the EU.

It appears that the measures take neither a holistic nor a risk-based approach when it comes to the art market and cultural property. CINOA advocates an approach that employs measures, which are proportionate to the real risk. The proposal addresses the wrong issue and diverts vital resources away from where they are needed, such as the fight against the real and confirmed financial sources of terrorism such as drugs, weapons and ammunition and counterfeit goods.

A significant impact on the EU art & antique market

Most art market businesses are SMEs with turnovers of well under €1 million and this would add a disproportionate burden to their time and expenses in administrative terms, while potentially losing them business. It is important to understand that art market businesses handle unique objects, which are often sold to buyers who act on impulse. A buyer can be lost if the transaction is not concluded easily and swiftly. The administrative burden related to the due diligence process and the tools which will have to be developed could mark the demise of the most vulnerable businesses, in a sector where dealer numbers have been steadily declining.

A threshold of €10,000 means that far too many art and antiques market transactions would be caught by the measures. For example, more than a quarter of all paintings and sculptures sold by dealers are priced at \$50,000 or more² and a fifth of such works sold in European auctions are priced at \$10,000 or more³.

Not only are the measures as proposed disproportionate for the art market for the reasons noted above, but also because in some cases they would involve unreasonable efforts to identify previous owners as part of the due diligence process for anti-money laundering. This will not always be possible as illustrated by recent case law. The New York Court of Appeals⁴ has ruled that an auctioneer cannot be forced to release the identity of the seller. This would have a significant impact on anyone subject to the EU's new anti-money laundering proposals involved in a transaction for an item of cultural property previously sold at auction in the world's leading art market (New York) as they would not be able to identify previous owners to complete the chain of ownership.

In addition, the Article 29 Working Party of regulators overseeing forthcoming GDPR rules have not completed their guidance on data protection relating to individuals, exposing the anti-money laundering proposals to the risk of imposing an extra burden in this area. Most antique dealers and auction houses are SMEs which do not have the resources to fund the same compliance services as those banks or payment providers which appear in the Annex III list of factors and evidence of potentially higher risks.

1 European Commission: Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU, June 2017. See <http://goo.gl/iWyMwF>

2 Dr Clare McAndrew, Art Economics: The Art Market 2018. An Art Basel & UBS Report. Page 57, Figure 2.7.

3 In 2017 19.42% of fine art lots – paintings, sculpture, prints, etc – sold at auction in Europe were priced at \$10,000 or above. Source: Art Economics with data from Auction Club.

4 See *Jenack v. Rabidazeh*, New York Court of Appeals, December 17, 2013 (<http://goo.gl/9o187p>) “The court concluded that the seller need not be identified to meet the statute’s requirements...” In brief, the dispute in this case rested on the auction house’s failure to disclose the name of the seller in accordance with New York General Obligations Law § 5-701(a)(6), governing agreements for “goods sold at public auction.” The Appellate court ruled that “the obvious awareness of Jenack as the auctioneer satisfies the statute and the sale is enforceable.” In other words, under New York state law, an auctioneer cannot be forced to release the identity of the seller.

Conclusion

Europe is the world's largest exporter of art and antiques and is home for more than half of the world's dealers. In 2016, dealers in Europe accounted for at least \$14.2 billion in sales (excluding European auction houses and privately brokered sales, which would amount to \$20.5 billion). The assumption that the EU is subject to a serious level of trafficking in cultural property is false and is diverting vital resources away from where they are needed. The measures proposed should be realistic and not hinder art & antique professionals.

CINOA asks for:

- **The removal of any specific reference to “cultural artefacts and other items of archaeological, historical, cultural and religious importance” in the higher risks list of Annex III.**
- **To add “cultural artefacts and other items of archaeological, historical, cultural and religious importance” in the list of factors and types of evidence of potentially lower risks of Annex II.**
- **Raising the threshold of non-cash payments to €50,000.**