

## CINOA SUBMISSION FOR THE EU AML CONSULTATION JULY 2020

### **The Public Consultation Questionnaire**

As representatives of art intermediaries, now considered as obliged entities, we wanted to encourage our membership to participate at the Public Consultation Questionnaire. We first tried to complete the questionnaire ourselves. However, that turned out to be extremely difficult if not impossible, without hiring a lawyer specialized in AML.

The multiple-choice options assume extensive knowledge of the effectiveness of current AML measures in the EU, even on a member state by member state basis. They also assume extensive knowledge of the nature and extent of any problem with associated terrorist financing, as well as potential risk reducing tools that might be introduced and multiple compliance structures across stakeholders in the financial sector, not to mention detailed knowledge of existing EU Treaty provisions. Even asking a question such as “should it be a directive or a regulation” assumes profound understanding of the intricacies of the legislative process, which is beyond most micro enterprises. It is understandable that the questionnaire asks such questions, given that the vast majority of sectors that are regulated are within the financial services industry, an industry comprising of mostly large-scale enterprises.

As an alternative to completing the questionnaire we therefore submit this CINOA Policy Paper on the proposed AMLR as a means of raising the many important issues and concerns of the art market sector.

### **THE ART MARKET SECTOR – MICRO ENTERPRISES and SMALL ENTERPRISES**

Established in 1935, CINOA is the global leader in representing the international art and antiques trade, setting benchmark standards for the industry and promoting a responsible art trade including the worldwide adoption of the CINOA Code of Ethics. CINOA represents the largest group of art and antique dealers in the EU. Affiliated dealers – from 18 European leading dealer associations plus associations from the United States, South Africa, Russia, and Australia – cover a wide array of specialties. The professional art and antique dealers’ role in finding, researching, restoring and bringing to light items that might otherwise remain hidden to scholarship is a major contributor to the conservation of cultural objects and heritage. For more information visit [www.cinoa.org](http://www.cinoa.org)

The art and antique sector was already fragile before implementing the necessary health and safety restrictions stemming from COVID 19 and which are devastating for the entire sector. This has been highlighted in many articles on the consequences for artists and museums, two vital stakeholders in our sector. Many small art galleries and businesses are still closed. Art and antique fairs, which account for about 45% of dealer sales, have been cancelled for the next few months. Not only are key stakeholders affected but ‘art fairs and other cultural events also produce revenue and employment directly as well as generate second-round spending and employment in unrelated industries, while significantly enhancing the cultural attractiveness of the cities that host them’<sup>1</sup>. Many businesses in the art sector are seriously evaluating if they can continue their operations. Several recent surveys estimate that one-third of the galleries could close permanently.

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<sup>1</sup> The Art Market Report 2020 by Dr Clare McAndrew <https://www.artbasel.com/about/initiatives/the-art-market> page 360

The majority of art galleries are considered micro enterprises and so are the connected professionals, such as artists or highly specialized firms, who act as intermediaries or service providers, such as fair booth designers, agents, restorers, photographers, shippers and insurers. Micro businesses always struggle to take on extra layers of bureaucracy when imposed by legislators and they are the type of businesses least able to deal with it.

In 2019, the current art market sector in the EU is estimated at 32% of global market but will be reduced due to Brexit to an estimated 12%<sup>2</sup>. This only represented approximately EUR 6.8 billion in 2019. Due to COVID-19, the European art market is expected to shrink further.

### **CINOA POLICY STATEMENT ON THE PROPOSED AMENDING OF AMLR**

In accordance with President von der Leyen's mission statement, CINOA is fully supportive of easy to comply with policies (based on evidence, subject to an impact assessment, in line with the principles of proportionality and subsidiarity) that do not add unnecessary regulatory burdens and which make life easier for people and businesses. As representatives of the art and antiques trade, CINOA supports effective measures against money laundering and terrorist financing and is ready to work with the EU institutions to help provide information and insight into the art market sector and the sector's business practices.

In this paper, we outline **the general characteristics of the art market sector, the need to reexamine the rationale for the AMLR policy and why it is incompatible to list the micro and small businesses of 'persons trading or acting as intermediaries in the trade of works of art'<sup>3</sup> as obliged entities, by imposing the same obligations and procedures as those that are being carried out by financial institutions**. This submission outlines only some of our concerns, but it does not explain the problems that art intermediaries have when trying to adhere to the new obligations of AMLD5. CINOA believes that through further analysis and dialogues with all stakeholders, a workable policy can be defined properly pinpointing who, when and how new measures should be carried out.

Art market sector business practices are regulated by the same laws and regulations that all business must adhere to in the EU, as well as by many national and international regulations, policies and treaties focusing on cultural property which require additional administrative procedures and obligations. Best business practices include strict due diligence and proof of provenance. Codes of Ethics, such as CINOA's, reinforce these obligations for art dealers and help to heighten awareness in the art sector. CINOA and other sector trade associations play a key role in disseminating information and updates to members.

To develop a successful art dealing business, it takes years of study to become an expert in a field and years to develop a client list as relationships are based on trust built over time. One of the key challenges identified by dealers over the last three years has been finding new buyers<sup>4</sup>.

91% of art market dealers are small and micro businesses. Approximately 75% are considered micro enterprises with turnovers of well under €2 m. Art galleries have a median of 3 employees<sup>5</sup> and 47% of galleries have a turnover under € 500.000<sup>6</sup>. Nowadays, very few cash transactions occur, and if transactions over thresholds do occasionally occur, they are subject to existing AML controls. All non-cash transactions flow through highly regulated financial institutions and gatekeepers<sup>7</sup>, which have

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<sup>2</sup> The Art Market Report 2020 by Dr Clare McAndrew <https://www.artbasel.com/about/initiatives/the-art-market>, page 47

<sup>3</sup> AMLD5, Article 2, 3 (i) and (j)

<sup>4</sup> The Art Market Report 2020 by Dr Clare McAndrew <https://www.artbasel.com/about/initiatives/the-art-market> page 74

<sup>5</sup> The Art Market Report 2020 by Dr Clare McAndrew <https://www.artbasel.com/about/initiatives/the-art-market> page 361

<sup>6</sup> The Art Market Report 2020 by Dr Clare McAndrew <https://www.artbasel.com/about/initiatives/the-art-market> page 57

<sup>7</sup> Gatekeepers as defined by ACAMS (Association Of Certified Anti-Money Laundering Specialists): Professionals such as lawyers, notaries, accountants, investment advisors, and trust and company service providers who assist in transactions involving the movement of money, and are deemed to have a particular role in identifying, preventing and reporting money laundering. Some countries impose due diligence requirements on gatekeepers that are similar to those of financial institutions-

departments and resources to monitor transactions as they are obligated to do for all their clients, regardless of the business activity. All parties scrutinize the details of how and with whom the transaction is executed and must report any suspicion relating to AML.

The AMLD5 has included art intermediaries as obliged entities. Our members now are, for the first time, required to comply with the same anti-money laundering obligations as any large financial institution. These new measures impose compliance procedures for art intermediaries that involve training and perhaps because of their small size, hiring staff or outsourcing the work in order to meet the new obligations. However, it is not even clear if by outsourcing the compliance procedures, art intermediaries will be legally protected. Furthermore, there is concern, shared by both the buyer and seller, about possible infringement of data protection rights. Many businesses in the sector are re-evaluating the viability of their business models and are re-considering the scope of their sales inventory. To avoid the new requirements, business models might focus on sales of less expensive works of art with a wider client base. For SMEs and micro enterprises these extra administrative costs and interruptions linked to AMLD5, for sometimes only a handful of “in scope” transactions per year, represent a disproportionate interference for little added benefit.

**CINOA believes these additional requirements are not justifiable and will have detrimental consequences that might put at risk the survival of hundreds of micro and small businesses. It should be understood that many are simply small shopkeepers, not financial institutions with compliance departments. Therefore, we believe that it is more appropriate for the responsibility for ensuring AML compliance continues to be carried out by the gatekeepers and financial institutions that manage the transactions. With such control and monitoring already in place, we believe that art intermediaries should be eliminated from the list of obliged entities as the measures add unnecessary procedure for which the art trade lacks the infrastructure and resources, whilst adding very little extra true benefit for regulators.**

By way of more detailed explanation four key reasons why CINOA believes art intermediaries should not be obliged entities are:

### ***1. Recent studies and data provide no rationale for including art intermediaries***

CINOA believes that the absence of material evidence of money laundering and terrorism financing cases arising from transactions involving the wider art market within the EU provides a sound reason to review the rationale for including art intermediaries as obliged entities.

#### Claimed links between antiquities and terrorism financing

First, it needs to be understood that allegations of terrorism financing and the art market concern antiquities, that is to say artefacts from ancient civilizations<sup>8</sup>, have not been proved. Moreover, the legitimate antiquities trade actually only accounts for less than 0.5% of the art market and these allegations concern Middle Eastern antiquities which account for less than .05 % of the art market. In any case, many studies, including the three mentioned below (of which two were commissioned by the European Commission), confirm that there is insufficient data from which to draw any concrete conclusions on connections between the funding of terrorism and the EU art market. Instead, conclusions appear to have been drawn from a handful of anecdotal cases and incomplete data.

#### *Rand Report 2020*

Specifically, regarding the claim linking terrorism financing to artifacts, most data is anecdotal. In May 2020, a new RAND Corporation Report<sup>9</sup> was published titled *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, which proves that most widely held assumptions and current theories are wrong about antiquities trafficking. The report argues that this has led to poor policy in tackling the problem as “*effective policy responses are hindered by the lack of data and evidence on two fronts: the size of the market and the network structure of participants.*” The authors constate that

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<sup>8</sup> Antiquities are objects from antiquity, especially the civilizations of the Mediterranean: the Classical antiquity of Greece and Rome, Ancient Egypt and the other Ancient Near Eastern cultures.

<sup>9</sup> Rand Corp, May 2020 *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*

“Despite growing public outcry about the scale of looting in Middle East conflict zones and increased policy interest in the use of antiquities looting as a source of terrorism finance, there is little hard data available about the size of the illicit trade. Moreover, comprehensive statistics that describe the legal global antiquities trade do not exist<sup>10</sup>. We found instead a market in which sellers struggled to find buyers.”<sup>11</sup> In their summary, they explain that “our analysis suggests that it is unlikely that large volumes of looted antiquities are being sold through observable channels in Europe or the Americas.”<sup>12</sup> In the report, the authors propose more effective ways forward for developing policies intended to disrupt illicit networks which CINOA actively encourages policy makers to consider.

#### *The Deloitte Report, The Ecorys Report & WCO 2018 Illicit Trade Report*

Many of the RAND Report findings are not in contradiction with recent reports commissioned by the European Commission, The Deloitte Report<sup>13</sup> and The Ecorys Report “Illicit trade in cultural goods in Europe”<sup>14</sup>, as well as the World Customs Organisation 2018 Illicit Trade Report<sup>15</sup>. Two facts can be concluded from the reports:

- No evidence exists of terrorist financing activities within the EU from the trade in cultural goods
- The level of risk of looted cultural property with links to terrorism financing is almost non-existent in comparison with drugs, weapons & ammunitions, cigarettes and counterfeit goods.

#### No data demonstrating that the art dealing sector is high-risk for money laundering

We recommend that the Commission obtains a clear overview of the statistics concerning the number of EU money laundering convictions directly linked to art dealing and the proportion of all art transactions it represents – 0.0001% or 5% ? - as well as a comparison to the figures for other sectors. We ask to be shown justification for why the art dealing sector has been singled out, when other sectors selling items or services well over the €10,000 threshold (such as luxury brands, automobiles, luxury tourism packages or yachts) are not listed as obliged entities. According to the Deloitte Report, figure 30, only very few possible AML cases related to cultural goods occur in the EU. Analysis is required to know if those committing the crimes are art professionals, amateurs or criminals who knowingly skirt the law and are unlikely to adhere to any of the new AML restrictions. Only with this data will it be possible to evaluate if ‘persons trading or acting as intermediaries in the trade of works of art’<sup>16</sup> should be subject to any new measures and which measures would be the most effective.

## **2. Need to ensure proportionality & micro/ small business-friendly approach**

Without any prior consultation with market representatives like CINOA, art intermediaries were added as obliged entities in AMLD5. Businesses in the art market already abide by a wide range of both national and international legislation, consumer protection and anti-money laundering regulations for cash transactions, as well as strict codes of ethics. Proposals for new measures should take into account the practicalities of their scope and detail, as well as how they will apply in different transaction scenarios<sup>17</sup>. Purchasers of works of art do not understand why the art intermediaries must perform such enhanced KYC when purchases in other sectors for higher amounts are not subject to the same ‘invasive’ (in their perception) questions. We ask that these practical issues, which are genuinely problematic for the art market when implementing AMLD5, should be considered as part of a consultation dialogue.

In AMLD1, 2, 3 and 4 the trade in artworks was not mentioned, neither was it included in the Commission’s proposed amendments in document *COM (2016) 450 final* that have led to AMLD5. The

<sup>10</sup> Rand Corp, May 2020 *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, Constructing a Global View of the Antiquities Trade, page 16

<sup>11</sup> Rand Corp, May 2020 *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, Online auction markets, page 73

<sup>12</sup> Rand Corp, May 2020 *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, Summary, page 85

<sup>13</sup> European Commission: *Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU*, June 2017, page 120: Figure 30: This shows that no evidence exists of terrorist financing activities within the EU from the trade in cultural goods.

<sup>14</sup> *The Ecorys Report Illicit Trade in Cultural Goods in Europe*

<sup>15</sup> World Customs Organisation’s *Illicit Trade Report 2018*, page 9: Figure 1

<sup>16</sup> AMLD5, Article 2, 3 (i) and (j)

<sup>17</sup> CINOA can provide specific examples on the problems related to the AMLD5 scope, terms and art market transaction scenarios

addition of “*persons trading or acting as intermediaries in the trade of works of art*” (that are now part of the Action Plan consultation) were added as obliged entities at the last minute to the AMLD5 by the European Parliament, without any prior consultation with the trade and without an impact assessment. As the proposed regulation will now be subject to a thorough impact assessment, we are more confident that the impact on microbusinesses such as ours will now be taken into consideration.

### ***3. Art sector micro/ small businesses are unable to fulfil the same obligations as large financial institutions***

We argue that the current measures within AMLD5, and also if they are to become part of a regulation, are disproportionate. It is unreasonable to expect art intermediaries to fulfil complex, and potentially costly, compliance roles designed for financial institutions. Because many transactions fall below the threshold, many dealers would only have to apply these extra measures and procedures infrequently, however, art intermediaries businesses, as obliged entities, must be prepared to adhere to the new obligations when the threshold is crossed. Therefore, staff must be trained, or new staff must be hired, procedures must be in place, either in house or outsourced, to immediately fulfil obligations should a sale, or linked sale, reach the threshold. The practicalities of these obligations require dedicated resources and an adequate infrastructure to implement them, neither of which most micro business have available.

### ***4. Financial institutions already complete due diligence checks on transactions involving the sale of works of art***

When art dealers buy and sell works of art, payment is done through financial institutions such as banks and payment services. Those financial institutions are far better placed than micro enterprises and small shopkeepers are to carry out the due diligence checks on the parties involved. Financial institutions often have sophisticated software, complex reporting systems, and employ large numbers of compliance staff to fulfil the necessary checks.

### **Conclusion**

CINOA, as representatives of the largest group of art and antique dealers in the EU, appreciates the opportunity to participate to the new EU AMLR Consultation. We support the European Commission's efforts and controls to safeguard the EU market against any financial and non-financial criminal activity when these actions are reasonable and proportionate. However, we believe that **art intermediaries should not be obliged entities in the AMLR** and the **additional regulatory burdens** this imposes, and which place the same obligations on financial institutions as on small non-financial actors, **risk irretrievably endangering the art market**. The risk is a loss of sales of works of art, less promotion of works of art, ultimately leading to less preservation and a loss of tangible movable culture.

**CINOA members have been applying for years the anti-money laundering obligations concerning payments in cash and art dealers are already obliged to report suspicions** regarding possible illicit funding. These obligations are also reflected in the CINOA Code of Ethics. Our members now are, for the first time, required to comply with the same anti-money laundering obligations as any large financial institution and these additional requirements have **detrimental consequences that might put at risk the survival of hundreds of micro and small businesses**. We therefore call for a **cautious, proportionate approach** in the process amending AML legislation.

We wish to be active in any consultations and dialogues regarding new measures affecting our important sector and the role of promoting, preserving and protecting movable cultural heritage. We are keen to illustrate in detail all aspects of the art business and discuss them with you.

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