

The New UK Anti-Money Laundering Regulations: How Will The Art World Be Impacted?

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On 10 January 2020 the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (the “**2019 Regulations**”) came into force in the UK, implementing the EU’s fifth Money Laundering Directive (“**MLD5**”) and amending the fourth Money Laundering Directive¹. The 2019 Regulations extend anti-money laundering responsibilities to UK art market participants (“**AMPs**”), including art dealers and other intermediaries. The extension of MLD5 to AMPs is a response to the increasing recognition that high-value art is used by criminals and terrorist groups to launder and hide money. Accordingly, individuals and firms within the art market must implement appropriate procedures to guard against the facilitation of money laundering.

Under the earlier legislation, AMPs had anti-money laundering and counter-terrorist financing (so-called “**AML/CTF**”) obligations only if they were classed as a “high value dealer”² – in short, someone who trades in goods and makes or receives a payment of more than €10,000 *in cash*.³ The 2019 Regulations now impose obligations on AMPs when acting in any transaction whose value exceeds €10,000, and not only in cash.

AMPs are now required to identify and assess the risks of money laundering and terrorist financing in their business. For this purpose, they will need to register with HM Revenue & Customs (“**HMRC**”), the supervisor designated by the UK Government for AMPs. Susan J Mumford of Artaml, a specialist technology provider for AML in the art market, adds, *“It’s important to have engagement by business owners, senior management, and company officers. In the case of some galleries, the task of investigation and implementation of this legislation is being assigned to junior gallery team members, in much the same way that GDPR compliance was handled. In the case of these new regulations, the potential consequences to a business and its key stakeholders of failure to properly comply can be significant, and they need to be treated with appropriate seriousness.”*

¹ The fourth Money Laundering Directive was transposed into UK law as the Money Laundering, Terrorist Financing and Transfer of Funds (Information of the Payer) Regulations 2017, typically referred to as the “**2017 Regulations**.”

² In UK law, a ‘high value dealer’ means 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 in total, whether the transaction is executed in a single operation or in several operations which appear to be linked.

³ The scope of ‘cash’ includes a deposit of money into a bank account, or payment to a third party for the benefit of the transaction party, but not payments by credit or debit card or by cheque.

They must also maintain a prescribed range of policies, controls and procedures. Such controls should be proportionate to the nature and size of the business. Those measures must include appointing a Nominated Officer (“NO”) and carrying out risk assessments, training, and customer due diligence or “Know Your Customer” checks of the underlying legal or beneficial owner (or owner-to-be) of the art (and in some cases of additional parties) *before* they conclude a transaction. The AMP must also keep appropriate records of the steps taken.

Enhanced measures will be required for business relationships with politically exposed persons (for instance, politicians or their family members), or in other situations where the risks of money laundering are high, given, for instance, the place of residence of the customer. As part of the enhanced due diligence process, AMPs must verify that their client’s source of wealth is consistent with the proposed transaction.

At the centre of the AML/CTF regime is the procedure for reporting suspicions of money laundering to the National Crime Agency (the “NCA”). Money laundering is defined in sections 327-329 of the Proceeds of Crime Act 2002 (“POCA”). When individuals from a regulated entity know or suspect that another person (such as a buyer or seller) is engaged in money laundering, they are required to inform the business’s NO, who is responsible for submitting a Suspicious Activity Report (“SAR”) to the NCA in appropriate cases. Failure to make a disclosure, without a reasonable excuse, is a criminal offence under sections 330-331 POCA, and carries a penalty of up to five years in prison or an unlimited fine. It is also an offence to disclose to another that an investigation into money laundering allegations is taking place, where the “tipping off” is likely to prejudice any investigation arising from the disclosure (sections 333A and 342 of POCA).

This process should not be confused with the disclosure regime which applies to all firms, irrespective of whether they are in the regulated sector, in circumstances where they know or suspect that they have committed or are about to commit a money laundering offence (such as becoming concerned in an arrangement which facilitates money laundering). Such disclosure provides a defence to any subsequent charge of money laundering.

The increased regulatory burden on AMPs will be considerable. In 2018-19 (when only cash transactions fell within the regime), UK auction houses submitted only 38 SARs – 0.008% of the total number submitted (478,437). This is despite auction houses mediating 46% of global art sales.⁴ The low submission rates may be attributed to a number of factors, including reluctance to carry out due diligence on parties accustomed to privacy and limited awareness in the sector of the usual ‘red flags.’

The United Nations Office on Drugs and Crime estimates that money laundering and other financial crimes in the global underground art market generate around USD 3 billion annually.⁵ Art is high-value, (relatively) portable, and regularly traded across borders in highly opaque transactions. By way of example, the 1MDB scandal which saw mass embezzlement of Malaysian state funds involved many extremely high-value art purchases of works from Monet to Van Gogh, which were later sold or used for loan security. It is also widely accepted that ISIS has made vast profits from its sale of looted Iraqi and Syrian art and antiquities.

⁴ In 2018, auction houses sold USD 31 billion of art globally, making up 46% of the market, according to [The Art Basel & UBS Art Market 2019 Report](#).

⁵ See Mashberg, T., *The Art of Money Laundering*, September 2019, available [here](#).

HMRC has been clear that it is conscious of the short lead-in time businesses have had to implement the new requirements, and has allowed AMPs one year from 10 January 2020 to complete their registration with the authority. The new regulations took effect without guidance from HMRC and without an official response to the industry consultation launched by the Treasury last spring, which asked AMPs to weigh in on the directive. However, the British Art Market Federation (“**BAMF**”) has now published guidance approved by HM Treasury.⁶

AMPs that do not impose the required additional administrative burdens are now opening themselves up to the risk of criminal prosecution. AMPs large and small must start considering their new responsibilities. Some AMPs will design new AML systems from scratch; others will enhance their existing systems. With this in mind, the following checklist sets out some of the areas that AMPs should consider when enhancing / designing their systems and controls.

1. Do I qualify? The 2019 Regulations define an AMP as:

“a firm or sole practitioner who by way of business trades in, or acts as an intermediary in the sale or purchase of, works of art and the value of the transaction, or a series of linked transactions, amounts to 10,000 euros or more.”⁷

A “work of art” has the definition ascribed to it under the Value Added Tax Act 1994. Notably, BAMF’s guidance makes clear that antiques (for example, furniture and early automobiles) and collectors’ items (for example, coins and stamp collections) are not subject to the 2019 Regulations unless they would otherwise fall within the regime (for example, as a high value dealer).

“Acts as an intermediary” remains somewhat unclear in scope. It naturally includes galleries and auction houses (in some cases requiring due diligence on both buyer and seller). BAMF’s guidance offers some further assistance on this, making clear for instance that a party acting solely as introducer would not be required to apply customer due diligence measures.

2. Is my business high-risk? AML/CTF procedures (as set out in the 2017 Regulations) should be proportionate to the nature and size of the business, including its potential exposure to money laundering and terrorist financing risk. That level of risk will depend on (for instance) the jurisdiction in which the entity does business, with whom, and what specific assets are handled (for example, large sculpture may be less susceptible to smuggling risk than paintings or manuscripts). As an urgent first step, AMPs must carry out a customised money laundering and terrorist financing risk assessment to focus their planning. The risk assessment should be updated annually. The more inherent risk involved in the business, the more stringent systems, controls, and processes will be required.

3. Do I have the capacity to carry out due diligence? Customer due diligence can be extensive, and ongoing monitoring is required throughout each business relationship. Some AMPs may wish to consider engaging an outside provider who specialises in fulfilling ‘Know Your Client’ and other AML/CTF control obligations, or who offers a technological solution to simplify the process.

⁶The guidance, published on 7 February 2020, is available [here](#).

⁷The definition in the regulations also separately includes the operators of freeports. However, there are currently no freeports in the UK.

Otherwise, AMPs must train staff members to know what information is required and how to obtain it. *“Technology has the ability to turn a complex set of procedures into something that guides you through the process,”* says Mumford. *“You alleviate worries about covering all bases, not to mention saving hours researching prospective customers and being sure to retain personal data in a GDPR-compliant manner.”*

4. **Who will be involved and take responsibility for AML/CTF obligations?** While HMRC has indicated that only AMPs of a certain size should consider appointing a specific person responsible for compliance with the law, every AMP must appoint a NO⁸, who according to gov.uk, *“can be trusted with the responsibility, is senior enough to have access to all your customer files and records and can decide independently whether or not they need to report suspicious activities or transactions.”* In Mumford’s view, *“the NO is ideally at Director level of a business, as they are the ones with the seniority to deny transactions to, or even report customers, new or old.”* These staff members will most likely need support from a wider team who should be vigilant about money laundering risks. In order to deliver efficiency for customers, there should be a clearly mapped-out route for compliance concerns in place as soon as possible.
5. **Do my employees understand their obligations?** Employees throughout an AML/CTF-regulated business will need to be aware of their money laundering and terrorist financing obligations. These businesses are required to give regular training to employees on how to recognise and deal with potentially suspicious transactions. Legal advisors can help AMPs to enhance or design a suitable programme and implement it internally.

The UK Government has made clear that it is committed to targeting corruption, money laundering and terrorist financing in whatever guise. It hopes that the 2019 Regulations will help the art world to clarify and demystify the elements of the art market previously regarded as opaque. AMPs must take immediate steps to implement the 2019 Regulations, to mitigate the risk of being targeted by HMRC when it sets about enforcing the provisions.

⁸ Regulation 21 of the 2017 Regulations

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