European Securities and Markets Authority

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PRESS RELEASE

ESMA makes proposals to help prevent and detect WHT reclaim schemes

The European Securities and Markets Authority (ESMA), the EU's securities markets regulator, has today published the Final Report on its inquiry into Cum/Ex, Cum/Cum and withholding tax (WHT) reclaim schemes. ESMA's key proposal is that national competent authorities (NCAs) for securities markets should be empowered to share information with the tax authorities, to assist in detecting WHT reclaim schemes.

ESMA's inquiry has highlighted that WHT schemes are primarily a tax related issue and so a response should be mainly sought within the boundaries of the tax legislative and supervisory framework. As part of its inquiry, ESMA has identified a number of measures adopted by various Member States to limit the risk of WHT reclaims schemes being pursued.

In its Report, ESMA recommends legislative change to remove the legal limitations on NCAs exchanging information acquired from other NCAs with tax authorities. Additionally, a common legal basis should be developed to ensure a consistent and convergent approach on the exchange of information directly acquired by NCAs in their supervisory activity with tax authorities.

Moreover, ESMA has identified best practices extracted from the experience of those NCAs that, thanks to an extended remit under national legislation, carry out supervisory activity for WHT schemes.

Steven Maijoor, Chair, said:

> "Today's Final Report is the result of almost two years of thorough legal and economic analysis by ESMA's experts. While halting these schemes seems to be primarily dependant on changes to tax legislation, ESMA considers that increased cooperation between NCAs and tax authorities across the EU would be an important step in identifying and deterring abusive schemes."

The Report builds on ESMA's Preliminary findings on multiple withholding tax reclaim schemes and outlines the general functioning of dividend arbitrages, Cum/Ex, Cum/Cum and WHT reclaim schemes, describes the experiences of NCAs in their respective jurisdictions and gathers information on the status of criminal investigations across the EU. The Report also considers the schemes from the perspective of regulated firms' obligations under the MiFID II legal framework, with particular reference to the obligation for investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the "integrity of the market", but also to the requirements on the suitability of their management bodies, whose members are required to act with integrity.

ESMA has also considered whether any potential solution to contribute to the detection and prosecution of WHT reclaim schemes could be achieved through an amendment to the Market Abuse Regulation (MAR), and included the outcome of such analysis in a dedicated section in its technical advice to the EU Commission on a potential review of MAR. See here.

Next steps

The Final Report will be submitted to the European Parliament.

Notes for editors

1. Further to different EU media publishing the result of journalistic investigations reporting the existence in some Member States of alleged large-scale tax fraud schemes known as “Cum/Ex”, the European Parliament adopted the Resolution 2018/2900 (RSP) of 29 November 2018, requesting ESMA to conduct an inquiry into dividend arbitrage, Cum/Ex and Cum/Cum schemes.

2. In July 2019, ESMA published a Report on preliminary findings on multiple withholding tax reclaim schemes. At the same time, and on the basis of the EP Resolution, the ESMA Board of Supervisors launched a formal inquiry under Article 22(4) of the ESMA Regulation concerning Cum/Ex, Cum/Cum and WHT reclaim scheme, whose final report is published today.

3. When issuers distribute dividends, the tax law of some Member States provides for a withholding tax (WHT) on the dividends distributed to be withheld by the issuer. At the same time, in some jurisdictions the tax law provides for a tax certificate to be issued (often by the shareholder’s custodian bank) and, in all those cases where the shareholder is not a tax subject in the State of distribution of the dividend, it can be later claimed back in the form of a reimbursement from the tax authorities.

4. Dividend arbitrage strategies have existed for many years in EU financial markets and involve the placement of shares in alternative tax jurisdictions around dividend dates, with the aim of minimising the relevant tax on dividends.

5. Those strategies are often structured in a way that an investor lends or sells its shares to a borrower/buyer domiciled in a country that has a lower dividend tax rate, so as to minimise the taxes paid on such dividend. The borrower/buyer receives the dividend paid out by the issuer of the share and then returns it to the lender/seller, minus the dividend tax and a percentage – or “cut” – negotiated between the two counterparties.

6. Typologies vary and may involve various forms of Cum/Ex or Cum/Cum trading. Given the breadth of potential typologies, the mechanics of such trading cannot be generalised, and an in-depth examination of the structure of each specific scheme is required.

7. However, in some schemes achieving a dividend arbitrage is not the main objective, as the real intention is to obtain multiple issuance of tax certificates and the consequent multiple refunds of taxes to multiple persons, with only one of them having actually received the dividend distributed and paid the relevant WHT.

8. ESMA’s mission is to enhance investor protection and promote stable and orderly financial markets.

9. It achieves these objectives through four activities:

    a. assessing risks to investors, markets and financial stability;
    b. completing a single rulebook for EU financial markets;
    c. promoting supervisory convergence; and
    d. directly supervising specific financial entities.

10. ESMA achieves its mission within the European System of Financial Supervision (ESFS) through active cooperation with the European Banking Authority (EBA), the

European Insurance and Occupational Pensions Authority (EIOPA), the European Systemic Risk Board, and with national authorities with competencies in securities markets (NCAs).

Further information:

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