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REGULATING MANDATORY DUE DILIGENCE STANDARDS TO SAFEGUARD EUROPEAN ART MARKET AGAINST ILLICIT TRADE AND MONEY LAUNDERING

Abstract: This article looks at the efficient regulatory tools used to curb illicit trafficking and money laundering on the art market. It focuses on the European Union (EU) due to its robust regulatory framework that consists of a matrix of legal instruments under public international law and EU secondary legislation. It endeavours to assess whether the complexity of an art trade regulatory framework allows the market participants to self-regulate by applying due-diligence standards. It also seeks to highlight the role of public institutions in delivering the guidelines on the minimum due diligence standards adapted to the current art market challenges, particularly stemming from many laundering schemes. This article commences with the legal framework for the protection of cultural heritage in the EU in the face of art market money-laundering schemes. Next, it outlines the longstanding tradition of codes of ethics in art market practice, and emphasizes its role in supporting due diligence as a tool preventing illicit art trade. Further on, the article looks at the regulatory framework of due diligence in art transactions. It concludes with an outlook of the enforceability of due diligence standards by way of self-regulation by art market participants.

Keywords: Due diligence, art market, European Union, money laundering

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1. The Vulnerability of the Art Market to Illicit Trade and Money Laundering: An Introduction

Legal provenance is the key theme in today's art market, its ethics and legal regulation. Its significance is shown, among other things, by the recent scandals involving the acquisition of illegally exported Egyptian archaeological artefacts by two prestigious museum institutions: the Metropolitan Museum in New York City and the Louvre Abu Dhabi.¹ Hence it is vital for the main market players to ensure the security of art transactions. It should guarantee that both the artwork and the funds invested in its acquisition come from a reliable and legal source. In other words, the art trade must neither be a space for illicit trafficking in cultural material nor a means of laundering illicitly sourced money.² Yet, despite an increased recognition of the art market as a popular vehicle for money laundering, efforts undertaken to combat this criminal activity have been insufficient.³

The vulnerability of the international art market to money laundering schemes and other criminal rackets is attributed to its lack of regulation and to the market being opaque.⁴ Art has a relatively high value compared to other retail goods and commodities, which means that more money can be laundered in a single transaction. According to UNESCO estimates, 'the black market of antiquities and culture constitutes one of the most persistent illegal trades in the world', and from illegal excavation to final sale, 'the value of the most beautiful masterpieces increases 100-fold, a greater growth than that of drugs'.⁵ The art market is considered by most as a lucrative business involving a great number of actors. It is not unusual to use several different intermediaries without disclosing the identities of the buyers and the sellers. Art transactions can be undertaken in private (especially now when a vast part of it takes place online) and by anonymous buyers who are able to pay the highest prices for pieces of unknown and undocumented provenance, which might have been looted or might not be authentic.⁶

1 Noce, "Antiquities Trafficking Charges Upheld".

2 Mather-Lees, "The Problem with Due Diligence".

3 Chu, "Global cooperation for an international database", 124.

4 Payne, "The art of money laundering".

5 Bokova, UNESCO 2011.

6 Payne, "The art of money laundering".

As the parties to the art market were not, until very recently, obliged to disclose their identities and the auction houses were not obliged to inform the public about the value of transactions, the art market remained a trade sphere available to anyone with the right amount of funds – no questions were asked about the source of their income or the prospective whereabouts of the piece of art. Given the possibility to artificially raise or lower prices using straw bids through shell companies, pricing in the art market is highly subjective. On top of this all, art is highly portable, which makes it an attractive way to transfer money internationally.⁷ It is thus little wonder that illicit money was prevalent in this segment of the market, and that many artworks were lost irrevocably. Such concerns triggered the enactment of more stringent regulations and the ongoing development of the concept of expert due diligence which would be applicable to and available to all the various stakeholders in the art market.⁸

Since the international art market is considered ‘the largest unregulated industry in the world (besides guns and drugs),’⁹ due diligence is not always associated with the art market, even for those who specialize in trading in this market sphere. Thus the answer to the question of why it is vital for due diligence examination to exist in the art market sphere falls somewhere between the need to maintain the market’s integrity and mitigating the risks existing within it.¹⁰

The results of the questionnaire conducted for the purpose of the 10th Session of the UNESCO Subsidiary Committee of the Meeting of States Parties (Subsidiary Committee) to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)¹¹ indicated that most dealers operating in the art market do not implement a due diligence policy and that they face problems in tracing the provenance of an object back beyond fifteen years.¹² The questionnaire furthermore pointed out that in most cases the minimum steps taken by the responding institutions to satisfy due

7 Napier, “Treasury study 2022”.

8 Giroud, Boudry, “Art Lawyers’ Due Diligence Obligations”, 401-417.

9 Martinović, “What Do The New UK Money Laundering Regulations Mean”.

10 Marinello, Hasler, “What Is Due Diligence?”, 316-319.

11 The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; this treaty is binding on 145 states worldwide, including 25 EU Member States.

12 UNESCO, Report on the results of the consultations with the art market on the revisions to the International Code of Ethics for Dealers in Cultural Property, C70/22/10.SC/9.

diligence requirements do not go any further than conducting a simple provenance check on the item subject to the transaction, focusing solely on its previous owners. The survey indicated that even though most traders include certain due diligence policies in order to distinguish between licit and illicit trade, most of them find it difficult to conduct complete inquiries on traded objects due to the lack of supporting evidence and documentation.¹³ The overall conclusion of the survey highlights two main common obstacles: a lack of clear standards and procedures hindering access to justice and legal security, and the practical challenge of cultural objects being traded without documented provenance, leading to difficulties in distinguishing between lawful and unlawful possession and contributing to illicit trade.

In this light, the aim of this article is two-fold. First, it endeavours to assess whether the complexity of the art market regulatory framework allows market participants to self-regulate by applying due-diligence standards. Second, it seeks to highlight the role of public institutions in delivering the guidelines on the minimum due diligence standards adapted to the current art market challenges, particularly stemming from many laundering schemes. In other words, the article queries the efficient regulatory tools used to curb illicit trafficking and money laundering on the art market. The special focus is on the art market in the European Union (EU) due to its robust regulatory framework that consists of a matrix of legal instruments under public international law and EU law.

This article commences with an overview of the legal framework for the protection of cultural heritage in the EU in the face of the art market money-laundering schemes. Next, it outlines the longstanding tradition of codes of ethics in art market practice, and emphasizes its role in supporting due diligence as a tool preventing illicit art trade. Further on, the article debates the regulatory framework of due diligence in art transactions. It concludes with an outlook of the enforceability of due diligence standards by way of self-regulation of art market participants.

2. The Legal Concept of Due Diligence

Due diligence is a comprehensive process involving the investigation, verification, and examination of facts and circumstances pertinent to a transaction or legal obligation. In legal doctrine, due diligence is

13 UNESCO, Report on the results of the consultations with the art market, C70/22/10.SC/9.

characterized by the standard of care and effort that a reasonable person is expected to exercise under specific circumstances. The concept is integral across various legal fields, including corporate law, securities regulation, environmental law, and, notably, in the art market to prevent illicit trade and money laundering. Indeed, the duty to exercise due (or required) diligence may stem from various legal branches and always refers to the behavioural obligation of vigilance on the parties involved in the process of an artwork transaction and acquiring the art object in question. The due diligence search is usually dependent on and strictly characterized by a transaction-specific list of elements to be verified before the closing. Such a thorough check goes far beyond the standard provenance and provenience check of the object; the latter might be seen as one of the steps to be taken during the due diligence search.

Due to limited control over and general supervision by the state authorities of the acquisition of objects in the art market, the variety of documentation accompanying each acquisition and lending transaction, gaps in the cultural heritage legislation at the EU level and the unequal transpositions of codes of ethics and international conventions into national legal systems, the implementation of the concept of due diligence constitutes a real-life opportunity for the promotion of transparency in art market transactions. By introducing a scheme allowing for an overview of the acquisition procedure, an import policy, and the use of specialized registers by art market participants, it might constitute a screening process that makes it possible to prevent offences related to money laundering which has been in place in many other parts of the market and to which the art market is particularly exposed.

3. The Tools Preventing the Art Market from Illicit Trade and Money Laundering. Self-regulation and Normative Tools

Cultural objects possess a multifaceted nature. They can be viewed as movable property or assets, reflecting a historical trend where cultural commodification dates back to ancient times. This practice has expanded significantly due to globalization and the advent of anonymous online sales. Conversely, cultural objects can also be regarded as heritage, distinguished by their intangible value that transcends mere monetary value. Due diligence can be defined in a normative fashion and as an ethical framework, the latter stemming from some form of professional self-regulation.

3.1. Normative Due Diligence Tools

Within the private law system of the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (1995 UNIDROIT Convention),¹⁴ the due diligence standard merely defines the good or bad faith of a new possessor and his or her rights to compensation for the value of the object upon return if it turns out to be stolen or looted.¹⁵ The good (or bad) faith of a new possessor is crucial but highly subjective in this context, as it depends on trade standards specific to a particular time and place. The 1995 UNIDROIT Convention expands on this principle. When determining whether the possessor exercised due diligence, all circumstances of the acquisition should be considered, including the nature of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects, and any other relevant information and documentation that could reasonably have been obtained. This includes consulting accessible agencies or taking other steps a reasonable person would have taken in similar circumstances (Article 4(4)). Such an interpretation is reflected in an almost the same way in Directive 2014/60/EU¹⁶ by an exhaustive list of actions which the parties to the art transaction are expected to take into consideration, including documentation on the object's provenance, the identity of the parties to the transaction, the price paid, and whether the possessor researched any register of stolen cultural objects.¹⁷

The insufficiency of a purely private law approach has been highlighted by the ever-growing number of current restitution claims pertaining to past losses, and many market countries not having acceded to the 1995 UNIDROIT Convention. Consequently, the fragmented situation persists. Additionally, even if treaties were applied retroactively, limitation periods of 30, 50, or even 75 years would not cover claims related to Nazi-looted art or colonial plunder. Despite the lukewarm reception of the 1995 UNIDROIT Convention, this standard has been reiterated in many subsequent legal and ethical instruments, thereby gaining significance.

14 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects, 24 June 1995, ILM 1322; this treaty entered into force on 1 July 1998, it is now binding on 51 states worldwide, including 15 EU Member States (Poland is not party).

15 Campfens, "Cross-border claims".

16 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012, 15 May 2014, OJ L 159/1.

17 Article 4 of the 1995 UNIDROIT Convention.

The nature of the due diligence concept in the EU law has been reflected in recent years in the 5th Anti-Money Laundering (AML) Directive (AMLD5).¹⁸ One of the requirements stemming from AMLD5 is that art market participants are obliged to discover the identity of the physical person they are dealing with within the art market transaction. The obligation to ascertain and verify the identity of the art market participant involved in a transaction is regulatory in its nature. The AMLD5 introduces the concept of an ‘enhanced customer due diligence’ and stipulates that the obliged entities must, where relevant, implement supplementary mitigating measures that complement enhanced customer due diligence measures. This should be done in alignment with a risk-based approach, considering the specific circumstances of business relationships or transactions.

The scheme of the AMLD5 has been constructed as a cascade system under which the obligation to undertake the measures specific for the enhanced due diligence standard has been combined with the obligation to undertake at least one of the other mitigating measures. While the standard enhanced due diligence measures may include the obligation to obtain additional information on the customer and on the beneficial owner, on the intended nature of the business relationship, source of funds and wealth of the customer, or information on the reasons for the intended or performed transactions, the additional mitigating measures may require the obliged entity to further introduce a reporting mechanisms requiring an increased supervisory examination or increased external audit requirements for branches and subsidiaries of obliged entities located in the country concerned.

3.2. Non-normative Due Diligence Tools

An obligation to actively research the provenance of artefacts before acquisition has featured in the ICOM Code of Ethics for Museums, the UNESCO International Code of Ethics for Dealers in Cultural Property (UNESCO Code of Ethics),¹⁹ and the Code of Ethics of the International Confederation of Art

¹⁸ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 30 May 2018, OJ L 156/43.

¹⁹ UNESCO International Code of Ethics for Dealers in Cultural Property (1999), CLT/CH/INS.06/25 REV.

and Antique Dealers' Associations (CINOA Code of Ethics).²⁰ The codes which apply to professionals contain requirements mandating a higher standard of diligence, as professionals are assumed to have better knowledge of the art market and are expected to conduct an in-depth examination of the cultural objects which are subject to certain transactions.

Such a due diligence mechanism based on self-regulation has also been recognised within the UNESCO Code of Ethics – it committed professionals not to 'import, export or transfer the ownership of property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported'. However, at the same time, it did not impose an obligation to actively research the provenance of cultural objects – not even as an ethical standard.²¹ The 2023 UNESCO Model Provisions on the Prevention and Fight against Illicit Trafficking of Cultural Property also provides for an obligation on museums and art market professionals to actively ensure the legal provenance of cultural objects before any transfer, and in that regard to 'check whether the cultural property in question is registered in publicly accessible databases such as the INTERPOL Database on Stolen Works of Art as well as relevant national databases and refer to the ICOM Red Lists of Cultural Objects at Risk'.²²

The existing standards for due diligence seem to be undergoing a shift, transitioning from being a mere requirement for eligibility for compensation upon restitution within a private law framework to evolving into a stringent legal obligation. This transformation is particularly significant in regions where the trade of unprovenanced antiquities was once a common practice, thereby amplifying the impact of these evolving measures.

Another important aspect in provenance verification is its interpretation as 'lawful' or 'unlawful'. This is pivotal in the context of restitution matters, however, it is contingent upon the perspective one adopts – lawful according to which legal system? National regulations on ownership exhibit considerable divergence, and international guidelines lack retroactive applicability while remaining ambiguously defined.

The above indicates that the mechanisms based on self-regulation cannot be considered as the sole tool responsible for ensuring compliance

20 CINOA Code of Ethics and Charter (2005).

21 Campfens, "Cross-border claims".

22 Provision 18 of the Draft Model Provisions on the Prevention and Fight Against the Illicit Trafficking of Cultural Property, C70/23/7.MSP/8, adopted in May 2023.

with the due diligence standards in the art market.²³ Introducing a system allowing all art market participants an overview of the acquisition procedure, an import policy, and the use of specialized registers might constitute a screening process that makes it possible to prevent offences related to money laundering – which has been in place in many market branches and to which the art market is particularly exposed.

4. The Current State of Cultural Heritage Protection in the Face of the Art Market Anti-money Laundering Phenomenon

Cultural heritage, although present and of great importance considering the diversity of traditions, views and interpretations characterizing EU Member States, has been dealt with extremely laconically within EU legislative system. While the Treaty on the European Union (TEU) does not go far beyond mentioning the concepts of ‘inheritance’²⁴ and ‘Europe’s cultural heritage’²⁵, the Treaty on the Functioning of the European Union (TFEU)²⁶ strives to combine the significance of heritage with the value of cultural diversity, and takes an approach to enhancing participation in cultural life. Both treaties fail, however, to provide a complex definition of the notion of ‘cultural heritage’.

A more dynamic approach to the systematic definition of cultural heritage has been taken within the EU regulations on the importation of cultural property from third countries.²⁷ Regulation (EU) 2019/880 states that ‘[cultural] heritage constitutes one of the basic elements of civilization having, inter alia, symbolic value, and forming part of the cultural memory of humankind’.²⁸ In this regard, movable elements of cultural heritage—cultural goods—are not only assets and commodities to be traded, but true vehicles of people’s identity, contributing to the maintenance of peace and full

23 Stepnowska, “Due Diligence”, 377-391.

24 Preamble of the Treaty on the European Union, 13 December 2007, OJ C 326.

25 Article 3 of the Treaty on the European Union.

26 Article 167 of the Treaty on the Functioning of the European Union, 26 October 2012, OJ C 202.

27 Szabados, “The EU Regulation on the Import of Cultural Goods”, 2.

28 3rd Recital of the Preamble to Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, 17 April 2019, OJ L 151/1.

realization of human rights.²⁹ Furthermore, Regulation (EU) 2019/880 emphasizes that due to these values, such goods, which are often ‘in high demand on the international market’ should be ‘protected from unlawful appropriation and pillage’. Therefore, ‘Member States should be allowed to intervene when receiving intelligence regarding suspicious shipments and to take all appropriate measures to intercept illicitly exported cultural goods’.³⁰

An EU cultural heritage governance must thus be seen within the wider context of European market practices. Multilevel governance in this sphere means that it should get involved in the fight against organized crime against cultural heritage, as the problem remains vivid and perhaps more damaging now than ever. The rapid and ongoing digitalization of the art sphere delivers new methods and approaches that can be used in the illicit trade of the art works, and brings about previously unknown safety issues in the transactions taking place in the art market.³¹ The crucial importance of investigating the criminal networks and illicit money flows behind the individual trafficking cases as well as the fact that even legally acquired cultural goods can be misused by criminals for crimes such as money laundering or terrorism financing.³²

The complexity of this criminal phenomenon has highlighted the need for a tailor-made response at the level of EU legislation, which was laid down in the EU Security Union Strategy 2020-2025³³ and the EU Strategy to Tackle Organised Crime 2021-2025.³⁴ Fighting it requires a comprehensive legal framework to enhance the prevention of trafficking in cultural goods, strengthen law enforcement levels, and boost international cooperation.³⁵

This domain remains, however, underregulated: the most important standards governing the art market in this regard are currently the AMLD5 and the rather ineffective regulations stemming from the codes of ethics,

29 Paragraph 2 of the Council Conclusions on EU Approach to Cultural Heritage in conflicts and crises, 2021 9837/21.

30 3rd Recital of the Preamble to Regulation (EU) 2019/880.

31 EU Action Plan against Trafficking in Cultural Goods, COM(2022)800, p. 1.

32 Council Conclusions on the fight against trafficking in cultural goods of 8 June 2023. 10249/23.

33 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, 24 July 2020, COM/2020/605.

34 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy to tackle Organized Crime 2021-2025, 14 April 2021, COM/2021/170.

35 EU Action Plan against Trafficking in Cultural Goods.

which are of a soft law character and do not have the binding force upon all market participants.³⁶

Even though the national transposition of the AMLD5 to the legal systems of all the EU Member States was successful, the problem remains of the still low level of factual AML protection in the art market, resulting from the low level of enforcement and high compliance costs. Money-laundering might be reckoned with and defeated, but it requires the introduction of an expert due diligence process which could be conducted and implemented by all the various entities involved in art market transactions – both wealthy auction houses with a long list of successfully concluded transactions and the private galleries or weekend art stalls struggling to comply with the AMLD5 requirements.

5. Ethical Standards in the International Cultural Heritage Protection Law and Policy

While the anti-money laundering legislation consists of a relatively new layer of cultural heritage law, the regulatory aspects of the art market have been under constant development over time, but it is its moral dimension which has proceeded. The importance and meaning of ethical standards in the field of art law and protecting cultural heritage has been on an upward trend in recent years, which has seen the adoption of various codes addressing matters applied in a wide range of contexts within the cultural heritage sectors.³⁷

5.1. Codes of Ethics

The adoption of ethical codes, guidelines and principles in the field of cultural heritage protection dates back no further than to the first half of the twentieth century, when they were first used in order to create the 1931 Athens Charter for the Restoration of Historic Monuments,³⁸ and later in the 1964 Venice

36 Frigo, “Procedural and Institutional Aspects, Code of Ethics”, 787-790.

37 See e. g. ICOM Code of Ethics for Museums, ICOM Code of Ethics for Natural History Museums, CINOA Code of Ethics and Charter, Code of Ethics of the International Council on Archives, Code of Ethics of the International Federation of Rock Art Organizations or Code of Ethics for the Friends and Volunteers of Museums.

38 The Athens Charter for the Restoration of Historic Monuments (1931).

Charter for the Conservation and Restoration of Monuments and Sites.³⁹ The texts of the codes of ethics were developed in order to fill in regulatory gaps and provide guidance in cases where there is no specific rule in place, or in matters requiring some further regulatory clarification.⁴⁰ Each of them had a different provenance and was drawn up under specific circumstances by different entities, such as e.g., specialized institutions; an international organization; an association of museums; and other public or private entities.

Despite their non-imperative legal character, codes of ethics are intended to be binding upon their addressees. It is safe to assume that they constitute a normative framework under which professionals commit themselves to operate.⁴¹ Yet the problem in the art sector is the continuing low level of practical enforcement of the ethical standards established and governed by the codes. Such non-compliance rarely leads to sanctions, even though sanctions are incorporated in the codes – e.g. the statutes of the ICOM foresee the mechanism of termination of membership in case of a breach of the regulations of the ICOM Code of Ethics for Museums.⁴² The obliged authorities fail to apply them, and even if they intend to – there is usually no code of conduct in place that would allow them to effectively establish and execute appropriate means.⁴³ However, the principles espoused in codes should be used as a benchmark evaluating the behaviour of the entities involved in the transactional process, and act as an incentive to incorporate them as customary practices, with indirect effect on the art legislation.⁴⁴

5.2. Legal Framework for the Art Market Trade Regulation

The two major elements in terms of establishing the legal framework for art trading are international treaty law and domestic statutes, particularly those conferring ownership of archaeological artifacts yet to be discovered in a state.

39 International Charter for the Conservation and Restoration of Monuments and Sites (1964).

40 Frigo, “Procedural and Institutional Aspects”, 789.

41 ICOM International Observatory on Illicit Traffic in Cultural Goods, ‘Ethical standards / Codes of ethics’, <https://www.obs-traffic.museum/ethical-standards-codes-ethics>.

42 ICOM Code of Ethics for Museums (1986).

43 ICOM International Observatory on Illicit Traffic in Cultural Goods, “Ethical standards / Codes of ethics”, <https://www.obs-traffic.museum/ethical-standards-codes-ethics>.

44 Article 7.2 of the ICOM Code of Ethics which explicitly refers to the obligation to respect the relevant provisions contained in both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention.

One of the most influential doctrines that deeply affected cultural institutions stems from the 1970 UNESCO Convention as it provided for a general rule that an export of cultural property from the territory of a Member State, designated without its authorization, is illicit, and used the concept of provenance as a tool helping to identify the state from which an object was illegally exported. It imposed an obligation on the states under which they should cooperate for the return of the cultural objects and, in that sense, adopt preventive measures in the form of ‘moral obligations’. In the preamble of the 1970 UNESCO Convention they were referred to as the obligations of States, which were to enable them to avert the dangers of theft and illicit trafficking of cultural heritage objects,⁴⁵ as well as the obligations of cultural institutions to ensure the compliance of their collections with ‘universally recognized moral principles’.⁴⁶ The 1970 UNESCO Convention led to museums being held at a higher level of accountability and it scrutinized the abuses and offences of such institutions by applying a new set of checks and balances to their behaviours.⁴⁷

The above treaty has been used as the basis of the EU’s system for the return of cultural objects. The EU Import Regulation 2019/880⁴⁸ introduced a general import prohibition of cultural goods unlawfully removed from the territory of the country where they were created or discovered. In terms of enforcement, it does not entail systematic controls, however, it does foresee a licensing system, to be effective as of June 2025, that relies on the documentation of the importer on the provenance⁴⁹ of cultural objects (this can be an export license from the country of origin or discovery).⁵⁰ The 1970 UNESCO Convention is also the basis of the EU’s system of the Directive 2014/60/EU which provides a legal basis for the return of cultural objects that were unlawfully removed from the territory of another Member State.⁵¹

As for the private law approach, the 1995 UNIDROIT Convention recognized that cultural heritage objects can also be traded and owned and, as

45 Preamble, 5th recital.

46 Preamble, 6th recital; see Jakubowski, “Preamble”, 48-50.

47 Osborne, “Scrutiny Modern Day Museums”, 14.

48 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and import of cultural goods, OJ L 151, 7.6.2019: 1-14.

49 For a comprehensive definition of the notion of provenance and provenience please see point 4.1.

50 Campfens, “Cross-border claims to looted art”, 19.

51 Campfens, “Cross-border claims to looted art”, 19.

such, are subject to private law regimes. It identified a so-called ‘good faith purchaser doctrine’ under which such a purchaser is eligible to acquire title to a stolen property or is entitled to compensation if the purchaser is required to return a stolen object to its original owner. Under the 1995 UNIDROIT Convention, new possessors are entitled to ‘fair and reasonable’ compensation if they can prove that they were duly diligent upon acquisition.⁵²

An analysis of the legal framework for cross-border restitution claims reveals that in its current form it is insufficient (in both private and public law regimes) to cover all the possibly arising restitution claims as the above legal acts apply to cultural item losses which happened after their implementation. This reveals the existence of a legislative ‘grey area’ to which most of the restitution claims fall as most of the losses occurred in the past and long before the Conventions or EU acts were adopted (which is currently still not the case for many market states). At present, the practice of art market transactions still often involves the ‘laundering’ of cultural objects, i.e. their disposal and transfer of ownership title to successive purchasers without any assessment of the good or bad faith of the seller (the actual holder), nor any verification of the provenance of the object.⁵³

6. The Role of Due Diligence in Regulatory Art Market Framework

The emphasis put on the origin of an artwork is still not strong enough in light of present-day threats to the art market resulting from more sophisticated methods of trafficking used by the cross-border organized crime. Moreover, the perception and understanding of due diligence in the art market is relatively limited and is confused with simply checking basic provenance data – such as whether the work in question has not been stolen or whether it is not the subject of a World War II-era claim.⁵⁴ The due diligence search should, however, be far more complex, as attested to by the wide variety of provenance issues which appear regularly in caselaw and media.

The most prominent examples occurred in 2014, when the Christie’s and Sotheby’s auction houses made headlines for their astonishing auction results, achieving exceptionally high prices for works representative of modern and contemporary art.⁵⁵ Riding their wave of success – they offered

52 Campfens, “Cross-border claims to looted art”, 23.

53 Campfens, “Cross-border claims to looted art”, 25.

54 Marinello, Hasler, “What is Due Diligence?”, 316- 319.

55 Mashberg, Blumenthal, “Christie to Return Cambodian Statue”.

10th century sandstone statues of gods from Cambodia with price tags up to millions of dollars, advertising each object as of prestigious quality and condition.⁵⁶ It was not long until it came to light that both works were identified as Cambodian spoils looted during its 1970-1975 Civil War. While allegations of Christie's and Sotheby's support for illicit traffic and export came from all around, nobody raised the issue of the due diligence which should have exercised from the beginning vis-à-vis the Cambodian artworks, and would have averted the situation.⁵⁷ It seems rather logical and obvious that together with the growth of the art market, there should be a corresponding extensive growth in mandatory searches into the provenance of the works involved. If expert and market-specific due diligence was exercised properly, Christie's and Sotheby's would not have faced allegations of negligence in their handling of the Cambodian statues. As the case indicates, if the two giants of the industry – who set an example to provincial auction houses and the art market in general – could have been drawn into such a dispute, then there is a crucial need for greater awareness of the importance of thorough expert due diligence in the market nowadays.

Considering the role of art market institutions in the implementation of due diligence standards it should be highlighted that the European Court of Human Rights indicated in its recent judgement *The J. Paul Getty Trust and Others v. Italy*⁵⁸ the importance of the participation of private institutions in art market transactions and their acting with the requisite diligence. The Court envisages a duty of the intermediary institutions in taking appropriate actions in order to investigate the legitimate provenance of the art work before it is being purchased. Failure to take such actions, particularly where the institution has developed reasonable doubts as to the legitimacy of the origin of the art work, may be considered as the institution acting in bad faith.

One could wonder why the art institutions are still reluctant to implement due diligence standards if they have been refreshed by the AMLD5 and boiled down to expert, art market specific instructions. Except for the most obvious reason – being the administrative burden of AMLD5 – the reluctance to follow through with enhanced due diligence is also associated with the costs, traditions, and the volume of sales of each institution obliged

56 Men, "Two Ancient Statues Returned to Cambodia".

57 Marinello, Hasler, "What is Due Diligence?", 316- 319.

58 European Court of Human Rights, *The J. Paul Getty Trust and Others v. Italy*, case no. 35271/19, judgment of 2 May 2024.

to comply with it.⁵⁹ Buyers who are eager to own a chosen piece of art are more than ready to conclude even a hasty sale during an art fair preview, avoiding the risk of losing out to another buyer and hoping to be rescued by their lawyer in the event the transaction turns out to be fraudulent.⁶⁰ Parties are used to acting based on the principle of trust – when faced with an artwork desired on the art market they assume (or prefer to assume) that all the elements of the transactions are acceptable and do not wish to question the professional integrity of their partner, hoping that ‘gentlemen’s agreements’ and handshakes are of ethical validity.

Due diligence requires many investments on the part of the entity enacting it – the barrier costs are usually significant due to the nature of negotiations over artworks, which end up with agreements to the best possible price, with no extra room for any additional costs for authentication checks. The artwork and the documentation accompanying it is very rarely subject to a technical or scientific analysis because of the risk of potential confidentiality leaks, as well as for psychological reasons – some buyers do not want to know the truth in the event a forgery is uncovered. Transactions of acquisitions usually involve intermediaries, who act in the chain between the buyers and sellers. They usually rely on commissions or other fees, and do not wish to undertake the costs of due diligence examinations in case the sale is not concluded. Engaging in a full due diligence process with pre-paid funds when the sale of the artwork is not certain brings the risk that the transaction will be concluded with some other buyer, who is ready to close the deal without a thorough check of the item and the delays resulting therefrom.

Considering such reasoning, it seems rather clear that due diligence, even though considered as ‘enhanced’ with respect to art market standards, does not fit into the transactional process recognized by other market branches. Since the dissemination and the flow of information in the art market is subject to extraordinary mechanisms, art market participants are not likely to approve of initiatives that would profoundly change these structures. Therefore, the proposals for reform focus on establishing means which enable the art market to address questions of authenticity in a more orderly, reliable and legally effective manner. Despite greater reliability and certainty of authenticity opinions, the envisaged framework is aimed at providing standard

59 Mather-Lees, “The Problem with Due Diligence”.

60 Mather-Lees, 2020, “The Problem with Due Diligence”.

practices regarding form, structure and transparency of expert opinion that will facilitate the market's functioning in many respects.

7. Final Remarks and Outlook

Even though the art market has been widely criticized for its noncompliance with general transaction standards, it has been slowly evolving to incorporate better practices addressing the needs of parties involved in art transactions. Recent international regulatory initiatives have managed to implement rules combining the anti-money laundering framework with legislative tools providing for quality due diligence standards in the art market.

Currently, there is certainly a degree of self-regulation identifiable in the provenance search taking place in the art market, but the approach is scattered: dealers and auction houses with reputations to protect, for instance, have adopted ethical codes and carry out due diligence on behalf of their clients to verify the legality of transactions. Despite the initial thought that for a market as complex, diverse and constantly evolving as the art market, a self-regulatory approach would be widely recognized as having several advantages over external, state-imposed regulation, the transaction practice indicates that in fact the institutions held responsible for the pre-sale diligence search and the tools they use do not always serve their best purpose in a way of safeguarding the art market transaction.

The practical implementation of enhanced due diligence standards remains in hands of private traders and art dealers. It seems apparent, however, that public institutions should be held responsible for providing an effective regulatory framework and ensuring the means for its actual enforcement. The transnational legal order should combine the interests of all the jurisdictions relevant from the perspective of trade in the art market, and ensure an equal and fair scope of prospective regulation by continuing to refer to due diligence standards as a transaction assessment tool.⁶¹ Due diligence is part of an increasingly important standard of conduct under ethical codes in the art field, and so should it be under national, EU and international regulations.⁶²

The introduction of import restrictions linked to mandatory due diligence standards is of growing importance of provenance research.

61 Campfens, Jakubowski, Hausler, Selter, "Research for CULT Committee".
62 Frigo, "Dispute Settlement and Due Diligence", 81-91.

Stakeholders in the art world, including buyers, dealers, auction houses, and museums, are now obligated to ensure the lawful provenance of cultural objects before engaging in transactions – scrutinizing the history of ownership and the legal acquisition of the item. However, the definition of what is deemed ‘lawful’ or ‘unlawful’ remains far from clear.

Addressing the challenge of fulfilling the minimum standard of due diligence involves considering various tools, as highlighted in a 2019 study by the Subsidiary Committee to the 1970 UNESCO Convention.⁶³ These tools include the UNESCO Database of National Cultural Heritage Laws (Natlaws), object-based databases like the Art Loss Register and INTERPOL’s Database of Stolen Works of Art, the ICOM Red Lists identifying at-risk objects, and electronic information exchange platforms such as the World Customs Organization’s ARCHEO and the United Nations Office on Drugs and Crime’s SHERLOC. Yet the practical implementation of these tools reveals challenges. Some tools are not readily accessible (ARCHEO and SHERLOC), others are outdated (UNESCO’s database), and certain databases are incomplete, providing only a glimpse into potential looting (INTERPOL). As a result, actors in the art world often depend on commercial organizations, such as the Art Loss Register, for risk analyses when researching artifacts without clear provenance. Furthermore, a significant institutional blind spot exists, marked by a lack of clear standards and accessible tools to establish lawful provenance. This gap necessitates guidance from a public authority to ensure adherence to strict standards in the art world.

The overarching conclusion underscores two primary challenges within the realm of cultural heritage and provenance research. Firstly, there exists a deficiency in clear standards and procedures, impeding access to justice and legal security. This obstacle obstructs the path for dispossessed owners, communities, and states of origin seeking restitution, while simultaneously jeopardizing legal certainty within the art world.

Secondly, there is a practical challenge where cultural objects are traded without documented provenance. This lack of a verifiable ownership history complicates the distinction between lawful and unlawful possession, creating a conducive environment for illicit trade. The absence of a systematic approach to establish the legitimacy of cultural objects fosters the paradoxical situation where possession of unlawfully looted (or lost) cultural items

63 Study on Due Diligence discussed on 22 and 23 May 2019, *Subsidiary Committee of the Meeting of States parties to the 1970 UNESCO Convention (C70/19/7.SC/8a)*, 3-4.

can be deemed lawful due to a lack of information on their ownership history. Addressing these challenges is imperative to promote transparency, curb illicit trade, and safeguard cultural heritage.

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