

PRESS RELEASE

ESMA broadens scrutiny of multiple withholding tax reclaim schemes

The European Securities and Markets Authority (ESMA) has published today a [report](#) on its preliminary findings on multiple withholding tax (WHT) reclaim schemes, following a European Parliament (EP) request, and has launched a formal inquiry to gather further evidence from national competent authorities (NCAs) on the supervisory practices regarding those schemes across the European Union (EU).

Some EU Member States allow for a WHT on the dividends of listed companies, which under specific circumstances can be reclaimed. This can be abused by aiming to obtain multiple repayments of a single WHT paid upon distribution of dividends, ESMA analysed the incidence of these schemes and whether they result in a violation of the Market Abuse (MAR) or Short Selling Regulation (SSR), while identifying potential supervisory responses. To identify these schemes, ESMA analysed EU cash trading and securities lending volumes that showed increased trading activity around dividend dates.

Overall, the Report found, among other things, that the execution of these schemes do not necessarily imply a breach of the provisions of MAR or SSR. However, there could be concerns about compliance with share trading reporting obligations. In addition, the Report found that:

- dividend arbitrage trading can be carried out through a wide range of sophisticated and complex trading methods giving the impression that a series of genuine claims have taken place;
- the schemes involve high volumes of trading in the outstanding shares of large capitalisation EU index stocks, since the schemes are more profitable when carried out on a large scale;
- the schemes appear to be aimed mainly at obtaining multiple repayments of a single WHT paid upon distribution of dividends (i.e. potentially involving a tax fraud) often using a short selling transaction; and

- some national tax laws allow for the issuance of tax certificates that do not contain any reference to the underlying distribution of dividends, making it difficult to identify multiple fraudulent requests.

In relation to the MiFID II framework, based on the information that has emerged so far, these tax schemes do not necessarily imply a violation of MiFID II. Information on the illegality of a given practice and on the degree of involvement of the supervised entities and their directors in specific cases should be the basis to determine whether certain MiFID II requirements have been breached.

Steven Maijoor, ESMA Chair, said:

“ESMA has looked into multiple withholding tax reclaim schemes from a securities markets perspective. While these schemes do not necessarily imply breaches of the market abuse or short selling regimes, they may affect the integrity of securities markets and individual firms.

ESMA has identified best practices that could be used by NCAs to detect and investigate multiple withholding tax reclaim schemes. In addition, we have launched a formal inquiry to further collect evidence on NCAs’ supervisory experiences.”

Strengthening supervision and cooperation

ESMA has identified best practices that could be used by NCAs to detect and investigate multiple WHT reclaim schemes. These include:

- setting up calibrated alerts in surveillance systems to detect cases where the percentage of traded shares of an issuer reaches a significant level, or perform selective analysis around the dividend distribution dates for possibly relevant issuers;
- using central securities registers data on settlement, transactions and short selling data on short positions to check matching transactions;
- liaising with central securities registers and tax authorities to understand the totality of available data; and
- conducting further firm-specific investigations if need be.

However, as NCAs have different legal mandates, responsibilities and powers it may not be possible for all practices to be adopted uniformly. In addition, further cooperation and mutual assistance between NCAs, tax authorities and other law enforcement bodies could help to prevent the continuation of these schemes and a clear legal basis is required for such cooperation. There is currently no legal basis in EU financial law, namely MAR, MiFID II and MiFIR, for NCAs receiving relevant information under these pieces of legislation to transmit it to the tax Authorities.

Formal Inquiry

ESMA, to build on its preliminary findings, has launched a formal inquiry under Article 22(4) of the ESMA Regulation, to gather further evidence from NCAs on:

- potential threats to the integrity of European financial markets;
- the nature and magnitude of actors in these schemes;
- whether cases were found of breaches of either national or EU law;
- the actions taken by financial supervisors in Member States, and
- potential recommendations for action and reform to the competent authorities concerned.

Next steps

ESMA will report on the results of this formal inquiry to the European Parliament.

Notes for editors

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. Even though ESMA's initial analysis mainly focused on the Cum/Ex scheme, its conclusions may cover any scheme which involves transactions (Cum/Ex or Cum/Cum or other schemes) aimed at creating the paperwork (incl. tax certificates) which allows persons to obtain tax refunds on dividend tax which was not paid, and which may represent a fraud under national legislation.
7. ESMA's mission is to enhance investor protection and promote stable and orderly financial markets.
8. It achieves these objectives through four activities:
 - i. assessing risks to investors, markets and financial stability;
 - ii. completing a single rulebook for EU financial markets;
 - iii. promoting supervisory convergence; and
 - iv. directly supervising specific financial entities.
9. 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).



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