ART YOU READY? BREXIT AND ITS LIKELY EFFECTS ON THE BRITISH ART MARKET

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I. INTRODUCTION

The United Kingdom has one of the world's largest art markets, surpassed only by the United States, and accounts for 21% of a total of "$67.4 billion in global sales in 2018."[1] The United Kingdom has also played a significant role in the European art market, "accounting for over 60% of sales by value" and serving as a hub for international transactions.[2] Given the scale of the British art market and the recent growth of the global art market (up 6% in 2018, bringing "the market to its second highest level in 10 years"),[3] any effects of Brexit on this market will be felt not only domestically, but globally as well.

This annotation examines how a changing relationship between the United Kingdom and the European Union may impact the British art market. Part I summarizes the status of E.U. law in the United Kingdom after Brexit. Part II discusses two recent developments in E.U. law affecting the British art market, the fifth Anti-Money Laundering Directive and Regulation 2019/880 on the Introduction and the Import of Cultural Goods, and how their effect may change post-Brexit. Finally, Part III explores factors that the United Kingdom may consider in deciding on new post-Brexit directions and proposes the best ways to approach these issues. Ultimately, this annotation concludes that while Brexit will give the United Kingdom the freedom to develop its art market regime, the country should not immediately make dramatic changes and should continue to address

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1. Katya Kazakina, *U.K. Law to Combat Dirty Money in Art Market Set to Take Effect*, BLOOMBERG (Jan. 8, 2020), https://www.bloomberg.com/news/articles/2020-01-08/u-k-law-to-combat-dirty-money-in-art-market-set-to-take-effect; *accord* Press Release, Art Basel, The Art Basel and UBS Global Art Market Report 2019 (Mar. 8, 2019), https://www.artbasel.com/news/art-market-report.

2. Clare McAndrew, *Why Brexit Is a Golden Opportunity for the U.K. Art Market*, ARTSY (Aug. 30, 2018), https://www.artsy.net/article/artsy-editorial-brexit-golden-opportunity-uk-art-market.

3. Art Basel, *supra* note 1.

issues that have been important to the European Union, even once it is no longer required to do so.

II. THE FATE OF E.U. LAW IN THE POST-BREXIT UNITED KINGDOM

The European Union (Withdrawal) Act 2018[4] sets out the framework for what will happen to E.U. law in the United Kingdom after exit day, providing that most current E.U. law will be retained and converted into a new body of domestic law.[5] Several key provisions of the Withdrawal Act specify what types of instruments will be preserved: Section 2 saves existing E.U.-derived domestic legislation that has effect before exit day, such as "legislation passed in order to implement one or more EU directives;"[6] Section 3 incorporates direct E.U. legislation "so far as operative immediately before exit day," including E.U. regulations and decisions;[7] and Section 4 saves many "residual rights, powers, liabilities, obligations, restrictions, remedies and procedures."[8] However, E.U. directives themselves will not be retained in the United Kingdom, only the legislation implementing those instruments.[9]

After Brexit, amendments to E.U. law made by the European Union will not apply automatically in the United Kingdom. Instead, the U.K. government and Parliament will be able to amend retained E.U. law independently.[10] Instruments covered by Section 2 of the Act "already ha[ve] a domestic status" in the United Kingdom, but the portions of E.U. law covered by Sections 3 and 4 constitute a "unique, new category of domestic law with new. . . rules determining how it may be modified," which are set out elsewhere in the Act.[11] Additionally, statutes implementing E.U. directives may "need to be amended if they provide explicitly that they are based on EU law."[12]

4. European Union (Withdrawal) Act 2018, c. 16, https://www.legislation.gov.uk/ukpga/2018/16.

5. Graeme Cowie, *The Status of "Retained EU Law"*, HOUSE OF COMMONS LIBR. (July 30, 2019), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8375.

6. *Id.*; *accord* European Union (Withdrawal) Act 2018, *supra* note 4, § 2;

7. European Union (Withdrawal) Act 2018, *supra* note 4, § 3.

8. Cowie, *supra* note 5; *accord* European Union (Withdrawal) Act 2018, *supra* note 4, § 4.

9. Cowie, *supra* note 5.

10. *EU Legislation and UK Law*, LEGISLATION.GOV.UK, https://www.legislation.gov.uk/eu-legislation-and-uk-law (last visited July 6, 2020).

11. Cowie, *supra* note 5.

12. Aleksandra Gorb, Eleanor Gadd & Vaughne Miller, *Legislating for Brexit: EU*

Practically, any substantive changes to E.U. law that the United Kingdom may desire to make will have to wait until 2021, as the country "will continue to obey all EU law" during an eleven month transition period.[13]

III. RECENT IMPACTS OF E.U. LAW ON THE BRITISH ART MARKET

Instruments affecting the art market, including the fifth Anti-Money Laundering Directive and Regulation 2019/880 on the Introduction and the Import of Cultural Goods, are among the E.U. laws that continue to be relevant in the United Kingdom after exit day. Although these are by no means the only E.U. instruments affecting the art market,[14] they are two recent examples that illustrate the range of activities governed by E.U. law, from the import of certain artistic objects to the sale of others, and the different extents to which E.U. policy may be retained following Brexit.

Perhaps the more important of the two is the E.U.'s fifth Anti-Money Laundering Directive, which was "transposed into U.K. law through the Money Laundering and Terrorist Financing (Amendment) Regulations 2019" and entered into force on January 10, 2020.[15] These new regulations extend the existing anti-money laundering regime to cover a variety of actors in the art market. First, the directive adds "persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10,000 or more," to its list of "obliged entities" (businesses or individuals subject to the regulations).[16] While previous regulations limited the monetary threshold to payments made in cash, the new version does not

Directives, HOUSE OF COMMONS LIBR. (Apr. 5, 2017), https://commonslibrary.parliament.uk/research-briefings/cbp-7943/.

13. Luke McGee, *Britain Is Leaving the European Union Today. The Hard Part Comes Next*, CNN (Jan. 31, 2020), https://www.cnn.com/2020/01/31/uk/european-union-brexit-intl-gbr/index.html.

14. Other relevant regulated areas include copyright and artist resale rights.

15. Julia Rodrigues Casella Hommes, *Combatting Money Laundering in the Art Trade: Changes for Europe and the UK*, INST. ART & L. (Jan. 10, 2020), https://ial.uk.com/combatting-money-laundering-in-the-art-trade-changes-for-europe-and-the-uk/.

16. 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, art. 1(1)(c), 2018 O.J. (L 156) 43, 53.

distinguish between different methods of payment and therefore has the potential to apply to many more transactions.[17] Second, the directive also adds "persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts to EUR 10,000 or more" to the list of obliged entities.[18] This new provision extends obligations "beyond the more traditional art market participants. . .to those storing works of art and operating freeports," where the €10,000 threshold refers to the value of stored pieces.[19] Finally, "transactions related to . . cultural artefacts and other items of archaeological, historical, cultural and religious importance," are added to the list of potential high-risk situations that may require the application of enhanced due diligence measures.[20]

By requiring art market participants to verify client identities, the fifth Anti-Money Laundering Directive will help "make the commercial art world more transparent, more accountable and a lower risk environment . . . ."[21] Because the directive required E.U. member states to incorporate its regulations into domestic law before exit day, its provisions continue to apply in the United Kingdom as retained E.U. law. Although the United Kingdom may decide to change its money laundering regulations once the transition period ends, its membership in the Financial Action Task Force (FATF) makes it likely that it will remain aligned with E.U. and "other globally recognized standards" in the future.[22] In fact, the United Kingdom has stated its intention to "continue updating anti-money laundering policies according to international standards" and even went further than some of the requirements in the E.U. directive in its implementing legislation.[23]

17. *The Fifth EU Money Laundering Directive and the Art Market*, STEPHENSON HARWOOD (May 28, 2019), https://www.shlegal.com/insights/the-fifth-eu-money-laundering-directive-and-the-art-market.

18. Directive (EU) 2018/843, *supra* note 16, art. 1(1)(c). For more about freeports, see Part III.

19. Hommes, *supra* note 15.

20. Directive (EU) 2018/843, *supra* note 16, art. 1(44)(b); *The Fifth EU Money Laundering Directive and the Art Market*, *supra* note 17.

21. Hommes, *supra* note 15; *accord* Kazakina, *supra* note 1.

22. Barnabas Reynolds et al., *UK Implements EU's Fifth Anti-Money Laundering Directive*, SHEARMAN & STERLING (Jan. 10, 2020), https://www.shearman.com/perspectives/2020/01/uk-implements-eu-fifth-anti-money-laundering-directive?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

23. *Id.*

Another regulation adopted before exit day is Regulation (EU) 2019/880 on the Introduction and the Import of Cultural Goods, which "will result in a new system of import controls for foreign acquired cultural goods, plus a general restriction on introducing unlawfully exported cultural material into the EU."[24] These rules will "require importers to provide proof that their goods were legally exported from the country of origin in order to obtain a special license from an EU country" and provide for the creation of a centralized electronic system to store and exchange this information.[25] Most relevant is Article 3(1) of the regulation, which prohibits the introduction of certain specified "cultural goods. . . which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country" and will apply from December 28, 2020 (a few days before the end of the Brexit transition period).[26] As part of a directly applicable regulation, this provision will also be incorporated into U.K. law.[27] However, whether the United Kingdom will maintain these import restrictions once it is able to amend retained E.U. law will probably depend on the future relationship between the United Kingdom and the European Union. [28]

IV. POTENTIAL FACTORS AFFECTING THE FUTURE OF THE BRITISH ART MARKET

Given the size of the British art market and the extent of relevant E.U. law, questions regarding the effects of Brexit are neither negligible nor theoretical. Although the United Kingdom may face disadvantages in trading with the European Union after Brexit, depending on what the final trade relationship will look like, these are unlikely to have a substantial effect on the broader British art market since trade from outside the European Union already accounts for

24. Alexander Herman, *Year in Review: Recap on 2019*, INST. ART & L. (Dec. 26, 2019), https://ial.uk.com/recap2019/.

25. Catherine Hickley, *EU Adopts New Rules on Cultural Heritage Imports*, ART NEWSPAPER (Apr. 10, 2019), https://www.theartnewspaper.com/news/eu-adopts-new-rules-on-cultural-heritage-imports.

26. 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, arts. 3(1) & 16(2)(a), 2019 O.J. (L 151) 1, 6, 11.

27. Emily Gould, *The EU's Parting Gift to the UK Art Market?*, INST. ART & L. (Apr. 1, 2019), https://ial.uk.com/the-eus-parting-gift-to-the-uk-art-market/.

28. Daniel Dalton, *Brexit: What's Next for the UK Art Market?*, ART NEWSPAPER (Jan. 31, 2020), https://www.theartnewspaper.com/comment/brexit-challenges-and-opportunities-for-the-art-market.

over 80% "of both imports and exports of art by value."[29] Therefore, the art market will most likely retain its importance in the United Kingdom, having even seen "a large number of European dealers establishing branches in London" since the 2016 referendum,[30] and the government will have to determine how best to approach its relationship to and regulation of this sector.

One factor for the United Kingdom to consider is whether to lower its value-added tax (VAT) for imported art or eliminate it altogether. The United Kingdom currently has an effective VAT of 5% for imported art.[31] While this is "the lowest rate allowable under EU rules," it is still higher than the world's largest art markets, as the United States has no VAT, and China, the world's third largest art market, charges only 3% VAT.[32] Once the United Kingdom is no longer bound by E.U. rules, it could decide to decrease the import VAT rate to below 5% or even eliminate it all together. This could make the U.K. art market even more attractive to foreign buyers, especially those who do not plan to import their purchased artworks into the European Union.[33] However, the United Kingdom should be careful not to make any drastic changes too soon. While a lower import VAT rate may have positive effects on the art market, it will be important to consider its impact on the economy holistically and ensure that any benefits are not outweighed by a loss in revenue overall. Since it is always easier to lower taxes than raise them, the best approach might be to decrease the import VAT rate gradually and study the impact of each incremental step on Britain's art market and economy, so that the government can eventually set an optimal rate that balances all the relevant interests and data.

Another factor the United Kingdom must consider is how it will cooperate with E.U. law enforcement in the future. Although this is not directly connected to the art market, the ability of the United Kingdom to join other European countries in investigating criminal activity like money laundering or trafficking implicates related activities such as the sale of art or the importation of cultural goods.

29. *Id.*

30. Alex Capon et al., *How the Art and Antiques Trade is Preparing for Brexit*, ANTIQUES TRADE GAZETTE, (March 4, 2019), https://www.antiquestradegazette.com/print-edition/2019/march/2382/news/how-the-art-and-antiques-is-preparing-for-brexit/.

31. *HMRC Internal Manual: Imports*, GOV.UK (Nov. 25, 2019), https://www.gov.uk/hmrc-internal-manuals/imports/imps05200.

32. McAndrew, *supra* note 2.

33. *See* McAndrew, *supra* note 2 (noting that lower raters "could attract global sales, effectively bypassing Europe altogether.").

For example, leaving the European Union will mean leaving the European Arrest Warrant scheme,[34] which does away with lengthy extradition procedures by giving a warrant issued in one country effect throughout the entire European Union.[35] This process has facilitated the United Kingdom's cooperation in E.U. efforts such as Operation Demetra, which exposed an antiquities trafficking network in 2018 and involved British, Spanish, German, Italian, and E.U. agencies.[36] The government has already "unveiled plans for an extradition bill" to mitigate the downsides of being outside the European Arrest Warrant scheme,[37] and it will be critical for the United Kingdom and the European Union to agree on how their law enforcement agencies will interact once the transition period ends.

A final factor for the United Kingdom to consider is how it will uphold existing regulations while creating new economic opportunities. One fascinating tension is how the United Kingdom will treat freeports, which are areas where goods, including art, can be imported, stored, and processed without having to pay customs duties before they are exported again.[38] The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, which implement the European Union's fifth Anti-Money Laundering Directive in the United Kingdom, cover operators of freeports that store works of art valued at €10,000 or more,[39] and the United Kingdom has stated its intention to continue following international anti-money laundering standards (see Part II above). At the same time, however, Prime Minister Johnson has announced plans to

34. Peter Barnes, *Brexit: What Happens Now?*, BBC (Feb. 5, 2020), https://www.bbc.com/news/uk-politics-46393399.

35. *European Arrest Warrant*, EUR. JUST. (last updated May 13, 2020), https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do.

36. Anna Somers Cocks, *Will the UK Be Able to Take Part in Antiquities Busts After Brexit?*, ART NEWSPAPER (Nov. 14, 2018), https://www.theartnewspaper.com/comment/will-the-uk-be-able-to-take-part-in-antiquities-busts-after-brexit.

37. Rob Merrick, *Brexit: UK Could Be Thrown Out of European Arrest Warrant System, Government Admits*, INDEPENDENT (Dec. 19, 2019), https://www.independent.co.uk/news/uk/politics/brexit-european-arrest-warrant-boris-johnson-queens-speech-crime-a9253861.html; *accord* Dominic Casciani, *Brexit: Five Things the UK Needs to Resolve After Leaving the EU*, BBC (Feb. 2, 2020), https://www.bbc.com/news/uk-51267987.

38. Naomi Rea, *Boris Johnson Plans to Make the UK a World Leader in Freeports, Building 10 State-of-the-Art Facilities for Collectors After Brexit*, ARTNET (Aug. 5, 2019), https://news.artnet.com/art-world/uk-freeports-boris-johnson-1616704.

39. The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, art 6, http://www.legislation.gov.uk/uksi/2019/1511/made#f00005.

establish up to ten new freeports throughout the U.K. in order to promote trade and energize the economy.[40] Leaving aside doubts as to whether the establishment of freeports will achieve Johnson's goals,[41] this plan seems to conflict with the government's intention to uphold anti-money laundering regulations. Given concerns that freeports can be tied to money laundering, the United Kingdom should carefully consider whether the establishment of freeports is worth the risk, and if it nevertheless decides to pursue this plan, the government should delineate clear rules to minimize the chance of these businesses being used for illicit purposes.

V. CONCLUSION

With the second-largest art market in the world and extensive E.U. instruments currently covering different aspects of the art sector, the United Kingdom has the opportunity to develop its own approach to the art market post-Brexit. The United Kingdom should take advantage of these circumstances in order to adjust its regime and support the art market's continued growth, but it should do so carefully and gradually to ensure that plans to expand the market do not negatively affect the country's general economy and security. Additionally, given the global nature of the art market, the United Kingdom should continue to align itself with general regulatory trends, including enhanced anti-money laundering and import controls, and ensure its continued ability to cooperate with its closest neighbors in related law enforcement matters. By taking all of these elements into account, the United Kingdom will be able to create an environment that fosters not only the art market's growth and value, but also its security, transparency, and legality.

40. Rea, *supra* note 38.

41. *See* Delphine Strauss, *Freeports Plan for 'Left-Behind' Regions Divides Opinion*, FIN. TIMES (Feb. 10. 2020), https://www.ft.com/content/297df8ce-4c31-11ea-95a0-43d18ec715f5 (reporting that "[t]rade and customs experts were more sceptical" of the freeport proposal).