



Guidelines for Coin Traders in Dealing with the German Cultural Assets Protection Act (*Kulturgutschutzgesetz*) (rev.: Nov, 2nd, 2016)

The law on the revision of the Cultural Assets Protection Act (hereinafter referred to as "KGSG") dated July 31, 2016 contains numerous regulations that have substantial impact on the coin trade. The "*Verband der deutschen Münzenhändler e.V.*" (Association of German Coin Traders) and the "*Berufsverband des deutschen Münzenfachhandels e.V.*" (Professional Association of German Coin Retailers) would like to provide clarification on this revision after having sought legal advice from attorney Dr. Arensmann, a specialist lawyer for administrative law in Osnabrück. Our comments on the matter, **which are non-binding and explicitly exclude any liability**, are provided as first recommendations for further action in your day-to-day business. There is considerable uncertainty existing at this time as far as proper understanding and appropriate handling of the new regulations are concerned, since a stable legal position needs to be established yet. These guidelines will therefore have to be amended in due course.

I. Obligation to Exercise Due Diligence

Pursuant to § 40 para 1 KGSG the marketing¹ of cultural assets is **sanctioned by punishment** if the asset was previously

- **lost,**
- **unlawfully excavated, or**
- **illegally imported.**

In accordance with the definition provided in § 2 para 1 no. 10 KGSG, *inter alia*, any movable item or entire group of items of numismatic value constitute a cultural asset, so that single coins as well as coin collections are generally summarised under the term "cultural asset".²

1. General Duty of Care

§ 41 KGSG specifies the general duty of care which has to be complied with by everybody. This includes **private collectors as well as commercial coin traders** who, pursuant to the law, are committed to exercise diligence in verifying whether the cultural asset was lost, unlawfully imported or illegally excavated prior to making coins available on the market. This duty of care is explicitly limited to reasonable expenditure so that private coin collectors are not exposed to meeting too highly set requirements.³

¹ § 2 para 1 no. 9 KGSG specifies that „marketing“ cultural assets refers to offering, selling, acting as a broker, distributing, free-of-charge disseminating or disposing of such for commercial purposes, or commercial exploitation in any other manner in one's own name or by acting in behalf of another person.

² It is disputed whether all coins, in general, do in fact fall within the scope of KGSG, or if this only applies to coins revealing numismatic value from a scientific point of view. In these guidelines, as a matter of precaution, we act on the assumption that the term „numismatic value“ should be widely interpreted, so that any and all coins are basically to be viewed as cultural assets in the meaning of KGSG.

³ c.f. Background paper for coin collectors, issued by the Fed. Cultural Ministry (BKM), July 2016, p.2: "This duty to care is explicitly limited to "reasonable efforts" so that collectors are not required to meet special efforts as far as common values of coins are concerned".

Considering the often relatively low values of coins, intensive research is usually not required, unless there are concrete clues indicating that one of the above stated offences were committed. The law states that such concrete clues are evident if, for example, **an extraordinary low price has been demanded without giving a legitimate reason for that** when buying for oneself, or if **the seller has asked for cash payment to settle a purchase price of more than € 5,000**.

In case of coins, particular caution is due if it is obvious that coin finds are to be put on the market, for example.

On the other hand, legislation has made it clear that, in the future, **no gapless evidence of origin for coins** will be required, and appropriately pointed out that, as a rule, nobody will remember the details of acquiring single coins after some time.⁴ Lastly, the crucial point is how a reasonable person would respond to the situation in a particular case under the same circumstances.

Given this background, a private coin collector who is not aware of the applicability of one of the above stated offences only needs to spring into action and examine the matter more closely, if the circumstances under which he acquires/acquired the cultural asset lead/led to a pertinent assumption.

It is noteworthy that private coin collectors are committed to comply with the duty of care but do not need to prepare and keep any records on that.

2. Professional Duty of Care

As of a value of € 2,500 per single item (purchase price or estimated value⁵), commercial coin traders are obliged to exercise an **additional, more stringent duty of care** when marketing coins. The general duty of care applies to traders if the value of a coin falls below the amount of € 2,500. Records on compliance with the professional duty of care only have to be prepared as of a value of € 2,500 per single item. Such documentation needs to be maintained for a period of 30 years.

In exceptional cases, coins may be qualified as archaeological cultural heritage. The professional duty of care then has to be applied as of a value of € 0.00 already. However, this is only the case if the coins were excavated and reveal an epistemological value for archaeology. The German Federal Fiscal Court (*Bundesfinanzhof*) explicitly clarified that coins do usually not reveal this type of epistemological value, in particular, if they are available in large numbers and can no longer be attributed to a certain locality.⁶ Therefore we presume that coins are no typical archaeological cultural assets.⁷

The professional duty of care involves:

1. establishing the name and address of the seller, the consignor, the acquirer or the client,

⁴ c.f. Background paper for coin collectors, issued by the BKM, July 2016, p.2: "The criterion for reasonableness does of course involve the point of time when the coin was acquired: in the standard case, nobody will remember the circumstances of acquiring an individual coin after 10 or 15 years. "

⁵ In cases of auction sales it is questionable whether the hammer price - minus premium and commission, if applicable - is relevant in establishing the purchase price. This issue has already been dealt with during the legislative procedure, however, it remained unresolved.

⁶ Decision dated Dec.11, 2012, by the Federal Fiscal Court, file no. VII 33, 34/11. This ruling is also explicitly reflected in § 42 para 3 phrase 2 KGSG: "Coins are not considered archaeological cultural assets [...] if available in large numbers and not revealing any type of relating epistemological value to archaeology.

⁷ This issue is addressed in more detail by Florian Arensmann, "*Die Ausfuhr historischer Münzen im Regelungsgefüge des Kulturgüterschutzrechts*" (Export of Historical Coins within the Framework of Regulations of the Law on Cultural Assets Protection), Marburg 2016 (also presented as thesis at the Osnabrück University in 2015), p. 224 et seq.

2. preparing a description and a depiction which are suitable to ascertain the identity of the cultural asset;
3. verifying the origin⁸ of the cultural asset;
4. examining the documentation to prove legal import and export⁹;
5. reviewing the applicability of prohibitions and restrictions on import, export and trade;
6. checking whether the cultural asset has been entered into registers and databases which are accessible to the public; and
7. obtaining a written or electronically transmitted statement by the consignor or seller confirming their entitlement to dispose of the cultural asset.

The duties listed under items 3 to 6 only need to be satisfied in accordance with the provisions of reasonable efforts and economic reasonableness. In this context, the value of the coin as well as cost and time expended in meeting the obligation to exercise due diligence are also important in establishing the criterion of reasonableness. The lower the value of the coin, the less requirements need to be met in complying with the duty of care.

A review of applicable import and export restrictions imposed by other states (item 5 above), if any, may be conducted by means of the **online portal of the Commissioner for Culture and Media** (*Beauftragte für Kultur und Medien*) appointed by the Federal Government at www.kulturgutschutz-deutschland.de. The section entitled "State Information" lists the relevant export provisions as well as the responsible authorities in various countries. The portal will gradually be further developed. Unfortunately, the wording of the relevant laws is only available there in the native languages. Other than that, any research as to a specific coin in fact being covered by these provisions is rather difficult, since most states do not summarise their protected cultural assets individually in lists, but only refer to their categories of cultural heritage in general. Some states, however, largely waive their requirement of obtaining an export permit for coins and medals, for example the USA, Switzerland, The Netherlands, Denmark and Sweden. Other countries set specific value and age limits, e.g. United Kingdom, France, Poland. More difficult to deal with are those countries which subject (almost) all coins and medals to the requirement of obtaining an export permit (e.g. Italy, Greece, Bulgaria, Romania, Turkey, Cyprus) or others that, in principle, impose an overall ban on cultural assets, such as China or Russia.¹⁰ In view of a potentially illegal export from their country of origin, such coins may as well be marketed if there is evidence that they were taken out of the relating country prior to a specific cut-off date (EU member states: **31 Dec.1992**, signatories to the 1970 UNESCO Convention: **26 Apr. 2007**).

In regard to checking whether the cultural asset has been entered into registers and databases which are accessible to the public (item 6 above), there is an association-internal warning system for coins existing which is being **maintained by the International Association of Professional Numismatists (IAPN)** and organisations on national level. Research opportunities with reference to lost or stolen coins are given in the "**Lost Coin Archive**" of IAPN and may be retrieved at: www.iapn-coins.org/lost-coin-archive.html. This directory is available free of charge to everybody. Given the often low value of coins and the considerable high time and cost expenditure involved, we deem further research in data bases like the Art Loss Register, which are subject to a fee, only necessary in rare cases as far as economic reasonableness is concerned. Apart from that, single coins are seldom recorded there.

3. Summary

In essence, the duty of care to be observed when marketing coins can be summarised as follows:

⁸ According the explanatory memorandum, verification of origin comprises clarification of a work's creatorship on one hand and, to the extent possible, verification of its whereabouts up to the present owner on the other hand (c.f. Doc. no. 18/7456 p. 98 of the German Parliament).

⁹ Such documents may, as a matter of course, be verified only if they exist at all.

¹⁰ As regards the provisions of the protective right of cultural assets pertaining to some of the above mentioned states with particular focus on coins, please refer to Florian Arensmann, *Die Ausfuhr historischer Münzen im Regelungsgefüge des Kulturgüterschutzrechts*, Marburg 2016, p. 241 et seq.

Private coin collectors must not wittingly place coins into circulation which were lost, illegally imported or unlawfully excavated. To the extent specific evidence exists that one of these facts might apply, a more detailed examination is required, which is limited to reasonable efforts, however. A criterion of reasonableness is, for example, the value of the coin and the date of its acquisition. Commercial coin traders have to meet additional obligations beyond the general duty of care whenever coins of a value of € 2,500 per unit are involved. Coins are usually not considered archaeological cultural assets if available in large numbers and not revealing any type of epistemological value in the field of archaeology. Thus, coins as a mass product are in principle exempt from the duty of care if the threshold of € 2,500 per unit is not exceeded. Even if additional obligations to exercise due diligence may arise in individual cases: they are mostly limited to the scope of reasonable efforts, with a particular view to economic reasonableness.

4. Tips for Practical Use

Commercial coin traders should proceed to obtain early confirmation from their business partners at the time of purchase (or at the time of takeover for auction) stating that they were made aware of the law on the protection of cultural assets. In doing so, the seller should confirm that there are no clues indicating that the coin or medal to be sold was previously lost, unlawfully excavated or illegally imported. We recommend observing this in all transactions, no matter what the value of the item is. Any single pieces of a value of € 2,500 should also be documented in a way that describes the object (incl. photo).

In addition to this, the documentation should reveal the duty of care that was applied:

- **Name and address of the seller (incl. passport copy)**
- **Negative result of a Lost Coin Archive research**
- **no indication of illegal excavation**
- **no indication of unlawful export or import**
- **all documents presented were examined in respect of import and export**
- **import and export bans and restrictions were reviewed**
- **all known provenances were specified**

Only this type of documentation will render the offering of the object legal. It does not have to be presented to any interested party or to the buyer but will remain in the coin trader's books.

II. Export Regulations

The export of coins from Germany to another country may be subject to restrictions under the German Cultural Assets Protection Act (KGSG).

While Regulation (EC) No. 116/2009 so far covered the export from Germany to a third country, KGSG now provides for comprehensive export control which includes exports from Germany to another EU member state. In our opinion, it is extremely doubtful whether this proceeding is consistent with free movement of goods within the European single market, which may be restricted pursuant to Art. 36 of the Treaty on the Functioning of the European Union only in rare and exceptional cases. This, however, does not change anything about the currently prevailing law which has to be observed for now. The new export regulations can be summarised as follows:

Under certain conditions, § 21 KGSG provides for a **total export ban** which first and foremost aims at securing the registration procedure for national cultural assets. An export ban would be applicable if registration of a coin in a cultural directory was already initiated but has not been completed. It also applies in cases of safeguarding or halting until a decision has been reached on the further handling. Thus, such export bans are only valid for a limited period of time. Finally, any export is prohibited if the required permit has not been obtained, or if the coin had been imported illegally.

§§ 22 and 23 KGSG list the export permit obligations for temporary or permanent export of national cultural assets in the meaning of § 6 KGSG to a member state of the EU or to a third country. This solely applies to coins that are in fact assets registered in one of the Federal States' cultural heritage directories, which is rarely the case.

The export of other cultural assets from Germany to a **country outside the European Union (a third country)**, is subject to the provisions of the directly applicable Regulation (EU) No. 116/2009. Accordingly, export permits are required in the following cases:

- Single coins which are at least 50 years old, exceeding the value of € 50,000
- Designated coin collections¹¹ of numismatic value which, independent of their age, exceed the threshold of € 50,000.

Pursuant to § 24 para 2 KGSG of the revised Cultural Assets Protection Act, higher age and value thresholds are applicable to the export of coins from Germany **to other EU member states**. Therefore, an export permit is only required for

- single coins which are at least 100 years old and exceed a value of € 100,000
- coin collections¹² of numismatic value which, independent of their age, exceed the threshold of € 100,000.

The purchase or selling price paid within the last three years represents the monetary value which is decisive for the obligation to obtain a permit, other than that a well-founded domestic estimate at the time of application will suffice.¹³

Independent from their value, archaeological cultural assets are subject to an export permit if older than 100 years. As already explained, we presume though that coins are usually not considered archaeological cultural assets. As far as the appraisal of coins as archaeological items or cultural assets is concerned, a special provision applies, according to which this has to be denied if the coins are available in large numbers, if they do not reveal any epistemological value for archaeology, and if they are not protected by an EU member state as customisable single objects (§ 24 para 2 KGSG). Thus, in the end, the principle holds according to which the export of coins as "mass products" is not subject to any approval.

§ 24 para 8 KGSG provides for a simplified export procedure according to which the requirement to obtain a permit is obsolete if there is proof that the asset was located on the German federal territory **temporarily not to exceed a period of two years**. However, this provision does not apply if the cultural asset was imported illegally or previously exported without a permit.

The competent authorities and the relevant printed forms for export may be retrieved at www.kulturgutschutz-deutschland.de under section "*Behörden und Ansprechpartner*" and "*Service/Downloads*".

III. Import Regulations

1. The Legal Situation to Date

According to the previous situation within the scope of the law on protection against cultural asset drain and on the return of cultural heritage there was practically no import ban for foreign cultural assets into Germany. Imports from EU member states were per se not subject to any approval, imports from signatories to the 1970 UNESCO Convention only required endorsement pursuant to § 14 of the Law on the Return of Cultural Assets if the items were individually designated and registered in the directory of precious cultural property of the signatory states. However, specifically designated coins were not registered in this directory. Therefore, there were no import obstacles existing to date.

¹¹ The law states that the term collection stands for a number of preserved and specifically collected items. This means that the individual intention of collectors and their specific systems and classifications, which are reflected in the composition of collections, are crucial for a respective determination. In isolated cases, collections may have differing focuses, which means that several collections, to be evaluated separately, have to be surmised. Usually, parts of a collection reflect a certain amount of homogeneity, or at least stand for the same type of motivation to collect, thereby distinguishing the collection from a mere stocktaking and documenting an inventory (c.f. Doc. no. 18/7456 p. 60 and p. 86 of the German Parliament). For example, a coin collection of the Romans (value: € 20,000), the Greek (value: € 30,000) and the Saxons (value: € 45,000) should not be subject to an export permit since each one of the various collection concepts does not exceed the threshold of € 50,000

¹² The term collection is outlined above in fn. 11.

¹³ The problem of determining the decisive value in bid sales during auctions also arises here, see fn. 5 above.

2. The new legal situation

Since KGSG came into force, the import of coins from abroad into Germany has become significantly more difficult. Pursuant to § 28 KGSG, a **total import ban** has been imposed on national cultural property of other EU member states or signatories to the 1970 UNESCO Convention (hereinafter referred to as UNESCO signatories) if the property was illegally exported in accordance with the laws of the relevant country of origin. In this context, the country of origin is the respective EU member state or UNESCO signatory state where the cultural property came into existence or where such close ties to the property were established that resulted in placing it under the umbrella of protecting national cultural heritage at the time of its removal. According to this definition, the place of manufacture, i.e. in case of coins the place of mintage is considered the country of origin.

Thus, in principle, the rule applies that coins which were subject to cultural property protection in another EU member state or UNESCO signatory state may not be imported to Germany if they were illegally removed from their country of origin: **illegal export = illegal import !**

Exceptions pursuant to § 29 KGSG can be made when reimporting coins which were lawfully located on federal territory prior to the August 6, 2016 cut-off date. Such reimports subsequent to temporary exports are not subject to prior approval.

Although the principle of an inquisitorial system applies in a potential administrative procedure, according to which the court officially investigates the facts of a case, the parties concerned have to be involved so that the importer who wants to invoke this rule of exception should - to the extent possible - have evidence available to prove that the coin(s) had lawfully been kept in Germany already at the time KGSG came into force. In accordance with the explanatory memorandum, such evidence may consist of receipts, documents relating to previous customs clearance, export permits, insurance policies, inventory lists or exhibition catalogues (Doc. no. 18/8908 p.91 of the German Parliament). Satisfactory statements by the previous owner documented in writing also serve this purpose. In view of the above, we do not consider any inventory certified by a notary public necessary.

Further exemptions are covered by the cut-off date regulation of § 32 KGSG. Accordingly, the import of cultural heritage is only deemed unlawful if taken out of another country in violation of the legal provisions for the protection of cultural heritage prevailing in that country

- after **December 31, 1992** from the sovereign territory of another **EU member state** or
- after **April 26, 2007** from the sovereign territory of a **UNESCO signatory state**.

Further import bans arise from the directly applicable EU embargo law with particular reference to the so-called **Iraq regulation** and the so-called **Syria regulation**. The cut-off date regulation applies here as well, stating that the stringent import ban on coins originating from Iraq or Syria does not apply if there is evidence proving that such coins had been exported from Iraq prior to **August 6, 1990**, and from Syria prior to **May 9, 2011**.

Despite the above stated regulations on the cut-off dates the newly created import restrictions impose a quite material restriction on cross-border coin trade. There are a number of states that do not place their cultural heritage under protection by means of a "listing principle" - as Germany does - but only by applying a general "principle of categories". As stated above, total export bans for cultural assets have in principle been imposed by some countries like Russia or China, other countries provide for value or age limits. Considering the information on the states available from the aforementioned online portals, it is not always easy to evaluate in detail whether the coin in question is in fact protected as national cultural heritage in another country, thus subject to an export ban. This is all the more relevant as the country of origin can often not clearly be identified in the case of coins. Generally speaking, it is not really comprehensible to determine when an individual coin was in fact taken from its country of origin, and which cultural property protection rights may have applied at such time.

3. Tips for Practical Use

In view of these uncertainties we **non-bindingly** recommend to apply the following **verification schedule** prior to importing any coins to Germany:

1. Was the coin already lawfully located in Germany on **August 6, 2016**?
 - Yes: Pursuant to § 29 KGSG, reimporting it after temporary export is permissible without taking further action.
 - No: Further checks need to be done as follows:
2. Is there evidence available proving that the coin was located outside of its country of origin, which is (i) a **EU member state**, prior to **December 31, 1992**, or (ii) a **UNESCO signatory state** prior to **April 26, 2007**?
 - Yes: According to § 32 para 1 no. 1 KGSG the import is permissible without taking further action.
 - No: Further checks need to be done as follows:
3. Was the coin in fact categorised/ defined as **national cultural heritage** under the laws of the country of origin?

The information on the states available from the above mentioned online portals will be helpful in answering this question.

- If this research does **not** reveal that the coin is protected as national cultural heritage of the respective country of origin, import to Germany is, in our opinion, permissible without taking further action.
 - If the coin does in fact fall under the category of **national cultural property** in the country of origin, further checks need to be done:
4. Is the **export** of the coin which is categorised as national cultural heritage **banned or subject to obtaining a permit** under any of the country of origin's regulations?

The above mentioned information on the states has to be analysed.

If

- **no export ban or requirement to obtain an export permit** exists, importing the coin to Germany is admissible and no proof of lawfulness, such as an export permit, needs to be presented;
- an **export ban** exists, importing the coin to Germany is prohibited; **wittingly infringing this import ban is a punishable offence!**
- the **requirement to obtain an export permit** does in fact exist, the relating permit issued by the country of origin has to be presented as evidence of a lawful import transaction. Without export permit it is prohibited to import the coin to Germany - **wittingly infringing this import ban is a punishable offence!**

In our opinion, compliance with this verification schedule will significantly minimise the risk of infringing the import ban, although some uncertainties in individual cases may persist.

In closing, we would like to point out the **significant risk of liability** in case of any illegal import: If it turns out that a coin has been imported in violation of the total import ban under § 28 KGSG, because the coin should not have left the country of origin at all or not without an export permit, it will not be possible to return it to the foreign seller or consignee just like this, because in this case, the total export ban under § 21 no. 3 KGSG applies. Besides that, § 40 para 1 KGSG prevents the trader from placing the coin on the market. Depending on whether the negotiated purchase price has been paid or not, either seller/consignee or trader will suffer severe financial damage, since it is virtually impossible to reverse the transaction due to these legal regulations. It is therefore recommended that traders explicitly inform their foreign business partners of the provisions of KGSG and avoid facing any liability risks.

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