



European Parliament

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Follow-up on ESMA's presentation of the final report on Cum-Ex, Cum-Cum and other withholding tax reclaim schemes before the FISC Committee

Dear Chair, dear Executive Director,
Dear Steven, dear Verena,

First of all, let me thank and congratulate you again for ESMA's final report on Cum-Ex, Cum-Cum and other withholding tax reclaim schemes. Unlike the EBA, your authority has taken the European Parliament's request seriously and delivered a broad and insightful report. I also agree with most of your findings and recommendations, in particular regarding the need to strengthen the cooperation between tax and supervisory authorities.

However, as expressed in my remarks during the hearing before the FISC Committee on 24 February 2021, there are some aspects in the report that I do not find convincing. In my view, many withholding tax reclaim schemes entail market practices that are clearly harmful to market integrity. They involve circular trading patterns, pre-arranged trades, artificially inflated trading activity around dividend dates and transactions conducted at off-market prices. The activities should have significant influence on prices inter alia for the derivatives involved. I find it hard to believe that these practices should typically be MAR-compliant, in particular with regard to the prohibition of wash trades and pre-arranged trades. This view has also been expressed by Prof. Dr. Christoph Spengel at the hearing, who is one of Germany's leading experts on withholding tax reclaim schemes. A recent report¹ by law firm Heist Legal, which has been involved in the prosecution of withholding tax reclaim schemes in Germany for many years, also concludes that certain schemes very likely entail violations of the MAR.

¹ <https://heist-legal.de/wp-content/uploads/2021/02/Stellungnahme-ESMA-Report-Langversion-1.pdf>

A particular point of concern are the derivatives transactions, mostly in stock futures, that play an important role in many withholding tax reclaim schemes. The German investigations have shown² that these transactions were regularly used to distribute the profit among participants by means of rigged transaction prices.

Against this background, it remains unclear to me how your authority comes to the conclusion that withholding tax reclaim schemes typically do not entail violations of the MAR. Both the dedicated report and ESMA's MAR review published on 24 September 2020 refer to deeper analyses but do not outline any details about the argument. Moreover, it is very unfortunate that your report focuses on the share trading side and almost fully ignores transactions in other financial instruments such as stock futures. Therefore, I would like to ask you to explain in detail your quantitative, economic and legal assessment of the involved derivative transactions. Furthermore, I would like to ask you to take into consideration in particular the findings of the aforementioned report by Heist Legal and to make public your assessment of the MAR-compliance of withholding tax reclaim schemes in detail.

It would be highly welcome if you were available to discuss this important matter with me and your experts in a video call.

In cooperation,
Sven Giegold



² See e.g. judgement 62 KLS - 213 Js 41/19 - 1/19 by the Landgericht Bonn from 18 March 2020, http://www.justiz.nrw.de/nrwe/lgs/bonn/lg_bonn/j2020/62_KLS_213_Js_41_19_1_19_Urteil_2020_0318.html