

Swiss free ports: still a safe house for private clients' trophy assets?

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Introduction

Geneva is host to one of the largest free ports in the world, which is home to billions of Swiss francs' worth of fine art and other high-value collectables, such as precious stones, wine and antiques. In recent years, critics have highlighted the risk of money laundering and tax evasion, as well as the reputational risk for customs warehouses. Globalisation and the aftermath of the financial crisis have triggered a substantial growth in investments in high-value artworks and other extremely valuable goods considered more as commodities. However, tighter regulations and fiercer competition abroad (eg, the Luxembourg free port recently passing scrutiny by the European Parliament and the UK prime minister's proposal to develop future free ports and related warehouses in the region) are forcing such facilities to adapt their storage services and due diligence processes to accommodate some of the estimated \$1.742 trillion worth of art and collectables of ultra-high-net-worth individuals (UHNWI).(1)

This article examines the legal situation of the Swiss free ports, which were the subject of a recent Swiss Federal Audit Office (SFAO) report(2) following an evaluation of the supervisory activities carried out by the Federal Customs Administration (FCA) at free ports and open customs warehouses. It also considers how the evolution of customs warehouse and AML regulations will affect the attractiveness of Swiss free ports for private clients.

Types of customs warehouse

In Switzerland, there are two categories of customs warehouse:

- duty-free warehouses, better known as 'free ports'; and
- open customs warehouses.

The former are, in principle, open to all, including individuals, whereas the latter are only for private use by the warehouse operator. Initially, such warehouses were used to facilitate international trade by enabling foreign goods to be stored temporarily on national territory without being cleared. Import duties and other taxes (eg, value added tax) are thus collected only once the goods clear customs for final import. However, nowadays, such warehouses are more often used by UHNWI as storage space for long-term valuable artworks and other high-value investment goods.

Evolution of customs warehouse and AML regulations

In January 2014 the SFAO published its evaluation of licensing and inspection activities within the Swiss free ports and open customs warehouses, concluding that the federal authorities had failed to grasp the political and economic challenges relating to customs warehouses. The SFAO also considered that customs supervision was insufficient to ensure the proper use of customs warehouses and limit irregularities and the risk of illegal activities and established a list of recommendations. Further, in June 2015 Switzerland published its first national risk assessment by the Interdepartmental Coordinating Group on Combating Money Laundering and the Financing of Terrorism (GCBF). Sectors not subject to the Federal Anti-money Laundering Act (AMLA), such as free ports and the art trade, were also assessed and recommendations were made for further improvements, especially regarding free ports.

Although significant AML regulations were already in place, with specific provisions in the Criminal

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Code and the AMLA, no rule specifically addressed money laundering in the art trade. In particular, the Federal Law on the International Transfer of Cultural Property regulates the import of cultural property into Switzerland, its transit and export, and its repatriation from Switzerland, but does not provide for AML obligations.

Legislative changes have since ensued, with new legislation entering into force as of 1 January 2016:

- The amended AMLA now includes "natural persons or legal entities who deal in goods professionally and receive cash payments (dealers)". Hence, art dealers and auction companies which fall under this definition and accept cash payments exceeding Sfr100,000 – even in several instalments – must comply with specific obligations (ie, an increased duty of diligence and communication, including the identification and documentation of the counterparty and the beneficial owner);
- The amended Customs Ordinance includes measures to ensure a clear distinction between goods intended for storage in free ports and those intended for export (eg, a six-month time limit on the storage of goods intended for export, extendable if proper grounds are determined), as well as the obligation to register the goods and their owner in an inventory and the expansion of the definition of 'sensitive goods' required to be classified as investment in records (eg, alcohol, tobacco and cars).

In December 2016 the Financial Action Task Force (FATF) published its fourth mutual evaluation report on AML and counter-terrorist financing measures in place in Switzerland. Referring to GCBF's national assessment and observing overall good results, the FAFT nevertheless identified weaknesses and made recommendations for further regulation and enforcement to promote greater transparency in the art sector.

In parallel and following the Panama Papers scandal, the EU Fifth AML Directive (2018/843/EU) entered into force on 9 July 2018 and had to be transposed into national law by member states by 10 January 2020. The most significant change foreseen by the EU Fifth AML Directive for 'art intermediaries' (ie, art dealers, auction houses and other entities transacting in art) is that they will be treated as financial intermediaries. Thus, art market players will be required to conduct, at the same level as financial intermediaries, risk-based due diligence enquiries on purchases amounting to €10,000 or more, irrespective of the method of payment.

Following the FATF's 2016 report, the AMLA is also undergoing changes. In particular, the threshold for cash payments will be reduced from Sfr100,000 to Sfr15,000. Contrary to the EU Fifth AML Directive, this change will apply only to the trade of precious metals and stones and not to art intermediaries. On 26 June 2019 the Swiss government adopted the relative message amending the AMLA and Parliament was expected to begin addressing the measures in the second half of 2019. However, at the end of January 2020, the National Council's Legal Affairs Committee decided by 13 votes to 12 not to proceed with the amendment of the AMLA. The AMLA's fate thus remains to be seen, but eventual amendments, if any, are not expected to come into force until the start of 2021 at the earliest.

The SFAO's 8 April 2019 report which addressed the situation at the end of August 2018 acknowledged the positive changes made in this regard, such as:

- the FCA's monitoring instrument;
- the defined minimum standards for inventories of stored goods;
- the registration of the name and address of owners of goods on inventories;
- the maintenance of a list of free port tenants and sub-tenants;
- the limitation of operating licences to five years for open customs warehouses and 10 years for free ports; and
- a minimum number of goods' movement per year (200 for open customs warehouses and 5,000 for free ports) in order to prevent their use predominantly for storage over long periods.

The new practice in risk analysis and control is still recent and the potential impact of their efficiency should be reassessed at a later stage. However, the SFAO already notes that exceptions to the minimum number of goods' movements exist and that some conditions for granting operating licences to free ports have been reviewed, but no supplementary or minimal compliance requirements for tenants of free ports have been put into place. The responsibility for this has been left to the management of the free ports. That said, the renewal of operating licences should offer the opportunity to review these points.

How will this affect the attractiveness of Swiss free ports for private clients?

Private clients who want to resort to the services of Swiss free ports are facing greater transparency. They should be aware of the AML obligations imposed on the dealers and financial intermediaries

with which they trade, particularly regarding due diligence enquiries to which they could be subject. As transactions involving trophy assets are often cross-border, the obligations foreseen by the EU Fifth AML Directive should also be considered. Despite stricter regulation, Swiss free ports continue to offer many advantages, such as confidentiality, security and the necessary logistics for such assets deposited long term, as well as flexibility regarding customs duties and tax.

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Endnotes

(1) Deloitte and ArtTactic, [Art and Finance Report 2019](#), p27.

(2) Follow-up to the evaluation of supervisory activities at free ports and open customs warehouses by the FCA, 8 April 2019 (Audit 17458), available [here](#).

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