Fighting Money Laundering in the Art Market – A Comparative Overview of U.S. and Swiss Law

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I. Introduction

The connection between money laundering and the art market was first identified as early as the 20th century (De Sanctis; Roth). However, it is recent international scandals, such as those revealed by the Panama Papers, that have intensified regulatory scrutiny of the art market (Roth; Cassani/Heninger; Kern). In the European

Union (EU), this oversight began in 2018 with the implementation of the Fifth Anti-Money Laundering Directive (AMLD V), which brought art market participants under the scope of anti-money laundering (AML) and counter-terrorism financing (CTF) regulations. This framework was further reaffirmed in 2024 with the adoption of the EU's first Anti-Money Laundering Regulation (AMLR).

Similarly, in February 2023, the Financial Action Task Force (FATF) — a leading international organization in the fight against money laundering — published a report specifically addressing the risks of money laundering in the art market (FATF, Report). The FATF emphasized the vulnerability of the art market to illicit activities and urged member states to implement robust countermeasures.

In the United States, the issue of money laundering within the art market resurfaced in particular in 2020 with a report from a Senate subcommittee (U.S. Senate, Report). This was followed by a comprehensive study published by the U.S. Department of the Treasury in February 2022 (U.S. DOT, Report). Despite these efforts, the American art market remains largely underregulated in terms of addressing money laundering risks. This regulatory gap is particularly concerning given the dominant position of the U.S. in the global art market, accounting for 42% of its total value in 2023 (UBS/Art Basel, Report 2024).

The lack of comprehensive regulation on this issue is not unique to the United States. Switzerland, which represented 3% of the global art market's total value in 2023 (UBS/Art Basel, Report 2024), also faces significant regulatory deficiencies concerning money laundering in the art sector.

This note aims to briefly compare the legal frameworks of these two jurisdictions with respect to combating money laundering in the art market. It begins by presenting the rules governing preventive measures (II.) and repressive mechanisms (III.) before concluding with some final observations (IV.). It should be noted, however, that this note does not delve into the specific methods by which money laundering may occur in the art market, nor does it analyze the particular vulnerabilities of the sector (on these topics, see, e.g., U.S. DOT, Report; Hufnagel/King; Dagirmanjian; Turner; Cassani/Henninger).

II. Money Laundering Prevention

In addressing the fight against money laundering, it is essential to focus on the so-called preventive rules — those designed to preclude money laundering activities, irrespective of whether a specific instance of money laundering has occurred. These rules require regulated entities to implement internal procedures aimed at preventing money laundering offenses. Two primary categories of measures must be adopted:

- Due Diligence Measures: These measures primarily involve gathering specific

information as part of establishing and maintaining business relationships. This includes identifying the client, verifying the ultimate beneficial owner, and determining the origin of funds.

- Reporting Obligations: When suspicious activities, including potential money laundering, are detected during the due diligence process, regulated entities are obligated to file a Suspicious Activity Report (SAR). Such reports must be submitted promptly to the respective national financial intelligence unit. In the United States, this unit is the Financial Crimes Enforcement Network (FinCEN), while in Switzerland, it is the Money Laundering Reporting Office Switzerland (MROS). These units analyze the reported information and decide whether the matter warrants escalation to law enforcement authorities for further investigation and potential prosecution.

Without delving into the specific content of these preventive rules, it is critical to identify the entities subject to these obligations to assess the extent of regulatory oversight in the art market in the United States (A) and Switzerland (B).

A. U.S. Law

On May 18, 2018, U.S. Congress Representative Luke Messer introduced a bill aimed at including art dealers in the fight against money laundering under the Bank Secrecy Act (BSA) (Turner). Although the bill ultimately failed to pass, Congress later amended the BSA to include the antiquities market within the scope of AML regulations (Turner). On January 1, 2021, the U.S. Congress enacted the Anti-Money Laundering Act of 2020 as part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA) (Pub. L. No. 116-283). This legislation introduced new provisions under Section 6110 of the AML Act, subjecting the antiquities trade to AML/CTF requirements (U.S. DOT, Report).

Following this, the Department of the Treasury was tasked with evaluating whether AML/CTF regulations should be extended to the broader art market. This evaluation culminated in the aforementioned Treasury report (U.S. DOT, Report).

In parallel, another legislative initiative — the ENABLERS Act — was proposed in 2021, seeking to fully subject the art market to AML/CTF regulations. Although the bill passed in the House of Representatives, it failed to secure approval in the Senate (Turner).

For now, AML/CTF regulations in the United States remain applicable primarily to financial intermediaries, such as banks, and do not seem to impose obligations on art market participants (U.S. DOT, Report; Dagirmanjian; Turner). With the finalization of the implementing regulations pending (Center for Art Law, USA AML Regulation), this regulatory gap persists.

Nevertheless, art market actors may still encounter AML/CTF obligations. Specifically, any person engaged in a trade or business in the United States is required to file a report if they receive more than USD 10,000 in cash, coins, or certain monetary instruments, whether in a single transaction or in two or more related transactions (U.S. DOT, Report).

Despite this, such measures are barely sufficient. The art market and its participants remain largely unregulated with respect to money laundering and terrorist financing risks.

B. Swiss Law

Under The Swiss law, the regulatory framework is broadly similar to that of the United States. Preventive AML measures under the Anti-Money Laundering Act (AMLA) primarily apply to financial intermediaries, such as banks (Art. 2 AMLA). Art dealers are generally not classified as financial intermediaries and are therefore not directly subject to these preventive regulations (Cassani/Henninger; Kern).

In certain circumstances, art dealers may be considered financial intermediaries if they provide financial services — such as loans — under Art. 2 para. 3 AMLA. However, this classification applies only if the financial service is not connected to the execution of another principal contract (e.g., the sale of artworks). Otherwise, the activity falls outside the scope of the AMLA, as specified in Art. 3 let. f of the Anti-Money Laundering Ordinance (Cassani/Henninger). Consequently, Art Secured Lending activities do not necessarily fall within the scope of AML regulations in Switzerland, as they are generally tied to a principal contract (e.g., the sale of artworks) when carried out by an art dealer or an auction house (on this topic, see Tistounet).

Nonetheless, art dealers in Switzerland may fall within the scope of AMLA in specific circumstances — namely, when they accept cash payments exceeding CHF 100,000 as part of a transaction (Art. 8a para 1 AMLA). This threshold, however, is relatively high compared to similar regulations in other jurisdictions, including the United States.

As a consequence, the Swiss art market, like its U.S. counterpart, remains largely exempt from comprehensive regulations aimed at preventing money laundering or terrorist financing.

III. Money Laundering Repression

In addition to preventive rules, most jurisdictions have also enacted measures to criminalize money laundering. These repressive regulations are designed to sanction individuals who actively engage in money laundering activities. Unlike preventive measures, these provisions are sector-agnostic and can, therefore, be applied to actors in the art market as well (Dagirmanjian; Cassani/Henninger).

To understand the scope and application of these measures, it is essential to briefly examine the legal frameworks in the United States (A.) and Switzerland (B.).

A. U.S. Law

In the United States, the Money Laundering Control Act (MLCA), codified under Sections 1956 and subsequent provisions of 18 U.S.C., criminalizes money laundering by categorizing such acts into four distinct types: promotional, concealment, structuring, and tax evasion (Dagirmanjian).

Some of these offenses may have direct implications for the art market and could expose actors within the sector to criminal liability (Dagirmanjian). Of particular relevance is Sec. 18 U.S.C. § 1957, which penalizes individuals who "*knowingly engage in a monetary transaction involving more than USD 10,000 in criminally derived property.*" This provision is especially significant in cases where illicitly obtained funds are used to purchase artworks (e.g., cash obtained from drug trafficking), thereby connecting money laundering to the art market.

B. Swiss Law

In Switzerland, unlike in the United States, money laundering is criminalized through a single offense. This is enshrined in Art. 305bis of the Swiss Criminal Code (SCC), which penalizes acts intended to conceal the illicit origin of assets. These acts may include traditional money laundering activities, such as using proceeds from drug trafficking to purchase artworks (Cassani/Henninger; Kern). The provision also extends to cases of "laundering of provenance," where the objective is to give a lawful appearance to cultural goods looted abroad (on this topic, see Bastian).

Additionally, Swiss law establishes a related offense that only applies to financial intermediaries subject to due diligence obligations under the AMLA (e.g., banks). Under Art. 305ter, para 1 SCC, financial intermediaries may face criminal prosecution if they fail to properly identify the beneficial owner or knowingly provide false information about the beneficial owner in the context of a business relationship.

IV. Conclusion

The American and Swiss systems currently exhibit significant similarities, as the art markets in both countries remain largely unregulated with respect to AML/CTF measures. Actors in the art market are not subject to preventive AML rules, despite international standards such as those outlined in the EU (Art. 3(3)(i) & (j) AMLR) or the recommendations of the FATF. Given the art market's inherent vulnerability to money laundering, it may be time for both nations to adapt their regulatory frameworks.

In the United States, the FinCEN is progressing slowly but continues to evaluate the expansion of AML regulations to encompass the art market (Center for Art Law, USA AML Regulation). While some scholars advocate for such reforms (Dagirmanjian; Turner), others remain critical (Burroughs).

Similarly, in Switzerland, a parliamentary motion submitted in 2022 proposes extending the AMLA to include art dealers (Motion Pult CN 22.3104). Since October 2024, the motion is under review by a commission of the Council of States. This indicates that Swiss law could undergo reform in the coming years. Legal scholars have also addressed this issue, with a majority, including the author of this note, supporting the inclusion of art dealers under the AMLA (Roth; Cassani/Henninger; Kern). However, this view is also not without opposition (Ryser).

For the time being, self-regulation appears to be the only practical solution. Several recommendations have been issued by organizations such as the Basel Institute on Governance (Basel Art Trade AML Principles) and the Responsible Art Market (RAM) initiative (RAM AML Guidelines). However, the non-binding nature of these recommendations limits their effectiveness. They fail to create a level playing field among actors within the same sector or to ensure uniform rules. This lack of uniformity is unfortunate, as standardized regulations would significantly enhance international cooperation, a critical factor in combating money laundering.

Furthermore, none of these recommendations or ongoing parliamentary efforts seem to address the issue of Non-Fungible Tokens (NFTs). Despite their significant presence in the art market, NFTs present considerable vulnerabilities to money laundering (FATF, Report; Hufnagel/King; Bastian). The omission of this digital asset class underscores a critical gap in current regulatory initiatives. Within the EU, despite the adoption of the new AMLR, NFTs are likely not covered by these rules since they are not considered as crypto assets under the new MICA Regulation (art. 2 (1)(7) AMLR; consid. 10 MICAR; art. 2(3) MICAR). This situation is, however, likely to evolve as the European Commission is tasked with presenting, by December 30, 2024, a specific proposal to provide a legal framework addressing the issue of NFTs (ESMA).

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