Application of Financial Disclosure Laws to Art Purchases in Belgium: Beyond '*Caveat Emptor*'

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The regard for art as a luxury acquisition with the sole purpose of enjoying it in your private home, has undergone some dramatic changes over the past fifteen years. Art is being regarded as an accessible investment. The ability to enjoy art is increasingly tangled up with the possibility of reselling it and making a profit. That rise has caused many art dealers, investors, auction houses and economists to regard art not as a luxury acquisition but rather to regard it as a financial asset.[1] And so it can happen that etchings of Picasso are being traded over the counter like coffee futures for millions of euros. The vision of art as an asset has led to an enormous boost on the art market and an increasing financialisation. The manner in which certain artists are being promoted by the press and other media and how their prices are being monitored in indexes and databanks indicates the existence of a market.[2] As a result, the chance that an art dealer turns into an investment consultant who defends the interests of the buyer, increases. The attitude, often unarticulated but persistent, that art is being bought in a context of appreciation for its intrinsic and aesthetic merit, may perpetuate reluctance to regulate the art market. Wrongly. If purchasing art is no longer caused by a spontaneous injection of aesthetics but becomes a calculated risk, then regulation becomes inevitable.

Art transactions, certainly in the higher segment of the market, appear to be, in essence, investment contracts. In this article we shall, first and foremost, describe the predominant types of art transactions. Subsequently, we shall describe the most important preoccupations of an art investor and the existing protection rules. Thirdly, we shall analyse the criteria the Belgian legislator has put forward to determine whether an artwork qualifies as a financial asset and the consequences thereof on the art market.

I. Types of Art Transactions

A. Auction Houses

Public auction houses account for a substantial proportion of art transactions. They are the counterpart of trading platforms where stock is being traded, it being understood that art is less liquid: so, to resell you must wait for a suitable auction.[3] As the agent of the owner, the auctioneer solicits offers and determines the final bid. The most obvious characteristic of

1 Deloitte, *Art and Finance Report*, (2017), pp. 173-179; Claire McAndrew, *Fine Art and High Finance*, (Bloomberg Press, NY, 2010) pp. 1-13. M. Gerlis, *Art as an Investment ? A Survey of Comparative Assets*, (Lund and Humphries, 2014).

2 ArtTactic (<www.arttactic.com>) offers a unique insight into the global art market through data analyses and research reports. Other providers of market information are Deloitte, Artnet and Artprice.

3 G. Adam, *The Dark Side of the Boom*, (Lund and Humphries, 2017), p. 137.

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this sale platform is the unpredictability of the knock-down price. Because the final sales price results from the open bidding, it is accepted as the fair market value.[4] Knowledge of the reserve price would be helpful to the buyer in setting the value of an artwork. If this price is not met during the bidding, the piece will be withdrawn by the auctioneer.

B. Art Galleries

Purchases may be made privately through a gallery or an art dealer. A gallery manages a significantly lesser volume of works than an auction house. A transaction through a gallery is ordinarily in the nature of a purchase at a non-negotiable price. This is especially true for commercial galleries where the taste of the consumer determines whether a purchase shall take place. Rarely, such a dealer will disclose information on past sale prices in order to enable the buyer to determine whether the price is fair. The purchase is determined by the aesthetic reaction the buyer has with the artwork.

A promotion gallery, however, represents artists who are selected on the basis of artistic expertise and market knowledge. In many cases, a promotion gallery represents the artist exclusively and exercises control on the marketing and distribution of the works of that artist. Hence, in the world of contemporary art trading, it is difficult to use the name of promotion galleries without entertaining thoughts of a financial investment environment. An emphatic process for some dealers (thinking from the perspective of the artist), is a technical process for the others (thinking from the perspective of the market).[5]

Private art dealers operate on the secondary market and offer artworks with provenance. They invest only, at a given point in time, in the value of artworks and are less concerned by the value of an artist's entire *oeuvre* on the long term.

C. Art Advisors

As investing in art gradually grows in popularity over the years, opportunities arise on the art market to address the concerns of investors. Logically, the importance of such advice increases in relation to the growth of the sums invested. In order to consider a transaction as an investment, the advice component must be part of the sales process. The bets on that are greater if advisors assist investors in getting the deal through.

The advisory function of an art dealer cannot be qualified unambiguously. Certainly, one might expect that an art dealer makes certain (price) statements incidental to art purchases. Doing so, however, does not necessarily mean that he acts as an art advisor. A buyer may solicit certain advisory information regarding the investment value of particular artworks, but, if a buyer relies upon such representations and it can be ascertained that the art dealer's representation induced the purchase, there is a potential conflict of interest.[6]

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4 The catalogues of auction houses are excellent sources of market information. The major auction houses publish annually editions with the prices of past auction results. Catalogues for specialised auction houses are published prior to the auction itself and contain valuable information on the artist, provenance and, sometimes, the value.

5 Many art dealers aggressively create markets for the works they handle and point this fact out to potential art investors.

6 The fiduciary relationship between the artist and the dealer is laid down in article 1984 of the Belgian Civil Code and implies that the art dealer should also invest in the relationship with the art investor. That approach is inherent to the art trade and is generally recognised: "A reputable dealer's knowledge is accumulated through the years of researching…we go to

D. Art Funds

Since the beginning of the 21st century, there has been a tendency towards financialisation of the art market. In the wake of that tendency, art funds were rising fast. The art funds industry peaked in 2012 and since then has then slowed down. That decline is due to the fact that art funds have certain handicaps. The most important one is sustainability. It is difficult to create an industry around it because there simply isn't the depth in the market. Investible art relates to a very small segment of the market and you can't pour millions into it. Put another way, no significant profits can be made of it. Another burgeoning area is the art lending industry which emerged out of the fund business. Art lending allows the lender to leverage against art and taps into a new business model.

II. Investor Concerns and Current Protection Measures

A. Authenticity

An art buyer must be convinced that the intrinsic quality of an artwork is actually what it claims to be. That quality will be determined based on its attribution. In case of discrepancy between the description of an artwork and the actual state of affairs, the buyer can annul the sale on the basis of error. A person is in error when he considers genuine that which, in fact, is false or considers to be false that which, in fact, is genuine. It all boils down to the question as to whether the buyer would have bought the artwork if he knew the actual state of affairs at the time of closing the deal. Certainty on the authenticity of an artwork can be obtained through contractual warranties based on expert reports and *catalogues raisonnés*.[7] Aside from error, a collector can in some very limited circumstances also rely on fraud to annul a purchase where the inauthenticity of an artwork is proven and the seller was aware of that fact. The claim based on fraud is not subject to the same restraints as the claim based on error. However, certain legal commentators provide an explanation as to why the legal concept of error is preferred over fraud. The principal reason is the proof of evidence: fraud requires evidence of fraudulent behaviour.[8] If the ratio between the cost for proving the authentic nature of an artwork and the price of the artwork is not proportionate, the investor can take the chance. After all, purchasing art is often an impulsive act.

B. Market Value and Appreciation Potential

Not everyone has the financial leverage to conduct an extensive due diligence prior to an art purchase or to claim damages. A major part of the profitable art trade consists of moderately priced artworks purchased by buyers who do not have enough capital. For those buyers, the question arises to what extent they can rely on a legal rule that allows them to gain insight in the market value of an artwork.

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a particular dealer not simply to buy artworks, but because we trust his visual expertise and his knowledge of the field. Essentially, we are buying his taste and sensibility" cited in F. Feldmann and S. Weil, *Legal and Business Problems of Artists and Galleries*, (PLI , 1973).

7 This implies that art experts are available for commercial expertise which, in view of the manner in which liability claims are handled under Belgian law, is rather unlikely (see, PhD thesis of B. Demarsin, *Authenticiteit en contracteren over kunst*, p. 525). On the risks related to art expertise: see, A.-L. Bandle, *Risques et Perils dans l'attribution des oeuvres d'arts: de la pratique des experts aux aspects juridiques*, (Schulthess, 2018).

8 Demarsin, above, note 7, p. 192.

The value of an artwork is variable according to the market on which it is traded and the importance of the value from the perspective of the buyer is not always clearly understood by the art dealer. Error as to the value of an artwork is not actionable. However, there is another legal basis to claim one has overpaid even if the artwork does correspond to the description given by the art dealer.[9] The application criteria are, however, not for the benefit of the mistaken buyer. The buyer can negotiate the conformity of the sale price with the market through explicit warranties or, in certain circumstances, hold the art dealer liable for gross negligence or for a failure to comply with its duty to inform as a professional seller.[10] Obviously, the investor who acts as a reseller can claim on the same basis. What is at stake in those scenarios is the accuracy of the price set by art dealers or auction houses in the context of a negotiated mandate to sell.[11]

The Belgian Code of Economic Law also contains certain consumer information duties for companies which must be complied with prior to a sale. An art dealer, in the current state of affairs, qualifies as a company for purposes of the Code of Economic Law. These information duties are laid down in article VI.2 of the Code. This provision stipulates that the information must be provided in a clear and understandable manner. This seems to imply that the art dealer must take a proactive stance – in contrast to the contemporary practices on the art market where sharing of information to anyone other than a privileged group of art collectors is rather limited. It presupposes that the art dealer shares the information without the need of the consumer to ask for it. Article VI.2 sums up the subject-matter of the duty to inform (price, identity, characteristics, size and date, etc.). The confirmation of each of these details entails an explicit warranty. Finally, disgruntled buyers can also rely on antitrust rules. The new rules on abuse of a substantial dominant position could be relevant to the case at hand.[12] Sometimes an art dealer or art collector will be confronted with the refusal by an artist's estate to list an artwork in a *catalogue raisonné*[13] or with situations where art dealers apply discriminatory practices by offering a privileged group of collectors discounts. Sometimes art collectors are blacklisted by galleries who refuse to sell them art. The legality of such a practice could also be raised under antitrust rules.[14]

9 The idea that error on the value of an artwork may not affect the validity of the agreement, has magnified to dramatic dimensions. The overwhelming point of view in legal doctrine is that mistake on the economic valuation cannot be annulled (see, Dermarsin, above, note 7, pp. 161-163: The position defended in his thesis relates to the legal concept of 'detriment' (article 1118 Civil Code – '*benadeling*') which renders an agreement null in limited circumstances).

10 Bandle, above, note 7, 44.

11 *Ibid*., 46 and 52: "Expert opinions are generally considered a contractual performance except in very limited cases where the absence of requisite intent to enter such a contract may be established through circumstances by which the opinion was given. An auction house that offers an appraisal against a commission or in view of a potential sale from which it may benefit, enters into a contractual relationship…the main difference between the expert-vendor and the expert-advisor is that the seller is strictly liable when offending the statutory standards, whereas the advisor is liable only for failing to show reasonable care".

12 Law of 21 March 2019 regarding the abuse of substantial dominant position.

13 Case 07-CV-6423 US District Court of Manhattan (Warhol-case).

14 In order to prevent arbitrage between the primary and secondary market, galleries are selective about their clientele. Blacklisting certain collectors (so-called art flippers) is considered (by the art market players) to be a legitimate strategy in an attempt to control prices but could give rise to legal arguments under article 101 TFEU – the key question is whether the practice relates to a legitimate refusal to sell or is a horizontal conspiracy to limit sales to certain interested parties. The conditions on the art market open the door to collusive

Not only does the legal framework adapt, the art trade is also conscious of the need for regulation. That is why art trade associations have begun to draw up codes of conduct to which their members should adhere, making the trade more regulated. The goal of such codes is to create awareness among members of the ethical standards of the profession. A core theme is the conflict of interest of the art dealer when making certain representations on past sales results. It appears to be axiomatic among reputable art dealers that representations of appreciation potential are inappropriate. The tendency to no longer regard art promotion as art criticism but as a service for the art buyer means, however, that there is a real chance that the art dealer or gallery will turn into an investment consultant that defends the interests of the buyer. The argument that representations on past sales results can be interpreted as a warranty as to an appreciation potential, certainly has some merit. It will, however, be difficult to prove that the representations induced art purchases. The use of recourse opportunities ('*caveat emptor*') for the disgruntled investor, who invested on the basis of such warranties, has little chance of success.[15] Instead of a post-sale recourse, one could also consider containing the investment risk through the legislative introduction of pre-sale information duties that go beyond the consumer protection rules as laid down in the Code of Economic Law. Those protection measures could offer a solution for the precarious position of the art investor.

III. Art as an Investment

The most obvious investments are shares and bonds. An investor buys shares in anticipation that the investment will offer a return on the sum paid as a result of the efforts of the management of the company whose shares are being sold. The Belgian legislator has taken the view that the subject-matter (shares or something else – e.g. art) of an investment contract is irrelevant and has, therefore, enlarged the scope of the financial rules intended to protect investors.[16] The law no longer applies the notion of 'share' but the wider notion of 'investment instrument' and tackles "alternative investments in movable properties".[17] The legislator has introduced in article 3, §1, 4° of the law of 11 July 2018 relating to the offering of investment instruments to the public and the admission of investment instruments to trading on the regulated market (the 'Prospectus Law'), certain criteria in order to determine whether an investment instrument is available or not:

> If rights are acquired which make it possible to execute a financial investment and which relate to one or more movable goods that are part of a group and whose collective management is assigned to one or more persons acting in a professional capacity (unless those rights provide for unconditional, irrevocable and complete delivery in kind of the goods).

price-fixing. A small group of collectors dominate sometimes a certain artist's market which creates an incentive for price-fixing to sustain or raise the value of their portfolios by driving up auction prices through telephone bidding etc.

15 See, above, notes 6 and 7.

16 Changes to the law of 16 June 2006 relating to the offering of investment instruments to the public and the admission of investment instruments to trading on the regulated market by implementation of article 357 of the Law of 4 April 2014 regarding insurance.

17 Article 3 §1, 4° of the Law of 11 July 2018 relating to the offering of investment instruments to the public and the admission of investment instruments to trading on the regulated market, O.J., 20 July 2018 ('Prospectus Law').

That's what it all boils down to.

The Financial Services and Markets Authority ('FSMA'), which is the financial regulatory agency in Belgium, applies the notion of 'alternative investment products' for products which are offered to the public as an investment and which, directly or indirectly, relate to movable property and which do not take the form of traditional investments (e.g. shares) which are well-defined in Belgian financial law. Below is an analysis of the circumstances under which art could qualify as an 'investment instrument' in the meaning of the Prospectus Law.

A. Art as an 'Investment Instrument'

An examination of the art trade, certainly in the higher segment of the trade, shows that the contours within which art is being traded are such that an investment is sometimes more likely than an outright sale. The characteristics of an investment offer are, at least, latently present. The criteria, as laid down in article 3, §1,4° of the Prospectus Law are clarified in more detail in a communication by the FSMA of 13th November 2014 regarding undertakings who commercialise investments in movable and immovable property.[18]

a. 'Rights which enable a financial investment'

First and foremost, article 3, §1,4° of the Prospectus Law stipulates that "rights which enable a financial investment" must be acquired in order to consider a transaction to be an 'investment instrument'. This position can be illustrated based on two interpretative lines of reasoning; a practical, more instrumental one and a principal, more intrinsic line.

The instrumental perspective starts from the premise that an investment instrument is, above all, an instrument. This implies that a distinction should be drawn between the instrument that makes the investment possible and the underlying assets.[19] On the face of it, the traditional financial instruments (shares, bonds, etc.) seem to qualify as 'rights' within the meaning of 3, §1,4° of the Prospectus Law.[20] Certain derivatives can also qualify as 'rights' under the Prospectus Law. Rights of first refusal or purchase options in contracts between art dealers and investors are not uncommon. Considering the existence of art indexes, those options could be linked to such indexes.[21] However, in the art trade, the relationship between the art dealer and its inner circle of collectors often has the characteristics of a select investor club. In such a case investors would decide to invest collectively, the use of the participation rights (as they are being defined in financial law to describe rights of investors in alternative investment funds[22]) is sufficient in order to be in the presence of a financial instrument. In other words, if no traditional financial instrument is available, the use of participation rights also seems to qualify under the definition of 'rights' within the meaning of article 3, §1,4° of the Prospectus Law: a participation right is the expression of a legal right in an artwork in which investors

18 FSMA_2014 dd. 13 Nov. 2014 – Communication to companies who commercialise investments in movable or immovable properties.

19 Article 3 §1, 4° juncto article 3 §1, 10° of the Prospectus Law.

20 Several ventures have been initiated relating to co-ownership of an artwork by several investors by dividing the artwork in shares which, in turn, can be traded separately.

21 Mei Moses Index, Sotheby's.

22 S. Delaey, *De contractuele verhouding inzake portefeuillebeheer, op de wip tussen MIFID en privaatrecht*, (Intersentia, 2010) p. 48, n° 51-56.

collectively invest and is a separate good on which ownership rights manifest themselves to the fullest extent.[23] Experiments are being rolled out in the art trade whereby it is possible to purchase shares representing ownership of an artwork in a manner similar to the purchase of shares in a traditional company. For each artwork, a prospectus is drafted setting out details of the artist, the artwork and its market. The structure of such a deal meets the instrumental line of reasoning in the sense that there is a clear distinction between the instrument and the underlying assets. This, in turn, raises the question, whether the Prospectus Law also applies to situations where investors – on an individual basis – purchase interchangeable[24] or, even, artworks distinguished one from the other, which are being offered to the public by an art dealer. In other words, what is the scope of the notion of 'rights' in article 3, §1,4° of the Prospectus Law and to what extent does the notion differ from the narrower notion of 'financial instrument'.

An '*a contrario*' reasoning from the law of 19th April 2014 regarding alternative investment funds (hereinafter the 'AIF Law') is useful as a reference framework for the clarification of the notion of 'rights' within the meaning of article 3, §1,4° of the Prospectus Law. In the AIF Law, it is stipulated that money should be collected from multiple investors and that that money must be, collectively, invested in the interest of the investors. The collective (investment) element is a constitutive part of the definition of an AIF. Such an element is not part of the definition of rights as laid down in article 3, §1,4° of the Prospectus Law. Article 3, §1,4° of the Prospectus Law merely addresses collective management but does not require a collective investment. Article 3, §1,4° of the Prospectus Law is therefore different from the AIF Law in the sense that it is only the structure in which the capital is being invested which must be collective.[25] In other words, the application of article 3, §1,4° of the Prospectus Law does not require that the purpose of the investment has a collective nature. It is sufficient that the capital is being invested individually on the condition that the artworks are being offered in some kind of group (for example, a solo exhibition of an artist in a gallery). There is no collective equity. Hence, the rights that are being acquired in exchange for the invested amounts do not have to meet the plural ownership that is typical for the participation rights in the AIF Law.[26] Most of the investment contracts in the art trade, provide for an individual ownership right over the artwork which is offered to the public. The heterogenous character of artworks and the fact that most investors have an aesthetic reaction with the artwork, explain this. Moreover, the possibility to individualise artworks is not a decisive element in order to determine whether or not an investment instrument is available.[27]

The foregoing analysis confirms the view that the qualification of the notion of 'investment instrument' in the sense of article 3, §1,4° of the Prospectus Law is not obvious. In such an ambiguous atmosphere, a new kind of line of reasoning can be tapped into: an interpretative point of view which determines the notion of 'investment instrument' that radiates away from the notion of 'financial instrument'. This line of reasoning is based

23 Delaey, above, note 22, n° 57 bis.
24 Editions and multiples are original artworks printed in large volumes and produced by a studio with or without the involvement of the artist.
25 Delaey, above, note 22, n° 56.
26 *Ibid*., n° 57.
27 In the communication of the FSMA it is stipulated that, in order for article 3 §1, 4° to apply, the question whether goods can be identified in the association, indivision or group is not relevant for defining an instrument as an investment instrument.

on the intrinsic characteristics required to prove the existence of a 'right' within the meaning of article 3, §1,4° of the Prospectus Law. If one takes characteristics such as 'standardisation' and 'fungibility' as the main measure of the extent of marketability of an investment instrument, then there are two reasons why individual ownership rights over artworks are difficult to reconcile with the notion of 'investment instrument'. Although some art can be standardised – some artists have been more productive than others and the daily activities of auction houses are more common than the expensive auctions that are mediatised – most artworks are unique which is shown in the price. A second reservation is the fungibility or interchangeability of the rights on the artworks. A comparison with other movable property, such as gold, which the legislator has recognised as qualifying as a financial investment, offers an interesting line of thinking.[28] In comparison to gold, the ownership right over an artwork is not fungible with the ownership right of another artwork. The risks and the value of an artwork are too different. The application of article 3, §1,4° of the Prospectus Law on the trade, over the counter, of editions and multiples is, on the other hand, more likely. Editions and multiples differ from unique and original artworks in the sense that they encompass original artworks, produced in multiples and which are interchangeable. They may involve limited or unlimited editions often produced by a studio without the engagement of the artist which, in turn, is an element that calls for the presence of a degree of standardisation.

Irrespective of how the notion of 'right' should be interpreted within the meaning of article 3, §1,4° of the Prospectus Law, one should also examine whether art is altogether suitable as a financial investment. The trade in artworks is relatively slow – it may take months before an artwork is sold. Unlike art, gold can be bought and resold within five minutes and, in the gold trade, the investment component is the most important source on the demand side. In the art trade, the investment component is certainly not the most important motivation. That all art increases in value, is not a generally accepted principle. On the other hand, the art trade is similar to the trade in gold in the sense that the value of artworks can be derived from the demand and supply on the market and that it can work as a hedge against inflation. Another argument in favour is that investors can rely on pooled data enabling the investor to track the performance of an artist and his artworks. However, the greatest common divisor of these academic and scientific initiatives is that the data are too variable and limited.[29]

Article 3, §1,4° of the Prospectus Law provides expressly for the possibility of enlarging the scope of application of this article through the implementation of a Royal Decree in order to anticipate new developments which may give the investment in movable property the appearance of a financial investment. Thus, the debate as to whether art is nothing but a financial asset or anything but a financial asset, certainly deserves some attention. However, in view of the above analysis, the discussion should probably be better conducted in respect of the question of whether there is a need for an alternative legislation on information duties in the context of certain art sales than there is for the application of the Prospectus Law. Investing in art, is, in other words, balanced between the application of the Prospectus Law and other financial rules and the application of consumer protection rules.

28 Bill of law on financial transactions and financial markets, Parliamentary actions, 1156/1 – 98 (article 155).

29 M. Gerlis, *Art as an Investment*, (Lund Humphries, 2016).

b. Movable property part of a group

The communication of the FSMA clearly states that it relates not only to movable property that is part of an association or a legal indivision, but also to movable property that is grouped. There are examples, the communication continues, of movable goods where each good is the individual property of a separate owner but where each owner entrusts it to one and the same professional custodian to be kept in one safe or in the same space or building. The extent to which art dealers offer additional services (like warehousing and safeguarding) shall be decisive to determine whether a group exists or not. Even in situations where the artwork is not held in deposit by the art dealer, the mere fact that artworks are being offered to the public in the context of a solo exhibition might be sufficient to apply article 3, §1, 4° of the Prospectus Law. The commercialisation of the artworks of living artists on the secondary market are often mentioned in the same breath with the exhibition held to bring them initially on the art market.

c. Collective management

The condition that raises the most questions relates to the notion of 'collective management', something which is not defined in the communication of the FSMA, meaning that, to seek a definition, reference should be made to the interpretation of the notion in the financial law. Article 3, 41 of the AIF Law describes management duties broadly as (i) the management of the investments, (ii) the trading and (iii) the administration thereof.

Certain practices in the current art trade, definitely fall within the concept of 'collective management' as referred to in financial law. The art dealer with whom the investor closes a deal, may inform the investor on a regular basis of pricing developments on the art market in relation to his investment. The art dealer will in many cases also act as an agent of the investor in order to facilitate a remarketing of the artwork in which the investor has invested. The art dealer often assumes duties which relate to the purchase or sale of artworks. The search for investment opportunities or pre-sale investigative measuresrelating to authenticity or provenance issues, are duties that are often assigned to art dealers. Finally, it is also possible that certain arrangements between the dealer and investor are agreed upon relating to the consignment of the artworks. It is often the case that the art dealer is appointed as agent to collect consignment fees, to arrange museal shows and, more generally, to conduct activities that relate to the general management of artworks (insurance matters or arranging storage facilities).

The Prospectus Law also demands that management duties are assigned to one or more persons who act professionally which, in turn, requires an investigation into the organisation aspects of management in the context of art sales in an art gallery or through a private dealer. The most common form of co-operation on the primary art market is the promotion gallery. The promotion gallery will act as the representative of the artist and, in doing so, make efforts to promote the *oeuvre* of the artist. Obviously, these efforts are in the interest of the investor who has invested in one or more artworks. That line of reasoning certainly has some merit if the art gallery is the exclusive representative. Whether this is sufficient in order to qualify as a professional manager within the meaning of article 3,41 of the AIF Law is doubtful. More interesting for the present investigation is the tendency – primarily on the secondary market – in which the sales function of the art dealer is being made secondary to the advisory function. The listing of activities

as set out above, clearly indicate that the art dealer increasingly – in particular on the secondary market – acts as an agent and trustee of the investor. That said, on the primary market the same tendency is also observable. Before artworks are put up for sale to the public, they are sometimes offered in 'private sales' to a privileged club of collectors of the art gallery.[30] Contrary to the relationship between the art lover and the art gallery, the art gallery often maintains with an inner circle of collectors a relationship that is very similar to the legal concept of 'agency'.

The legal qualification of the relationship between collector and art dealer seamlessly matches the legal relationship between investors and their manager in the meaning of the AIF Law. Most authors qualify the latter relationship as an agency. The scenario in the art trade in which investors rely on art dealers to take care of the management of their collection matches seamlessly the agency structure.[31] This implies that the relationship between the collector and the art dealer can be considered to be a professional management within the meaning of article 3§1,4° of the Prospectus Law. Any argument by a dissatisfied gallery owner or dealer that this is not stipulated in the contractual arrangements is irrelevant. It is substance over form, as they say in trade.

The extent to which the contractual relationship between the investor and the art dealer meets a management structure that attributes sufficient power to the art dealer in order to qualify as 'collective' management under the Prospectus Law, should also be part of the investigation. Does the Prospectus Law require that the investor is sidelined from decision making, or does the Law allow the investors to keep day-to-day investment discretion in relation to the rights on the underlying assets or on the artworks themselves. The manifestations in which agency in art trade occurs are numerous. There is no standard model. Generally, it is correct to say that exclusive assignments between investor and art dealer, probably, lead sooner to the qualification of collective management in the meaning of the Prospectus Law as such structure matches seamlessly the so-called 'autonomy of the professional manager' as defined in the guidelines of ESMA.[32] There must be a waiver – collectively – of day-to-day investor discretion. Literally, ESMA defines the day-to-day investor discretion as follows:

> a form of direct and on-going power of decision – whether exercised or not – over operational matters relating to the daily management of the undertakings' assets.

Applied to the art trade, operational matters could be understood as: the participation in art fairs, the closing of consignment loans, the collection of consignment fees and the negotiation of museal shows.

Again, whether or not the art dealer has any operational control will depend on the market in which he operates – the primary or secondary market. In the contemporary

30 Many art dealers have a separate login on their website for collectors and use this platform to share information.

31 Delaey, above, note 22, n° 91. A more differentiated approach is required between art sales on the primary and secondary markets. On the primary market the situation will occur less often owing to the fact that the art dealer is primarily the agent of the artist. The advisory function does not override the sales function on the primary market. On the secondary market the difference between sale and advisory function is more blurred.

32 <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-600_final_report_on_guidelines_on_key_concepts_of_the_aifmd_0.pdf>.

trade, the gallery owner is answerable to two people: the artist and the collector. First and foremost, he has responsibility towards the artist to do his utmost to promote the career of the artist. The advisory function vis-à-vis the collector comes second but is not easily categorised.[33] The interests of the art dealer and investor on the secondary market run more often in parallel than on the primary market. The fortune of the investor is more interwoven with and dependent upon the efforts of the art dealer.[34] Investors rely upon a gallery's expert personnel for advice. It is for this reason that the day-to-day investor discretion to decide whether to manage or sell on the secondary market is often contractually assigned to the art dealer who exercises his power in order to produce a return or, at least, a preservation of the value of the artworks intended to be managed. In these scenarios the balance of power shifts towards the art dealer and investors – collectively – who waive their day-to-day investor discretion as interpreted by ESMA.[35] That investors – prior to the assignment of these powers – collectively exercise a certain investor discretion is a certain fact in the contemporary art trade. The circle of investors is often small and privileged which, in turn, leads to risks of collusion.[36] Whether there is any collective management by the art dealer, will depend on the nature of the agency duties and the manner on which they are documented. Or, in other words, it will depend on whether the assignment of investor discretion extends beyond a factual facilitation of the exercise of the investment discretion.

Such a waiver – on a collective basis – of day-to-day investment discretion is referred to in legal doctrine as the 'autonomous management theory'.[37] This implies that the art dealer can take decisions autonomously that influence the value of the artworks in which collectors have invested.[38] The value of each artwork directly influences the value of the other artworks. The management decision taken by the art dealer in respect of individual artworks directly influences the valuation of all artworks that belong to the *oeuvre* of the artists in the portfolio. In other words, each management decision in respect of an individual artwork is in favour of the group of artworks which are being offered for sale or that are part of the investment deal the gallery or art dealer has set up. That line of

33 Maureen Holm 'The Art Investment Contract: Application of Securities Law to Art Purchases', (1981) 9(2) *Fordham Urban Law Journal*, Vol. 9, N° 2. "An art dealer may not expressly hold himself out to the public as an art advisor, yet he must inevitably make statements incidental to art purchases. The purchaser of works exhibited in galleries may elicit from the art dealer information of an advisory and expert nature which, to the extent granted, will be relied upon".

34 Alice Xiang, 'Unlocking the Potential of Art Investment Vehicles', (2018) *Yale Law Journal*, p. 1698: "In an attempt to control price of the artist works over time, primary market players want to sell their best works to collectors who will keep the artworks off the market for the foreseeable future".

35 ESMA guidelines on key concept of AIFMD, Final report, (see footnote 32): "ESMA clarified that in order for an undertaking not to be considered a collective investment undertaking, the day-to-day discretion or control should be granted to all the unitholders or shareholders of the undertaking and the fact that one or more of them are granted such a discretion or control should be of no relevance for this purpose".

36 Collectors or a dealer, or both in a concerted action, can affect an entire artist's market by driving up auction prices for artworks by that artist. On the secondary market, auction sales influence overall prices. As the remaining part of the art market is opaque, influential collectors and dealer benefit from an information advantage which, in turn creates opportunities for collusive price-fixing.

37 Delaey, above, note 22, n° 56.

38 See, footnote 25.

reasoning is best explained by referring to a specific kind of management in the art trade: the right of first refusals.[39] Rights of first refusal provide the art dealer with control over the timing for the remarketing of artworks and are used to eliminate arbitrage on the primary market. The manner in which rights of first refusal are used matches seamlessly the autonomous management theory. Those investors who are interested in realising an exceptional return have the right thereto, but must take into account the contractually assigned day-to-day discretion. In such scenarios the restriction of the right of the investors to remarket is justified on the basis of the autonomous right of the art dealer to manage the artworks in a manner that is necessary to preserve a normal growth of the artworks that are subject to management.

The contours within which the art trade on the secondary market is organised offers opportunities for collusion between collectors and their art dealer. The art dealer can take responsibility for the remarketing of the artworks in which collectors have invested. On the primary market collusion is less likely, but features like rights of first refusal indicate that the gallery owner sometimes also takes responsibility vis-à-vis the collectors to produce a return, or, at least, to preserve the value of artworks that are being offered for sale. Or, in other words, the art dealer and the gallery owner bear, under certain circumstances, a collective responsibility as if they are the thread on which everybody's beads are strung.[40]

d. Delivery in kind

The sole element where there is no clarity in the current advisory practice of the FSMA concerns the criterion that an artwork can be considered an investment instrument only if the buyer-collector waives any physical enjoyment. The most obvious scenario here is when the artworks are kept (or can be kept) on deposit with the gallery owner or in a warehouse. The question is whether the market watchdog ('FSMA') will be awakened if the lines are less clearly drawn. For example, it is conceivable that the ongoing practice in the context of gallery sales whereby the artist does not transfer his IP rights in order to allow borrow-backs for future exhibitions and fairs, is sufficient proof that delivery of the artwork to the buyer-collector is conditional, which, in turn, indicates that he waives – at least partly – any physical enjoyment.[41]

Another factual element that points towards the existence of an incomplete delivery is that many investors will agree to waive physical enjoyment of their artwork in favour of museums. That practice fits perfectly within the prevailing management theory in the art trade which says that borrow-backs are considered useful and necessary to realise a surplus-value or return.

B. Consequences of the Qualification as an Investment Instrument

The consequences of the qualification as an investment instrument in the meaning of the Prospectus Law are far-reaching. A public offer of investment instruments shall, depending on the countervalue, be subject to certain information requirements. A public offer on the Belgian territory implies that there is:

39 Xiang, above, note 34, p. 1698: the tendency to use rights of first refusal is primarily noticeable on the primary market.

40 Holm, above, note 33, p. 420.

41 In the art trade, these practices are referred to as 'borrow-backs'.

> a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities.[42]

An offer of artworks in the context of an art gallery or an auction house can, depending on the circumstances, qualify as a public offer. If the offer of artworks is considered a public offer, certain information duties must be complied with by the issuer. The Prospectus Law stipulates which information duties have to be complied with. These duties take the shape of a prospectus[43] or an information memorandum[44] and provide that certain information has to be communicated in respect of the modalities of the offer and the related risks. The decisive element to determine whether a prospectus or an information memorandum has to be communicated is laid down in article 7 §1 and article 10 §1 en §3 of the Prospectus Law.

For offers with a global countervalue below €5,000,000 there is no requirement for a prospectus, but an information memorandum has to be published. A *de-minimis* arrangement has been inserted in the Prospectus Law for public offers with a countervalue below €500,000 and to the extent each investor subscribes maximally for an amount of €5,000. For those offers, it is not necessary to publish either an information memorandum or a prospectus.

If the financial thresholds are not met, the offer can be private.[45] These offers could fall under the rules that apply to the commercialisation of investment instruments. In the communication of the FSMA of 27th October 2015 regarding the rules for advertising of financial products that are being commercialised among non-professional clients,[46] it is clearly stipulated that commercialisation is a broader notion than a public offer and that advertisements for financial products, into which category investment instruments fall, should meet the criteria laid down in the communication.

The discussion concerning the qualification of a purchase of an artwork as a form of an alternative investment has spread since the introduction of the notion of 'investment instrument' in the Prospectus Law of November 2014. The chance that this could lead to information duties were slim as the prospectus law did not, until recently, contain a requirement to publish an information memorandum for offers below certain thresholds. With the introduction of the new thresholds – by implementing the European Prospectus Regulation, the cards are shuffled differently. The new Prospectus Law introduces certain additional information requirements for offers that are not subject to the obligation to publish a prospectus.[47]

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42 Article 4, 2° of the Law of 11 July 2018 relating to the offering of investment instruments to the public and the admission of investment instruments to trading on the regulated market, O.J., 20 July 2018.

43 Royal Decree of 31 Oct. 1991 on the prospectus that needs to be published in the context of public offers of financial instruments.

44 Royal Decree of 23 Sept. 2018 relating to the publication of an information memorandum in the context of public offers of financial instruments, O.J., 5 Oct. 2018.

45 Article 27, 1° of the of the Law of 11 July 2018 relating to the offering of investment instruments to the public and the admission of investment instruments to trading on the regulated market, O.J., 20 July 2018.

46 Circulaire FSMA_2015_16 dd. 27 Oct. 2015.

47 The Law of 11 July 2018 relating to the offering of investment instruments to the public and the admission of investment instruments to trading on the regulated market intends to repeal

IV. Conclusion

Whether art can be considered to be a financial asset – in the same way as shares, gold or real estate – is subject to debate. People are willing to pay for art and expect to be able to realise a return. Moreover, it is a source of income for intermediaries like auction houses and art dealers. A whole industry is built upon and around art – people are willing to spend money on museums, art journals etc. Art is considered to be something of value. That tendency opens the doors for an investment climate, it being understood that returns sometimes do not outweigh the risks. Therefore, it is only logical that the scope and reach of financial regulation extends to art. Legal recognition that the substance of an art transaction constitutes an investment contract should trigger investor protection that goes beyond the principles of '*caveat emptor*'. The argument that every art transaction can be reduced to a game of luck, denies the role of the art dealer. By arguing so, it becomes clear that the better the market of an artist (and the related risks) is mapped, the sooner investors will be willing to put money into the market. Regulation does not have to be something superfluous but rather something that is in favour of both the investor and the art dealer.

the Law of 16 June 2006. The law of 2018 reiterates those elements of the Law of 2016 which are not stipulated in the Prospectus Regulation, 2017/1129 of 14 June 2017.