MOTION FOR A RESOLUTION

to wind up the debate on the statements by the Council and the Commission
pursuant to Rule 123(2) of the Rules of Procedure

on the cum-ex scandal: financial crime and loopholes in the current legal
framework
(2018/2900(RSP))

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European Parliament resolution on the cum-ex scandal: financial crime and loopholes in the current legal framework
(2018/2900(RSP))

The European Parliament,

– having regard to Articles 4 and 13 of the Treaty on European Union (TEU),
– having regard to Articles 115 and 116 of the Treaty on the Functioning of the European Union (TFEU),
– having regard to the capital markets union, of which one of the primary objectives is to ensure ‘the integrity, transparency, efficiency and orderly functioning of financial markets’,
– having regard to Article 1(5) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)1 (‘ESMA Regulation’), requiring ESMA to contribute to the integrity, transparency, efficiency and orderly functioning of financial markets,
– having regard to Article 9 of the ESMA Regulation, which gives ESMA a leading role in promoting transparency and fairness in financial markets, monitoring financial activities, issuing recommendations and warnings, and temporarily prohibiting or restricting such activities if they represent a threat to the objectives set out in Article 1,
– having regard to Article 22(4) of the ESMA Regulation, as well as Article 22(4) of Regulation (EU) No 1093/20102 of 24 November 2010 establishing a European Banking Authority (EBA), which stipulate that at Parliament’s request, ESMA can ‘conduct an inquiry into a particular type of financial activity or type of product or type of conduct in order to assess potential threats to the integrity of financial markets or the stability of the financial system and make appropriate recommendations for action to the competent authorities concerned’,
– having regard to Article 31 of the ESMA Regulation, which stipulates that ESMA ‘shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union’,
– having regard to Article 40 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments3, which gives ESMA intervention powers to temporarily prohibit or restrict the

1 OJ L 331, 15.12.2010, p. 84.
3 OJ L 173, 12.6.2014, p. 84.
marketing, distribution or sale of certain financial instruments or certain types of financial activity or practice when (a) the proposed action addresses a significant threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system in the Union, (b) regulatory requirements under Union law that are applicable to the relevant financial instrument or activity do not address the threat, and (c) competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address it,

– having regard to the cum-ex revelations made by a consortium of investigative journalists led by the German non-profit media organisation CORRECTIV on 18 October 2018,

– having regard to the Fourth Inquiry Committee of the German Bundestag investigating the scandal, which culminated in a report¹ in June 2017,

– having regard to the investigations by the German and Danish fiscal authorities,

– having regard to its resolutions of 25 November 2015² and 6 July 2016³ on tax rulings and other measures similar in nature or effect,

– having regard to its resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union⁴,

– having regard to its recommendation of 13 December 2017 to the Council and the Commission following the inquiry into money laundering, tax avoidance and tax evasion⁵,

– having regard to its decision of 1 March 2018⁶ on setting up a special committee on financial crimes, tax evasion and tax avoidance (TAX3), and defining its responsibilities, numerical strength and term of office,

– having regard to its plenary debate of 23 October 2018 on the cum-ex scandal,

– having regard to its joint ECON/TAX3 committee meeting of 26 November 2018,

– having regard to Rule 123(2) of its Rules of Procedure,

A. whereas cum-ex deals are characterised by banks and stockbrokers rapidly trading shares with (‘cum’) and without (‘ex’) dividend rights, with the aim of being able to conceal the identity of the actual owner; whereas these schemes allowed both parties to claim tax rebates on capital gains tax that had only been paid once;

B. whereas although it is difficult to calculate the maximum amount of the damage incurred, given that many actions started in the late 1990s and have been time-barred for quite some time, the total damage of the cum-ex files scandal to the affected Member States is estimated to be at least EUR 55 billion, which amounts to approximately one third of the total EU budget for 2017;

C. whereas these deals were reportedly conceived by German lawyer Hanno Berger, who is fighting allegations that the cum-ex transactions he worked on were illegal; whereas Mr Berger has been charged in a Wiesbaden court for allegedly receiving improper refunds on trades that were valued at EUR 15.8 billion (USD 18 billion), costing tax authorities EUR 106 million according to the indictment; whereas prosecutors in Germany are allegedly investigating the role of dozens of banks, brokerage firms, accounting companies and law firms in the deals;

D. whereas the cum-ex files have demonstrated professional and organised financial criminality on an unprecedented scale in Europe, with those involved allegedly taking advantage of cross-border tax loopholes and legal trading practices to allow shareholders to claim double ownership of the same shares;

E. whereas it has been reported that these criminal practices involve German and other EU Member States’ financial institutions, including several large well-known commercial banks;

F. whereas in 2016, it was revealed that the Danish tax authority had failed to act on numerous warnings that foreign companies were abusing Danish tax rules and forging documents in order to fraudulently apply for dividend tax refunds, an abuse which was estimated to have cost the Danish tax authority over EUR 1.5 billion1;

G. whereas the German Government had reportedly been aware of these fraudulent tax practices for some years but only informed other Member States in 2015; whereas the German Finance Ministry reportedly said it was aware of 418 different cases of cum-ex tax fraud with a combined value of EUR 5.7 billion;

H. whereas the final report of the Fourth Inquiry Committee of the Bundestag concluded, as well as the German courts, that tax practices such as cum-ex deals involving short sales are illegal, and that the Association of German Banks had exacerbated the problem instead of helping to resolve it;

I. whereas the influence of the business lobby, as shown in this case and others, is deeply rooted in national and European institutions, with reports that the advisory groups counselling the European Central Bank are dominated by representatives of the banking sector2, and that the biggest accountancy firms are embedded in EU policy making3;

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1 European Network on Debt and Development, Tax Games - the Race to the Bottom: https://eurodad.org/tax-games-2017
2 Haar, Kenneth, Open door for forces of finance at the ECB, Corporate Europe Observatory, October 2017: https://corporateeurope.org/sites/default/files/attachments/open_door_for_forces_of_finance_report.pdf
3 Accounting for influence: how the Big Four are embedded in EU policy-making on tax avoidance, Corporate Europe Observatory, July 2018:
J. whereas the investigation by the consortium of European journalists identifies Germany, Denmark, Spain, Italy and France as allegedly the main target markets for cum-ex trading practices, followed by Norway, Finland, Poland, Denmark, the Netherlands, Austria and the Czech Republic, and whereas these practices potentially involve an unknown number of EU Member States as well as countries of the European Free Trade Association (Switzerland, for example);

K. whereas public institutions were unable or unwilling to conduct in-depth investigations into the information shared by the public prosecutors from other Member States regarding the cum-ex scandal;

L. whereas the dividend arbitrage exposed by the cum-ex scandal highlights the fact that financial institutions, hedge funds, equity traders, lawyers and big international tax firms, some of which are big and important players in the European capital market, have actively promoted these practices;

M. whereas special purpose vehicles (SPVs) are at the centre of the scandal, as investment bankers and hedge funds would structure SPVs which were subsequently sold to investors by traders, with banks providing loans, thereby multiplying the volume of the trades by up to 20 times;

N. whereas the fact that foreign investors are entitled to claim a refund of the withholding taxes on dividends plays a central part in the scandal;

O. whereas in December 2017 the Commission put forward new guidelines on withholding taxes to simplify procedures for cross-border investors in the EU, encouraging Member States to adopt systems of relief at source from withholding taxes; whereas this new Code of Conduct on Withholding Tax1, which barely mentions the risk of fraud and suggests that this be solved with IT systems or relief at source, speeds up national processes for approving claims for the refund of withholding taxes;

P. whereas the Commission highlights that the new Code of Conduct on Withholding Tax would eliminate the risk of fraudulent behaviour such as double refund applications and unjustified claims for refunds or applications for relief; whereas, however, in the context of the cum-ex scandal it seems evident that relief at source will increase the risk of double-non-taxation or zero taxation;

Q. whereas the use of withholding taxes is a fundamental tool that Member States can use to unilaterally counteract base erosion and profit shifting, and should be used by them accordingly;

R. whereas the role of whistle-blowers over the last 25 years has proven significant in revealing sensitive information at the focal point of public interest;

S. whereas the mandate of the Special Committee on Financial Crimes, Tax Evasion and

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Tax Avoidance (TAX3) explicitly covers any relevant developments within the remit of the committee that emerge during its term;

1. Strongly condemns the tax fraud, theft of European taxpayers’ money and tax avoidance practices that characterise the dividend arbitrage trading schemes revealed in the cum-ex scandal, which have undermined several Member States’ tax bases, depriving citizens of very necessary public goods and social provisions;

2. Highlights that, according to the EU Anti-Money Laundering Directive\(^1\), ‘tax crimes’ relating to direct and indirect taxes are included in the broad definition of ‘criminal activity’ and are considered predicate offences for money laundering;

3. Notes with concern that the cum-ex scandal has shaken citizens’ trust in the EU’s and national tax systems and stresses how crucial it is to restore public confidence and ensure that any damage caused will not be repeated;

**European Supervisory Authorities**

4. Calls on the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) to conduct an inquiry in accordance with Article 22 of the ESMA and EBA regulations into the use of complex financial arrangements for aggressive tax avoidance and evasion, including all forms of dividend arbitrage, in order to assess the threat they may pose to the integrity of financial markets and the stability of the financial system;

5. Recommends that the inquiry establish where the coordination and surveillance of financial supervisors, stock exchanges and tax authorities across Member States fell short, enabling these tax theft schemes to continue for years despite having been identified;

6. Recommends that the inquiry analyse, measure, describe and identify the role of different market players – banks, investment companies, asset managers, insurers, hedgers, depositories and custodians – and their share along the value chain generated by these deals;

7. Recommends that the inquiry establish the legal nature of the funds used for this purpose, tracing their origins and ultimate beneficial owners, and review the licences of the market participants involved in these fraudulent trading practices;

8. Suggests that the inquiry include recommendations for action to be taken by the competent authorities and for the results and conclusions of the inquiry to be made publicly available;

9. Appeals to the Council to trigger Article 18 of the ESMA and EBA regulations to guarantee a swift and coordinated European response, with the commitment of ESMA

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and the EBA to intervene in the face of a continued threat to the integrity of the European financial system, given the eminently cross-border nature of these arrangements;

10. Calls for a coordinated pan-European investigation into the scandal, ensuring exchange of information and, where appropriate, joint investigative work, between tax administrations and law enforcement and prosecutorial authorities of the Member States concerned;

11. Calls for national and European supervisory authorities to be given a mandate to look into tax avoidance practices, as they constitute a risk to financial stability and the integrity of the internal market;

Inquiries and sanctions

12. Calls on the Member States identified as allegedly the main target markets for dividend arbitrage trading practices, namely Germany, Denmark, Spain, Italy, France, Finland, Poland, the Netherlands, Austria, Norway and the Czech Republic, to continue to investigate potential fraud and other practices carried out by financial institutions, lawyers, accountants and tax advisers in their jurisdictions;

13. Urges all Member States to thoroughly investigate and analyse dividend payment practices in their jurisdictions, to identify the loopholes in their tax laws that generate opportunities for exploitation by tax fraudsters and avoiders, to analyse the potential cross-border dimension of these practices and to put an end to all harmful tax practices;

14. Encourages the national courts of auditors to carry out audits of capital gains tax refund procedures with regard to dividend and share transactions in order to identify the possible damage incurred as a result of the cum-ex scandal and the loopholes that exist at national level;

15. Encourages the competent authorities to open criminal investigations, temporarily freeze suspicious assets, subject the management boards potentially involved in this scandal to inquiry, impose appropriate penalties and sanctions on the parties involved, and take the necessary steps to recover all assets stolen from public coffers;

16. Stresses the need for coordinated action between national authorities in order to guarantee recovery of all assets stolen from public coffers;

17. Takes the view that both the perpetrators and enablers of these crimes, which include not only tax advisers but also lawyers, accountants and banks, should be brought to justice without further delay and be liable to incur criminal sanctions; stresses the urgent need to end white-collar impunity and ensure better enforcement of financial regulations;

Taxation

18. Urges the Member States to review and update bilateral taxation agreements between Member States and with third countries to close loopholes that incentivise tax-driven trading practices with the purpose of tax avoidance;
19. Calls on the Commission to assess the state of play of all potentially harmful taxation agreements and any possible loophole in EU rules on common taxation of parent companies and their subsidiaries, to come up with new upgraded policy measures to tackle dividend arbitrage practices, and to take the necessary steps to prevent traders from exploiting loopholes in tax law;

20. Calls for the Commission to stop encouraging Member States to adopt systems of relief at source from withholding taxes;

21. Asks the European Supervisory Authorities to consider a ban on tax-driven financial instruments, activities or practices, in particular on dividend arbitrage, if their perpetrators fail to prove that these complex financial arrangements have a substantive economic purpose other than tax avoidance;

22. Calls for the role of special purpose vehicles (SPVs) and special purpose entities (SPEs) to be investigated and for the Commission to consider limiting the use of these instruments, taking into consideration that a high share of their use in foreign direct investment flows has been found to be an indicator of aggressive tax planning;\(^1\)

23. Notes that the French Senate, in an effort to combat the practice of dividend arbitrage, has tabled an amendment to the draft budget bill that would make it possible to withhold 30% of the value of the transaction to a foreign beneficiary, to be reimbursed \(a\) \(a posteriori\) if they prove that they are the ultimate beneficial owner; calls on European legislators to evaluate the possibility of implementing this measure at EU level;

**Cooperation and information exchange**

24. Regrets the fact that these new revelations seem to indicate possible shortcomings in the current systems of information exchange and cooperation between Member State authorities in the fields of taxation and financial crime; reminds the Member States of their obligation under Article 4(3) of the TEU to cooperate sincerely, loyally and expeditiously; calls on national tax authorities to reap the full potential of the mandatory automatic exchange of information in the field of taxation as provided for in the consecutive amendments to Council Directive 2011/16/EU on administrative cooperation in the field of taxation;\(^2\)

25. Regrets that the recently adopted Council Directive (EU) 2018/822 of 25 May 2018 (DAC6);\(^3\) would not have enabled the exchange of information on the cum-ex transactions, as they would not have been considered as reportable transactions, and calls for DAC6 to be amended in order to require the mandatory disclosure of dividend arbitrage schemes, including the granting of dividend and capital gains tax refunds;

26. Urges all Member States’ tax authorities to nominate Single Points of Contact (SPoCs) in line with the OECD’s Joint International Taskforce on Shared Intelligence and Collaboration, and calls on the Commission to ensure and facilitate cooperation

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\(^1\)IHS, _Aggressive tax planning indicators_, prepared for the Commission, DG TAXUD Taxation Papers, Working Paper No 71, October 2017.

\(^2\)OJ L 64, 11.3.2011, p. 1.

between them, with a view to making certain that information on cases with cross-border relevance is shared rapidly and efficiently between Member States;

27. Calls on the Member States to step up their cooperation in tax matters through the automatic exchange of information, as well as intensifying cooperation between Financial Intelligence Units (FIUs) through FIU.net, thereby improving transparency, administrative cooperation and coordination and information exchange; asks the Commission to consider a legislative proposal for an EU Financial Intelligence Unit, a European hub for joint investigative work and an early warning mechanism;

28. Reiterates its call for the creation of an EU Tax Policy Coherence and Coordination Centre (EUTPCCC) within the structure of the Commission¹, which would ensure effective and expeditious cooperation between Member States and facilitate early warning in cases like the cum-ex scandal; urges the Member States to support this call and the Commission to present a legislative proposal for such a mechanism;

Better regulation of financial markets

29. Underlines that enablers and promoters of tax fraud should be held legally co-responsible when designing cum ex transactions and comparable aggressive tax plans; points out that when they take part in fraud, they should systematically be liable to incur both criminal sanctions and disciplinary measures;

30. Appeals to the Commission to consider the need for a European framework for capital income taxation that reduces incentives that destabilise cross-border financial flows, generate fiscal competition among Member States and undermine tax bases that guarantee the sustainability of European welfare states;

31. Urges the Member States taking part in the enhanced cooperation procedure to agree as quickly as possible on a Financial Transaction Tax (FTT); stresses that, had an FTT been in place, this sort of practice would have been discouraged and not been so profitable for tax fraudsters;

Increasing resources to fight financial crime

32. Regrets the fact that the financial crisis has resulted in generalised resource and personnel reductions in EU tax administrations; calls on the Member States to invest in and modernise the tools available to fiscal and FIU authorities and to devote the necessary human resources to this task, so as to improve surveillance and reduce timing and informational gaps between administrations and taxable persons, with a view to ensuring as far as possible that claims for tax refunds cannot be submitted and reimbursed without proof that the taxes have actually been paid;

33. Calls on the Commission, ESMA and the EBA to substantially increase their human and financial resources in the fight against financial crime;

¹ See European Parliament resolution of 6 July 2016 on tax rulings and other measures similar in nature or effect, OJ C 101, 16.3.2018, p. 79.
**Speeding up the adoption of other EU legislation**

34. Deplores the fact that several legislative files, such as those on public country-by-country reporting and the common consolidated corporate tax base (CCCTB), aimed at ensuring greater coherence among tax rules, greater transparency and information exchange are currently blocked by Member States in the Council; calls on the Member States to reach a rapid agreement on these files; calls also for an end to the unanimity rule for taxation matters in the Council;

35. Stresses the need to protect whistle-blowers who disclose information on tax fraud and tax evasion for example at national and EU level; invites anyone who has information of value to the public interest to report it, either internally, externally to the national authorities, or where necessary to the public; and calls for the Commission proposal for a directive of the European Parliament and of the Council of 23 April 2018 on the protection of persons reporting on breaches of Union law (COM(2018)0218) to be swiftly adopted taking into account the opinions adopted by the relevant committees of the European Parliament;

36. Recalls that the payment of taxes is both an essential corporate contribution to society and a tool for good governance, and is therefore a requirement for responsible business practice; stresses the need to include harmful tax practices in the scope of corporate social responsibility (CSR);

37. Recalls that both credit and financial institutions, as well as tax advisers, accountants and lawyers, are considered ‘obliged entities’ under the Anti-Money Laundering Directive and are therefore bound to comply with a set of duties to prevent, detect and report money laundering activities;

38. Welcomes the Commission proposal of 12 September 2018 to amend, among other regulations, the regulation establishing the EBA in order to reinforce the role of the EBA in anti-money laundering supervision of the financial sector (COM(2018)0646); stresses that, in accordance with the Single Supervisory Mechanism, the ECB has the task of carrying out early intervention actions as laid down in relevant Union law; takes the view that the ECB should have a role in alerting competent national authorities and should coordinate any action regarding suspicions of non-compliance with anti-money laundering rules in supervised banks or groups;

**Institutional follow-up**

39. Calls on the TAX3 Special Committee to conduct its own assessment of the cum-ex revelations and to include the results and any relevant recommendations in its final report;

40. Reiterates that a permanent subcommittee on combating tax evasion, tax avoidance and money laundering should be established as soon as possible, following the recommendations adopted in plenary on 13 December 2017

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\(^1\) OJ C 369, 11.10.2018, p. 132.
41. Instructs its President to forward this resolution to the Council, the Commission, the European Central Bank, the European Banking Authority and the European Securities and Markets Authority.