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EBA staff

EBA Regular Use

Action plan on dividend arbitrage trading schemes (“Cum-Ex/Cum-Cum”)

Background

1. On 28 November 2018, the European Parliament asked the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) to “conduct an inquiry into dividend arbitrage trading schemes such as cum-ex or cum-cum in order to assess potential threats to the integrity of financial markets and to national budgets; to establish the nature and magnitude of actors in these schemes; to assess whether there were breaches of either national or Union law; to assess the actions taken by financial supervisors in Member States; and to make appropriate recommendations for reform and for action to the competent authorities concerned”.¹
2. The EBA fulfilled the request by submitting two surveys to national authorities, by assessing the responses to them, and by setting out its expectations of credit institutions and national authorities under the current regulatory framework.
3. The EBA submitted one survey to authorities designated under national law as competent for anti-money laundering supervision of financial institutions within the EBA’s remit. The survey aimed at gaining an understanding of whether dividend arbitrage trading schemes, such as cum-ex and cum-cum schemes, were treated as tax crimes and, consequently, whether the handling of proceeds from such schemes would amount to money laundering in line with Directive (EU) 2015/849 (AMLD4). It also sought to establish how supervisors had assessed the ML/TF risk associated with those schemes, and obtain information on actions taken by supervisors in response to those risks. The EBA addressed the second survey to prudential supervisory authorities, to gain an understanding of how financial institutions’ involvement in such schemes complied with the prudential framework and in particular with the provisions on institutions’ governance arrangements within Directive 2013/36/EU (CRDIV).

¹ European Parliament Resolution of 29 November 2018 on the cum-ex scandal: financial crime and loopholes in the current legal framework (2018/2900 (RSP)) at http://www.europarl.europa.eu/doceo/document/TA-8-2018-0475_EN.html

4. Having assessed the responses to the survey, the EBA's inquiry concluded that national authorities do not share the same understanding of dividend arbitrage trading schemes and the extent to which financial institutions' handling of the proceeds from these schemes constitutes money laundering, and that this was due to differences in Member States' domestic tax regimes: dividend arbitrage trading schemes are not possible in some jurisdictions and, where they are possible, they are not always treated as tax crimes.
5. Despite these divergences, the EBA's inquiry also concluded that facilitating tax crimes, or handling proceeds from tax crimes, undermines the integrity of the EU's financial system. The EBA therefore set out expectations of credit institutions and national authorities² under the *current* regulatory framework. This included
 - taking a comprehensive view of the risks highlighted by dividend arbitrage trading cases, which may give rise to questions about the adequacy of financial institutions' internal controls and internal governance arrangements, and their anti-money laundering systems and controls.
 - prudential and AML/CFT authorities exchanging information when performing reviews of institutions' internal controls and governance;
 - AML/CFT authorities reaching out to local tax authorities to understand whether or not dividend arbitrage trading schemes constitute tax crimes, and sharing this information with their prudential counterparts as appropriate;
 - prudential and AML/CFT authorities pursuing targeted inspections; and
 - supervisory colleges discussing such schemes in the context of the 2020 supervisory cycle of the EBA's supervisory convergence plan, with a view to establish whether potential (joint) supervisory activities in case of concerns should take place (e.g. targeted review, inspection, etc.).³
6. In addition to the aforementioned conclusions of its inquiry in relation to the *current* regulatory framework, the EBA is also setting out today an action plan to enhance the *future* regulatory requirements applicable to dividend arbitrage trading schemes.

Action plan

7. The EBA's action plan seizes on the opportunities afforded by recent legislative changes in EU law. Directive 2019/878/EU (CRD5) makes explicit the link between AML/CFT and the prudential framework and aims at providing competent authorities with common tools to

² Without prejudice to the specific tasks and responsibilities under the remit of prudential competent authorities.

³ See <https://eba.europa.eu/supervisory-convergence>

assess the potential impact on institution's governance arrangements, to ensure sound risk management, and to take appropriate supervisory measures where weaknesses are identified.

8. In addition, since January 2020, the EBA has a new objective to contribute to preventing the use of the EU's financial system for AML/CFT purposes. To that end, it has a new duty to 'lead, coordinate and monitor' the fight against ML/TF across the EU's financial services sector. In the specific context of dividend arbitrage schemes, the EBA will be expected to lead by setting clear expectations of the actions financial institutions and AML/CFT competent authorities should take; to coordinate by supporting the development of a common understanding of ML/TF risks arising from tax crimes; and to monitor by identifying vulnerabilities in CAS' approaches to AML/CFT supervision.
9. Given this amended legislative background, and acknowledging the differences in competencies between AML/prudential authorities and tax authorities, the EBA will therefore:
 - i. amend its prudential **Guidelines on Internal Governance**, in order to ensure that the management body develop, adopt, adhere to and promote high ethical and professional standards. In particular, the policies implemented by institutions will need to set out principles on, and provide examples of, acceptable and unacceptable behaviours linked in particular to misconduct and financial crime, including tax crimes through dividend arbitrage schemes. The amended draft Guidelines will be consulted by Q3 2020 and finally adopted by Q1 2021.
 - ii. amend its prudential **Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders** in order to ensure that tax offences, including where committed through dividend arbitrage schemes, are considered in the assessment. The amended draft Guidelines is planned to be consulted by Q3 2020 and to be finally adopted by Q1 2021.⁴
 - iii. amend its prudential **Guidelines on Supervisory Review and Evaluation Process (SREP)** with regard to the section on governance, in order to include an appropriate reference to tax crimes, such as dividend arbitrage schemes, to reflect the relevant amendments in the guidelines on internal governance and fit and proper assessments. The amended draft Guidelines is planned to be consulted by Q2 2021 and finalised by Q4 2021, but some first elements may be included in an Opinion on the prudential treatment of ML/TF risks under SREP to be published by Q4 2020.
 - iv. monitor, in the context of the preparation of the Supervisory Convergence Report due in Q2 2021, how **prudential colleges** have followed up, in a risk-based approach, on guidance embedded in the 2020 convergence plan.

⁴ See <https://eba.europa.eu/supervisory-convergence>, with the convergence plan for 2020 being submitted to the BoS meeting in April under separate cover, with relevant actions on DATSs proposed in chapter 8

- v. assess the responses the EBA will receive to its ongoing consultation on its **Guidelines on ML/TF risk factors** to identify whether the existing references to tax crimes contained in the draft Guidelines are sufficient to address the risks arising from dividend arbitrage trading schemes;
- vi. amend its **Guidelines on Risk-Based AML/CFT Supervision** under Article 48(10) of AMLD4 to include additional requirements on how AML/CFT competent authorities should, in a risk-based approach, identify, assess and address ML/TF risks associated with tax crimes such as illicit dividend arbitrage schemes. These amendments will review the scope of information that AML/CFT competent authorities should consider and clarify how AML/CFT supervisors and tax authorities should cooperate, in line with changes introduced by AMLD5. The draft of the revised guidelines is planned to be published for consultation in Q4 2020 and will be finalised in 2021.
- vii. amend its biennial **Opinion on ML/TF Risks** under Article 6(5) of AMLD4, by assessing ML/TF risks associated with tax crimes in greater detail than the previous version the Opinion already did. The Opinion tends to identify and analyse current and emerging money laundering and terrorist financing (ML/TF) risks to which the EU's financial sector is exposed, drawing on information provided by competent authorities and obtained in the context of the EBA's work throughout the year. The next Opinion is planned to be published in Q1 2021.
- viii. continue to allocate, in its ongoing multi-annual programme of **staff-led AML/CFT implementation reviews** of AML/CFT competent authorities, explicit time to authorities' handling of ML/TF risks associated with tax crimes, where this risk is significant. The EBA will publish a summary report of its implementation reviews every year, with the next edition planned to be published in Q2 2021.
- ix. monitor discussions in **AML/CFT colleges**, and intervene actively as necessary, to ensure that AML/CFT colleges for financial institutions that are exposed to significant ML/TF risks associated with tax crimes, address such risks. The basis of this work are the 2019 Guidelines on Cooperation and Information Exchange between AML/CFT and Prudential Supervisors, which require AML/CFT competent authorities to set up stand-alone AML/CFT colleges for certain financial institutions. The EBA will publish its first report on the functioning of AML/CFT colleges in Q4 2020.
- x. carry out an **inquiry under Article 22 of the EBA Regulation** into the actions taken by financial institutions and national authorities within their competencies to supervise compliance with requirements applicable to dividend arbitrage trading schemes as amended as per the above.