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# Art, money laundering and terrorist financing: new developments in Swiss law - Art, Cultural Institutions and Heritage Law

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## Art, money laundering and terrorist financing: new developments in Swiss law

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It seems that not a month goes by without the use of the art market for money laundering and terrorist financing making the headlines. From Nouriel Roubini's Davos comments in January<sup>[2]</sup> to the United Nations Security Council Resolution 2199 banning the export of antiquities to target Islamic State's revenue;<sup>[3]</sup> the so-called *Rybolovlev v Bouvier* case or stories of drug lords, such as Joaquin Guzmán or Pablo Escobar, using art as a vehicle to launder the proceeds of their illegal activities; more than ever, money laundering and terrorist financing have become hot topics for the art market.<sup>[4]</sup>

Characterised by confidentiality, portability and price volatility reaching hundreds of millions of dollars, the art market has long raised the question of whether increased transparency and regulation is required. This question has become even more relevant in the face of suspicions of money laundering and terrorist financing plaguing this market. Switzerland is not immune to this problem because its art market ranks among the five most prominent markets with two per cent of global activity and a turnover of 1 to 1.5bn Swiss francs.<sup>[5]</sup>

To adjust to the evolution of the international fight against money laundering and terrorist financing, Switzerland has recently implemented the revised Financial Action Task Force (FATF)<sup>[6]</sup> Recommendations on combating money laundering and the financing of terrorism and proliferation.<sup>[7]</sup> These new provisions, combined with international sanctions against certain terrorist groups, have a direct impact on actors in the art market, such as auction houses, dealers and collectors. The present contribution provides a general overview of the recent developments in anti-money laundering and terrorist financing regulations in Switzerland, and offers some recommendations for art lovers and art buyers.

### How to launder money and finance terrorism with art

In June 2015, the Interdepartmental Coordinating Group on Combating Money Laundering and the Financing of Terrorism (Construction Generale Maçonnerie Terrassement (CGMT)), a permanent body appointed by the Swiss government,<sup>[8]</sup> issued its first report on the national assessment of money laundering and terrorist financing risks in Switzerland, and dedicated two sections to art trade and free ports.<sup>[9]</sup>

Laundering techniques in the art world are numerous and can take diverse forms, such as the use of false bills for the fictitious purchase of artworks; fictitious auctions, where an artwork is bought by an accomplice with money provided by the owner (money launderer); artificial speculations over the price of an artwork; or telephone auctions or bid orders guaranteed by a security that is subsequently returned by, and in the name of, a recognised bank because the uncommitted buyer (money launderer) renounces the artwork.

Several years ago, the Basel Institute on Governance (BIG), qualifying the art market as 'global, highly fragmented and complex, involving a great variety of operators' and with 'a higher risk of exposure to dubious trade practices', raised the issue of the insufficient level of regulation and compliance efforts from the various actors of the market.<sup>[10]</sup> BIG tried to gather major art market players to agree to guidelines for the art trade: the Basel Art Trade (BAT) Guidelines.<sup>[11]</sup> These guidelines aim at establishing standards for art market operators, particularly regarding the identification of sellers and buyers, due diligence before sale, identification of the source of funds, aftersales responsibility and conflict management.

The BAT Guidelines have, however, remained a working paper because of a lack of support from the industry; one of the reasons invoked being that existing legislation and internal anti-money laundering and terrorist financing were considered sufficient.

In the case of Switzerland, significant anti-money laundering and terrorist financing regulations have already been put in place, with specific provisions enacted in the Swiss Criminal Code (SCC)<sup>[12]</sup> and the Anti-Money Laundering Act (AMLA). However, there is no rule specifically addressing money laundering and terrorist financing in the art trade. The International Cultural Property Transfer Act (CPTA), which regulates the import of cultural property into Switzerland, its transit and export, and its repatriation from Switzerland, does not provide for anti-money laundering and terrorist financing obligations, such as the identification of the origin of the assets in a transaction involving a cultural object (the know your customer (KYC) rule).

Given the legislation in place, the CGMT assessed the overall risk of money laundering as a medium for areas covered by anti-money laundering regulation and the risk for terrorist financing limited. As to areas not covered by anti-money laundering and terrorist financing regulations, such as the art trade and free ports, the CGMT concluded that the current system addresses the risks adequately, but made some recommendations for further improvements, especially regarding free ports. For example, merchandise for export should only be stored for a limited time, as opposed to existing practice, and the content of inventories should be extended. Most importantly, inspections undertaken in free ports should be harmonised.

## Switzerland's new provisions on anti-money laundering and terrorist financing

Following the revision in 2012 by the FATF of its 40 Recommendations on international standards on combating money laundering and the financing of terrorism and proliferation, Switzerland revised its legislation to comply with the new requirements. These modifications include amendments to the SCC and the AMLA, which will enter into force on 1 January 2016.

The amended AMLA notably extends to economic fields that previously did not fall under its scope of application. This will increase the number of transactions for which the origin of the funds must be traced and reduce the number of entities that do not comply, for example, with the duty to communicate dubious transactions to the Money Laundering Reporting Office Switzerland (MROS). The SCC will be amended further to include serious tax offences in the list of prior money laundering offences.

### *New definition of 'dealers' and new obligations*

As of 1 January 2016, the amended AMLA will include 'physical or moral persons who negotiate goods professionally and receive cash payments (dealers)'.<sup>[13]</sup> Art dealers who fall under this definition and accept cash payments exceeding the amount of 100,000 Swiss francs – even in small amounts – will have to comply with specific obligations, unless the amount exceeding the cap of 100,000 Swiss francs transits through a financial intermediary that is covered by the AMLA (eg, a bank). This system is nothing new because the European Union (EU) has already imposed a cap of €10,000 for cash payments with dealers since the end of June 2015 (previously €15,000).<sup>[14]</sup>

While the specifics of the revised AMLA obligations remain to be detailed in an ordinance,<sup>[15]</sup> they include notably:<sup>[16]</sup> (1) the verification of the identity of the buyer; (2) the identification of the beneficial owner and the judicial structure of the buyer; and (3) the establishment and retention of documents relating to the transaction. If an operation appears unusual, or if there are indications that the assets arise from a criminal offence or tax offence (as explained below), or are connected to a criminal organisation, the art dealer will have to clarify the background and purpose of the transaction. In cases of serious suspicion of the existence of such circumstances, the dealer will have to report the transaction to the MROS without informing the relevant parties or third parties.<sup>[17]</sup>

In light of these new rules, art dealers who fall within the scope of the revised AMLA and accept cash transactions above 100,000 Swiss francs will also have to mandate an auditor who will report to the authority in charge of supervising dealers, and will need to report to MROS if the dealer under supervision does not comply with his or her communication duties.<sup>[18]</sup>

These new rules aim at ensuring that all the dealers, not only registered intermediaries (eg, banks) who must already comply with KYC and reporting obligations, involved in transactions exposed to money laundering and terrorist financing are also subject to surveillance and reporting obligations. To avoid the administrative burden resulting from this new regime, dealers can invite their clients to go through a financial intermediary for payment.

### *Beware of the tax man*

As of the beginning of 2016, the scope of prior offences to money laundering will be extended under the SCC to qualified (serious) tax crimes or offences (direct taxes).<sup>[19]</sup> This includes, for example, misleading the authorities by using documents that are false, falsified or recognised as being incorrect, or by committing tax fraud for an amount of subtracted taxes equivalent to more than 300,000 Swiss francs per tax period. Furthermore, the prior tax offences in the area of customs smuggling (indirect taxes) will be extended to trans-border transactions of merchandise to cover, for example, offences related to VAT.<sup>[20]</sup>

Detecting the existence of a tax offence will prove to be a conundrum for every party involved given the complexity of national tax legislation, but especially for art dealers, whose expertise does not necessarily lie within international tax law.

## Action against terrorist financing: al-Qaeda and Islamic State

Cultural goods, such as cultural heritage artefacts and ancient treasures, are particularly targeted by terrorist organisations to finance their activities. Some art collectors, driven by passion more than by reason, may fall into a trap, hoping to save unique pieces from looting and destruction. The territories controlled by Islamic State in Iraq and the Levant have been subject to this cultural looting, which led the UN Security Council to adopt Resolution 2199 in February 2015 to specifically address this issue.<sup>[21]</sup>

Switzerland also enacted new sanctions regarding Syria in December 2014, prohibiting the trade of cultural goods exported after 19 May 2011.<sup>[22]</sup> These rules complete the existing legal framework forbidding the financing of terrorism<sup>[23]</sup> or the support of secret criminal organisations,<sup>[24]</sup> and Switzerland updates sanction lists regularly based on the Embargo Act and resolutions of the UN Security Council. One example of Swiss sanctions against terrorist groups is the Act Forbidding the Groups 'al-Qaeda' and 'Islamic State' and Related Organisations, which was adopted to condemn any behaviour on Swiss territory aimed at collaborating with or supporting these terrorist organisations.<sup>[25]</sup>

## Conclusion

Art dealing is characterised by discretion. This feature raises sensitive challenges in the fight against money laundering and financing of terrorism because most actors in the art market do not fall under any special supervision. Although many international art market stakeholders have developed internal guidelines and compliance programmes to ensure lawful and ethical business practices, particularly to prevent corruption and minimise risks in their business activities, these are not applied uniformly and vary from one entity to another.

The amendments to Swiss law on money laundering and terrorist financing will have a global impact on the art market because dealers who negotiate goods professionally and receive cash payments above the cap of 100,000 Swiss francs without using a financial intermediary will be subject to important diligence duties and reporting obligations in cases of serious suspicions of illegal activities, now including the laundering of money resulting from serious tax crime or offence. This situation should, however, be assessed against that prevalent in foreign systems, such as the EU regime, which recently imposed a decreased cap for cash payments of €10,000, or the compliance system of international auction houses, which generally apply the lowest caps required by law throughout their organisations.

The exact scope of art dealers' obligations under the new anti-money laundering and terrorist financing rules is still uncertain because the implementing legislation (eg, the future ordinance on dealers that should enter into force with the amendments of the AMLA) is still undergoing work. As always, the devil will lie in the detail. It is already a fact that business will not be as usual and that the industry will have to evolve. The new rules will result in additional administration and paperwork, and most importantly, will require greater caution from dealers to avoid any legal liability. In this context, if not too late, self-regulation initiatives may bring welcome guidance.

## Notes

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<sup>[2]</sup> John Graper and Peter Aspeden, 'Davos 2015: Nouriel Roubini says art market needs more regulation', *Financial Times* (London, 22 January 2015), available at: [www.ft.com/cms/s/992dcf86-a250-11e4-aba2-00144feab7de,Authorised=false.html?\\_i\\_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F992dcf86-a250-11e4-aba2-00144feab7de.html%3Fsiteedition%3Duk&siteedition=uk&\\_i\\_referer=#axzz3gRlPnYV1](http://www.ft.com/cms/s/992dcf86-a250-11e4-aba2-00144feab7de,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F992dcf86-a250-11e4-aba2-00144feab7de.html%3Fsiteedition%3Duk&siteedition=uk&_i_referer=#axzz3gRlPnYV1) (last accessed 20 July 2015).

<sup>[3]</sup> United Nations Security Council Resolution 2199 (2015) para. 17 whereby the United Nations Security Council '17. *Reaffirms* its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph'.

<sup>[4]</sup> Eileen Kinsella, 'We Profile 3 Famous Billionaire Drug Kingpins and the Art They Adored', *Artnews*, 14 July 2015, available at: <https://news.artnet.com/market/3-drug-kingpins-art-adored-316531> (last accessed 20 July 2015).

<sup>[5]</sup> Interdepartmental coordinating group on combating money laundering and the financing of terrorism (CGMT), Swiss national report on money laundry and terrorist financing risks, June 2015, p 118, available at [www.news.admin.ch/message/index.html?lang=en&msg-id=57750](http://www.news.admin.ch/message/index.html?lang=en&msg-id=57750).

<sup>[6]</sup> The FATF is an intergovernmental body created in response to the increasing concern over money laundering, of which Switzerland is a member.

<sup>[7]</sup> International standards on combating money laundering and the financing of terrorism & proliferation FATF 2012 Recommendations available at: [www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/fatf\\_recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/fatf_recommendations.pdf).

<sup>[8]</sup> The CGMT was appointed by the Federal Council at the end of 2013. The CGMT is a permanent body headed by the Deputy State Secretary for International Financial Matters (Federal Department of Finance) and consists of members of management in several offices of the Swiss administration. It is tasked with coordinating the measures related to combating money laundering and terrorist financing in the Swiss Administration. In this context, it must ensure continuous risk assessment in particular, with the objective of identifying new money laundering and terrorist financing threats and recommending possible measures to mitigate them. The CGMT's report also implements a FATF recommendation, which requires its members to perform risk analyses so that the measures for combating money laundering and terrorist financing can be better adjusted to actual risks.

<sup>[9]</sup> Interdepartmental coordinating group on combating money laundering and the financing of terrorism (CGMT), Swiss national report on money laundry and terrorist financing risks, June 2015, p 115–120, available at [www.news.admin.ch/message/index.html?lang=en&msg-id=57750](http://www.news.admin.ch/message/index.html?lang=en&msg-id=57750).

<sup>[10]</sup> Dr Thomas Christ/Claudia Von Selle, Basel Art Trade Guidelines, Intermediary report of a self-regulation initiative, no 12, p 3, available at: [www.baselgovernance.org/sites/collective.localhost/files/publications/biog\\_working\\_paper\\_12.pdf](http://www.baselgovernance.org/sites/collective.localhost/files/publications/biog_working_paper_12.pdf).

<sup>[11]</sup> Dr Thomas Christ/Claudia Von Selle, Basel Art Trade Guidelines: Intermediary report of a self-regulation initiative, no 12, p 7, available at: [www.baselgovernance.org/sites/collective.localhost/files/publications/biog\\_working\\_paper\\_12.pdf](http://www.baselgovernance.org/sites/collective.localhost/files/publications/biog_working_paper_12.pdf).

<sup>[12]</sup> Art 305 *bis* SCC, which sanctions money laundering, and 260 *quinquies* SCC, which sanctions terrorist financing.

<sup>[13]</sup> Art 2(1)(b) amended AMLA (free translation).

<sup>[14]</sup> See Directive 2005/60/CE of 26 October 2005 on money laundering; Directive (UE) 2015/849 of the European Parliament and Council of 20 May 2015 related to preventing the use of the financial system for means of money laundering and financing of terrorism.

<sup>[15]</sup> Explanatory Report of 9 July 2015 on the Money Laundering Ordinance, available at: [www.admin.ch/ch/f/gg/pc/documents/2692/OBA\\_Rapport-expl\\_fr.pdf](http://www.admin.ch/ch/f/gg/pc/documents/2692/OBA_Rapport-expl_fr.pdf).

<sup>[16]</sup> Art 8a revised AMLA.

<sup>[17]</sup> Art 9(1*bis*) and 19a(5) 5 revised AMLA. It is unclear whether this duty to report exists only for cash transactions above 100,000 Swiss francs.

<sup>[18]</sup> Art 15 revised AMLA. Dealers are not assimilated to financial intermediaries under the revised AMLA and must comply with specific provisions, which do not state that dealers fall under the supervision of the FINMA.

<sup>[19]</sup> Art 305 *bis* (1) and (1*bis*) revised SCC. Prior tax offences for direct taxes will include taxes on revenue and fortune of individuals and companies, but not taxes on successions or donations.

<sup>[20]</sup> Art 14(4) of the Criminal Administrative Custom Smuggling Act.

<sup>[21]</sup> Resolution 2199 (2015) of the Council of Security of the United Nations dated 12 February 2015.

<sup>[22]</sup> Ordinance Instituting Measures Against Syria (RS 946.231.172.7).

<sup>[23]</sup> Art 260*quinquies* SCC.

<sup>[24]</sup> Art 260*ter* SCC.

<sup>[25]</sup> Act Forbidding the Groups 'al-Qaeda' and 'Islamic State' and Related Organisations (RS 122).

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