UK anti-money laundering (AML) regime

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1. Introduction

The UK is traditionally ahead of the European curve on anti-money laundering and the UK government is likely to keep leading the way following the country's departure from the European Union. Since 2010, the UK government has:

- been the first member of the G20 to establish a public central registry of company beneficial ownership information;
- led the way on tackling tax evasion and tax avoidance, bringing in more than £2 billion from offshore tax evaders;
- introduced some of the world's strictest legislation on bribery through the Bribery Act 2010, making it a criminal offence for a company to fail to prevent a bribe being paid.

The size of its financial and professional services sector makes the UK unusually exposed to anti-money laundering risks. In April 2016, the UK government published an Action Plan for anti-money laundering and counter-terrorist finance which was described as representing *"the most significant change to the anti-money laundering and terrorist finance regime in over a decade."*[1] By the start of 2018, the UK government hopes to launch the Office for Professional Body Anti-Money Laundering Supervision, a new anti-money laundering supervisory body which will sit within the Financial Conduct Authority.

The main anti-money laundering legislation in the UK consists of, on the one hand, a series of criminal offences found in the Proceeds of Crime Act 2002 ("**POCA**") and, on the other hand, compliance obligations found in the Money Laundering Regulations 2017 (the "**Regulations 2017**"). The Regulations 2017, which implement the EU's Fourth Money Laundering Directive ("**4MLD**"), came into force on 26 June 2017, repealing the Money Laundering Regulations 2007 (the "**Regulations 2007**").

The 4MLD seeks to give effect to the international standards for combating money laundering and terrorist financing developed by the Financial Action Task Force, an inter-governmental body founded on the initiative of G7. The UK, most EU Member States and the EU Commission are members of the Financial Action Task Force. Switzerland is a member too.

2. Money Laundering Regulations 2017

Regulated entities

Whilst POCA concerns anyone doing business in the UK, the Regulations 2017 only apply to businesses in the so-called "Regulated Sector". The Regulated Sector includes, among others, financial institutions, lawyers, accountants, tax advisers and estate agents.

In the UK (but not in other EU Member States, see below), most art businesses remain outside the Regulated Sector as was the case under the Regulations 2007. There are a few exceptions, such as high value dealers and companies offering loans against art or art-related investment products. The Regulations 2017 widened the definition of a high value dealer by lowering the threshold for cash transactions subject to anti-money laundering compliance from EUR 15,000 to EUR 10,000.

The Regulations 2017 define a high value dealer as *"a firm or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when the trader makes or receives, in respect of any transaction, a payment or payments in cash of at least 10,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked."* [2] Therefore, antique and fine art dealers, auctioneers and brokers, jewellers and car dealers qualify as high value dealers if they accept cash payments of or over EUR 10,000.

If an art business falls within the Regulated Sector, it must comply with the Regulations 2017.

Outlined below are the key changes introduced by the new regulations.

Simplified Due Diligence

Under the Regulations 2007, regulated entities were entitled to automatically apply simplified customer due diligence in certain circumstances (e.g. UK pension schemes and public authorities). These automatic exemptions no longer apply. While the Regulations 2017 still allow simplified customer due diligence, regulated firms are required to conduct a case-by-case risk assessment to determine whether simplified customer due diligence is justified.

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1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517992/6-2118-Action_Plan_for_Anti-Money_Laundering__web_.pdf

2 https://www.gov.uk/government/consultations/money-laundering-regulations-2017

Politically Exposed Persons

The definition of a politically exposed person ("**PEP**") has been expanded to include domestic PEPs, i.e., citizens holding prominent positions in their home country such as politicians, the judiciary and senior members of the armed forces. When doing business with a PEP, regulated entities must conduct enhanced customer due diligence. Under Regulation 35 of the Regulations 2017, a regulated person is required to apply enhanced due diligence measures to individuals for at least a year after they cease to be a PEP.

Record keeping requirements

The Regulations 2007 required regulated entities to maintain their customer due diligence material for a period of five years from the date when the business relationship with the client comes to an end. The Regulations 2017 impose a new obligation on regulated entities to delete personal data at the end of the five-year period.

Written risk assessments

The Regulations 2017 contain detailed provisions on the risk assessment required of regulated entities. Under Regulation 18, a regulated person is required to take appropriate steps to identify and assess the risks of money laundering and terrorist financing, considering a number of factors such as: its customers; the countries or geographic areas in which it operates; its products or services; its transactions; and its delivery channels. Furthermore, a regulated person must keep an up-to-date written record of all steps it has taken to identify and assess the risks of money-laundering.

Register of Beneficial Owners for Trusts

Under the Regulations 2017, the UK government is required to establish a central register of beneficial ownership information for trusts. The Trust Register will be operated by the HM Revenue & Customs.

Trustees will be required to provide information on the identity of settlors; other trustees; beneficiaries; all other natural or legal persons exercising effective control over the trust; and all other persons identified in a document or instrument relating to the trust, including a letter or memorandum of wishes. This is a significant change in reporting requirements for trusts.

The UK has already legislated to require transparency of the beneficial ownership of UK companies, Limited Liability Partnerships and Societates Europaeae. The obligation on these entities to maintain a register of people with significant control ("**PSC register**") and provide this to the UK registrar of companies was put in place through the Small Business, Enterprise and Employment Act 2015, and a subsequent suite of regulations in March 2016. Unlike the PSC register, the Trust Register will not be open to the public. It will only be available to law enforcement agencies and the UK Financial Intelligence Unit.

3. Proceeds of Crime Act 2002

Substantive offences

There are three so-called "substantive offences" in Sections 327 to 329 POCA, each of which carries a penalty of up to 14 years' imprisonment and/or a fine.

- **Section 327:** concealing, disguising, converting, transferring or removing criminal property from England and Wales, or from Scotland or from Northern Ireland.

- **Section 328:** entering into or becoming concerned in an arrangement which the person so doing knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

- **Section 329:** acquiring, using, or having possession of criminal property otherwise than for an adequate consideration.

The main defence against committing a substantive offence is to make a report to the UK National Crime Agency ("**NCA**"). If a business, or any of its employees, knows or suspects that a proposed course of conduct could involve the commission of a substantive offence, it should seek appropriate consent by making what is known as "an authorised disclosure" to the NCA.

Offences applicable only to businesses in the Regulated Sector

POCA sets out criminal offences applicable only to businesses in the Regulator Sector.

- **Section 330:** failure to disclose offences

A person engaged in a business in the Regulated Sector who knows or suspects, or who has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering, must disclose certain information to the NCA. Failure to do so is an offence which carries a maximum penalty of five years' imprisonment and/or a fine.

- **Section 331:** failure to disclose offences (Money Laundering Reporting Officer)

A Money Laundering Reporting Officer (i.e. the designated member of staff in charge of the company's anti-money laundering monitoring and procedures) commits an offence under Section 331 if he/she receives disclosures of suspected money laundering activity and fails to pass on the information to the NCA. This offence carries a maximum penalty of 5 years' imprisonment and/or a fine.

- **Section 333A:** Tipping-off

It is an offence for a person in the Regulated Sector to disclose to a third party that a suspicious activity report has been made to the NCA, if that disclosure

might prejudice any investigation resulting from this report.

In 2015, the NCA initiated criminal proceedings under POCA against 2,306 individuals and found guilty 1,335. Money laundering using high-value goods has been recognised as a high priority by the UK government.[3] The Criminal Finances Act ("CFA"), which came into force on 30 September 2017, gives law enforcement agencies further powers to confiscate valuable items and other assets acquired using the proceeds of crime. There will be a new Code of Practice specifically dedicated to the seizure of personal property including precious metals, precious stones, watches and artworks.[4]

4. Criminal Finances Act 2017

The CFA, which received Royal Assent on 27 April 2017, introduced important changes to POCA, including:

- **Unexplained wealth orders**
  The CFA creates Unexplained Wealth Orders ("UWOs") which require a person who is suspected of involvement in serious criminality to explain the origin of assets that appear to be disproportionate to their known income. The UWO specifically targets red flag situations where a person buying expensive items - such as property, jewels or artworks - does not appear to be wealthy enough to make the purchase. A failure to provide a response would give rise to a presumption that the property was recoverable. A person could also be convicted of a criminal offence, if they make false or misleading statements in response to a UWO.

- **New corporate offences of failure to prevent facilitation of UK and foreign tax evasion**
  Part 3 of the CFA introduces two new offences: the UK tax evasion facilitation offence and the foreign tax evasion facilitation offence. The aim of these offences is to hold legal persons to account for the actions of their staff where a staff member criminally facilitates a customer to commit a tax evasion offence. It is a defence for a legal person if it could show that it had in place reasonable prevention procedures, or that it was not reasonable to expect such procedures.

- **Enhanced information sharing**
  Section 11 of the CFA provides a new mechanism for information sharing between entities in the Regulated Sector in relation to suspected money laundering. This will enable the submission of joint disclosure reports, bringing together information from multiple reporters into a single suspicious activity report that provides the whole picture to law enforcement authorities.

3 http://www.nationalcrimeagency.gov.uk/publications/731-national-strategic-assessment-of-serious-and-organised-crime-2016/file. See also http://www.nationalcrimeagency.gov.uk/news/735-the-glassby-arch-the-restoration-of-a-unique-piece-of-local-history.

4 https://www.gov.uk/government/consultations/proceeds-of-crime-act-2002-and-anti-terrorism-crime-and-security-act-2001-codes-of-practice.

5. The Terrorism Act 2000

The Terrorism Act ("TA") applies to dealings with funds or property used to support terrorism. Art businesses which sell cultural property from countries occupied by terrorists are at greatest risk of committing an offence under the TA, the most relevant one being the retention or control or facilitation of the retention or control of terrorist property. This offence carries a penalty of up to 14 years' imprisonment and/or an unlimited fine.

To establish a defence to the terrorism offence, you must prove that you did not know and had no reasonable cause to suspect that the arrangement related to terrorist property. A defence can also be established by filing a suspicious activity report with the NCA and, where appropriate, obtaining consent to carry out an activity involving terrorist property.

Importantly, unlike POCA, the TA makes it a positive obligation to report your belief or suspicion that another person has committed a terrorism financing offence if the information comes to you in the course of your employment. A report must be made irrespective of whether or not you have any involvement in the acts concerned or would otherwise be in danger of committing one of the 'substantive offences'. Failure to disclose carries a maximum of five years' imprisonment and/or a fine.

6. Implementation of the 4AML in the EU

The 4MLD does not require EU Member States to include auction houses and art/antique dealers/galleries in the Regulated Sector. However, some EU Member States have chosen to include auction houses and art/antique dealers/galleries within the Regulated Sector, in some cases, such as Italy, following the adoption of the 4MLD.

Thankfully for the British art market, the UK government has opted not to include auction houses and art/antique dealers/galleries in the Regulated Sector, unless the art business qualifies as a high value dealer or offers loans against art or art-related investment products. In Germany, the introduction of the 4MLD has resulted in auction houses and art/antique dealers being required to comply with more specific and wider obligations. In France and Spain, auction houses and art/antique dealers/galleries have been in the Regulated Sector for some time.

France

According to the Code monétaire et financier, auction houses and art/antique dealers/galleries (*'les opérateurs de ventes volontaires'* and *'les personnes se livrant habituellement au commerce d'antiquités et d'œuvres d'art'*) fall within the Regulated Sector. In particular, they are obliged to identify clients and verify their identity. This obligation was strengthened pursuant to *Loi* No. 2016-1691 (so called "*Sapin 2*") and Ordonnance

No. 2016-1635 implementing the 4MLD into French law. Additionally, *Ordonnance* No. 2016-1635 provides for stricter identification and verification criteria (especially when the transaction involves beneficial owners).

Spain

In Spain, auction houses and art/antique dealers/galleries (*'las personas que comercien profesionalmente con objetos de arte o antigüedades'*) are also in the Regulated Sector (*Ley* No. 10/2010 *'de prevención del blanqueo de capitales y de la financiación del terrorismo'*). Like their French counterparts, they are obliged to identify and verify the identity of clients. The regulations implementing the 4MLD are still in draft. The main changes are likely to cover penalties for infringement and the reporting regime, with a view to ensuring the anonymity of reports to the national anti-money laundering agency. In addition, the draft regulations propose to enhance the internal system of risk assessment for regulated businesses, and to establish a public registry of businesses frequently dealing with suspicious entities.

Germany

In Germany, the legislative measure implementing the 4MLD, the *'Gesetz zur Umsetzung der Vierten EU-Geldwäscherichtlinie, zur Ausführung der EU-Geldtransferverordnung und zur Neuorganisation der Zentralstelle für Finanztransaktionsuntersuchungen'*, came into force on 26 June 2017. Even before the latest amendments, German anti-money laundering rules had included, *inter alia*, in its definition of *Verpflichtete* (persons subject to the anti-money laundering obligations, including the identification of clients and verification of their identity), so-called *Güterhändler* (dealers of goods) (see para. 2(16)). The regulations implementing the 4MLD now also make special reference to *"hochwertige Güter"*, i.e. high-value goods, which expressly include precious metals such as gold, silver and platinum, precious stones and gems, jewellery and watches and works of art and antiquities (see para. 1(10)). Going forward, German auction houses and art/antique dealers/galleries can be required by the supervising body to nominate an anti-money laundering officer to discharge their duties relating to customer due diligence (see para.7 (3)). Auction houses and art/antique dealers/galleries accepting payments in cash above a threshold of EUR 10,000 are required to implement internal risk management measures (i.e. a risk analysis team and an internal security policy).

Italy

Prior to the implementation of the 4MLD, the Consolidated Text of Public Safety Laws (so-called "TULPS") only required art/antique dealers/galleries and auction houses to satisfy certain formalistic obligations, such as obtaining a copy of an ID document for each client and keeping an updated list of clients. For the first time, decree No. 90/2017 (in force from 4th July 2017) implementing 4MLD requires art/antique dealers/galleries and auction houses (*'i soggetti che esercitano l'attività di case d'asta o galleria d'arte'*) to identify and verify the identity of clients, by assessing the information provided by clients through a reliable and independent third party who is able to ascertain their identity. The reform of the anti-money laundering regime introduces different regimes (from simplified to enhanced) depending on the lower/higher degree of risk of money laundering. The decree requires regulated entities to maintain customer due diligence information for a period of ten years from the date when the business relationship with the client comes to an end. In addition to the traditional reporting obligations, when client information cannot be verified, auction houses and art/antique dealers are expressly required to abstain from concluding any suspicious transaction until the national anti-money laundering agency is adequately notified.

7. Conclusion

The risk of money-laundering creates serious reputational, legal and financial risks for the art trade. The opacity of the art market makes it a natural target for criminals. Stringent anti-money laundering regulations create red tape which can be a hindrance, especially for smaller art businesses. As the art market is moving towards more transparency, regulatory supervision is likely to increase in the coming years.