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Newsletter

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Stricter controls in Swiss free ports

Swiss free ports have attracted criticism in the past for having been partly used for illegal purposes. In reaction to this criticism, the Federal Council strengthened controls in Swiss free ports as of 1 January 2016.

1 INTRODUCTION

Customs warehouses have increasingly been a topic for media reports and political inquiries in recent years, since the Organisation for Economic Cooperation and Development (OECD) and the Financial Action Task Force (FATF) alleged that they were partially used for doubtful practices such as tax fraud or money laundering.

Historically, the **main purpose of customs warehouses** was to enable **foreign goods** to be **temporarily stored without having to be cleared**. This facilitates international transit trade and allows, to a certain extent, further work on the goods before their import into Switzerland if needed. Custom duties and taxes (especially the import value added tax) for goods stored in customs warehouses are only due when they are actually imported. In addition, the sale of such goods within the customs warehouses is exempt from value added tax.

In Switzerland, there are two types of **customs warehouses**: free ports and open customs warehouses (together hereafter "customs warehouse"). Both are operated by warehouse keepers, who have appropriate authorizations. In **free ports**, personnel from the Swiss Federal Customs Authority are present. Ten free ports currently exist, a notable one being situated in Geneva. By contrast, goods in **open customs warehouses** can be stored by the warehouse keeper himself or by third parties, and the Customs Authority is not permanently present. Currently, there are more than 200 open customs warehouses.

Further to the conclusion of numerous free trade agreements and thus to the elimination of certain customs duties, the use of customs warehouses has evolved in recent years. Due to the poor returns of financial investments, fears of inflation as well as the waning confidence in the financial and banking systems,

investments in luxury goods such as artworks, antiques, precious metals, luxury watches, vintage cars and precious wines have increased. This resulted in an increased demand for safekeeping of luxury goods in Swiss customs warehouses. According to an article in "The Economist" magazine, goods worth hundreds of billions of dollars are currently stored in customs warehouses around the world, an important part of which is deposited in Swiss customs warehouses.

Customs warehouses have adapted to this increased demand for secured storage. Further to important investments, particularly in security measures, they now offer **multiplied storage** facilities as well as **associated services for luxury goods**.

The Federal Council has reacted to the criticism related to the use of customs warehouses for illegal purposes. After consulting with the interested parties, it published its strategy for customs warehouses in 2015. In particular it states that, while customs warehouses are economically significant, they do not constitute legal vacuums. In this context, the Federal Council has adopted the following **measures**.

"The Federal Council has reacted to the criticism related to the use of customs warehouses for illegal purposes."

2 MEASURES TAKEN BY THE FEDERAL COUNCIL

The measures include:

- > **enhanced disclosure duties;**
- > **enforcement of non-customs legislation (e.g. the International Transfer of Cultural Property Act);**
- > **administrative and judicial assistance;**
- > **revision of the anti-money laundering legislation;**
- > **tighter export regulations.**

In detail, the following has been engineered:

2.1 ENHANCED DISCLOSURE DUTIES

Since 1 January 2016, warehouse keepers must maintain an **electronic register** indicating **tenants, subtenants and storing parties**. This register must include the following information: names, addresses and business branches of the tenants, subtenants and storing parties; a Swiss mailing address, if their seat is abroad.

Moreover, the warehouse keeper or storing party must keep **electronic inventory registries** for the purpose of controlling the movement of goods. In the case of free ports, inventory duties are limited to **sensitive goods** (see below). Namely, this inventory must include: type of the previous customs document showing the date of acceptance, the issuing customs authority and its number; date of the storage; country of origin or – in the case of export – the country of destination; product description;

information needed for the enforcement of non-customs laws; special measurement and weight information as well as distinguishing criteria depending on the type of good (e.g. number of pieces, dimensions, carat, fabrication number); value of the stored good; type of the next customs document showing the date of acceptance, the issuing authority and its number; signs, numbers, number of packing units; procedures which need to be carried out with the good; storage location and date of relocation. Since 1 January 2016, the following **additional information** must also be registered: name and address of the owner of the stored goods; gross mass and storage mass, as well as the original storage party's name and address in case the goods are taken over from another storage party within the customs warehouse.

With regards to the information about the owner of the stored goods, the Federal Customs Authority has indicated in a practice statement published in November 2015 that **the legal owner under civil law** is the one to be registered. Thus, owners of goods can be natural as well as legal persons. In contrast, **partnerships and trusts cannot be owners**, because they do not constitute autonomous legal entities. According to the Federal Customs Authority, each individual partner of the partnership or the trustee in the case of a trust must be registered as owner. Although partnerships have no legal personality under Swiss law, general and limited partnerships that are registered in the commercial registry can acquire rights in their own name (see Article 562 of the Swiss Code of Obligations). It is thus not evident why the partners should be registered as owners instead of the general or the limited partnership itself.

"The requirements for inventory registries have increased since 1st January 2016."

Upon the Federal Customs Authority's request, the warehouse keeper or the storage party must provide evidence of ownership of the goods (for instance by presenting a purchase agreement, a gift agreement or a will). The Federal Customs Authority can moreover request authenticated documents identifying the owner.

Essentially, the **sensitive goods** mentioned above are the following: animals and plants, parts of animals and plants as well as products thereof (pursuant to the Ordinance regarding the trade of animals and plants belonging to protected species); war material according to the War Material Act; weapons; weapon accessories and ammunition according to the Weapons Act; the following goods as per the customs tariff: alcoholic beverages, tobacco products, banknotes and securities, coins, pearls, diamonds, gemstones, precious stones, precious metals, metal clads with precious metal as well as products made thereof, jewelry, passenger cars and motorbikes, watch making products, watches and clocks, furniture listed under the customs tariff numbers 9401 and 9403, artworks, collectors' items and antiques, goods assessed for export; nuclear goods and nuclear waste according to the Nuclear Energy Act; narcotics, chemicals, medicinal products, explosives, goods under embargo; and cultural assets pursuant to Article 2 Para. 2 of the International Transfer of Cultural Property Act.

2.2 ENFORCEMENT OF OTHER LEGISLATION

The Federal Council continues enforcing **other non-customs laws within the customs warehouses**. These are, amongst others, the following: the International Transfer of Cultural Property Act, Endangered Species Regulations, War Material Act, Weapons Act, Therapeutic Products Act and the Trademark Act.

"The Federal Council continues enforcing other non-customs laws within the customs warehouses."

It can be assumed that the Federal Customs Authority will perform its control functions more stringently than in the past. One hopes that it will enjoy the human resources needed for such tasks.

2.3 ADMINISTRATIVE AND JUDICIAL ASSISTANCE

Through administrative and judicial assistance, **foreign authorities** can obtain information about goods stored in customs warehouses.

Information is exchanged between Swiss and foreign customs authorities through the so-called mutual **administrative assistance**, based, for instance, on the anti-fraud agreement with the EU. In the context of indirect taxation and under this agreement, Switzerland assists the EU not only in cases of duty fraud, but also in cases of tax avoidance for indirect taxation.

Judicial assistance consists in the exchange of information between judicial authorities. It is carried out on the basis of the Mutual Legal Assistance in Criminal Matters Act and applies where foreign authorities request the transmission of information or the confiscation of goods for proceedings pending outside Switzerland.

2.4 ANTI-MONEY LAUNDERING LEGISLATION

Certain dealers will now be subject to the **anti-money laundering legislation** like financial intermediaries. This ensures that payments for goods – also for goods stored in customs warehouses – are reviewed for the purposes of anti-money laundering. It was rightly considered unnecessary to subject the customs warehouses themselves to the Swiss anti-money laundering legislation.

Further to the anti-money laundering legislation's revision, **dealers** must observe an increased duty of care as of 1st January 2016, if they accept **cash exceeding CHF 100,000**. In such a case, the contracting party as well as the beneficial owner must be identified and documented. Moreover, they must clarify a transaction's background and rationale if it appears to be unusual or if there is grounded suspicion that the financial assets are proceeds of crime, of qualified tax offences or fall under a criminal organisation's control.

As these new rules apply to each actual transaction, they can also affect real estate brokers, art dealers as well as dealers of luxury cars or jewelry. Yet, dealers can avoid this increased duty of care by handling payments exceeding CHF 100,000 through a financial intermediary (which will be a bank in most cases).

2.5 TIGHTER EXPORT LAWS

Pursuant to the new provisions of the customs regulation that entered into force on 1 January 2016, goods that are assessed for export can only be stored in customs warehouses if the **recipient of the goods has his residence or registered office abroad**. These tightened rules ensure that the customs warehouses are not misused for deliveries that are subject to value added tax. Accordingly, Swiss residents cannot, for instance, sell artworks to other Swiss residents and claim that its delivery in the customs warehouse is exempt from value added tax.

The export declaration form must show the goods' recipient as well as the storing party. Goods that are exported to the customs warehouse are considered sensitive goods. Consequently, they must be included in the inventory registry in any case. Moreover, the storage of such goods in the customs warehouse is limited to six months, as it was the case under the old law. In contrast, this period may now only be extended under stringent conditions. Furthermore, the customs regulations now state that failure to comply with this period will result in the revocation of the export assessment. As a consequence, the seller will have to evidence exemption from value-added tax due to export through other means.

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3 CONCLUSION

The Swiss customs warehouses **contribute to the competitiveness of the Swiss economy**. They perform useful tasks as they are properly organized and providing the best conditions for storage and transit of goods. At the same time, the competitive **pressure** has increased with foreign customs warehouses namely in Singapore, Luxemburg and, in the future, also in Dubai and Shanghai.

The Federal Council's above measures now require from operators of customs warehouses that they identify and register owners and buyers of stored goods, particularly of sensitive goods such as artworks and antiquities. This ensures a higher transparency, which will hamper and ultimately impede foreign tax offenses from being committed through storing valuable goods in Switzerland. Moreover trafficking of antiquities and stolen artworks will largely be made impossible.

The Federal Council's measures are appropriate and constitute a welcome development. In particular, the Federal Council has clarified that customs warehouses are no legal vacuums.

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The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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