

ANTI-MONEY LAUNDERING REGULATIONS AND THE ART MARKET

***EU, US, AND UK COMPARATIVE
STUDY BY JURISDICTION***

Last Updated: July 28, 2022

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INTRO

In 2018, the European Union ('EU') enacted the 5th Anti-Money Laundering ('AML') Directive ('Directive'). This brought the art world under the regulatory purview of the EU's anti-money laundering regulations. Although the EU has sought to prevent money laundering across the European community since 1990, this specific move was sparked by the rise in terrorist attacks across Europe in 2010s, and several reports detailing links between terrorist financing and art AML.

Member states are required to enact legislation to bring directives into force in their own countries. This system allows for member states to tailor directives to their own context, creating scope for diversity in implementation. In this case, the 5th AML directive had to be enacted into national legislation by 10th January 2020.

That in mind, this report is the first ever guide on differing Art AML practices across EU member states and the UK following enforcement of the 5th Directive. For comparison and to heighten the report's comprehensiveness, the US approach has also been included. This report is not to be taken as legal advice. Instead, it comprises detailed survey responses from leading Art Law experts in 14 jurisdictions on Art AML regulations in their nation. This includes applicable laws, whether NFTs are included in the legislation and differing sanctions. Its aim is to shed greater light on the variety of Art AML laws, as well as raise greater awareness on Art AML and the implications for art market participants across Europe and the wider world.

The Center for Art Law is grateful for the co-operation of all participants and is excited to see how the Art AML landscape continues to evolve.

Poppy Kemp

Center for Art Law
Post-Graduate Fellow 2022

ABOUT US

Center for Art Law is a Brooklyn-based nonprofit that offers educational resources and programming for the advancement of a vibrant arts and law community.

Created in 2009 as an online resource, the Center evolved into a reputable and respected organization that provides learning opportunities to a worldwide community. Today, the Center is the only independent art law entity in the United States dedicated to writing, gathering, and sharing law and visual arts information for the benefit of artists, students, lawyers, academics, and many more.

Our main outreach is through our website where we publish articles, provide insights, and aggregate art law resources, including law firms, educational courses, books, films, artists' assistance, and bar associations. Our Case Law Corner provides summaries of recent and ongoing art law litigation. Since 2009, we have published over 1,000 articles and dozens of resource pages that have become a repository of information.

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AUSTRIA

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INTRODUCTION TO AUSTRIA'S ART AML REGULATIONS

1 There is no uniform AML act in Austria. Instead, individual regulations can be found in various laws. The most important

1.1. Section 165 of the Criminal Code (Strafgesetzbuch)

The Austrian Criminal Code defines money laundering as (i) the concealment of the illegal origin of proceeds from certain criminal activities, the so-called predicate offences (in particular theft, drug trafficking and fraud) and/or

(ii) knowingly taking possession of, holding, investing, managing, converting, realizing or transferring to a third party assets that originating from a predicate offence committed by a third party.

Money laundering is a criminal offence, punishable by up to three years in prison. If money laundering is committed with assets amounting to more than EUR 50.000,00 or as member of a criminal organisation it is punishable with one to ten years in prison.

First entry into force: 01.01.1975 Last amendment: 01.09.2017

1.2. Financial Markets Anti-Money Laundering Act (Finanzmarkt-Geldwäschegesetz)

With the implementation of the 4th Money Laundering Directive in Austria, the regulations on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing for credit and financial institutions were combined for the first time in one law, the Financial Market Anti-Money Laundering Act (Finanzmarkt-Geldwäschegesetz), which gave the financial market supervisory authority a uniform and clear legal basis for its supervisory activities. The Financial Market Money Laundering Act is applicable to credit and financial institutions as well as to service providers in relation to virtual currencies.

First entry into force: 15.01.2018
Last amendment: 28.05.2021

1.3. Beneficial Owner Registry Act (Wirtschaftlicher Eigentümer-Registergesetz)

The beneficial owner register was established for the purposes of preventing money laundering and terrorist financing. Implementing Articles 30 and 31 of the 5th Money Laundering Directive a

central register has been established in which the beneficial owners of companies are entered. A beneficial owner is - in short - a natural person who ultimately owns or controls a legal entity.

The identification of beneficial owners aims at making it more difficult for natural persons engaged in money laundering to anonymously participate in economic activities with criminally obtained assets. To this end public limited companies, limited liability companies, associations, foundations and trusts are inter alia obligated to report their beneficial owners to the register.

In addition, according to the entities concerned must verify and if necessary update their entry in the beneficial owners register at least once a year.

First entry into force: 15.01.2018

Last amendment: 22.01.2021

1.4. Sections 365m et seqq. Trade Act (Gewerbeordnung)

Implementing the 4th and 5th AML EU-Directives the Austrian Trade Act obligates certain persons/entities to conduct anti-money laundering measures. The provisions in the Trade Act place great emphasis on the principle of «know your customer», which is intended to prevent money laundering and deprive money launderers of the advantage of anonymity, through risk analysis, identification of customers, monitoring, reporting and record keeping obligations.

First entry into force: 18.07.2017

Last amendment: 22.07.2020

1.5. Gambling Act (Glücksspielgesetz)

The Gaming Act also provides for measures to prevent money laundering and terrorist financing. In addition to the obligation to identify customers, further measures include, mandatory employee training, the preparation of a risk analysis, the implementation of a system for reporting to the Money Laundering Reporting Office, etc. However, these appear to be of little relevance to art market participants.

First entry into force: 01.01.1990

Last amendment: 06.08.2020

1.6. Sections 8a-8f of the Lawyers act (Rechtsanwaltsordnung) and sections 36a-36f of the Notaries act (Notariatsordnung)

In order to prevent money laundering and terrorist financing transactions from being conducted through a lawyer or notary, every lawyer and notary is obliged to observe general due diligence obligations relating to the organization of the lawyer's office. In addition, the lawyer is subject to special due diligence obligations (eg identification of client, verification of source of funds, reporting suspected money laundering), if and when conducting or advising on transactions with a high risk of money laundering for a client. These transactions are:

- buying or selling real estate or businesses,
- managing money, securities or other assets,
- opening or managing bank, savings or securities accounts; or
- establishing, operating, or managing trusts, corporations, foundations, including raising the necessary funds.

First entry into force: § 8a-8c RAO: 29.10.2003, § 8d-f RAO: 29.12.2007, § 36a-36c NO: 29.10.2003, § 36d-f NO: 29.12.2007

Last amendment: §§ 8a, 8b, 8d RAO: 22.03.2020, § 8c RAO: 01.04.2020, § 8e RAO: 26.06.2017, § 8f RAO: 16.09.2017, § 36a, 36c NO: 01.08.2019, § 36b, 36d NO: 22.03.2020, § 36e NO: 26.06.2017,

2 EU law

In this context, it should be noted that regulations are directly applicable in Austria and directives must be transposed into national law. The relevant EU legal acts concerning AML are the following:

2.1. Money Transfer Regulation (EU) 2015/847

This regulation determines the transmission and verification of certain information on the payer and payee in payment transactions and applies from 26 June 2017. The aim is to ensure that money transfers can be fully traced.

Entry into force (EU): 25.06.2015

2.2. Directive (EU) 2015/849 (4th AML Directive)

The directive aims to prevent the use of the financial system for the purpose of money laundering and terrorist financing. It was published in the Official Journal of the EU on 5 June 2015 and had to be implemented into national law by 26 June 2017.

Entry into force (EU): 25.06.2015

2.3. Directive (EU) 2018/843 (5th AML Directive)

Amending the 4th AML Directive, the 5th AML Directive was published in the Official Journal of the EU on 19 June 2018 and was to be implemented until 10 January 2020. The implementation in Austria has been carried out through the EU Financial Amendment Act 2019 (EU-Finanz-Anpassungsgesetz) which amended several Austrian laws, Federal Law Gazette I No. 62/2019.

Entry into force (EU): 09.07.2018

WHO ARE AMPS?

Art Galleries, Art Dealers, Auction Houses, Freeports. The AML rules as applicable to the art trade do not provide for exemptions for certain institutions or persons.

HOW DOES THE AML REGIME APPLY TO AMPS IN YOUR JURISDICTION?

According to Section 365o Trade Act the AML regime (ie due diligence requirements etc) for Art market participants applies

- 1 If and when a business relationship is established [the term "business relationship" is meant to cover a relationship that is established for a longer time period], or
- 2 If and when occasional transactions of or exceeding EUR 15.000,00 are carried out, whether or not the transaction is carried out in a single operation or in several operations that appear to be linked, or
- 3 In case of persons/entities trading in works of art or persons/entities acting as intermediaries in art trading, including art galleries and auction houses, if and when the transaction or several linked transactions amounts/amount to or exceeds/exceed EUR 10.000,00 (cash or non-cash), or
- 4 In case of persons/entities storing works of art, trading in art works or acting as intermediaries in art trading, if this operation is conducted through a free port, if and when the transaction or several linked transactions amounts to or exceeds EUR 10.000,00 (cash or non-cash), or

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In case of suspicion or substantiated reason to believe that the client participates in transactions, which serve the purpose of laundering money (as defined by Section 165 Criminal Code), or

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In case of reasonable doubt about the authenticity or adequacy of customer identification data.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

If the AML regime of the Austrian Trade Act applies, pursuant to Section 365p Trade Act the following due diligence measures must be carried out:

- Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source (eg ID, passport).
- Identifying the beneficial owner of the business partner and taking reasonable measures to verify that person's identity, taking reasonable measures to verify the ownership and control structure of the customers (eg excerpt of beneficial owner register, corporate register extract).
- Conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the concerned person's/entity's knowledge of the customer, including where necessary the source of funds and ensuring that the documents, data or information held are kept up to date.
- The person/entity concerned must also verify that any person purporting to act on behalf of the customer is authorised to do so.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

I. Politically Exposed Persons

If and when the customer/business partner or the beneficial owner of the customer/business partner is

- (i) a politically exposed person (short "PEP") or
 - (ii) a relative of a PEP or
 - (iii) a person, known to be closely associated with a PEP,
- enhanced due diligence requirements apply. Pursuant to Section 365n Trade Act the persons under items (i) to (iii) are defined as follows:

1 Definition: Politically exposed person

A natural person who holds or has held important public office, which includes, but is not limited to:

- Heads of State, Heads of Government, Ministers, Deputy Ministers and Secretaries of State;
- Members of Parliament or members of similar legislative bodies;
- Members of the governing bodies of political parties;
- Members of supreme courts, constitutional courts or other high courts whose decisions, except in exceptional circumstances, are no longer subject to appeal;
- Members of courts of audit or of the governing bodies of central banks;
- Ambassadors, chargés d'affaires and high-ranking officers of the armed forces;
- Members of the administrative, management or supervisory bodies of state-owned enterprises;
- Directors, deputy directors and members of the governing body or a comparable position with an international organization;

None of the public functions referred to above include functionaries of middle or lower rank;

2 Definition: Relative of a PEP

- the spouse of a politically exposed person or a person equivalent to the spouse of a politically exposed person,
- the children of a politically exposed person and their spouses or persons equivalent to the spouses,
- the parents of a politically exposed person;

3 Definition: Persons, known to be closely associated with a

- natural persons known to be joint beneficial owners of legal entities or legal arrangements with a politically exposed person or to have other close business relations with a politically exposed person;
- natural persons who are the sole beneficial owner of a legal entity or legal arrangement known to have been established de facto for the benefit of a politically exposed person;

II. Other Risk factors

Annex 8 to the Trade Act provides a non-exhaustive list of factors

1 Risk factors concerning customers:

- Exceptional circumstances of the business relationship,
- Customers located in high-risk geographical areas as defined in item 3,
- Legal entities or legal arrangements serving as instruments for private asset management,
- Companies with nominal shareholders or shares issued as bearer instruments,
- Cash-intensive enterprises,
- Ownership structure of the company that appears to be unusual or overly complicated given the nature of the business,
- The customer is a third country national applying for residence rights or citizenship of a Member State in exchange for the transfer of capital, purchase of real estate or government bonds or investment in companies in that Member State;

2 Risk factors concerning transactions:

- Banks with retail banking operations,
- Products or transactions that could encourage anonymity,
- Business relationships or transactions without personal contacts and without certain security measures, such as electronic means for establishing identity, relevant trust services as defined in Regulation (EU) No. 910/2014 or other secure means of identification at a distance or by electronic means as defined in Section 6 (4) FM-GwG,
- Receipt of payments from unknown or unrelated third parties,
- New products and new business models including new distribution mechanisms as well as use of new or developing technologies for new or existing products,
- Transactions relating to oil, weapons, precious metals, tobacco products, cultural goods and other articles of archaeological, historical, cultural or religious significance or of exceptional scientific value, as well as ivory and protected species.

3 Geographic Risk Factors

According to annex 8 of the Trade Act geographic risk factors may include transactions with residents of:

- countries whose financial systems do not have sufficient structures to combat money laundering and terrorist financing according to credible sources (e.g. mutual evaluations, detailed evaluation reports or published follow-up reports),
- countries where corruption or other criminal activities are significant according to credible sources, countries against which, for example, the Union or the United Nations has/have imposed sanctions, embargoes or similar measures,
- countries that support terrorist activities financially or otherwise or in which known terrorist organizations are active.

A credible source on high-risk countries is the Financial Action Task Force (FATF) established by the G-7 member states. FATF regularly publishes reports and lists of countries falling into the high/higher risk

III. Enhanced due diligence requirements ([w.fatf-gafi.org/countries/](http://www.fatf-gafi.org/countries/)).

The person/entity concerned must assess the risk factors for each individual transaction taking into account the risk factors above. If one or more risk factors are present, enhanced due diligence requirements must be implemented in addition to the general due diligence requirements set out in section 365p of the Trade Act.

1 Transactions with Politically exposed persons (PEPs)

According to Section § 365s para 1 of the Trade Act the person/entity concerned shall:

- have appropriate risk management systems in place, including risk-based procedures, to determine whether the customer or the beneficial owner of the customer is a politically exposed person.
- in the case of business relationships with politically exposed persons, the consent of senior management has to be obtained before entering into or continuing business relationships with such persons,
- take reasonable steps to identify the source of assets and funds used in business relationships or transactions with such persons; and
- subject the business relationship to enhanced ongoing monitoring.

3 Transactions in which high-risk countries

According to Section § 365s para 8 Trade Act the person/entity concerned shall:

- obtain additional information about the customer and the beneficial owner(s); obtain additional information about the type of business relationship sought;
- obtain information on the origin of funds and the origin of the assets of the customer and the beneficial owner(s);
- obtain information on the reasons for the transactions envisaged or carried out;
- obtain approval from senior management for the creation or continuation of the business relationship;
- increase monitoring of the business relationship through more frequent and better-timed checks and by selecting transaction patterns that require further review.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

According to Section 365y of the Trade Act copies of the documents and information necessary to comply with the due diligence (see above) must be kept for five years after the end of the business relationship with the customer, or after the date of an occasional transaction. Also the records of transactions, consisting of the original documents or copies necessary to identify transactions, must be kept for five years after the end of the business relationship with the customer, or after the date of an occasional transaction.

WHAT REPORTING REQUIREMENTS APPLY?

According to Section 365t of the Trade Act the entity/person concerned has to fully cooperate with the Money Laundering Reporting Office (Interior Ministry) by immediately informing the Money Laundering Reporting Office on its/his own initiative by means of a suspicious activity report if it/he becomes aware of, suspects or has reasonable grounds to suspect that:

- An attempted, imminent, ongoing or already completed transaction is related to assets derived from a criminal act enumerated in Section 165 (Money laundering) of the Criminal Code (including assets derived from a criminal act committed by the perpetrator himself)
- A component of property derives from a punishable act enumerated in Section 165 (Money laundering) of the Criminal Code (including components of property deriving from a punishable act of the perpetrator himself), or

- The attempted, imminent, ongoing or already completed transaction or the asset component is related to a criminal organization pursuant to Section 278a of the Criminal Code, a terrorist organization pursuant to Section 278b of the Criminal Code, a terrorist offense pursuant to Section 278c of the Criminal Code or terrorist financing pursuant to Section 278d of the Criminal Code.

All suspicious transactions, including attempted transactions, must be reported. The suspicious transaction report shall be submitted in a common electronic format using the secure communication channels established by the Money Laundering Reporting Office. A standardised notification template has to be completed and e-mailed to the following address: A- FIU@bmi.gv.at.

The entity/person shall, where applicable, require its managerial staff and employees to do so. The entity/person shall provide the Money Laundering Reporting Office with all required information directly upon request.

The entity/person shall have adequate procedures for its employees to report violations internally through a dedicated, independent and anonymous channel that is proportionate to the nature and size of the entity/person involved.

An entity/person shall not carry out transactions that the entity/person knows or suspects are related to money laundering or terrorist financing until the entity/person has completed the action required under Section 365t and complied with any other special instructions issued by the Money Laundering Reporting Office.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

Entities/persons obligated by Section 365t (aware of, suspects or has reasonable grounds to suspect money laundering) must immediately inform the Money Laundering Reporting Office on their own initiative by means of a suspicious activity report. A standardised notification template has to be completed and e-mailed to the following address:

A-FIU@bmi.gv.at. The Money Laundering Reporting Office has to decide within 24 hours whether the transaction can take place or not. In the latter case, the Money Laundering Reporting Office has to issue a legally binding order, stipulating whether for purposes of the investigation the client can only be informed after five days.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

Pursuant to § 366 of the Trade Act failing to comply with AML provisions in the Trade Act is sanctioned as follows:

up to EUR 20.000 for failing to comply with anti-money laundering provisions of the Trade Act, up to EUR 30.000 for failing to provide a suspect notification or requested information to the Money Laundering Reporting Office,

up to EUR 1 Mio or double the profit gained from the violation (if the amount can be quantified), in case of severe, repeated or systematic violations of anti-money laundering provisions of the Trade Act.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

There is a general guidance on the application of the AML requirements (Link: https://www.rakwien.at/userfiles/file/20200504_Geldwaesche_Leitfaden_inklAnhang.pdf) by the Austrian Bar Association (RAK; Link (German).)

A summary of AML in commercial (Link: <https://ratgeber.wko.at/geldwaeschebekaempfung/>) Law by The Austrian Federal Economic Chamber (WKO) and a practice-oriented FAQ concerning AML (Link: https://www.bmdw.gv.at/dam/jcr:08e3296a-3b3d-4845-90c6-ce4a956a2a41/Geldw%C3%A4sche_Fragen_und_Antworten_f%C3%BCr_die_Praxis_2020.pdf) by the Federal Ministry for Digital and Economic Affairs (BMDW)

Answers provided by Dr Peter M. Polak, Partner, Polak & Partner Rechtsanwälte GmbH.

INTRODUCTION TO BELGIUM'S ART AML REGULATIONS

The Belgian law enacting the 5th Directive came into force on 20th July 2020 ('the Law'). This came into force on 15th August under the condition precedent of the publication of a Royal Decree introducing applicable codes for registering as an art market participant. Registering as an art market participant had, according to the Royal Decree, to occur at the latest on 1 January 2022. The Law applies therefore, de facto, on art transactions entered into since 1 January 2022.

WHO ARE AMPS?

Art Galleries, Art Dealers, Auction Houses, Freeports, Private museums (case-by-case assessment required). Artists and public museums are excluded.

HOW IS A 'WORK OF ART' DEFINED?

The Law refers to 'works of visual art'. Whether such works are digital or not is not relevant for purposes of the Law. As the notion 'works of visual art' is defined by referencing the copyright rules, the key question is whether the digital work is sufficiently original in the meaning of the copyright rules.

An NFT has more features of a certificate of ownership. In the case of copyright, the creator is the owner of the copyright in that particular work. If you purchase an NFT, you obtain the beneficial ownership of the NFT and not the copyright to the underlying artwork. An NFT is, as a rule, not a «work of visual art», within the meaning of copyright rules; not even a copy of an artwork. It is a tokenized version of a digital work and therefore, as a rule, not covered by copyright and not subject to the Law.

HOW DOES THE AML REGIME APPLY TO AMPS IN YOUR JURISDICTION?

In terms of the personal scope of the Law, the rules applies to all natural or legal persons who buy and sell or act as intermediaries in the trade of artworks or movable property more than fifty years old, when the sale price of one or all of these works or property is equal to or greater than EUR 10,000 and who are registered with the Federal Government (Service Economy, SMEs, Self-Employed and Energy).

The tiebreaker to determine whether a person falls under the anti-money laundering rules is the existence of an actual trading activity on a regular basis in artworks. It is not sufficient that a person sells (artists) or acquires (museums) artworks. A Royal Decree introduced an identification requirement for the natural or legal persons who are targeted by the Law. The targeted art market participants should register at the crossroad bank of enterprises, by using the corresponding Nacebel-code for their trading activity. This identification requirement is necessary to give the Financial Intelligence Unit, who is the supervising authority, the certainty that it has the legal authority to take knowledge of suspicions of money laundering that are reported to it. Save for the registration under the correct Nacebel-code, no other proof of professional reliability (e.g. diplomas, accreditations, etc.) is required for identification.

In terms of the material scope of the Law, the term «artwork» means an original work of art as defined in Article XI.175, § 1, second and third paragraphs, of the Economic Code provided the sale price of one or all of these works or goods is equal to or greater than 10,000 euros. The law does not define the term «all of these», so that it is not clear whether the works of art must form an artistic whole or whether the joint purchase of works of art that do not form an artistic whole also fall within the scope of the law.

Note that NFTs are not explicitly mentioned in Belgian AML regulations. Case law concerning their inclusion is not yet available.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

The anti-money laundering law provides for a risk assessment whereby art market participants must tailor their client and transaction due diligence in proportion to the purpose of the relationship or transaction, the size of the financial transaction or relationship and the degree to which the business relationship or a transaction poses a low or high risk. The annexes to Law provide some comfort to determine whether a relationship or transaction has a low or high risk. The Federal Government issued specific guidance relating to the due diligence for galleries, auction houses and dealers.

The different art market federations are invited to submit a tailor-made AML procedure to be approved by the Federal Government. If they choose to do so, their members are presumed to be in compliance with the Law.

If no approval is sought from the Federal Government, irrespective of high or low risk, an art market participant must at least identify the client and verify his identity as well as obtain information regarding the purpose and nature of the relationship or transaction. The information should be obtained prior to or at the moment of the signing of the transaction documents. The identity of the client is the sole information that should be documented (UBO, ID, passport, etc.). The Law allows that information regarding the risk profile of the transaction is obtained through contractual representations and warranties (e.g. no agency, no third party payments, no conflict of interest, etc.). That said, if it results from the client or transaction due diligence that the risk of anti-money laundering is high, the art market participant should show a heightened attention that the sources of information relied on provide him/her with a high degree of certainty about the legality of the transaction and identity of the client involved.

In the latter case, legalization of documents relating to client identity or written proof of the different elements of the transaction due diligence (e.g. proof of wealth) should ideally be available.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Yes, they are specified in Annex III of the Law.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Identification data, a written record of the due diligence relating to the detection of atypical transactions and a copy of the supporting documents and records of transactions, which are necessary for the identification and accurate reconstruction of the transactions carried out, shall be kept for ten years from the end of the business relationship with their client or from the date of an occasional transaction.

WHAT REPORTING REQUIREMENTS APPLY?

Art market participants shall report to the Financial Intelligence Unit when they know, suspect or have reasonable grounds to suspect that funds, regardless of their amount, are related to money laundering or terrorist financing or that transactions are related to money laundering or terrorist financing. Reporting shall be done by way of a written report of the due diligence investigations. The Law does not specify the detailed modalities of the report. E-mail correspondence between buyer, seller and their professional advisors could therefore constitute sufficient proof of a due diligence investigation.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

Financial Intelligence Unit («Cel voor Financiële Informatieverwerking»).

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

Administrative fines (up to 1.250.000 EUR) and criminal sanctions (from 150 EUR to 5000 EUR).

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

There are no governmental guidelines.

Answers provided by Oliver Lenaerts, Esq., Contour.

INTRODUCTION TO BULGARIA'S ART AML REGULATIONS

Bulgaria's AML regulations are contained in the Measures Against Money Laundering Act (MAMLA) which came into force on 27th March 2018.

WHO ARE AMPS?

Art Galleries, Art Dealers, Auction Houses.

WHO ARE ART MARKET PARTICIPANTS?

According to art. 4 of the MAMLA

- a) persons that, by way of their business, are trading or acting as intermediaries in the trade in works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or of the linked transactions amounts to or exceeds EUR 10,000 or the equivalent thereof in another currency; and
- b) persons that, by way of their business, are storing, trading or acting as intermediaries in the trade in works of art when this is carried out in free zones and where the value of the transaction or of the linked transactions amounts to or exceeds EUR 10,000 or the equivalent thereof in another currency; are considered «obliged entities» and must comply with the AML measures envisaged in MAMLA.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

An AMP in the trade of a work of art has an obligation to carry out client due diligence on its customer and on any ultimate beneficial owner of the customer.

Art market participants must identify the physical person who they are dealing with in any transaction or, when dealing with a corporate body or a trust, the person or persons who control that entity. These are the same due diligence requirements that apply to banks and other persons in the regulated sector.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Yes, for example

- (1) PEPs (politically exposed persons in the Republic of Bulgaria, in another Member State or in a third country, or in international organisations, as well as potential customers, existing customers and beneficial owners of a customer which is a legal person or other legal entity who are closely linked with any such PEPs);
- (2) clients who are registered in high AML risk countries (with strategic AML deficiencies etc.)
- (3) in general - «suspicious» clients and transactions.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

The obliged entity shall retain all documents, data and information collected and prepared for AML purposes for a period of 5 (five) years.

WHAT REPORTING REQUIREMENTS APPLY?

When it comes to legal entities, internally, suspicious clients/transactions or any AML concerns can be reported/addressed to the responsible persons - Manager, compliance officer, legal team etc.

Where there is a suspicion and/or awareness of money laundering and/or of involvement of proceeds of criminal activity, the obliged entity must notify promptly the Financial Intelligence Directorate of the State Agency for National Security before the operation or transaction is conducted and to delay the conduct of the said operation or transaction within the time allowed in accordance with the statutory instruments governing the type of activity concerned. In the notification, the obliged entity shall state the maximum period of time for which the operation or transaction can be deferred. Where the obliged entity becomes aware of money laundering or that the proceeds of criminal activity are involved, the said entity shall furthermore notify the competent authorities according to the Criminal Procedure Code, the Ministry of the Interior Act and the State Agency for National Security Act.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

As above.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

If an obliged entity fails to comply with its obligations under the MAMLA, unless the act constitutes a criminal offence, it shall be liable to:

1. a fine of BGN 1,000 or exceeding this amount but not exceeding BGN 10,000, where the offender is a natural person;
2. a pecuniary penalty of BGN 2,000 or exceeding this amount but not exceeding BGN 20,000, where the offender is a legal person or sole trader;

Sanctions elevate upon a repeated violation and in case of systematic violations - may be up to millions.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

State Agency for National Security.

Answers provided by Dilyana Bozhkova, Deputy AMLCO at Deloitte Bulgaria.

INTRODUCTION TO CROATIA'S ART AML

Croatia's legislation on AML is contained in Anti Money Laundering and Terrorist Financing Act (OG 108/2017, 39/2019; 151/2022, AMLTFA). Anti-money laundering regulations have been in place in Croatia since 1997.

WHO ARE AMPS?

- the Persons performing activities of trade or brokerage related to trade of works of art and antiques (including art galleries and auction houses when performing such activities) as well as any person performing such activities including works of art and antiques storage activity in free zones are required to implement certain measures, actions and procedures determined by AMLTFA before and/or during each transaction (individually or more mutually connected) worth EUR 10.000.

This includes Art Galleries, Art Dealers, Auction Houses.

No institutions or person are explicitly excluded, but AML rules prescribed in AMLTFA apply specifically for transaction or mutually connected transactions worth at least EUR 10.000 when these performing activities of trade or brokerage related to trade of works of art and antiques (including art galleries and auction houses when performing such activities) as well as any person performing such activities including works of art and antiques storage activity in free

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

- identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a credible, reliable and independent source;
- identifying the beneficial owner of the customer and taking reasonable measures for the verification of the beneficial owner's identity;
- collecting data on the purpose and intended nature of the business relationship or a transaction and other data in line with AMLTFA which will enable an understanding of the purpose and intended nature of the business relationship;
- conducting ongoing monitoring of the business relationship, including scrutiny of transactions the customer carries out during the course of the business relationship.

DO THE AML RULES IDENTIFY 'HIGH

Yes, AML regulations as prescribed in AMLTFA identify customers and transaction as low-risk and high-risk based on:

- (i) variables linked with the customer,
- (ii) variables linked with geographic area and
- (iii) variables linked with products, services, transactions or delivery channels in question.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Assessing each client by filling in certain forms when advising or conducting a transaction to which AMLTFA applies, which consist of:

- a. identification of the client and/or their beneficial owner, legal representatives and proxies;
 - b. assessing whether the client is a politically exposed person or a family member/close to such person;
 - c. risk assessment of the client as elaborate in the answer to the previous question;
 - d. due-diligence of the client and/or transaction in question.
2. Active monitoring of the client's transactions during the duration of the business relationship in order to check whether the transactions correspond to the reporting entity's knowledge of that party, the type of work, the source of funds, the purpose and the intended nature of the business relationship or transactions, which practically means re-conducting due-diligence regarding the client at the frequency corresponding to their assessed degree of riskiness, but preferably not less than once every two years.

WHAT REPORTING REQUIREMENTS

Reporting entities are obliged to inform the Anti-Money Laundering Office of the Republic of Croatia (AMLO):

- about all cash transactions in the amount of EUR 10.000 and more, immediately, or at the latest within three days from the date of execution of the transaction, according to Art 61 AMLTFA;
- about all suspicious transactions, funds and persons according to Art 56 – 60 AMLTFA;
- about all complex and unusual transactions according to Art 53 AMLTFA.

Where can AMPs report suspicions of laundering?

Reporting entities are obliged to inform the Anti-Money Laundering Office of the Republic of Croatia (AMLO):

1. about all cash transactions in the amount of EUR 10.000 and more, immediately, or at the latest within three days from the date of execution of the transaction, according to Art 61 AMLTFA;
2. about all suspicious transactions, funds and persons according to Art 56 – 60 AMLTFA;
3. about all complex and unusual transactions according to Art 53 AMLTFA.

What sanctions apply to AMPs who fail to comply with AML

AMLTFA prescribes misdemeanour sanctions that apply to all reporting entities and that consist of fines whose amount depends on the type and circumstances of the perpetrated misdemeanour. Fines can be imposed based on supervisions carried out by the competent authorities (the Financial Inspectorate of the Republic of Croatia and the Tax Administration).

Criminal liability may also occur if a certain failure to comply with AMLTFA corresponds to the crime of money laundering or terrorism financing, prescribed in the Criminal Code of the Republic of Croatia, Art 265 and Art 98 respectively, or any other applicable crime.

Answers provided by Jakov Mamic, attorney-at-law/partner from MAMIC GRGIC VINTER attorneys at law LLC (for more information visit <https://www.odmgv.hr/en/> or send e-mail to: jakov.mamic@mamic-grgic.hr and/or office@mamic-grgic.hr)

INTRODUCTION TO FRANCE'S ART AML REGULATIONS

1. French Penal Code (CP):

a) Article L 324-1 of the French Penal Code serves as a general provision that prohibits all forms of money laundering. Money laundering involves either assisting in the unjustified legitimization of the origin of assets or income that belong to the perpetrator of a crime or misdemeanor, or participating in the investment, concealment, or conversion of proceeds derived from a crime or misdemeanor. Money laundering requires having actual knowledge of the fraudulent source of the funds involved.

Penalties for money laundering are determined by articles L 324-2 to L 324-9 of the same code.

b) Other specific provisions within the French Penal Code address money laundering originating from particular activities, including pimping (Article L 225-6 CP), drug trafficking (Article L 222-38 CP), financing terrorism (Article L 421-1 CP), customs violations (Article L 415 CD), fiscal fraud (Article 1741 CGI - tax code), and actions that infringe upon the rights of the European Union.

2. Directive (EU) 2015/849 and Transposition:

Furthermore, Directive (EU) 2015/849, established on 20 May 2015, focuses on the utilization of the financial system for the purpose of money laundering or the financing of terrorism. This directive was subsequently incorporated into national law through Ordinance 2016-1635 issued on 1 December 2016. It was supplemented in October 2018 by a directive introducing measures to combat money laundering through criminal law.

These rules aim to strike a balance between the need to increase security and the protection of fundamental rights and economic freedoms. The amendments have also brought EU legislation into line with international standards drawn up under the FATF.

On March 29, 2023, the ambassadors of the EU member states approved the negotiating mandate for this proposal, which would facilitate access to financial information for national authorities.

3. French Monetary and Financial Code (CMF) Articles L 561-1 to L 561-47 and R 561-1 to R 561-54:

The French Monetary and Financial Code encompasses a range of provisions, specifically Articles L 561-1 to L 561-47 and R 561-1 to R 561-54. These provisions address various aspects of combating money laundering.

4. Dealers Practical Compliance Guide 2013 - Published by the Auction Houses Council (Conseil des Ventes):
The Auction Houses Council (Conseil des Ventes) issued the Dealers Practical Compliance Guide in 2013. This guide serves as a resource for dealers and auction houses, offering practical insights into ensuring compliance with relevant regulations.

5. Customs Code (CD) (Code des Douanes) and Money Laundering in the Context of Customs Offenses (Article L 415):
The Customs Code (Code des Douanes) is applicable to instances of money laundering that arise from a customs offense, as stipulated in Article L 415. This provision establishes a connection between customs-related misconduct and the potential for money laundering. Consequently, art dealers and auction houses may face legal action based on any of these aforementioned provisions.

WHEN DID THE LEGISLATIONS ENTER INTO FORCE?

- Art L 324-1 art L 324-2 à L324- 9 French Penal Code (CP) : Version in force since January 01, 2002
- Directive (EU) 2015/849 of May 20, 2015 on the use of the financial system for the purpose of money laundering or terrorist financing, entered into force by Order 2016-1635 of 1/12/2016.
- Brussels, March 29, 2023 7901/23 (Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2019/1153 of the European Parliament and of the Council, as regards access of competent authorities to centralised bank account registries through the single access point- financial crime): no information on transposition at this time.
- Monetary and Financial Code (CMF) Art. L 561-1 à L 561-47 et R 561-1 à R 561-54 : Version in force since February 01, 2009

WHO ARE AMPS?

- Art Galleries
- Art Dealers
- Auction Houses
- Freeports
- Museums

There exists a fundamental obligation for all individuals to refrain from participating in or facilitating Money Laundering. Under Article L561-2 of the French Monetary and Financial Code (CMF), a comprehensive list is provided, enumerating professionals who are subject to specific obligations in the fight against money laundering. Within the context of art business, this list encompasses:

- Financial intermediaries.
- Art and antiques dealers (number 10).
- Auction Houses (under the surveillance of the Auction Council, as per Article L321-18 of the Commercial Code) (number 14).
- Dealers engaged in transactions involving goods like precious stones, jewelry, watches, furniture, etc. (number 11), particularly when they accept cash payments exceeding €10,000, whether the transaction occurs in a single operation or through multiple operations that appear interconnected.
- Professionals such as lawyers, notaries, and others who function as fiduciary agents or play a role in relevant transactions (number 13).

These designations outline specific sectors that are obligated to actively contribute to the prevention of money laundering.

HOW DOES THE AML REGIME APPLY TO ART MARKET PARTICIPANTS (AMPS) IN YOUR JURISDICTION?

These regulations carry particular relevance to art businesses, as any infringement could potentially result in the imposition of criminal and/or administrative sanctions. It is worth noting, for a thorough perspective, that Article L 112-6 of the French Monetary and Financial Code (CMF) prohibits cash payments exceeding €1,000 for French residents and exceeding €15,000 for non-French residents. This provision underscores the importance of financial transparency and contributes to the overall framework of regulatory compliance.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

The extent of due diligence necessary is contingent upon the type of client relationship, classified as either occasional or professional, the latter indicating an enduring and routine business interaction.

Occasional Customers:

For these instances, client identification and/or determination of the effective beneficial owner is obligatory when the proposed transaction exceeds €15,000 or when the transaction arouses suspicion in terms of money laundering. In the case of individuals, identification involves duplicating an official document with a photograph. In contrast, entities necessitate a trade registry extract not older than three months, outlining the legal name and structure, as well as the names of shareholders and legal representatives. Specific provisions also apply to trusts.

Professional/Business Customers:

Alongside client or beneficial owner identification, additional data and checks are essential based on the level of money laundering risk: normal/standard, low, or high. When confronting a normal risk scenario, auctioneers must not solely identify their customers but also collect information and oversee transactions. The Conseil des Ventes, in its published text on money laundering, provides an illustration of this concept, citing «a regular customer, a recognized collector, who frequently consigns goods for sale or purchases items at their organized auctions.» No specific due diligence is mandated for low-risk clients such as banks, insurance companies, regulated stock exchange-listed companies, or similar institutions domiciled in France, the EU, or EEE.

For situations involving standard risk (as outlined in Article L 561-6), supplementary due diligence necessitates investigating the client's background before and during the business relationship (including profession, asset and wealth level, estimated income, etc.), along with transaction monitoring. Compliance procedures must ensure that transactions consistently align with the client's activity and history.

In instances of high risk (refer to Article L 561-10-2 and Regulation R 561-20), enhanced due diligence is mandatory. This entails confirming the client's identity through supplementary documentation (like certification from an independent third party), scrutinizing the source and destination of funds, identifying the

transaction's purpose and the beneficiary of funds.

Article L. 321-18 of the French Commercial Code entrusts the Conseil des ventes with the task of verifying that the parties concerned comply with the above obligations.

DO THE AML RULES IDENTIFY HIGH RISK CATEGORIES OF CUSTOMERS/ BUSINESS PARTNERS/ TRANSACTIONS?

Yes. Two categories of customers are classified as high risk:

- Client Absence for Identification (No face-to-face relationship): When the client or their legal representative cannot be physically present for identification purposes, thereby lacking a face-to-face interaction, they fall under the high-risk category.
- Politically Exposed Persons (PEPs): Clients who are or were Politically Exposed Persons (PEPs), with their functions having ceased within the past year, regardless of their residency in France, are considered high risk.

Four types of transactions are also recognized as high risk:

- Extremely Complex and Unusually Large Transactions: Transactions that exhibit exceptional complexity or unusually large sums are classified as high risk.
- Transactions Enabling Anonymity: Transactions that possess the potential to facilitate anonymity are flagged as high risk.
- Unusual Patterns of Transactions without Apparent Justification: Any transactions involving unusual patterns that lack apparent lawful purpose or economic rationale are identified as high risk.
- Transactions Involving High-Risk Third-Countries: Transactions conducted with individuals or entities domiciled or registered in third-party countries designated as high risk by the EU Commission, as specified in the established list, are categorized as high risk.

In these particular scenarios, enhanced due diligence measures are mandatory (as specified in Article L 561-10-2), as discussed earlier.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Records related to Know Your Customer (KYC) and Know Your Transaction (KYT) procedures must be maintained within France for a duration of 5 years following the conclusion of a business association with a customer or after the occurrence of an occasional transaction.

WHAT REPORTING REQUIREMENTS APPLY?

Auction houses and art dealers are obligated to promptly and autonomously submit a suspicious activity report (*déclaration de soupçon*) to TRACFIN under two specific circumstances, as outlined in Article L561-15 of the French Monetary and Financial Code (CMF). This requirement applies when they possess knowledge, suspicion, or reasonable grounds to suspect that either assets or transactions are linked to the proceeds of a felony punishable by imprisonment of one year or more, or are associated with terrorism financing or fiscal fraud. This reporting responsibility is applicable if money laundering is being perpetrated, has been committed, or an attempt has been made.

This obligation is not subject to any financial threshold, ensuring the inclusion of fragmented operations within a larger fraudulent scheme. Furthermore, no concrete evidence is mandatory at this stage of reporting.

The submission of such reports is preferably done before the transaction takes place; however, it is also admissible to report subsequently, particularly if the funds used for the transaction seem to have a fraudulent origin. Generally, reporting is executed in written form, supplemented by supporting documentation. Nonetheless, oral statements can also fulfill this requirement. These reporting obligations are confidential and must not be disclosed to clients.

WHERE CAN AMPS REPORT SUSPICIONS OF MONEY LAUNDERING?

Instances of suspicious activities or operations are required to be reported to TRACFIN (Traitements du Renseignement et Action contre les Circuits Financiers clandestins) through the submission of a statement of suspicion (*déclaration de soupçon*). This responsibility falls upon the «reporting person» (*déclarant*), a designation made within the operational entity responsible for reporting.

Furthermore, the operational entity should appoint a «corresponding person» (*correspondant*) who serves as the primary contact for TRACFIN. This individual is responsible for addressing inquiries, conveying TRACFIN's instructions and recommendations to the entity's staff, and facilitating communication.

The reporting person and the corresponding person can be the same individual, and both are required to hold a high-ranking position within the entity's hierarchy.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML

Yes. Two categories of customers are classified as high risk:

- Client Absence for Identification (No face-to-face relationship): When the client or their legal representative cannot be physically present for identification purposes, thereby lacking a face-to-face interaction, they fall under the high-risk category.
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In these particular scenarios, enhanced due diligence measures are mandatory (as specified in Article L 561-10-2), as discussed earlier.

ARE YOU CONCERNED ABOUT A CONFLICT IMPOSED BY DATA RETENTION REQUIREMENTS UNDER DATA PROTECTION AND AML LAWS (E.G. THE RIGHT OF ERASURE UNDER EU GDPR VS. THE STRICT REQUIREMENT TO RETAIN DATA AND TRANSACTION RECORDS FOR FIVE YEARS UNDER AML REGULATIONS)?

Partly.

In order to strike the right balance between privacy and data protection, and the fight against money laundering and the financing of terrorism (AML/CFT), a specific legal regime for digital euros must be introduced into European law. In addition to the risk of generalized tracking, the project also includes a ceiling on the number of digital euros held per European. This raises the risk of over-identification of individuals, and could lead to constant checks on balances held. A digital euro that does not respect the principles of necessity and proportionality of data collection and processing would not comply with either the RGPD or Articles 7 and 8 of the European Charter of Fundamental Rights, which concern respect for private and family life and the protection of personal data respectively. Faced with these issues, the CNIL and the EDPS intend to confirm their intention to remain in this debate to prevent the risks identified as early as 2021 from becoming a reality. This was said in a Communiqué de presse, 1er févr. 2023 from the CNIL.

HAVE THE AML REGULATIONS CLARIFIED THE POSITION AS TO DIGITAL WORKS (E.G. IN THE UK "DIGITAL WORKS" ARE NOT CURRENTLY INCLUDED UNDER THE SECTION 21(6) VAT ACT 1994 DEFINITION OF "WORKS OF ART")?

Anti-money laundering rules make no specific reference to digital works.

Nevertheless, under French law, in general, for a work to be considered a work of art, it must meet certain criteria, including originality. This should also apply to digital works.

The French Intellectual Property Code makes no specific

distinction for digital works as works of art. However, it does set out the general criteria for a work to be protected by copyright. To be protected, a work must be original, i.e. the fruit of its author's creativity, and shaped, formatted, into a certain form. Digital works, be they digital paintings, digital sculptures, interactive installations, etc., can certainly meet these criterias, and therefore potentially be considered works of art under French law. Article L112-1, which states that all forms of intellectual creations are protected, regardless of their nature (for example, digital works), Irrespective of their nature or mode of expression. Article L112-2 provides a non-exhaustive list (examples) of what can be considered protected works. Since this is only a non-exhaustive list, digital works are therefore not excluded. However, each case is assessed individually, and there may be legal debates as to whether a specific digital work meets the criteria of originality and creativity necessary to be considered a work of art, and therefore protected by anti-money laundering provisions in the art market.

ARE THOSE WHO DEAL IN NON-FUNGIBLE TOKENS SUBJECT TO THE AML REGULATIONS?

Law no. 2022-267 of February 28, 2022, modernizing the art market, authorizes auction houses to sell NFTs publicly. One can therefore probably consider that NFTs, sold publicly at auction houses like other types of works of art, are subject to anti-money laundering rules.

With the aim of making transactions more reliable, the application of anti-money laundering and anti-terrorist financing rules is not easy for NFTs. Art galleries are subject to customer due diligence obligations; they must identify their customers and, for works of art exceeding 10,000 euros, carry out certain due diligence procedures that can be reinforced by additional due diligence measures in case of doubt. Obligations relating to the supply of virtual assets apply from as little as €1,000. These standards also evolve rapidly in line with European regulations.

BUT: The European Regulation on Markets in Crypto-Assets (MiCA) dated May 31, 2023, has been published in the Official Journal of the European Union of June 9, 2023. The MiCA regulation aims to protect investors and safeguard financial stability, while enabling innovation and promoting the attractiveness of the crypto-asset sector. The text also includes

measures to prevent money laundering, terrorist financing, and other criminal activities. In particular, the European Securities and Markets Authority will be required to set up a public register for non-compliant crypto-asset service providers operating in the European Union without authorization (see Title VII, art. 110). Excluded from the scope of the regulation are non-fungible tokens (NFTs), unless they meet certain criteria set out in the regulation, and crypto-asset services provided on a fully decentralized basis without intermediaries.

IS THERE GUIDANCE ON THE APPLICATION OF THE AML REQUIREMENTS ON THE ART SECTOR (E.G. PROVIDED BY GOVERNMENT OR TRADE BODIES)? IF SO, PLEASE DETAIL BELOW:

- TRACFIN and DGDDI publish guidelines relating to the fight against money laundering and the financing of terrorism (lcb/ft) for persons habitually trading in antiques and works of art may 10, 2019
- TRACFIN BC/FT trends and risk analysis 2019-2020

WHERE CAN AMPS FIND MORE INFORMATION AND ASSISTANCE ON AML? (E.G. ART MARKET FEDERATIONS; GOVERNMENT INSTITUTIONS)

TRACFIN website – www.economie.gouv.fr/tracfin
10, rue Auguste Blanqui
93 186 Montreuil-sous-Bois cedex
Tel 01 57 53 27 00 Fax : 01 57 53 27 91
crf.france[@]finances.gouv.fr

CASE EXAMPLES OR REPORTS ASSOCIATED WITH AML VIOLATIONS IN YOUR ART MARKET JURISDICTION:

- Paris, Pôle 2, Ch. 1, Nov. 27, 2013, RG no. 12/20946: basing its decision on the provisions of the French Monetary and Financial Code, the Paris Court of Appeal handed down a suspended 15-day ban on the practice of voluntary sales to an auction operator. The operator had agreed to sell a painting without knowing the actual identity of the seller.

· Cour de Cassation, Criminal Division, February 1, 2005, 04-81.962, Published in the bulletin: In this case, the owner hoped to convince the judges of his good faith by demonstrating that he had paid by cheque for the works acquired from another gallery owner, and that he had entered the seller's name in a register enabling him to be identified. Far from convincing the judges, this argument enabled them to stigmatize the gallerist's bad faith: the successive and rapid purchases, paid for by cheques, as well as the absence of verification of the origin of the works, were akin, in their haste, to the laundering of works of art. By paying by cheque, the purchaser was not demonstrating his good faith, but simply seeking to protect himself from a possible claim by the owner of a work he undoubtedly knew to be stolen. reprinted in Dalloz action Droit du marché de l'art François Duret-Robert - 2020-2021

Answers provided by Noor Kadhim, Counsel at Fieldfisher.

INTRODUCTION TO GERMANY'S ART AML REGULATIONS

The German anti-money laundering ("AML") legislation, named Geldwäschegesetz ("GwG"), was designed to prevent the misuse of the legal economic system for the purpose of money laundering, terrorist financing and other criminal offences.

WHO ARE AMPS?

Art Market Participants ("AMPs") under the GwG are: art galleries, art dealers, auction houses, freeports, everyone acting as an intermediary in art transactions, or storages, if in a free port. The AML rules do not directly exclude certain institutions or persons, see the definition stated in the GwG: "For the purposes of the GwG, a person acting as an intermediary in the trade of works of art is someone who commercially acts as an intermediary for purchase agreements for works of art, including as an auctioneer or gallery owner."

Under the GwG, a person storing works of art is someone who commercially stores works of art. It is not relevant on whose behalf or on whose account the activity is performed.

AML REGIME APPLIES TO AMPS WHEN THEY:

AMPs are, since the transposition of the 5th European AML directive, explicitly mentioned by GwG. They need to perform a general risk assessment and fulfill general due diligence obligations such as Know Your Customer ("KYC"), as well as, for certain transactions, increased due diligence obligations. This applies to any transaction from EUR 10.000 on, no matter in what way the payment is made or if the payment is split into several tranches. It is part of the due diligence obligations that in cases of doubt, the Financial Intelligence Unit ("FIU") has to be contacted.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

The general due diligence requirements (Section 10 GwG) include in particular:

- identification of the contracting party and, if applicable, of the person acting on his behalf,
- verification of agency relationships (determination of the identity of the beneficial owner if the contractual partner is acting

on behalf of another person),

- obtaining and evaluating information on the purpose and the intended nature of the business relationship - Clarifying whether a politically exposed person ("PEP") is involved (Section 1 (12) GwG contains a list),
- continuous monitoring of business relationships, including transactions. Section 10 GwG also gives details on when and how this has to take place (at a very early stage!).

Then there are more specific requirements regarding certain transactions prescribed Section 14 (lighter requirements) and 15 GwG (heavier requirements for PEPs, certain countries, certain types of transactions, etc.).

DO THE AML RULES IDENTIFY 'HIGH RISKS' OR 'RED FLAGS'?

Yes, e.g. in the case that a transaction is connected to a country with a high AML risk.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Performance of the due diligence has to be well documented; records have to be kept for 5 years from the year the business relationship that gave rise to the obligations ends.

WHAT REPORTING REQUIREMENTS APPLY?

None, unless there is a case of doubt. In such a case the AMP is obligated to report to the FIU as above mentioned. In order to report a suspicious case, everyone must register at the FIU.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

At the FIU. A report to the FIU needs to be well documented and prepared in a short period of time.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

For smaller violations fines up to EUR 100.000. For more heavy violations or repeated violations: fines up to EUR 5 Mio. or 10% of turnover of the past year.

In addition, authorities may publicly disclose breaches of the obligations of the AMP (so called «naming and shaming»).

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

Guidelines by BVDG (trade association for gallerists) which are available for its members.

Answers provided by:

Dr Katharina Garbers-von Boehm, LL.M., Partner, and
Lukas von Gierke, Lawyer
Büsing, Müffelmann & Theye Berlin/Frankfurt/Munich.

INTRODUCTION TO GREECE'S ART AML REGULATIONS

The new Law 4734/2020 came into effect on 10th August 2020. It transposed the 5th Directive into domestic law.

WHO ARE AMPS?

Art Galleries, Art Dealers, Auction Houses, Freeports, Museums. There are no express exemptions. However, AMPs trading or related to Digital Art and NFTs are not currently included in the AML Rules.

What due diligence requirements apply?

- 1) Financial Institutions to keep records — including names and addresses — of those trading art via virtual currency.
- 2) Member States to maintain publicly available database of national Ultimate Beneficial Owners (UBO) registries for all kind of legal entities, including trusts. Banks to establish Bank Accounts Registries to be only accessible by the Authorities.
- 3) Member States to create functional Politically Exposed Persons (PEPs) lists including all titles, roles or functions of them.
- 4) High Value Goods, including Art, are subject to reporting requirements and regulatory enforcement.
- 5) To set limits for monthly transactions via prepaid cards - issued only within the EU, up to €150, with a €50 online/remote limit applicable.
- 6) Companies to perform enhanced due diligence, including Source of Wealth Investigations, when dealing with high risk countries — specifically those identified by the EU as having sub-standard AML regulations and as high-risk for the use of the financial system for money laundering or terrorist financing.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

As above mentioned AML Rules identify the following high risk categories:

- 1) Art traders dealing through virtual currency, particularly for High Value Art Items.
- 2) Complex corporate or trust legal schemes covering the Ultimate Beneficial Owners (UBO).
- 3) Politically Exposed Persons (PEPs).
- 4) Art traders originating from high risk third countries.
- 5) Users of prepaid cards for high value transactions

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Competent persons have the obligation to keep: i) documents and information concerning due diligence obligations, ii) the original invoice and tax documents of the executed transactions, iii) documents of licenses or approvals by the authorities, and iv) business correspondence and exchange of emails with clients.

Notable is the establishment of a centralized automated data retrieval system (Bank Accounts and Payment Accounts Registry System) in order to get timely access to information on the identity of holders of bank and payment accounts and safe-deposit boxes, which are kept within the Greek territory.

WHAT REPORTING REQUIREMENTS APPLY?

Competent persons and/or their employees have the obligation: i) to report to the competent Authorities, when they have serious suspicions or indications that financial transactions are connected with ML or terrorist activities, ii) to provide to the competent authorities all required information and details. Lawyers, Notaries, and Chartered Accountants are exempted from those obligations, in case they have the role of defense or counsel or technical expert in the context of a trial, no matter before or during it.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

Suspicious transaction reporting concerning money laundering or terrorist financing, can be done internally or to the established Greek Financial Intelligence Unit (FIU). Strict measures are taken for the protection of individuals from being exposed to threats, retaliatory or hostile action and adverse or discriminatory employment actions.

The Hellenic FIU is a member of FATF, the FIU-Net and the Egmont Group and files annually its Report with the Commission on Transparency of the Hellenic Parliament, the Ministries of Finance, Justice, Protection of Citizens.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

Failure to comply with AML Regulations implicates the penal prosecution of the involved person for charges grounded on the multiple and heavy penal crimes provided in the Art.39 of the current Law 4734/2020. The condemnation of the involved person implicates incarceration of at least 10 years and financial fine of up to 2.000.000 EUR, in case he commits the money laundering professionally and repeatedly.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

Competent Art and Trade bodies are - most probably - apt to provide guidance on the particular application of AML requirements in the field of art.

The most appropriate advice should be taken by a competent lawyer specialized in the art market and its relevant legal issues.

Answers provided by Stylianos Gregoriou and Eva Gregoriou, Senior Partner & Managing Director at Gregoriou Law Firm.

INTRODUCTION TO ITALY'S ART AML REGULATIONS

Italian legislation has developed in line with international standards and European Directives. The legislative framework for money laundering consists of Legislative Decree 231/2007, which transposed the relevant European Directives (2005/60/EC, (EU) 2015/849 and (EU) 2018/843) and of Legislative Decree 109/2007 for combating the financing of terrorism and the activities of countries that threaten international peace and security. These legislative texts were recently amended by Legislative Decree 125/2019, which contained some corrective measures and provisions for transposing the Fifth Anti-Money Laundering Directive (2018/843). Further amendments to the system for cash use were introduced by Decree Law 124/2019, converted with amendments into Law 157/2019.

In compliance with EU law, Legislative Decree 231/2007 adopted a definition of money laundering that includes self-money laundering, namely the investment of illicit profits in economic or financial assets by the perpetrators or accomplices of a predicate offence (Article 2). However, Italy's criminal law system long considered self-laundering as a mere post-factum to the original crime and so not punishable in itself. Law 186/2014 (Article 3, paragraph 3) finally introduced a specific crime into Italian criminal law (see Article 648-ter[1] of the Penal Code).

AML REGIME APPLIES TO AMPS WHEN THEY:

The law applies when art dealers act as intermediaries in transactions involving the sale and purchase of art works when the value of the sale exceeds EUR 10,000. It is necessary to identify the buyer and the seller.

WHO ARE AMPS?

Art Galleries, Art Dealers.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

Collecting identity documents and verifying the origin of funds used to pay the transfer price.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Yes.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Subjects are not obliged to keep a register.
What reporting requirements apply?
The requirements of the statutory anomaly indices.
Where can AMPs report suspicions of laundering?
Reports should be submitted to the Bank of Italy.
What sanctions apply to AMPs who fail to comply with AML Regulations?

2000 EUR for each infringement.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

Guidelines from Associazione Nazionale Gallerie d'Arte Moderna e Contemporanea (ANGAMC).

Answers provided Federica Minio and Simona Valassina - Studio Morri e Rossetti.

INTRODUCTION TO LUXEMBOURG'S ART AML REGULATIONS

The key legislation in this context is:

Law of 12 November 2004 (coordinated version) on the fight against money laundering and terrorist financing.

Law of 27 October 2010 (coordinated version) enhancing the anti-money laundering and counter terrorist financing legal framework; organizing the controls of physical transport of cash entering, transiting through or leaving the Grand Duchy of Luxembourg; implementing United Nations Security Council resolutions as well as acts adopted by the European Union concerning prohibitions and restrictive measures in financial matters in respect of certain persons, entities and groups in the context of the combat against terrorist financing.

Additional legislation includes:

Grand-ducal Regulation of 1 February 2010 (coordinated version) providing details on certain provisions of the amended Law of 12 November 2004 on the fight against money laundering and terrorist financing.

CSSF Regulation No 12-02 (coordinated version) of 14 December 2012 on the fight against money laundering and terrorist financing.

Law of 10 August 2018 amending: 1° the Code of Criminal Procedure; 2° the Law of 7 March 1980 on the organization of the judicial system, as amended; 3° the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended; 4° the Law of 25 March 2015 determining the salaries and the advancement conditions and rules for civil servants for the purpose of organizing the Financial Intelligence Unit (FIU).

Law of 13 January 2019 (coordinated version) establishing the Beneficial Owner Register. Grand-ducal Regulation of 15 February 2019 on the registration, payment of administrative fees and access to information recorded in the Beneficial Owner Register.

Law of 25 March 2020 (coordinated version) establishing a central electronic data retrieval system related to IBAN accounts and safe-deposit boxes.

Law of 10 July 2020 (coordinated version) establishing a Register of

Fiduciaries and Trusts. Circular CSSF 20/740 Financial crime and AML/CFT implications during the COVID-19 pandemic.

Circular CSSF 17/650 (as amended by Circular CSSF 20/744) Application of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended (hereinafter "AML/CFT Law") and of the Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the AML/CFT Law ("AML/CFT GDR") to predicate tax offenses. Circular CSSF 22/815 FATF statements concerning 1) high-risk jurisdictions on which enhanced due diligence and, where appropriate, counter-measures are imposed

2) jurisdictions under increased monitoring of the FATF.
- Circular CSSF 19/732 Prevention of Money Laundering and Terrorist Financing: Clarifications on the Identification and Verification of the Identity of the Ultimate Beneficial Owner(s).

The legislation is already in force.

WHO ARE AMPS?

Art Galleries, Art Dealers, Auction Houses, Freeports, Museums, art-secured lenders.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

Professionals are subject to a number of obligations: constant vigilance towards customers; these may be simplified or enhanced obligations; the implementation of an adequate internal structure including a risk assessment; cooperation with the supervisory and judicial authorities.

All professionals have the obligation to take appropriate measures (proportionate to their nature and size) to identify and evaluate the risks of money laundering and terrorist financing to which they are exposed. Professionals are required to adapt their customer due diligence in accordance with the risks identified through this assessment.

The risk assessments must be documented, kept up-to-date and made available to the relevant control authorities and self-regulatory bodies. Requirements are: to perform a customer due diligence; to have a client-acceptance process; to have expected documentation at client file level; to identify the beneficial owner with identification

and verification of the identity of the intermediary persons acting on its behalf and its beneficial owner(s) by using a risk-based approach.

As part of their risk-based approach, professionals must define and set up their own risk appetite. Professionals should include additional relevant factors when conducting their risk assessment of a business relationship.

The professional needs to collect, record, analyze, understand and record information on the source of funds of the clients. The professional may obtain corroborative documents regarding the economic background of the transaction and assess its plausibility. They must ensure that the documents, data and information held are kept up to date.

The 2015 Free Zone Operator Law introduces within the supervisory scope of the Tax Authority the Registration Duties, Estates and VAT Authority (AED), the operators in a free zone authorized to carry out their activity pursuant to an authorisation by the ADA within the Community control type 1 free zone located in the municipality of Niederanven Section B Senningen called Parishaff L-2315 Senningerberg (Hoehenhof).

In its mission of control and supervision of professionals, the Registration Duties, Estates and VAT Authority (AED) will request the professionals concerned to fill out a mandatory questionnaire that includes: the different measures put in place within the structure in order to enforce the due diligence obligations; the fact that an adequate internal organization to combat money laundering and the financing of terrorism has been set up (appointment of a professional compliance officer, etc.); if the professional has already reported suspicious transactions to the CRF, etc.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Yes. Higher risk situations relate to the following: Non-face-to-face relationships, correspondent banking relationships, relationships with Politically Exposed Persons (with no distinction between domestic and foreign PEPs) and relationships with clients from high-risk third countries.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Professionals must keep all relevant documents and information obtained for a minimum duration of 5 years, without prejudice to longer retention periods which may be imposed by law. The following documents must be kept: a copy or the references of the documents required and, as regards the business relationships and transactions, the supporting evidence and records, consisting of originals or certified copies of the documents.

WHAT REPORTING REQUIREMENTS APPLY?

Professionals are required to inform without delay, on their own initiative, the CRF when they know, suspect or have reasonable grounds to suspect that money laundering or terrorism financing is being committed or has been committed or attempted. This report must be accompanied by all supporting information and documents having prompted the report.

Upon request of the AED, professionals must provide information such as: the personal details of the contact person; their managers; their turnover; the number of employees; the knowledge of their customers as well as the methods of financing the transactions made by their customers (without indicating their names); the existence of an appropriate internal organization. They must further provide without delay to the FIU, at its request, any information requested by the authorities.

This obligation includes the submission of the documents on which such information is based.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

Cellule de renseignement financier (CRF)
41B, bd. Franklin D. Roosevelt – L-2450 Luxembourg Tél: +352 47 59 81-2447
E-mail : crf@justice.etat.lu

<https://justice.public.lu/fr/organisation-justice/crf.html> / <https://justice.public.lu/fr/organisation-justice/crf/goaml.html>

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

In the event of non-compliance with due diligence requirements, proper internal organization or cooperation with the supervisory authorities, including the AED, various administrative measures and sanctions may be taken against the AMPs at fault, such as:

- a warning;
- a reprimand;
- administrative fines;
- a possible withdrawal of the business permit.

As a matter of fact, the AED works closely with the Minister of the Economy. On the reasoned opinion of the Director of the AED, as soon as the non-compliance with the obligations of the fight against money laundering and the financing of terrorism affects the professional integrity of the manager, the Minister may decide on the permanent or temporary withdrawal of the business permit until further notice from the Director of the AED.

AMPs who fail to comply with AML Regulations are subject to various criminal sanctions.

Money laundering is sanctioned by imprisonment up to five years and a fine ranging between €1,250 and €1,250,000.

Other possible sanctions include the confiscation of the criminal property, certain professional prohibitions and the closing of business.

Persons prosecuted for money laundering offenses may go through a plea-bargaining procedure, which can lead to shortened criminal proceedings, through the reach of a judgment upon consent (articles 563 to 599 of the Criminal Proceedings Code).

Luxembourg authorities may prosecute money laundering against Luxembourg nationals, irrespective of where money laundering is committed, and against anyone found to be money laundering in Luxembourg (irrespective of where the predicate offence is committed). According to the Law of 27 October 2010 concerning financial restrictive measures or a directly applicable European regulation, international financial sanctions will apply to any Luxembourg natural person or legal entity, as well as on any other natural or legal person operating in or from the Luxembourg territory.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

[https://justice.public.lu/fr/organisation-justice/crf.html/](https://justice.public.lu/fr/organisation-justice/crf.html) Deloitte Luxembourg Art & Finance report

Contact:
Deloitte Art and Finance Adriano Picinati di Torcello
Director | Global Art & Finance Coordinator 20 Boulevard de Kockelscheuer
L-1821 Luxembourg
Email: apicinatiditorcello@deloitte.lu Tel: +352 45145 2531

Answers provided by Catherine Cathiard, Partner, Cathiard-Avocat.

INTRODUCTION TO NETHERLANDS' ART AML REGULATIONS

The Money Laundering and Terrorism Financing (Prevention) Act (in Dutch: Wet ter voorkoming van witwassen en financieren van terrorisme or "Wwft") is intended to prevent laundering money or spending money on terrorist activities.

AML REGIME APPLIES TO AMPS WHEN THEY:

It has become mandatory for AMPs to conduct a client screening (klantenonderzoek), not only for cash payments but also for cashless payments of 10,000 EUR or more for the sale of works of art. This also includes related transactions (i.e. cumulative transaction value of 10,000 EUR or more). Auction houses must also conduct customer surveys and immediately report any unusual transactions to the Financial Intelligence Unit (FIU) Netherlands. If a transaction involving a person or company (or financial institution) from a country with a high risk of money laundering is involved, the obligation to screen the client will be even more stringent.

WHO ARE AMPS?

The Wwft states that all intermediaries in the purchase or sale of art must comply with the Wwft regardless of the amount. Also persons and companies who buy or sell art, if the transaction is above €10,000, fall under the Wwft.

Therefore, the AML regulations include:
Auction houses, Art Galleries, Art Dealers, Freeports

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

The Wwft prescribes that an institution must conduct a client screening before entering into a business relationship or carrying out a transaction. There are two levels of screening: (1) a normal client screening, and (2) an enhanced client screening. In addition, there is an obligation to monitor existing clients.

You must also determine whether the natural person representing the client is authorized to do so. The art dealer or gallery must identify this natural person and verify his or her identity. In addition, the AMP must be able to recognize so-called «fall guys» or «money mules». The AMP must therefore take reasonable steps to determine whether the natural person is acting for him- or herself or for others.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Should the outcome of drawing up a customer's risk profile give cause to concern, or if a transaction involving a person or company (or financial institution) from a country with a high risk of money laundering is involved, the duty to screen your client will be even more stringent.

The AMP should consider the following investigation measures when conducting an enhanced client screening:

- a) collect additional information about these customers and beneficial owners;
- b) collect additional information regarding the purpose and nature of that business relationship;
- c) collect information about the origin of the funds used in that business relationship or transaction and the source of the assets of those clients and those beneficial owners;
- d) collect information about the background and rationale for the intended or executed transactions of those customers;
- e) obtain approval from senior management to establish or continue that business relationship; and
- f) perform enhanced checks on that business relationship and the transactions of those customers, by increasing the number of checks and frequency of updates of data on those customers and those beneficial owners and by selecting transaction patterns that require further investigation.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Customer survey data should be kept for 5 years.

WHAT REPORTING REQUIREMENTS APPLY?

A possible incident report to the FIU must be made online, after registration, via the reporting portal.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

You can find information here <https://www.fiu-nederland.nl/en/fiu-the-netherlands>.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

Designation (art. 28 Wwft); order under penalty (art. 29); administrative fine (art. 30); publication of the sanction (art. 32f).

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

www.Kvk.nl, www.fiu-nederland.nl/en Supervision Bureau Wwft of the Dutch Tax Authorities

Laurens Kasteleijn, Art Law Services, www.ArtLawServices.com.

INTRODUCTION TO POLISH AML REGULATION

With the introduction of the European Directive (EU) 2018/843 (AMLD V), amending the existing Directive 2015/849 (AMLD IV) on the prevention of the use of financial systems for the purposes of money laundering, the changes introduced had to be included in the national legislations of Member States.

In the republic of Poland, the new rules of AMLD V were introduced by an Act of 30 March 2021 (hereinafter 'the 2021 Act') on a change to the Act on Money Laundering and Terrorism Financing Prevention and some other acts (Ustawa z dnia 30 marca 2021r. o zmianie ustawy o przeciwdziałaniu praniu pieni dzy oraz finansowania terroryzmu oraz niektórych innych ustaw (poz. 815)), where amendments to the original Act (hereinafter 'the 2018 Act', the AML Act) of 1 March 2018 on Money Laundering and Terrorism Financing Prevention (Ustawa z dnia 1 marca 2018r. o przeciwdziałaniu praniu pieni dzy oraz finansowania terroryzmu (Dz. U. 2018 poz. 723)) were contained.

Therefore, the amendment by the 2021 Act (containing the 5th Directive's updates) the AML Act applicable AML legal regime.

WHO ARE THE AMPS?

Under Article 2 of the AML Act, which lists the obliged institutions, sub-article 24a, which has been added as a result of the Directive, lists what Art Market Participants (AMPs) are bound by the provisions of the document. Specifically, the persons who deal with, or act as intermediaries in the trade of artworks, collectibles and antiques, notably in auction houses, art galleries or when employing the use of free ports or duty free zones, and persons who store these objects, if such activity is being used by the custom free areas, such as freeports. This applies to transactions of EUR 10 000 or more.

WHO IS EXCLUDED UNDER THE ACT?

The exclusion applies when the trade activity of a natural person does not generate revenue greater than 50% of the minimum wage, and if the person has not been conducting trade activity for the period of 60 months prior.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

The know-your-client procedure and risk assessment under Art. 27 of the 2021 Act, which constitutes the main due diligence measures, are among the core duties of obliged entities. These are used to establish the financial security measures, listed under Article 33 of the Act. The obliged institutions are required to implement financial security measures, and they are under obligations to recognize and assess risks of money laundering or terrorism financing, as well as under a duty to document these risks.

Under Article 34 of the AML Act, the measures in question include:

- Art. 34(1)(1) – Client identification and verification
 - o Under Art. 36 of the Act, the factors that must be included for identification of natural and legal persons are listed.
- Art. 34(1)(2) – Identification of actual beneficiary and taking reasonable steps in order to verify this identity; and to assess the structure of ownership and control.
- Art. 34(1)(3) – Trade relationship assessment
- Art. 34(1)(4) – Ongoing monitoring and updating.
- Art. 34(2) – verification of the authorized intermediary's identity and empowering him acting on the clients' behalf.
- Art. 34(3) – the obliged institutions must document implemented financial security measures and must be able to provide proof to institutions under Art. 130 of implementing suitable financial security measures considering the risks found.
- o Article 130(1) – assigns controlling of the duties under the act to the Polish Financial Authority – Generalny Inspektor Informacji Finansowej (General Financial Information Inspector, GIIF)

If any of these financial security measures cannot be implemented, the obliged institution must not enter into a trade relationship, must not conduct occasional transactions and must not use any transaction with the use of a bank account, followed by the termination of any trade relationship existing (Article 41 of the AML Act).

These financial security measures also must be used when dealing with the person authorized to act as intermediary (Article 34(2)), and all these measures must be documented.

These measures must be used when entering into a trade relationship, but also when the transaction is occasional (Article 35). However, they must be used whenever there is a risk of money laundering or terrorism financing.

The AMPs that can be obliged institutions are also required to implement AML (Anti-Money Laundering) and CTF (Countering Terrorism Financing) internal procedures, that are to be verified and amended, when necessary (Art. 50 of the AML Act), and it the procedure description should contain (Article 50(2) of the AML Act):

- actions taken to prevent the risks of AML and CTF and proper management of identified risks.
- rules of recognition and assessment of these risks, the means used for the management of risks.
- rules on using financial security measures.
- rules on storing documents and information.
- rules on duties relating to informing the Financial Authority.
- rules of educating staff members on the AML rules, as well as staffs' rules of infringement notification procedure, control rules and;
- rules on documenting the hindrances of verifying a real beneficiary.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

If the client meets the conditions of Article 42(2)(1), the obliged institution may assess them to be less of a money laundering and terrorism financing risk and use the simplified financial security measures. If however, the high risk of these infringements is present, the obliged institutions must make use of increased security measures (Article 43). The Act provides the following examples of these red flags:

- Article 43(2)(1) – creating trade relationships in unusual circumstances.
- Article 43(2)(2) – when the client is:
 - o A) legal person or entity not having legal personality, whose activity is used to store personal assets
 - o B) company, which shares have not been issued into circulation
 - o C) a resident of a country of under point 10
- Article 43(2)(3) – an object of the client's trade activity including a large number or a high-valued cash transaction.
- Article 43(2)(3) – unusual or overly complex ownership structure of a client, taking into consideration the type and scope of trade activity.
- Article 43(2)(7) – where the risk is higher because of no physical presence of the client
- Article 43(2)(10) – when trade relationship or occasional transaction is made with:

- Article 43(2)(11) – when the trade relationship or occasional transactions are connected to crude oil, weapons, gemstones, tobacco products, cultural artifacts, ivory, protected species, or other objects of archaeological, historic, cultural and religious or scientific value.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Under Article 49(1) of the AML Act, the obliged institutions are required to store for the period of 5 years, counted from the moment of ceasing the trade relationship or from the day of the occasional transaction, the following:

- Copies of documents and information resulting from the use of financial security measures, including those used by means of electronic identification
- Proofs of transactions and transaction records, including original documents and copied necessary for identifying transaction

They also must keep the analysis of risks under Art. 34(3) for the period of 5 years, counting from the day of the analysis.

WHAT REPORTING REQUIREMENTS APPLY?

Under Article 28 of the AML Act, the obliged institutions are to provide, upon GIIF's request, the risk assessments and other relevant information needed for the National Risk Assessment.

Under Article 74 of the Act, the obligated institution is to report to GIIF any circumstances of money laundering or terrorism financing, and that must be done no later than 2 days upon confirming the suspicion by the institution and the report must include certain details listed in point (3) of the provision.

Under Article 76, the obliged institutions are to immediately transfer or share the information and documentation possessed to GIIF, including documentation pertaining to

- Clients
- Certain transactions
- Type and size of assets and their storage place

GIIF can also decide on the date and form of the transfer or share (Art. 76(3)(1) and Art. 82 of the Act)

Under Article 80, GIIF is also tasked with receiving submissions of real and potential infringements with regard to money laundering or terrorism financing from employees, former employees and

other persons who had acted on behalf of obliged institutions.

Under Article 86 of the Act, the obliged institution is to immediately inform GIIF of the reasonable suspicion that a transaction or assets may be being used for the purposes of money laundering or terrorism financing.

They must also inform the prosecutor's office of reasonable suspicions that assets in a transaction were derived from illegal means and may be related to money laundering or terrorism financing.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

Article 25 of the AML Act provides that GIIF is also tasked with preparing the National Money Laundering and Terrorism Financing Risk Assessment ("Krajowa ocean ryzyka").

However, the most recent one is from 2018, and despite the updating requirement, that obliges GIIF to check the Assessment every two years, and implements the updates, if necessary, the changes for AMPs introduced with the implementation of AMLD V into the Polish legal system in AML have not been addressed yet. Additionally, GIIF devotes only 3 pages to the art market, and is using sources that are lacking diversity and detail, resulting in assessing the risks of money laundering or terrorism financing as average. AMPs consequently do not have recourse to national guidelines on the domestic art market. Nevertheless, the two documents published by the Responsible Art Market Initiative: Art Transaction Due Diligence Toolkit and Guidelines on combatting Money Laundering and Terrorism Financing, could prove useful for adjusting the activity to the new AML regime.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

For non-compliance, the obliged institutions can expect to be subjected to administrative sanctioning. The sanctioning regime is described in Chapter 13 of the AML Act and is applied when the institution obliged does not perform its obligations (Article 147), specifically in cases where i.a.:

- The institution failed to appoint the person responsible for implementing the provisions of the act
- The institution failed to prepare a risk assessment and its

- Failure to inform the prosecutor's office.
- Failure to comply with GIIF's decision.

The administrative fines include (Art. 150 of the Act)

- Publication of information about the infringement of the intuition in the public information registry
- A cease of action order
- Concession or permission withdrawal, or deregistration from the regulated activity registry
- Ban on taking managerial position duties by the person responsible for infringements for up to a year
- Financial penalty:
 - o Up to twice the amount of a benefit of infringing or of a loss avoided as a result of infringement, and if impossible to assess, up to EUR 1 000 000
 - o Natural persons can be fined up to PLN 20 868 500
 - o Legal persons up to EUR 5 000 000

Article 156 also lists criminal sanctions applicable for infringements.

POSITION ON THE DIGITAL WORKS OF ART AND NFTS

The works considered under the AML Act are those listed in Article 120 of the Goods and Services Tax Act of 11 March 2004 (Ustawa z dnia 11 marca 2004r. o podatku od towarów i usług; Dz.U. 2004 nr 54 poz. 535), which in detail describes what constitutes works of art, antiquities and collectibles. Nevertheless, digital works are not falling in the brackets of any category listed in this provision, and the same holds for NFTs.

Answers provided by Filip Radzikowski, Legal Intern at Center for Art Law and International and European Law Masters student at University of Amsterdam.

INTRODUCTION TO ROMANIA'S ART AML REGULATIONS

The AML legislation applicable in Romania is Law n.129/2019 on preventing and combating money laundering and terrorist financing and for amending and supplementing several normative acts. This came into force on 20th July 2019. However, the first Romanian law on money laundering entered into force in 2002 (former Law no. 656/2002 on preventing and sanctioning money laundering).

HOW DOES THE AML REGIME APPLY TO AMPS IN ROMANIA?

The Romanian law on AML and its implementing rules define reporting entities as "persons who sell works of art or who act as intermediaries in the trade of works of art, including when this activity is carried out by art galleries and auction houses, where the value of the transaction or a series of related transactions represents the equivalent in lei of 10,000 euros or more" (art. 5 para. (1) lit. j) of the AML Law no. 129/2019).

The implementing rules of the AML Romanian Law ("Norma din 2021 de aplicare a prevederilor legii nr. 129/2019...") issued by the National Office for Prevention and Control of Money Laundering specify that the reporting entities are the entities that actually perform the activities mentioned [selling work of art or intermediating the sale of the works of art] according to the codes CAEN 4778 (Other retail sale of new goods in specialized stores), CAEN 4779 (Retail sale of second-hand goods in stores), CAEN 4791 (Retail sale via mail order houses or via Internet), CAEN 4799 (Other retail sale not in stores, stalls or markets), and CAEN 9003 (Artistic creation). Also referred to are entities carrying out the mentioned activities in free zones – the activities of selling, or intermediating the sale, or depositing, works of art.

HOW ARE 'WORKS OF ART' DEFINED?

From the AML Law perspective transactions implying art objects [note: the AML Law refers both to the works of art and objects of art] and other objects of archaeological, historical or cultural importance, religious objects, rare objects of scientific value, as well as ivory and protected species are high risk transactions (art. 17 para. 12 § 2 lit. f) of Law no. 129/2019).

The AML Law does not define the works of art, neither the objects of art, but its implementing rules ("Norma din 2021 de aplicare a prevederilor legii nr. 129/2019....") specify that the "works of art" have the meaning given by the Romanian fiscal Code.

According to the Romanian Fiscal Code works of art are:

1. pictures, collages and similar decorative plaques, paintings and drawings, executed entirely by hand by the artist, other than architectural, engineering and other industrial, commercial, topographical or similar plans and drawings, original, hand-executed, manuscripts, photographic reproductions on sensitized paper and carbon copies obtained from the plans, drawings or texts listed above and hand - decorated industrial articles falling within CN code 9701
2. engravings, prints and lithographs, old or modern originals, which were drawn directly in black and white or color, of one or several plates / plates executed entirely by hand by the artist, irrespective of the process or the material, employed, but not including mechanical or photomechanical processes falling within CN code 9702 00 00
3. original productions of statuary or sculpture, in any material, provided that they are executed entirely by the artist; copies made by an artist other than the author of the original, falling within CN code 9703 00 00
4. tapestries made by hand according to original models provided by the artist, provided that there are not more than 8 copies of each, falling within CN code 5805 00 00,
5. individual ceramic pieces executed entirely by the artist and signed by him
6. enamels on copper, executed entirely by hand, limited to 8 numbered copies bearing the artist's signature or the name of the workshop/ studio, excluding articles of jewelry and goldsmiths' and silversmiths' wares
7. photographs taken by the artist, printed by him or under his supervision, signed, numbered and limited to 30 copies, all sizes and mounts included.

Note: the AML Romanian Law does not make any references to collectors objects. The AML Regulations also do not make any referrals to Non-Fungible Tokens.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

AMPs should set: (1) internal policies and rules; (2) internal control mechanisms; and (3) money laundering risk management procedures. These should comprise the following:

appropriate know your clients measures;
appropriate measures regarding the reporting, keeping of records and all documents according to the requirements of AML law, and the prompt provision of data at the request of the competent authorities;
appropriate measures in the field of internal control, risk assessment and management, compliance and communication management; and
appropriate measures in the field of protection of its own personnel involved in the application of these policies, against any threats or hostile or discriminatory actions.

TRAINING AND PERIODIC EVALUATION OF EMPLOYEES:

AMPs are obliged to provide an independent audit function for the purpose of testing policies, internal rules, mechanisms and procedures if in the last financial year at least two of the following criteria are met:

- a) total assets: 16,000,000 lei,
- b) total net turnover: 32,000,000 lei,
- c) average number of employees: 50.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

AML rules (provided by art. 17 para. 14 of Law no. 129/2019) name several categories of high risk as: clients; products, services, transactions, and distribution channels; and geographic risks.

Works of art and other objects of archaeological, historical or cultural importance, religious objects, rare objects of scientific value, as well as ivory and protected species are considered high risk factors, as per above.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

AMPs are obliged to keep in letter or electronic format, in a form allowed in court proceedings, all records obtained by applying the know your clients measures (eg. copies of identification documents, of monitoring and performed surveillance, including, if available, the information obtained by electronic means of identification, relevant trusted services regulated in EU or any other secure identification process, either remote or electronically, recognized, approved or accepted by the The Authority for the Digitalization of Romania - necessary for the observance of the requirements related to know you clients aspects). The obligation lasts for a period of 5 years from the date of termination of the business relationship with the client or from the date of the occasional transaction.

AMPs shall keep supporting documents and records of transactions, consisting of account statements or business correspondence, necessary to identify transactions, including the results of any analysis performed in relation to the client (e.g. requests to establish the history and purpose of complex unusually large transactions). These documents may be originals or copies admitted in court and shall be kept for a period of 5 years from the date of termination of the business relationship with the client or from the date of the occasional transaction.

WHAT REPORTING REQUIREMENTS APPLY?

There are 2 types of reports that must be submitted:

1. AMPs are required to submit a report of suspicious transactions exclusively to the National Office for Prevention and Control of Money Laundering if they know, suspect or have reasonable grounds to suspect that the goods come from the commission of crimes or are related to the financing of terrorism; or the information that AMP holds may be used to impose the provisions of AML law; and
2. AMPs are required to report the transactions that do not show indicators of suspicion if the amount is paid in cash, in lei or in foreign currency, equivalent to a minimum of 10,000 euros, including related operations.

Also, AMPs have to inform the National Office for Prevention and Control of Money Laundering, exclusively by electronic means, on

starting, suspending, and ending their activity within 15 days.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

National Office for Prevention and Control of Money Laundering which is the Financial Intelligence Unit of Romania.

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

Failing to comply with the AML obligations under the Romanian law may be qualified as misdemeanor, or crime, depending on the conditions they have been committed in.

The sanction of misdemeanor is warning or the fine - the quantum of the fine is between 5.000 lei and 150.000 lei (the approx. exchange rate is 4,9 lei for 1 euro) for natural persons, and for legal persons the maximum is increased with 10% of the total revenues. If the circumstances are severe, repeated, systematic or a combination of these, but the conditions for the deed to represent a crime are still not met, the maximum limits of the fine is increased with 50.000 lei for natural persons and 5.000.000 lei for legal entities. When the deeds are qualified to be crime, the sanction is imprisonment from 6 months to 3 years or with a fine. In this case, the law also states that the sanction could be even higher (art. 47 para. 1).

The AML law provides, beside the fine, also complementary sanctions: confiscation of goods used or resulting from the contravention, or the ones that were intended to be used for the deeds; suspension of the authorisation of the AMP for a period from one month to 6 months; blocking the bank account for a period of 10 days to a month; cancellation of the authorisation; closure of the branch or other secondary office; a public statement identifying the natural or legal person and the nature of the violation; an order requiring the natural or legal person to put an end to the respective behavior and to refrain from repeating it; a temporary ban on exercising management functions in the reporting entities against any person with management responsibilities in an obligated entity or any other natural person declared responsible for the breach.

INTRODUCTION TO SPAIN'S ART AML REGULATIONS

The main AML/CFT regulations in Spain are Law 10/2010 28th April of Anti-Money Laundering and Terrorism Financing Prevention and the Royal Decree 304/2015 5th May.

Who are the AMPs?

These are professional dealers in works of art or antiques. In particular, art galleries, art dealers, auction houses, freeports and museums. The legislation also applies to most entities active in the financial system, postal services, currency exchange, casinos. The 2003 amendments added lawyers and notaries as covered entities.

The main AML/CFT regulations in Spain are Law 10/2010 28th April of Anti-Money Laundering and Terrorism Financing. The legislation has already been put into force since the 5th of June 2014.

WHAT DUE DILIGENCE REQUIREMENTS APPLY?

The Regulation establishes exemptions for the full application of AML due diligence measures depending on the size and economic magnitude of the companies that fall within the scope of the Spanish AML Law. Indeed, the Regulation foresees that companies with less than 10 employees and an annual balance sheet of under 2 million Euros will be exempt from complying with obligations concerning internal AML policies, AML bodies, reviews by an external expert or AML training for employees. The Spanish AML Law foresees the possibility of applying simplified due diligence measures to those customers or products that show low risk of money laundering. In summary, the application of simplified due diligence enables the companies subject to the Regulation to lower the level of application of due diligence measures. The AML also establishes enhanced due diligence.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Money laundering laws in Spain cover banks, investment companies, credit companies, insurance companies, brokerage companies, securities companies, money transfer companies, and payment institutions. These organizations appear to be at high risk for money laundering and terrorist financing. Also, in the Spanish AML regulations, a private banking client is considered a high risk client.

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Obliged subjects shall keep all documents obtained or generated in the due diligence process, including, in particular, copies of verified identification documents, customer statements, documents and information provided by the customers or obtained from reliable third-party sources, contract documents and the results of any analysis carried out, for a period of ten years from the date of termination of the business relationship or occasional transaction execution.

WHAT REPORTING REQUIREMENTS APPLY?

A suspicious transaction report shall be promptly made using the channels and format established by the Executive Service of the Commission. Notwithstanding such reporting having been made to the Executive Service of the Commission, the obliged subject shall immediately take additional risk management and mitigation measures, which must take into account the risk of disclosure.

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING?

Commission for the Prevention of Money Laundering and Financial Crimes (Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias)

WHAT SANCTIONS APPLY TO AMPS WHO FAIL TO COMPLY WITH AML REGULATIONS?

The regulatory agency imposes administrative sanctions and fines on those organizations that do not meet their obligations.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

The Financial Action Task Force (FATF) has made a report about AML specifically focusing in Spain published in December 2014 <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/3-Legal-systems-and-operational-issues-Mutual-Evaluation-Spain-2014.pdf>. More information can be found on the Executive Service of the Commission on Prevention of Money Laundry and Monterey infractions (SEPBLAC) in Spain.

Answers provided by Gunna Freivalde, attorney-at-law partner at AMG Attorneys S.L.

INTRODUCTION TO USA'S ART AML REGULATIONS

Since the USA is outside Europe, the 5th Directive does not apply to it. Instead, America's AML legislation came into force on 13th September 1982 as the Bank Secrecy Act ("BSA"). The BSA was modified with respect to the undefined category of "antiquities" as part of the Anti-Money Laundering Act ("AML Act") of 2020, passed into law as part of the National Defense Authorization Act ("NDAA") of 2020.

WHO ARE AMPS?

Not applicable. However, whether they exclude certain institutions or persons is unclear, pending finalization of implementing regulations. Section 6110(a)(1)(B) of the AML Act describes persons «engaged in the trade of antiquities» are expressly inclusive of any «advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities, subject to regulations prescribed by the Secretary [of the Treasury].» Section 6110(b)(2)(A) instructs the Secretary of the Treasury and the FBI, Attorney General, and Homeland Security to consider the appropriate scope for the rulemaking, including determining which persons should be subject to the rulemaking, by size, type of business, domestic or international locations, or otherwise,» and «whether thresholds should apply in determining which persons to regulate.»

Shortly after the AML Act, the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued on March 9, 2021 a Notice to "Inform[] Financial Institutions of Efforts Related to Trade in Antiquities and Art,"[1] which served as a reminder to those entities already regulated by the BSA of FinCEN's stated concerns about the trade in art and antiquities.

On September 24, 2021, FinCEN published an Advanced Notice of Proposed Rulemaking (the "ANPR") in the Federal Register at 86 FR 53021, pp. 53021-53024. [2] The ANPR sought input and comment on:

- Application of the Bank Secrecy Act to the trade in antiquities
- Potential for money laundering, through terrorist financing and other illicit activity
- Roles, responsibilities and activities of persons engaged in trade in antiquities
- Information typically exchanged
- Breakdown of certain kinds of transactions
- Interaction (including payment) from overseas actors
- Which participants are best positioned to guard against money laundering?
- What regulations, including possible thresholds and exemptions, should FinCEN consider?

The comment period pursuant to the ANPR closed on October 25, 2021.

On July 27 2023, FinCEN confirmed that no regulations pursuant to the AML Act have yet been drafted or proposed, stating only that FinCEN "intends to issue a Notice of Proposed Rulemaking to implement Section 6110 of the Anti-Money Laundering Act of 2020 (the AML Act)." [3] FinCEN is nearly two years past the deadline set by Congress to do so.

DO THE AML RULES IDENTIFY 'HIGH RISKS'/'RED FLAGS'?

Unclear, pending finalization of implementing regulations. In addition to mandating consideration of the types of persons/institutions who should be subject to rulemaking, Section 6110(b)(2) of the AML Act further instructs consideration of «the degree to which the regulations should focus on high-value trade in antiquities, and on the need to identify the actual purchasers of such antiquities, in addition to the agents or intermediaries acting for or on behalf of such purchasers,» as well as «whether certain exemptions should apply to the regulations.»

WHAT RECORD KEEPING REQUIREMENTS APPLY?

Unclear, pending finalization of implementing regulations. For currently-regulated «financial institutions,» various recordkeeping requirements apply, including as to credit transactions, transfers of currency or monetary instruments, wire transfers, and sales of monetary instruments. Once regulations are promulgated for antiquities dealers and/or a wider range of art market participants, key issues will be the types of transactions to which recordkeeping requirements are applicable, the length of time for which records must be retained, and the value thresholds at which these requirements are triggered.

WHAT REPORTING REQUIREMENTS APPLY? WHO IS THE 'CUSTOMER' FOR CCD PURPOSES?

Unclear, pending finalization of implementing regulations. For currently-regulated «financial institutions,» reporting requirements include cash transactions exceeding \$10,000 and Suspicious Activity Reports. Once regulations are promulgated for antiquities dealers and/or a wider range of art market participants, key issues will be the value thresholds at which these requirements are triggered and the «red flags» denoting suspicious activity, art, and any broker or agent acting for them. It will be the seller, and BAMF

WHERE CAN AMPS REPORT SUSPICIONS OF LAUNDERING? IDELINES, PART 15.19) 47.

FinCEN has an e-filing system for SARs, available at <https://bsaefiling.fincen.treas.gov/main.html>.

WHERE CAN I FIND GUIDANCE ON AML FOR ART BUSINESSES?

Responsible Art Market offers excellent public programming on this topic, and AMP shoud consult with experienced legal counsel.

Answers provided by Megan Noh, Partner, Pryor Cashman LLP and Nicholas M. O'Donnell of Sullivan & Worcester LLP.

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ADDITIONAL RESOURCES

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DISCLAIMER

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This resource is intended to be for educational purposes only and should not be taken as legal advice. Should readers require advice on the AML regulations, they should consult an attorney in the appropriate jurisdiction.

FOR THE ATTENTION OF ATTORNEYS:

The Center for Art Law has been diligently monitoring and collecting information from attorneys around the world related to the implementation of AML regulations within the art market for the past two years. We are putting together a comprehensive report which covers the United States, the European Union and the United Kingdom. We hope to publish our results by the end of September. There are a number of jurisdictions that we have not yet been able to include in our report. Therefore, we ask that attorneys working in the missing jurisdictions please reach out to us with their valuable insight to assist us with our report and ensure it is as informative as possible. We are missing data from the following jurisdictions: Denmark, Estonia, Finland, Hungary, Lithuania, Malta, Portugal, Republic of Cyprus, Sweden, Slovakia and Slovenia. If you know of an attorney that may be able to help, please nominate them and we will ask for their assistance. We expect to treat these jurisdictions in subsequent revisions of the report. Any assistance is greatly appreciated by the Center.