European Securities and Markets Authority

24 February 2021
ESMA70-155-11890

European Parliament – FISC Sub Committee on Fiscal Matters

Public hearing on "Cum/Ex and Cum/Cum scandal"

Fabrizio Planta
Head of Markets and Data Reporting Department
European Securities and Markets Authority (ESMA)

Dear Chairman, honourable Members of the Parliament,

I would like to thank you for inviting me today and giving me the opportunity to present ESMA's Final Report on Cum/Ex, Cum/Cum and withholding tax (WHT) reclaim schemes.

The Final Report contains the outcome of the inquiry launched by ESMA further to the European Parliament Resolution 2018/2900 of 29 November 2018.

In its inquiry, ESMA has requested information to the EU securities regulators (NCAs) and carried out an internal analysis to provide an EU-wide picture of the structure and distribution of WHT schemes from the securities regulators' perspective, with a view of identifying gaps, best practices and potential solutions to prevent, detect and prosecute WHT reclaim schemes.

To begin with, ESMA has described the general functioning of dividend arbitrages, Cum/Ex, Cum/Cum and WHT reclaim schemes, including an analysis on how WHT on dividends works across Member States. ESMA has also reported the experience of NCAs regarding their market surveillance and investigations carried out at national level, to assess the presence and the impact of WHT schemes in their respective Member State.

ESMA has also analysed the phenomenon from the perspective of regulated firms' obligations under the MiFID II legal framework, collected information on the status of criminal investigations across the EU and carried out an enhanced legal analysis on the possibility and limits for NCAs to exchange information with tax authorities.

Furthermore, ESMA has analysed securities lending in all Member States, especially assessing the presence of significant variations in the securities lending transactions across the dates where some Member States passed legislative changes to halt multiple WHT reclaim schemes.

ESMA's inquiry has highlighted that WHT schemes are to be primarily considered as a tax related issue and therefore ESMA's Final report stressed that a first legislative and supervisory response should be sought within the boundaries of the tax legislative and supervisory framework, and I welcome that this is the context in which we are discussing today.

We have identified a number of measures that could be considered in that respect, such as making it possible to directly and automatically link any given tax reclaim to the underlying distribution of dividends or entrusting a single entity with responsibilities over collecting the WHT and issuing the relevant certificate. The TRACE Implementation Package produced by the OECD Committee on Fiscal Affairs in January 2013 may represent a valid reference in that context.

However, it is not in ESMA's remit to assess the effectiveness of those measures or the presence of constraints to their implementation.

Said that, to best respond the EP Resolution, ESMA has also considered potential solutions that could be pursued within the boundaries of its remit. ESMA had also publicly consulted on some of those proposals in the context of the Review of Market Abuse Regulation.

First of all, ESMA's inquiry has confirmed that, at EU level, the broad investigative and surveillance powers given to NCAs in respect of market abuse and short selling are to be strictly linked to those areas.

In the absence of an enhanced legal basis, either at European or national level, wherever no violations of the market abuse or the short selling regimes have taken place, the NCAs will not be able to investigate WHT schemes.

ESMA has considered the opportunity to enhance NCAs' remit to cover unfair behaviours or general threats to the market integrity, but eventually did not suggest proceeding in that sense for the difficulties to define such broad concepts. Additionally, even in presence of an extended remit, it would take time for NCAs to acquire the necessary expertise, limiting any ambition to address the issue in the short term.

Moreover, unlike any potential legislative change in the relevant WHT legislative framework, any such extended powers to NCAs would not directly prevent WHT schemes from being perpetrated, but rather only contribute to their detection and prosecution post facto.

Nevertheless, as from a technical perspective NCAs' existing monitoring tools and powers could be used to detect WHT schemes, ESMA has identified a number of best practices extracted from the experience of NCAs. This includes market surveillance inputs (such as alerts) and investigative suggestions. However, today these best practices are only an option for those NCAs whose remit has been enhanced by national legislation.

Second of all, ESMA's inquiry has concluded that enhanced cooperation and mutual assistance between NCAs, tax authorities and other law enforcement bodies could help to detect and prosecute WHT reclaim schemes.

As cooperation between NCAs and tax authorities must be done under a clear legal basis, ESMA suggested two legislative changes.

Regarding the information directly obtained by NCAs within their supervisory activity at national level, ESMA suggested to provide an EU common legal basis for its exchange with tax authorities.

As for the information obtained by NCAs through cooperation and information exchange mechanisms from other NCAs within the EU, ESMA suggested to remove the current legal limitations for its exchange with tax authorities.

ESMA is aware that such proposals will not be the perfect solution to the issue of WHT reclaim schemes, as their nature makes them a global phenomenon often taking place beyond the boundaries of the European Union, and ESMA's proposals would only affect information sharing within the EU. Nevertheless and notwithstanding the views collected during our consultation, we remain of the view that pursuing them would still be beneficial.

Last of all, ESMA has also assessed the potential use of Central Securities Depository (CSDs) as a source of information to systematically detect WHT schemes, but our conclusion was negative.

This is because in the majority of cases CSDs do not have any relation with beneficial owners and thus do not have tax information unless they perform tax services. Even in those cases, the data would be partial.

Even though the Shareholders Rights Directive II may enable CSDs to obtain more information regarding beneficial owners of transactions, CSDs may not always receive the information which may be communicated by intermediaries directly to the issuer.

To conclude, I would like to thank you for your interest in ESMA's work on this important matter and I hope ESMA's findings can help your work to enhance EU tax policies.

I look forward to answering any questions you may have.