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**Public Hearing of the Subcommittee on Tax Matters of the European Parliament
on the Cum-Ex/Cum-Cum Scandal**

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Statement by Prof. Dr. Christoph Spengel

Sincere Members of the European Parliament, I am very honored for being invited the second time to present my findings on what I call **“the biggest tax robbery in European history”**: Cum-Ex, Cum-Cum and related share transactions. My quantitative estimates for Germany only reveal a total tax damage of more than Euro 50 billion. These share transactions continue until today.

Let me make three points very clear which I explain in a row and finally draw my conclusions. As being German, I only talk about the situation in Germany.

1. Cum-Ex and Cum-Cum share transactions are associated with each other

Cum-Ex transactions seek to achieve a multiple refund of the dividend withholding tax being paid only once (it is a so-called double dip). According to judgements of German Courts, such transactions are illegal and criminal. The first criminal judgement dates from 18 March 2020 by the Bonn Regional Court. Currently, the case is pending at the Federal High Court of Justice. The Cologne prosecutor investigates more than 70 cases, in total approximately 900 persons are suspected, among them bankers & banks, brokers and lawyers & law firms acting around the globe, around 130 banks are involved. Additional criminal cases are pending at the Regional Courts of Bonn, Frankfurt and Wiesbaden. To conclude, the prosecutors and the criminal courts are very active and hopefully manage to restore a considerable portion of taxes that were stolen.

Cum-Cum transactions aim to avoid paying a dividend withholding tax in the hands of non-resident shareholders for more than five decades now. To achieve this, German shares are transferred into Germany shortly before the dividend record date to German banks based on a security lending contract. At the dividend record date, German banks are entitled to a refund of the dividend withholding tax. Afterwards, all transactions are reversed. Instead of a dividend subject to limited

liability to tax in Germany, non-resident shareholders receive a security lending fee which is tax-exempt for them.

It is well known that more than two third of the shares listed at the German stock market are owned by non-resident shareholders. **Without including these non-resident shareholders, it is logically impossible to achieve a considerable “double dip” of the dividend withholding tax.** Assumingly, therefore, in a first step these shares are transferred with (i.e. cum) dividend into Germany before the dividend record date and in a second step are used for Cum-Ex short sales around the dividend record date. Soon afterwards, all transactions are reversed.

2. Cum-Ex share transactions are still observable today

A multiple refund of the dividend withholding tax being paid only once (a double dip) via Cum-Ex transactions was and is still possible. The system of collecting the dividend withholding tax on the one hand and issuing a tax voucher including the process of refunding this tax on the other hand was and still is very vulnerable due to fiscal federalism in Germany.

Most experts believed that this shortcoming was shut in 2012 in Germany. This assumption is, however, false. **It is still possible to achieve a refund of the dividend withholding tax although not being paid.** This can happen if dividends are transferred by Clearstream to a foreign custodian bank of a non-resident shareholder and the underlying shares are sold “cum” dividend before the dividend record date and delivered afterwards “ex” dividend to resident German buyers. This turned out at a public hearing of the German Parliament on 9 September 2020.

In addition, it turned out in the course of manipulated American Depositary Receipts (ADR) issued by a US subsidiary of a German bank that the German federal tax office refunded a dividend withholding tax on German shares which did not exist. We call this **cum/fake!**

3. Pick up Cum-Cum share transactions finally

As mentioned, Cum-Ex and Cum-Cum transactions are associated with each other. According to a recent judgement of the Hesse Tax Court from 28 January 2020, Cum-Cum transactions are illegal and considered as abuse of law if they are part of a coherent market arrangement following the sole purpose to avoid dividend withholding tax. In the case at hand, UK banks transferred German shares before the dividend record date to a German bank in the years 2004-2006 based on a security lending contract. With further arrangements, it is possible to achieve a refund of the dividend withholding tax in Germany. Afterwards, all transactions were reversed. Instead of a dividend subject to limited liability to tax in Germany, the UK banks received a security lending fee which is tax-exempt for non-residents in Germany. This is an obvious loophole in the German tax law!

Instead of picking up Cum-Cum transactions finally, the **German Federal Ministry of Finance made several attempts to whitewash these illegal share transactions.** In 2017, according to an interrogation of „Bundesanstalt für Finanzdienstleistungsaufsicht“(BaFin), **90 per cent of German banks fear tax risks regarding illegal Cum-Cum transactions** undertaken after 2013. Following the judgement of the Hesse Tax Court, also Cum-Cum transactions undertaken prior to 2013 are illegal

and might be criminal. However, no concrete activities such as a new interrogation by BaFin, controls by the tax inspectors and raids by the prosecutor have been taken up so far. This is a real scandal!

4. Conclusion

Cum-Ex and Cum-Cum transactions are associated with each other. In Germany, considering only **Cum-Ex transactions**, approximately 900 persons are suspected, among them bankers & banks, brokers and lawyers & law firms acting around the globe. It is obvious that most of the share transactions originate from somewhere abroad. Also, the buyers of the shares were residing abroad, the only connection to Germany was their custodian bank issuing an illegal tax voucher for a dividend withholding tax not being paid. The President of the Cologne Tax Court called Cum-Ex transactions a **“criminal masterpiece”**.

And: **it is a global phenomenon**, for instance, given the whole setting, the **Danish cases reveal similar patterns as the cases in Germany and identical persons are suspected**.

What is necessary to **detect these global Cum-Ex and Cum-Cum schemes**? We need

- more efficient joint controls of participants in the capital market,
- a co-ordinated supervision of activities on capital markets,
- a mutual assistance of prosecutors from different countries and
- efficient exchange of information of supervising bodies.

Regarding Europe, I refer to the Resolution by the European Parliament from November 2018. These efforts must be strengthened and enforced.

In addition, **more manpower, this means more chief inspectors with an expertise in taxation for the prosecutors** is necessary to detect the schemes. Time matters considerably since a reclaim of taxes expires if the limitation period has expired.

In particular with regard to Cum-Ex transactions in Germany, the system of collecting the dividend withholding tax on the one hand and issuing a tax voucher including the process of refunding this tax on the other hand must be made airtight. In the era of digitalization, this should be an easy task.

Referring to Cum-Cum transactions, my hope is that the prosecutors are going to pick them up as well and that the German tax legislator closes the loophole in the tax law with regard to limited tax liability soon. I have some doubts on my second hope.

Appendix

Articles & Statements published by Christoph Spengel on the Cum-Ex/Cum-Cum Scandal

- 1) Die nicht vorhandene Gesetzeslücke bei Cum Ex Geschäften (with T. Eisgruber), DStR 2015, S. 785-801
- 2) Darlegung der tatsächlichen und rechtlichen Gegebenheiten, welche bei sogenannten Cum/Ex-Geschäften mit Leerverkäufen zur mehrfachen Erstattung bzw. Anrechnung von tatsächlich nur einmal einbehaltener und abgeführter Kapitalertragsteuer bzw. bis zur Abschaffung des körperschaftsteuerlichen Anrechnungsverfahrens nur einmal gezahlter Körperschaftsteuer führten, Sachverständigengutachten für den 4. Untersuchungsausschuss der 18. Wahlperiode, Mannheim 2016; (https://www.bundestag.de/blob/438666/15d27facf097da2d56213e8a09e27008/sv2_spengel-data.pdf)
- 3) Kurzstellungnahme zum Schreiben des Bundesministeriums der Finanzen vom 11.11.2016 - IV C 6 - S 2134/10/10003-02; Wirtschaftliche Zurechnung bei Wertpapiergeschäften; Anwendung der Grundsätze des BFH-Urteils vom 18. August 2015 – I R 88/13 vor dem Hintergrund des Votums der Finanzministerkonferenz vom 1.12.2016, Mannheim 2016, (https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Spengel/Dokumente/Medien/Beitraege/BMF-Schreiben_Cum-Cum_November_2016-final.pdf)
- 4) Dringender Handlungsbedarf bei Cum/Cum-Geschäften, DB 2016, S. 2988-2995
- 5) Replik zu Spatscheck/Spilker: Cum-/Ex-Transaktionen im Fokus der Steuerfahndung (with T. Eisgruber), DB 2017, S. 750-751
- 6) Schätzung des durch Cum/Ex-Geschäfte mit Leerverkäufen entstandenen Steuerschadens (with V. Dutt, H. Vay) Mannheim 2017, (https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Spengel/Dokumente/Medien/Steuerschaden_Cum-Ex_2017-03-31_.pdf)
- 7) Schätzung des durch Cum/Cum-Geschäfte entstandenen Steuerschadens (with J. Peitzmeier), Mannheim 2017 (https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Spengel/Dokumente/Medien/Steuerschaden_Cum-Cum_de.pdf)
- 8) Unzulässige Verrechnungspraxis deutscher Banken bei Cum/Ex-Geschäften, FR 2017, S. 545-553
- 9) Kollektivversagen: Cum/Cum, Cum/Ex und Hopp!, Wirtschaftsdienst 2017, S. 454-455
- 10) Kurzstellungnahme zum Schreiben des Bundesministeriums der Finanzen vom 17.7.2017 - IV C 1 - S 2252/15/10030:005; Steuerliche Behandlung von „Cum/Cum-Transaktionen“, Mannheim 2017 (https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Spengel/Dokumente/Medien/Beitraege/BMF-Schreiben_Cum-Cum_Juli_2017.pdf)
- 11) Dividendenstripping durch Cum/Ex- und Cum/Cum-Geschäfte – Analyse aktueller Entwicklungen (with V. Dutt, H. Vay), StuW 2018, S. 229-238
- 12) Stellungnahme zur Öffentlichen Anhörung im Europäischen Parlament “Cum Ex scandal: financial crime and the loopholes in the current legal framework” am 26.11.2018, Mannheim 2018 (https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Spengel/Dokumente/Medien/Beitraege/Spengel_Stellungnahme_European_Parliament_2018-11-26_final.pdf)
- 13) Task Force gegen Steuerbetrug – ein irreführender Begriff, Wirtschaftsdienst 2019, S. 816
- 14) Steuerrechtliche Behandlung von Cum/Cum-Geschäften – Folgerungen aus dem Urteil des Hessischen FG vom 28.01.2020 und Konsequenzen für die Praxis, DB 2020, S. 1919-1927

- 15) Stellungnahme zur Öffentlichen Anhörung im Finanzausschuss des Deutschen Bundestages zu
Anträgen der Fraktionen der DIE LINKE. und BÜNDNIS 90/DIE GRÜNEN zum Thema „Cum/Ex“ am
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