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David Maria Sassoli
President of the European Parliament
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EBA-2020-D-3012

11 May 2020

Subject: EBA response to the European Parliament resolution of 29 November 2018 on the *Cum-ex scandal: financial crime and loopholes in the current legal framework (2018/2900(RSP))*

Dear Mr Sassoli,

Thank you very much for sending us the aforementioned resolution of the European Parliament on the Cum-ex scandal.¹ The resolution *inter alia* requested that the European Banking Authority (EBA) “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”.

I am writing today to report on the measures the EBA has taken in 2019 to fulfil the request for an inquiry, the conclusions of that inquiry, which the EBA’s Board of Supervisors approved in January 2020, and the EBA’s 10-point Action Plan to enhance the future regulatory framework in respect of such schemes, which the Board of Supervisors approved in April 2020.

Throughout 2019, the EBA fulfilled the request by undertaking an inquiry into this issue through the use of two surveys submitted to national authorities. One survey was addressed to authorities designated under national law as competent for anti-money laundering supervision of financial

¹ http://www.europarl.europa.eu/doceo/document/TA-8-2018-0475_EN.html

institutions within the EBA's remit. The survey aimed at gaining an understanding of how national authorities had assessed the ML/TF risk associated with dividend arbitrage trading schemes and at obtaining information on actions taken by supervisors in response to those risks. Notably, the survey sought to understand 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).

Having examined the responses by supervisory authorities, the EBA's inquiry concluded that there are differences in the way that AML and prudential supervisory authorities approach dividend arbitrage trading schemes and the extent to which financial institutions' handling of the proceeds from these schemes constitutes money laundering. This was due to differences in Member States' domestic tax regimes, as dividend arbitrage trading schemes are not possible in some jurisdictions and, where they are possible, they are not always treated as tax crimes.

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 a series of actions expected of credit institutions and supervisory authorities 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.).²

The aforementioned findings and expectations under the current regulatory framework are set out in a report that was approved by the EBA's Board of Supervisors in January 2020 and that I am attaching for your convenience.

As a second step, the EBA's Board of Supervisors subsequently also approved, in April 2020, an Action Plan for 2020/21 that will enhance the *future* regulatory requirements applicable to dividend arbitrage trading schemes. The EBA's action plan seizes on the opportunities afforded by recent legislative changes in EU law, such as Directive 2019/878/EU (CRDV) and the revised EBA Regulation that has been applicable since 1 January 2020, and comprises the following 10 actions:

- i. Amend the EBA's 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 the EBA's 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.
- iii. Amend the EBA's 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.

² See <https://eba.europa.eu/supervisory-convergence>

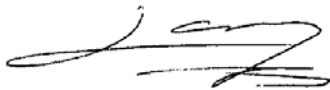
- iv. Monitor, in the context of the preparation of the Supervisory Convergence Report due in Q2 2021, how **prudential colleges** have followed up, in a risk-based approach, on guidance embedded in the 2020 convergence plan.
- v. Assess the responses the EBA will receive to its ongoing consultation on the EBA **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 the EBA **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 the EBA's 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.

The report and action plan will be published on the EBA's website in the coming days.

We hope that the EBA's inquiry, report and action plan for 2020/21 meet the expectations set out in the Parliament's resolution. We would be happy to provide you with a progress update as and when the plan has been actioned.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Jose Manuel Campa', is positioned below the text 'Yours sincerely,'.

Jose Manuel Campa

CC:

Irene Tinagli, Chair of the Committee on Economic and Monetary Affairs European Parliament

Sven Giegold, MEP

Othmar Karas, MEP