



European Securities and  
Markets Authority

# FINAL Report

**On Cum/Ex, Cum/Cum and withholding tax reclaim schemes**





European Securities and  
Markets Authority

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## Acronyms and definitions used

ADR	American Depositary Receipt
AIF	Alternative Investment Fund
CCP	Central Counterparty Clearing
CRD IV	Capital Requirements Directive - Directive 2013/36/EU of the European Parliament and of the Council
CRR	Capital Requirements Regulation - Regulation (EU) No 575/2013 of the European Parliament and of the Council
CSD	Central Securities Depository
CSDR	Central Securities Depositories Regulation - Regulation (EU) No 909/2014 of the European Parliament and of the Council
DKK	Danish Krone
EBA	European Banking Authority
ECB	European Central Bank
EEA	European Economic Agreement
EMIR	European Markets Infrastructure Regulation - Regulation (EU) No 648/2012 of the European Parliament and of the Council
EP	European Parliament
ESCB	European System of Central Banks
ESMA	European Securities and Markets Authority
ETF	Exchange Traded Fund
EU	European Union
GMSLA	Global Master Securities Lending Agreement
MAR	Market Abuse Regulation – Regulation 596/2014 of the European Parliament and of the Council
MEP	Member of the European Parliament
MIFID I	Markets in Financial Instruments Directive I – Directive 2004/39/EC of the European Parliament and the Council



MiFID II	Markets in Financial Instruments Directive II – Directive 2014/65/EU of the European Parliament and the Council
MiFIR	Markets in Financial Instruments Regulation – Regulation (EU) 600/2014 of the European Parliament and of the Council
NCA	National Competent Authority
OECD	Organisation for Economic Co-operation and Development
OTC	Over-the-Counter
PTSC	Post Trading Standing Committee
RSP	European Parliament Resolution
SEC	U.S. Securities and Exchange Commission
SFTR	Securities Financing Transactions Regulation – Regulation (EU) No 2015/2365 of the European Parliament and the Council
SSR	Short Selling Regulation – Regulation (EU) No 236/2012 of the European Parliament and of the Council
STOR	Suspicious Transactions and Orders Report
TRACE	Treaty Relief and Compliance Enhancement
TREM	Transaction Reporting Exchange Mechanism
UCITS	Undertakings for the Collective Investment in Transferable Securities
WHT	Withholding Tax

# 1 Executive Summary

## Reasons for publication

Further to different EU media publishing the result of journalistic investigations reporting the existence in some Member States of alleged large-scale tax fraud schemes known as “Cum/Ex”, the European Parliament adopted the Resolution 2018/2900 (RSP) of 29 November 2018<sup>1</sup>, requesting the European Securities and Markets Authority (ESMA) to conduct an inquiry into dividend arbitrage, Cum/Ex and Cum/Cum schemes.

In July 2019, ESMA published a Report on preliminary findings on multiple withholding tax reclaim schemes<sup>2</sup> (Report on preliminary findings). At the same time, and on the basis of the EP Resolution, the ESMA Board of Supervisors launched a formal inquiry under Article 22(4) of the ESMA Regulation concerning Cum/Ex, Cum/Cum and WHT reclaim scheme.

This Report presents the results of the findings of the formal inquiry and provides an updated analysis of the subject.

## Contents

This Report contains the information received from National Competent Authorities (NCAs) through the formal inquiry under Article 22(4) of the ESMA Regulation and additional internal analysis to provide an EU-wide updated picture of the structure and distribution of Withholding Tax (WHT) reclaim schemes from the securities regulators’ perspective, with a view of identifying gaps, best practices and potential solutions for their prevention, detection and prosecution.

To this aim, ESMA describes the general functioning of dividend arbitrages, Cum/Ex, Cum/Cum and in general multiple WHT reclaim schemes, provides an analysis of how WHT on dividends works across Member States and the relevant risks, and through the NCAs collects information on the status of the current criminal investigations across the EU.

ESMA also reports the NCAs’ experience regarding their market surveillance activities as well as any specific analysis carried out at national level to assess the presence and the impact of WHT schemes in their Member State.

ESMA has also analysed those schemes in light of regulated firms’ obligations under the MiFID II legal framework and carried out a legal analysis on the possibility and limits for NCAs to exchange information with tax authorities.

ESMA has expanded the analysis on securities lending data contained in the ‘Report on preliminary findings’ to cover all Member States, especially assessing the presence of significant variations in the securities lending markets across the dates where some Member States passed legislative changes to halt multiple WHT reclaim schemes.

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ESMA's inquiry has highlighted that WHT reclaim schemes are to be primarily considered as a tax related issue and therefore ESMA is of the view that a first legislative and supervisory response should be sought within the boundaries of the tax legislative and supervisory framework.

However, within the boundaries of its remit, ESMA has assessed potential solutions that could be pursued to contribute to the detection of WHT reclaim schemes.

In particular, ESMA has assessed the potential use of Central Securities Depositories (CSDs) data as a source of information to detect WHT schemes, highlighting why it does not seem to be able to represent a source of information that on its own could lead to detection of WHT schemes.

After having considered the proposal to enhance NCAs' remit to cover also WHT schemes, ESMA is not eventually proposing that solution, concluding that its potential is outweighed by its limits and drawbacks.

Moreover, ESMA's has identified a number of best practices extracted from the experience of those NCAs that, thanks to an extended remit under national legislation, carry out supervisory activity for WHT schemes.

Finally, as enhanced cooperation and mutual assistance between NCAs, tax authorities and other law enforcement bodies could help to detect and prosecute WHT reclaim schemes, ESMA recommends pursuing a legislative change to remove the legal limitations for NCAs to exchange with tax authorities the information obtained through cooperation with other NCAs within the EU and provide a common legal basis for the exchange with tax authorities of the information directly acquired by the NCAs within their national supervisory activity.

## **Next Steps**

ESMA has considered the issue of multiple WHT reclaim schemes also in its technical advice to the EU Commission on a potential review of the Market Abuse Regulation, which is published in parallel to this Report.

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<sup>1</sup> Resolution of the European Parliament 2018/2900 (RSP) of 29 November 2018 ([http://www.europarl.europa.eu/doceo/document/TA-8-2018-0475\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0475_EN.pdf)).

<sup>2</sup> ESMA Report on the Preliminary findings on multiple withholding tax reclaim schemes [https://www.esma.europa.eu/sites/default/files/library/esma70-154-1193\\_preliminary\\_findings\\_on\\_multiple\\_withholding\\_tax\\_reclaim\\_schemes.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-154-1193_preliminary_findings_on_multiple_withholding_tax_reclaim_schemes.pdf)

## 2 Background

1. At the end of October 2018, different media in the EU published the result of an investigation carried out by a consortium of investigative journalists that reported the existence in some EU Member States of alleged large-scale tax fraud schemes known as “Cum/Ex”. Those schemes, aimed at pursuing multiple WHT reclaims, have been known in Germany for some years, including relevant media coverage and a parliamentary investigation committee publishing its results on this topic in June 2017. However, such schemes also exist in other Member States.
2. To give further background, when German companies pay dividends, they withhold about a quarter to cover any taxes the shareholder might later owe. Subsequently, shareholders get certificates showing how much money was deducted, and the amount can be credited against their tax bill or, if they owe no additional taxes, refunded.
3. According to the journalistic investigation reported by the media in October 2018, the scheme involved short selling of shares around the date of dividend pay-outs and exploited an interpretation of the German tax code that apparently allowed multiple persons to claim ownership of the same shares and the corresponding right to receive a refund of the same amount as the taxes withheld from dividend payments. Two or more investors may have received certificates corresponding to taxes that were in fact withheld only once.
4. This practice, that is reported to have cost German taxpayers more than €55 billion according to EU media, is currently being investigated by German prosecutors, who are assessing the involvement of accountants, tax advisors, investment firms and law firms and is being tried in Court. At the same time, tax authorities in Germany are trying to recover the tax refunds that they consider as illegal.
5. Further to the media investigations, on 21 October 2018 ESMA received a request from MEP Sven Giegold asking ESMA to initiate on its own initiative an inquiry into the subject.
6. On 14 January 2019 ESMA received a letter from MEP Markus Winkler on behalf of the President of the European Parliament, transmitting the Resolution 2018/2900 (RSP) of 29 November 2018, whereby the European Parliament requested ESMA to conduct an inquiry into those schemes<sup>3</sup> in order to:
  - assess potential threats to the integrity of financial markets and to national budgets;
  - establish the nature and magnitude of actors in these schemes;
  - assess whether there were breaches of either national or Union law;
  - assess the actions taken by financial supervisors in Member States;
  - make appropriate recommendations for reform and for action to the competent authorities concerned.

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<sup>3</sup> The EP Resolution 2018/2900 (RSP) of 29 November 2018 requests ESMA “to conduct an inquiry into dividend arbitrage trading schemes such as Cum/Ex and Cum/Cum”. Those trading schemes and their relevance to pursue multiple withholding tax reclaims is described in the next sections of this report.

7. On 29 March 2019 ESMA received another letter from MEPs Giegold, Berès, Karas and Klinz emphasising that the EP Resolution called upon “*EBA and ESMA to conduct an inquiry on the basis of Article 22(4) of the respective ESAs Regulation*”, highlighting ESMA’s insufficient response to the EP Resolution.
8. In the MEPs’ view, threats to the integrity of a market “*go beyond questions of legality. Market integrity encompasses the fair and safe operation of markets, without misleading information or inside trades, so that investors can have confidence and be sufficiently protected. Integrity means more generally the adherence to strong moral and ethical principles and values*”.
9. MEPs conclude stating that if “*no further action is taken, the European Parliament will of course reserve its right to initiate another resolution on the matter*”.
10. On 2 July 2019 ESMA published a Report on preliminary findings on multiple withholding tax reclaim schemes (ESMA70-154-1193)<sup>4</sup> that was also submitted to the European Parliament.
11. The preliminary Report analysed multiple WHT reclaim schemes in order to assess the magnitude of the practices, how widespread they actually are across the EU, to what extent the schemes are connected with short selling and market abuse violations and any potential solution to prevent and detect them. At the same time, ESMA analysed the structure of such schemes in light of the requirements of the MiFID II framework and evidence from market data.
12. On the basis of the European Parliament Resolution 2018/2900 (RSP) of 29 November 2018, together with the approval of the Report on preliminary findings, the ESMA Board of Supervisors approved the launch of a formal inquiry under Article 22(4) of the ESMA Regulation.
13. ESMA’s formal inquiry on Cum/Ex, Cum/Cum and WHT reclaim schemes started with requests of information addressed to the NCAs, in the form of a questionnaire divided into four sections: i) general questions on the presence of WHT reclaim schemes in the relevant jurisdiction; ii) questions focusing on the specific experiences of each NCA on WHT reclaim schemes; iii) questions relating to compliance with MiFID II requirements, and iv) questions to identify potential solutions to counter WHT reclaim schemes.
14. All NCAs have responded to the ESMA questionnaire, with the exception of the Croatian Financial Services Supervisory Authority (HANFA), that requested information to the Croatian tax authority but reported not to have received a response at the time of publication of this report.
15. In addition to the assessment of the responses received to the questionnaire, ESMA has carried out an additional internal analysis to provide an EU-wide picture of the structure and distribution of WHT schemes from the securities regulators’ perspective, with a view of identifying gaps, best practices and potential solutions to prevent, detect and prosecute WHT reclaim schemes.

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<sup>4</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-154\\_1193\\_preliminary\\_findings.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-154_1193_preliminary_findings.pdf)



16. In order to achieve this in the most accurate manner, ESMA has described the general functioning of dividend arbitrages, Cum/Ex, Cum/Cum and WHT reclaim schemes, including an analysis on how WHT on dividends works across Member States. ESMA has also reported the experience of NCAs regarding their market surveillance activities as well as investigations or specific assignments carried out at national level to assess the presence and the impact of WHT schemes in their respective Member State.
17. ESMA has also analysed the phenomenon from the perspective of regulated firms' obligations under the MiFID II legal framework, collected information on the status of criminal investigations across the EU and carried out an enhanced legal analysis on the possibility and limits for NCAs to exchange information with tax authorities.
18. Subsequently, ESMA has expanded its analysis on securities lending data to cover all Member States, especially assessing the presence of significant variations in the securities lending markets across the dates where some Member States passed legislative changes to halt multiple WHT reclaim schemes.
19. Additionally, ESMA has also assessed the potential use of CSDs data as a source of information to detect WHT schemes, highlighting the potential and the limits of those data, and discussed the issue with the relevant market experts through its Post Trading Standing Committee.
20. Lastly, ESMA has considered whether any potential solution to contribute to the detection and prosecution of WHT reclaim schemes could be achieved through an amendment to MAR, and included the outcome of such analysis in a dedicated section in its technical advice to the EU Commission on a potential review of MAR<sup>5</sup>.

### **3 Dividend arbitrage, Cum/Cum, Cum/Ex and WHT reclaim schemes**

21. When issuers distribute dividends, the tax law of some Member States provides for 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.
22. 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.
23. Dividend arbitrage strategies therefore require the establishment of an equity position cum-dividend in a tax-favourable jurisdiction. That equity position needs to be later 'unwound', i.e. returned to their original less favourable jurisdiction.
24. 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

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<sup>5</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf)

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.

25. Dividend strategies may also be carried out through derivatives, e.g. through the purchase of put options and an equivalent amount of underlying stock before the dividend date by a party benefitting from a reduced tax on dividends, with the goal of unwinding the position by exercising the put option after receiving the dividend payment.
26. ESMA’s inquiry has highlighted that the so called Cum/Cum trades are usually considered a form of dividend arbitrage and are profitable wherever the tax regime on dividends of the buyer/borrower is more favourable than the one of the seller/lender.
27. NCAs agree on the fact that the main purpose of the Cum/Cum strategies is to reduce the amount of tax burden on the payment of such dividends, generating a tax benefit which is generally shared between the participants to the arrangement. From a pure taxation perspective, Cum/Cum trades can also be divided in internal “Cum/Cum” and external “Cum/Cum”, where the difference essentially lies in the legal residence of the person receiving the shares.
28. 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. In some cases, potentially no persons have actually received any dividend, and both the trading and WHT reclaims are wholly based on fictitious shares.
29. Those schemes, often referred to as Cum/Ex schemes, also consist in equity deals where a share transfer (either by sale or lending) occurs right before the date of the dividend payment, this time with the intention of creating the paperwork (incl. tax certificates) which allows persons to obtain tax refunds on dividend tax which was not paid, and which is likely to represent a fraud under national legislation. Those schemes can by nature be perpetrated only to the detriment of those countries where the tax law provides for WHT on the dividends distributed, in some cases associated with the issuance of tax certificates that can be later on claimed back in the form of a reimbursement from the tax authorities.
30. Both Cum/Ex and Cum/Cum schemes foresee the transfer of shares around the dividend payment date. However, as emphasised by NCAs in their response to the ESMA’s inquiry, in the Cum/Ex case the trade is carried out before the dividend is paid out but settlement takes place only after the distribution date whereas, in the case of Cum/Cum arrangements, transactions are carried out and settled prior to the dividend pay-out.
31. In those cases involving the issuance of tax certificates, the main problem is that they often do not contain any reference that allows to directly and automatically link a given tax certificate to the underlying distribution of a dividend, and therefore multiple issuance of certificates and multiple refunds for a given distribution of a dividend are possible.
32. Some of the multiple WHT reclaim schemes exposed by the journalistic investigation reported by the media in October 2018 were indeed connected to the double issuance of tax certificates and double refunds of taxes to two parties, with only one of them having actually received the dividend distributed and paid the relevant WHT.

33. In Germany, for example, until 2011 the WHT was withheld and remitted to tax authorities by the issuer, whereas the tax certificate was issued by the shareholder's custodian bank. That system allowed for two or more tax certificates to be issued and thus enabled two or more investors to claim WHT refunds even though only one of them actually received the dividend distributed and paid the WHT. From 2012 on, since the custodian banks are responsible both for collecting the WHT and issuing the tax certificates, it should no longer be possible to issue multiple tax certificates for a single WHT paid, while it is currently under assessment whether other schemes have been used after 2011, e.g. through the issuance of American Depository Receipts (ADRs) or through so called "reverse market claims". In one of the schemes analysed, a domestic investment fund purchased domestic shares from a non-domestic counterpart over the dividend date in quantities/volumes that were multiple of the size of the assets they managed. In order to achieve this, the fund purchased shares with longer settlement period and simultaneously sold them with a shorter settlement period. This process generated the necessary liquidity to invest beyond the fund assets under management.
34. A simplified description of a typology of multiple WHT tax scheme that took place in Germany is contained in Annex I.
35. Despite the attempts to produce an accurate taxonomy of WHT reclaim schemes, typologies vary and may involve various forms of Cum/Ex or Cum/Cum trading or a combination of the two. It should be noted that, in the absence of a unique definition, semantically Cum/Cum and Cum/Ex merely refer to the dates of the trade which establishes a position (always cum-dividend) and the dates of eventual delivery, settlement, unwind or financing of that trade (either cum-dividend or ex-dividend). All the other elements of the scheme, including the instrument used (shares, stock loans, options/forwards/ futures, ETFs, ADRs, etc.), the number of participants, the existence of shares, the jurisdiction of participants and the legitimacy of requests to tax refunds may vary in each case.
36. 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.
37. Even though an accurate taxonomy cannot be produced, ESMA's inquiry has shown that NCAs tend to associate Cum/Cum trades to dividend arbitrage and Cum/Ex to WHT reclaim schemes.
38. In particular, some NCAs identified a pattern to be followed in order to carry out a Cum/Ex scheme and obtain undue refunds of WHT taxes.
39. For instance, whilst NCAs have highlighted that Cum/Cum trades may be carried out with the involvement of two trading parties only, BaFin considers that Cum/Ex trades can occur only when at least a third party takes part in the artificial structure (see Annex I).
40. It can be argued that unlike other basic dividend strategies, Cum/Ex schemes may represent a fraud, as they involve false representation to tax authorities in order to receive a reimbursement for a WHT which was not paid in the first place.
41. However, it is not in the remit of ESMA to qualify these behaviours as illegal or fraudulent. In this respect ESMA has to rely on national legislation and national Courts' decisions.

42. Differently, one could argue that dividend arbitrage, in its most basic form, i.e. trading actual shares in such a way as to place these shares in a favourable tax jurisdiction to then obtain a tax refund on tax which was actually paid, may well not be a fraud. The wider and different discussion as to whether it is tax evasion or tax avoidance and whether this is an illegal practice under the tax law of each Member State will not be the subject of ESMA's assessment.
43. Furthermore, it is not the subject of this report whether these types of practices, even if legally acceptable, are acceptable or not from a moral or ethical point of view.

## **4 WHT on dividends: a cross Member States perspective**

44. Within its inquiry, ESMA collected information on the legal framework of each Member State to provide an overview on the risk of WHT reclaim schemes being perpetrated and the presence of any legislative changes passed in some Member States in order to halt them.
45. Additionally, ESMA collected information on criminal and administrative investigations carried out by other authorities at national level.

### **4.1 Risk of WHT reclaim schemes being perpetrated**

46. ESMA's inquiry showed that the great majority of the Member States' tax system provides for a WHT to be deducted at the source from the dividends distributed.
47. The features of the WHT regimes vary across the EU, with rates between 7% and 30% and scope that can be either limited to some subjects (e.g. residents) or extended to any person receiving dividends. Only a few of Member States do not provide for a WHT system (Hungary, Latvia, Liechtenstein and Norway).
48. According to the responses of NCAs to the ESMA's inquiry, the procedures and the documentation required to obtain the reimbursement of a WHT on dividends vary across the EU.
49. For instance, in some Member States (e.g. Cyprus, Germany and Spain), upon distribution of dividends, a certificate is provided to the shareholder, in some cases by the issuer, in others by the bank acting as a depository or custodian. Wherever the holder of the tax certificate is entitled to a WHT refund, they can later on claim it back presenting such certificate to the tax authority.
50. In other Member States, there is no tax certificate issued to non-resident dividend receivers, and any request for reimbursement has to be presented to the tax authority together with the supporting documents showing the entitlement to the refund. In that sense, such procedure differs from the use of a tax certificate in that the first is subject to scrutiny, whilst the latter often gives automatic right to receive a WHT reimbursement.
51. For instance, in the case of France, the refund procedure for a non-resident taxpayer can be started either by the taxpayer itself or by the issuer, and the refund by the tax authority occurs only upon verification of the payment of the WHT. In other Member States like Greece, the refund of paid WHT to non-residents is subject to additional requirements, with

a procedure providing for the requests to be submitted to a depositary that registers the requests in a dematerialised securities system, which records information on the special tax treatment (reduced rate or zero tax rate).

52. Table 1 summarises the gathered information on WHT, the procedures for its reimbursement and the NCAs' views on the risk of their Member State being the target of WHT schemes.

53. Despite the fact that most national tax systems do provide for a WHT on dividends distributed, only a few NCAs consider their own Member State to be a potential target of WHT schemes. Most NCAs consider the features of their national WHT regime and the safeguards in place to be adequate to limit the risk of WHT reclaim schemes being carried out.

54. In most Member States, such features and safeguards are designed around a clear identification of the shareholder entitled to receive the dividends. This can be achieved in different ways, such as:

- the indication of the shareholder's details on the tax certificate (Cyprus);
- issuers' reporting to the tax authority of all persons receiving dividends (Estonia);
- a system where the majority of shares is registered (Greece).

55. In other Member States, features to limit the occurrence of WHT schemes include:

- the use of a WHT agent who makes the deduction for the issuer and has access to the identity of the beneficial owner and transaction information (Italy);
- a system where the tax authority is the direct recipient of both the WHT and tax refund claims, so that reconciliation is possible (Slovenia);
- the limitation of the WHT's applicability to residents only (Cyprus).

**Table 1** – Functioning of WHT regimes: procedures for its reimbursement and risk for Member States to be the target of WHT schemes

Member State	Presence of WHT on dividends	Issuance of certificates	WHT schemes targeting that Member State reported	Feature of the system limiting the risk of WHT schemes
AT	Yes	No	Yes	N/A
BE	Yes	No	Yes	N/A
BG	Yes	No	No	- Specificities of refund procedures
HR	N/A	N/A	N/A	N/A
CY	Yes	Yes	No	- WHT applicable only to residents

Member State	Presence of WHT on dividends	Issuance of certificates	WHT schemes targeting that Member State reported	Feature of the system limiting the risk of WHT schemes
				- Indication of the shareholder entitled of the refund on the dividend certificate
<b>CZ</b>	Yes	No	No	- System of securities evidence dematerialised enabling clear evidence of securities ownership
<b>DK</b>	Yes	No	Yes	- Monitoring of scheme risk - Close cooperation between authorities - Extensive documentation required for the refund
<b>EE</b>	Yes	N/A	No	- Issuers' reporting to the tax authority of persons receiving dividends
<b>FI</b>	Yes	No	No	N/A
<b>FR</b>	Yes	No	No	- Extensive documentation for the refund required
<b>DE</b>	Yes	Yes	Yes	- Presence of a paying agent
<b>EL</b>	Yes	No	No	- Registration of majority of shares
<b>HU</b>	Only for natural persons	Yes	No	- Tax audits
<b>IE</b>	Yes	Yes	No	- Specificities of refund procedures
<b>IT</b>	Yes	No	No	- Presence of WHT Agents
<b>LV</b>	No	No	N/A	N/A
<b>LT</b>	Yes	No	No evidence of being a target, but existence of schemes cannot be categorically ruled out	N/A
<b>LU</b>	Yes	Yes	No evidence of being a target, but existence of schemes cannot be categorically ruled out	N/A
<b>MT</b>	Yes	Yes	No	- WHT applicability limited to persons whose total annual

Member State	Presence of WHT on dividends	Issuance of certificates	WHT schemes targeting that Member State reported	Feature of the system limiting the risk of WHT schemes
				revenue does not exceed a certain amount -Report of persons receiving dividends by the issuer to the tax authority
NL	Yes	No	No	N/A
PL	Yes	No	No evidence of being a target, but existence of schemes cannot be ruled out categorically	N/A
PT	Yes	No	N/A	N/A
RO	No	No	No	N/A
SK	Yes	Yes	No evidence of being a target, but existence of schemes cannot be categorically ruled out	- Submission to the tax administrator of a notification which clearly identifies the recipients of the dividends
SI	Yes	Yes	No	- Tax Authority being the direct recipient of WHT, so cross checks are possible - Extensive documentation for the refund required
ES	Yes	Yes	No evidence of being a target, but existence of schemes can not be categorically ruled out	- Presence of brokers/depositories
SE	Yes	No	No evidence of being a target, but existence of schemes cannot be ruled out categorically	-Tax on dividend is withheld directly by the person who distributes the dividend (CSD/portfolio manager) which reports and pay taxes
UK	No	No	No	N/A
IS	Yes	No	Assessment not made	- Specificities of refund procedures
LI	No	N/A	No	N/A
NO	Yes	Yes	N/A	N/A

## 4.2 Legislative changes passed in some Member States to prevent WHT reclaim schemes

56. Only a few Member States have passed legislative changes in the past few years in order to prevent WHT reclaim schemes. Such Member States are Austria, Belgium, Finland, France and Germany.

57. Denmark has not passed legislative changes specifically targeting WHT reclaim schemes, but since 2015 substantially strengthened its administration of dividend refund, including a significant staff increase and enhanced procedures. Furthermore, the Danish Minister of Taxation has announced a legislative change, including a new dividend refund model built on relief at source and a pre-registration procedure.

58. The above legislative changes are summarised in Table 2.

**Table 2** – Legislative changes passed in some Member States to prevent WHT reclaim schemes.

Member State	Application Date	Legislative Reference	Changes Introduced
Austria	1 January 2015	Amendment to the Austrian tax law and the Austrian Code of Tax Procedure	<p>Enhancement and simplification of the detection by the tax authority of unlawful WHT reclaim requests through:</p> <ul style="list-style-type: none"> <li>(i) requiring all WHT reclaims from a tax-payer to be submitted in a single application after the calendar year's expiration;</li> <li>(ii) intensifying the obligation to provide evidence of entitlement from the person filing the WHT reclaim request.</li> </ul>
Belgium	22 January 2019	Law of 11 January 2019 on Combatting Tax Fraud and Tax Avoidance regarding WHT	<ul style="list-style-type: none"> <li>- Presumption regarding pensions funds: all the legal acts related to dividends received by a pension fund are to be considered "artificial" if the pension fund has not held the underlying shares in full ownership for an uninterrupted period of at least 60 days, therefore introducing a distinction between short-term and long-term participations held by pension funds;</li> <li>- WHT imposed on any dividends to be used only to offset Belgian income tax and only if</li> </ul>

			<p>the beneficiary of the dividend has held the shares in full ownership;</p> <p>- Entitlement of an income deriving from a Belgian WHT only in specific and exceptional circumstances.</p>
Finland	January 2021	HE 282/2018	Enhancement of the transparency on dividend beneficiary information through the implementation of a system (OECD Treaty Relief and Compliance Enhancement - TRACE- model) that reports to the Finnish Tax Administration information on the dividend beneficiary.
France	1 July 2019	Finance law no. 218-1317 of 28 December 2018 codified in art 119 bis A of the General Tax Code	Introduction, inter alia, as a requirement for repayment of the withholding tax, proof of evidence from the beneficiary that the underlying transaction's main purpose and effects are neither (i) to avoid the application of a withholding tax nor (ii) to obtain a tax benefit.
Germany	1 January 2012	§§ 43, 44, 44a, 45a, 50d, 52a Einkommensteuergesetz (German Income Tax Act)	Replacement of the so-called debtor principle by the paying agent principle. Before such legislative change, issuance of tax certificates and reception and transmission of WHT were carried out by different institutions. Since the change, the final domestic depository institution used by the investor must withhold the capital income tax and transmit it to the competent tax office. As a result, the same institution is responsible for both the withholding of the tax and the issuance of the tax certificates.

### 4.3 Criminal and administrative investigations carried out by other authorities at national level

59. Within its inquiry, ESMA has requested the NCAs to provide information about the presence of criminal or administrative investigations carried out by other authorities at national level in relation to WHT reclaim schemes.

60. As a general remark, the availability of that information to NCAs is limited by the circumstance that NCAs are not competent for tax frauds, which fall within the mandate of the Public Prosecutor and the tax authorities. In particular, tax authorities usually retain

competence in relation to administrative proceedings / civil actions, whilst the Public Prosecutor remains the leading authority over criminal matters, even though often in cooperation with the tax authorities.

61. As a general rule, NCAs do not play any direct role in respect of such investigations. An exception to this trend is represented by the possibility for some NCAs to flag to other authorities suspicious activity they detect. For example, FSMA reported to have transmitted preliminary investigations to the public prosecutor. Similarly, AMF and CNMV are obliged to inform the competent authorities if they become aware of a crime or a significant offense, even when outside the scope of their competence. On the same line, BaFin has to inform tax authorities if it becomes aware of facts that suggest a tax crime. AMF is allowed to transfer information to the judicial authority in the context of criminal or tax proceedings in derogation to professional secrecy rules.
62. NCAs do not usually have visibility over the proceedings started by the tax authorities, nor over the investigations carried out by the Public Prosecutor and are not usually informed of the status and/or the outcome of those investigations.
63. As part of its request for information, ESMA asked NCAs to liaise as appropriate with the national tax authorities, to be able to assess their involvement in investigations over WHT schemes and be able to map their spreading across the EU. Whilst in some cases NCAs were given such information, in other cases the secrecy rules and limitations to exchange of information prevented the tax authorities from sharing that information.
64. According to the limited information collected from NCAs, administrative investigations have been or are currently being carried out by tax authorities or Public Prosecutors in the following Member States: Germany, Luxembourg, Austria, Hungary, Denmark and Belgium. Investigations are also performed in the United Kingdom.
65. BaFin specified that the types of trades concerned by such investigations were related to Cum/Ex schemes. According to BaFin, the Federal Central Tax Office of Germany reported that various Public Prosecutors are also currently engaged in criminal investigations in relation to Cum/Ex trades. In relation to the Netherlands, the AFM clarified that tax authorities have signaled some transactions to the Public Prosecutor, whilst the AFM did not have information regarding any investigations directly performed by tax authorities.
66. Between 2012 and 2015, Denmark was supposedly subject to a WHT fraud for approximately 12.7 billion DKK. Administratively, the Danish Tax Agency has withdrawn its decisions to refund the withheld dividend tax, as the Agency has found the refunds were unjust. A number of the decisions have been appealed to the Danish Appeals Board, which in 111 separate cases has upheld the Tax Agency's decisions. Furthermore, the Danish Tax Agency has initiated civil lawsuits in the US, UK, Malaysia and Dubai against pensions plans, companies and persons who have been involved in supposedly unjust refunds for the total amount of approximately 12.7 billion DKK.
67. It is not possible to exclude that other investigations relating to such trades are currently carried out also in other Member States.
68. Similarly, information on Court decisions declaring the illegality of multiple WHT reclaim scheme in the Member States also appears to be limited.



69. The majority of NCAs that responded to ESMA's questionnaire were not aware of any final decision by a public authority declaring the illegality of such schemes, whilst at the same time they could not exclude that any such decision may have been taken in their respective Member State.
70. The Danish FSA, BaFin and UK FCA have responded to ESMA's questionnaire by providing information regarding WHT schemes in respect to Denmark, Germany and proceedings in the UK.
71. In Denmark, a District Court ascertained a violation of the Danish criminal code in a case of reimbursement of a WHT. The scheme in question involved hundreds of fictitious share trades close to the dividend payment date by a network of experienced banking professionals located in several countries. The District Court sanctioned a German Bank with a fine of 110 million DKK (about 15 million EUR) for having contributed to the unlawful reimbursement of a WHT on dividends in the amount of 1.1 billion DKK (about 150 million EUR), from the Danish State Treasury.
72. In Germany, in the last years the Fiscal Courts delivered several decisions involving WHT schemes<sup>6</sup>.
73. To understand the content of such decisions, it is worth recalling that pursuant to German law the person owning the shares at the time of the decision on the dividend distribution (i.e. the day of the general shareholders' meeting of the public limited company) is the one entitled to the dividend and the one to which the payment of the relevant capital income tax on the dividend to the tax authorities is to be attributed. For tax purposes, in exceptional cases and under certain conditions (e.g. where another person exercises effective control over the shares and bears the economic consequences normally associated to ownership, despite not being the legal owner), shares can be considered as attributed to a so-called beneficial owner instead of the legal owner, which is therefore the one to be treated as the shareholder from a tax perspective.
74. The referenced decisions of the German Fiscal Courts deal in particular with questions on the beneficial ownership of shares, which is relevant for the attribution of dividends and the entitlement to dividend tax refunds.
75. For example, the Cologne Fiscal Court, in the ruling of 19 July 2019 (case no. 2 K 2672/17) stated that parallel multiple ownership of the same shares for tax purposes and therefore multiple refunds of capital income tax that has only been withheld and paid to the tax authorities once is logically impossible. Even in cases in which shares were bought over-the-counter, the beneficial ownership of the shares cannot pass to the purchaser before the share transfer takes place. Before that moment, the purchaser can not prevent the legal owner from exercising full effective control over the shares. Therefore, the Court ruled that the attribution of the withheld capital income tax and the right to a refund could not have passed on to the purchaser.
76. Similarly, the Kassel Fiscal Court, in the ruling of 10 February 2016 (case no. 4 K 1684/14) stated that in an over-the-counter share purchase, the buyer does not become the owner

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<sup>6</sup> These cases are: Cologne Fiscal Court, 19 July 2019 (case no.: 2 K 2672/17), Kassel Fiscal Court, 10 February 2016 (case no.: 4 K 1684/14), Kassel Fiscal Court, 10 March 2017 (case no.: 4 K 977/14), Düsseldorf Fiscal Court, 12 December 2016 (case no.: 6 K 1544/11 K,AO), Federal Fiscal Court decision of 16 April 2014 (case no.: I R 2/12).

of the shares for tax purposes at the time when the contract was concluded. The Court argued that the purchaser could only become the owner for tax purposes when the possession of the shares is transferred, which in the case in question took place after the date of the dividend distribution. In the Kassel Fiscal Court, ruling of 10 March 2017 (case no. 4 K 977/14), the above-mentioned opinion regarding over the counter Cum/Ex transactions was confirmed also for the case of stock exchange transactions that are settled via a central counterparty.

77. On 18 March 2020, a criminal division of the regional Court in Bonn sentenced two UK nationals to suspended sentences for tax evasion (case no. 62 KLS 1/19). They had been involved in the planning and execution of Cum/Ex transactions as part of their work for a large credit institution and then for an asset management group. In addition, a credit institution based in Germany was fined because of its participation in some of the above Cum/Ex transactions.
78. Finally, although multiple WHT schemes have not been tried before UK Criminal Courts, the UK FCA reported that some proceedings are ongoing in different jurisdictions which are also subject to UK litigation in the High Court.

## **5 The experience of the NCAs**

### **5.1 NCAs' surveillance activity and investigation**

79. NCAs oversee the markets to ensure detection and enforcement of violations of the financial markets' laws and requirements within their remit.
80. With reference to the market abuse regime, most NCAs have in place automated surveillance systems capable of analysing the market data and the transaction reporting data to produce alerts whenever a transaction potentially constitutes market abuse.
81. Such alerts are followed up and cross-referred to the other available information, such as the reporting of net short positions and major shareholdings, order data, suspicious transactions and order reports from intermediaries, financial institutions or firms operating a trading venue, and all the publicly available information contained in press releases, media activity and rumours.
82. As a result, combining all of the above information obtained both nationally and through international cooperation, NCAs can detect transactions or behaviours that are deemed to be suspicious and start an investigation using the broad set of powers attributed to them by MAR.
83. The powers given to NCAs by MAR include requests for information to be addressed to any person, on-site inspections, seizure of documents and relevant material, requests for existing telephone recordings to regulated firms, acquisition of data traffic records from telecommunication operators, requests for suspension of trading and demands for the cessation of a behaviour or practice.
84. On the same line, whenever an NCA suspects that a transaction has been carried out in violation of the SSR, they can resort to the relevant powers to investigate and prosecute any infringements thereof.

85. ESMA's inquiry has shown that no NCAs carry out systematic market surveillance to detect multiple WHT reclaim schemes, as their market surveillance systems and procedures are focussed on the detection of market abuse. NCAs believe that any activity aimed to detect multiple WHT reclaim schemes does not fall within their remit but within the competence of tax authorities.
86. UK FCA, being given an extended remit by national law, can use transaction reporting data and the other regulatory information they receive not only to detect potential market abuse but also for purposes of detection of financial crimes in a broader sense.
87. Despite considering WHT schemes outside of their remit, some NCAs reported having encountered those schemes during their broader oversight activity on financial markets or have been requested by other national authorities to carry out specific assessments and data analysis on historical data, to identify transactions and entities connected to tax related trades.
88. The experience of the EU 28 plus EEA NCAs in relation to market surveillance and potential investigations on WHT cases has been summarised in Table 3, while specificities that emerged within the ESMA's inquiry are reported thereafter.

**Table 3** - EU 28 plus EEA NCAs' experience in relation to market surveillance and potential investigations on WHT cases

	<b>NCA</b>	<b>Regular market surveillance for WHT schemes</b>	<b>Ad hoc analysis / investigations</b>
<b>AT</b>	<b>FMA</b>	No	<b>See below</b>
<b>BE</b>	<b>FSMA</b>	No	<b>See below</b>
<b>BG</b>	<b>FSC</b>	No	No
<b>HR</b>	<b>HANFA</b>	<b>N/A</b>	<b>N/A</b>
<b>CY</b>	<b>CySEC</b>	No	No
<b>CZ</b>	<b>CNB</b>	No	No
<b>DK</b>	<b>Danish FSA</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. If unlawful activities within the Danish FSA's remit take place, such activities are investigated. This could include e.g. transactions breaching MAR or SSR.
<b>EE</b>	<b>Estonian FSA</b>	No	No
<b>FI</b>	<b>Fin FSA</b>	No	No
<b>FR</b>	<b>AMF</b>	No	<b>See below</b>
<b>DE</b>	<b>BAFIN</b>	No	<b>See below</b>
<b>EL</b>	<b>HCMC</b>	No	No
<b>HU</b>	<b>MNB</b>	No	No

	<b>NCA</b>	<b>Regular market surveillance for WHT schemes</b>	<b>Ad hoc analysis / investigations</b>
<b>IE</b>	<b>CBol</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. If individuals or companies regulated and supervised by the Central Bank of Ireland were involved in unlawful activities, this would be relevant to the assessment by the Central Bank of Ireland of i) the fitness and probity of the individuals and their suitability to work in the Irish financial services industry and ii) the adequacy of the governance, systems and controls of any regulated entity.
<b>IT</b>	<b>CONSOB</b>	No	<b>See below</b>
<b>LV</b>	<b>FKTK</b>	No	No
<b>LT</b>	<b>Lietuvos Bankas</b>	No	No
<b>LU</b>	<b>CSSF</b>	No	The authority did not carry out ad hoc analysis nor investigations involving potential WHT schemes. However, the CSSF has cooperated with other NCAs and with public prosecutors in several cases within the context of its prudential supervision of credit institutions.
<b>MT</b>	<b>MFSA</b>	No	No
<b>NL</b>	<b>AFM</b>	No	The authority did not carry out ad hoc analysis nor investigations involving potential WHT schemes. Certain tax related trades could be considered to be possible wash trades, within the remit of the AFM.
<b>PL</b>	<b>KNF</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. However, according to the Polish law if the KNF comes into possession of information regarding potential tax frauds, it is obliged to inform the tax authority.
<b>PT</b>	<b>CMVM</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. The CMVM is subject to a duty of secrecy under the Portuguese legal framework and information obtained under its competences cannot be shared with other authorities. Exception to this is market abuse cases (where the information can be shared with the Public Prosecutor) and any other offence that comes to the CMVM's attention but is not within its competence (where the information can be shared with the Public Prosecutor and the relevant authorities at national level).
<b>RO</b>	<b>ASF</b>	No	No
<b>SK</b>	<b>NBS</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. However, NBS closely cooperates with other national law enforcement authorities whenever an entity supervised by NBS is involved in a multiple WHT reclaim scheme.
<b>SI</b>	<b>ATPV</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. If ATPV came across information regarding potential tax frauds, it would notify the tax authority.

	<b>NCA</b>	<b>Regular market surveillance for WHT schemes</b>	<b>Ad hoc analysis / investigations</b>
<b>ES</b>	<b>CNMV</b>	No	No
<b>SE</b>	<b>FI</b>	No	The authority did not carry out ad hoc analysis or investigations involving potential WHT schemes. WHT reclaim schemes would most likely fall under the remit of the tax authorities but may fall within the supervisory remit of Finansinspektionen insofar as transactions were carried out in breach of e.g. MAR or SSR.
<b>UK</b>	<b>UK FCA</b>	No	<b>See below</b>
<b>IS</b>	<b>FME</b>	No	No
<b>LI</b>	<b>FMA</b>	No	No
<b>NO</b>	<b>Finanstilsynet</b>	No	No

### **UK FCA (UK)**

89. The UK FCA does not undertake regular surveillance for WHT schemes, but within its extended remit granted by national legislation<sup>7</sup> and as part of its investigatory and supervisory processes, they undertook a MiFID I era surveillance programme in 2016/2017 on Transaction Reporting data. Although in the UK there is no WHT to be deducted from dividends paid by UK companies and therefore there is no possibility to commit a WHT fraud to the detriment of the UK tax system, such broad review was aimed to identify UK FCA authorised firms which may have been engaging in potential misconduct in relation to EU listed securities.
90. To that purpose, the UK FCA developed an alert, which has been calibrated to look for significant or increased volumes around ex-dividend dates in ‘liquid’<sup>8</sup> EU equities, whenever trading volumes were in excess of a given percentage of the total free float trade in issue, in the three days prior to the ex-dividend date.
91. On identification of any instances of significant trading, the UK FCA followed-up directly with some firms via correspondence and visits, to understand the nature of the trading and identify the underlying clients. The majority of them were institutional clients, with legitimate custodians who could provide verification of share ownership and consequential entitlement to the net dividend.
92. Overall, the UK FCA experience highlighted a cross border dimension of WHT reclaim schemes, that have involved Countries such as Denmark, Belgium, Norway, USA, UK, Gibraltar, Dubai, Cayman Islands, British Virgin Islands, Malaysia and Germany, while the target of the schemes were Denmark, Belgium, Norway and Germany, even though any market with a WHT regime may be a potential target.

<sup>7</sup> The UK FCA legal basis is Part XI of the Financial Services and Markets Act 2000 (FSMA), in particular section 168 (4) and (5) of FSMA.

<sup>8</sup> NCAs’ experience has shown that liquid shares are the typical target of multiple WHT tax reclaim schemes.

93. As to the actors, the UK FCA experience showed the involvement of custodians, brokers, tax reclaim agents, exchanges, banks, US 401(k) pension plans, corporate entities from Malaysia, Cayman and British Virgin Islands, Dubai and Gibraltar.
94. The UK FCA has undertaken some further MiFID II surveillance, with a focus on volume spikes around Cum/Ex dates, but work is ongoing in this area and the alert can be run periodically or on an ad hoc basis.
95. In order to deliver a broader supervisory message, the FCA published Market Watch 52<sup>9</sup>.
96. The UK FCA have assisted other law enforcement agencies across the EU and they highlighted that the home state NCA for the relevant security will continue to be in the best position (by virtue of receiving all transaction reports about that security via TREM) to detect potential WHT fraud impacting securities listed in their jurisdiction.

### **BaFin (DE)**

97. Whilst not performing systematic market surveillance to detect WHT schemes, BaFin reported that whenever their regular market surveillance activity makes them aware of any law infringements, insofar as in line with the law and the authority's confidentiality restrictions, they bring that to the attention of the relevant authorities.
98. BaFin considers not to have a legal basis to carry out investigations in relation to multiple WHT schemes on an ongoing basis.
99. However, BaFin may assess findings from criminal and administrative proceedings and possible effects of tax back payments, penalties or fines on the solvency and liquidity of financial institutions under its supervision. BaFin is also in contact with tax and law enforcement authorities in order to provide support whenever allowed by the law.
100. Additionally, in the light of a growing public and political interest, BaFin performed specific reviews of transaction data in relation to WHT schemes under both MiFID I and MiFID II.
101. BaFin analysed the transaction data of a selected group of securities included in the German DAX index for the years 2017 and 2018. Those securities were ranked by unusual high turnover before and after the dividend payment date, dividend yield and liquidity. Suspicious trades were identified by unusual high net amounts traded before and after the dividend payment date, as WHT schemes such as Cum/Ex trades require significant trading volumes to be profitable.
102. In relation to Cum/Cum trades, BaFin analysed a sample of transaction reporting data applying the same criteria used for Cum/Ex trades, with an additional focus on the nature of the market participants involved, as Cum/Cum trades necessarily require the presence of a German and a foreign tax resident.
103. BaFin reported that the analysis carried out showed the limits of the use of transaction reporting data to detect trades potentially hiding multiple WHT reclaim schemes.

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<sup>9</sup> <https://www.fca.org.uk/publication/newsletters/marketwatch-52.pdf>

104. Additionally, further to recent media reports about US SEC investigations on potential WHT schemes involving pre-release ADRs, BaFin carried out an analysis on German companies, contacting several national and international market participants and conducting a review of historical transaction reporting data concerning ADRs. However, BaFin reported that also in that case the analysis carried out showed that transaction reporting data have shown their limits in the detection of potentially suspicious WHT schemes involving pre-release ADRs.
105. BaFin and Bundesbank conducted in 2016 a survey among various institutions under BaFin's supervision, asking them whether they had encountered Cum/Ex type trades between 2000 and 2012 or had any knowledge about those schemes. The results of the survey were compared with the information gathered by other relevant authorities in Germany and, in case of any inconsistencies, BaFin requested follow up information and additional documents. Whilst most institutions were not involved in any kind of Cum/Ex type activities, a few institutions admitted a role in those schemes or BaFin detected them as alleged perpetrators. BaFin considered Cum/Ex type schemes as a violation of Section 370 of the German Fiscal Code which is applicable to tax fraudulent activities.
106. Similarly, BaFin and Bundesbank conducted in 2017 another survey on potential Cum/Cum type trades among institutions under BaFin's supervision. Whilst that survey was partly similar to the first one on Cum/Ex, the latter focused on other types of actors, since Cum/Cum type trades necessarily requires a German and a foreign tax resident. Additionally, the Cum/Cum survey took into account in which capacity institutions were involved, e.g. whether they acted as investment firms, brokers or depository banks. Once again, the results of the survey were compared with the information gathered by other relevant authorities in Germany, and any contradictions and inconsistencies were individually followed up. Unlike Cum/Ex type schemes, the Cum/Cum trades are not considered tax evasion in Germany. However, in accordance with Section 42 of the German Fiscal Code, tax authorities deem it inappropriate and an abuse of tax planning schemes.
107. Lastly, BaFin carried out an additional survey in December 2018 to examine ADR-based WHT schemes. In particular, BaFin addressed banks, securities trading banks and asset management companies to assess whether those firms were involved in the emission or trading of ADRs or pre-released ADRs. BaFin also contacted a number of depository banks and brokers that handled pre-released ADRs to gather more information concerning that matter. BaFin is currently assessing again the implication of Cum/Cum schemes. In this assessment banks, investment firms and asset managers are included.
108. BaFin is reviewing the outcome of the analysis carried out or the upcoming results of the ongoing analysis in relation to Cum/Ex and Cum/Cum type trades as well as the trades associated with ADRs and takes them into account especially when scrutinising fit and proper requirements.

#### **AMF (FR)**

109. The AMF highlighted that the French tax framework makes it impossible to perpetrate any multiple WHT reclaim scheme whose detection, investigation and sanction would in any case fall within the remit of the French tax authorities.

110. Market surveillance carried out by the AMF focusses primarily on detection of market abuse and shortcomings of the short selling regime. Within that primary focus, such surveillance may lead to analyse trades that could be linked to tax-related transactions.
111. Whenever the analysed information raises a suspicion of tax fraud, the AMF will transfer the relevant information to the tax authorities.
112. In this respect, by derogation to its professional secrecy rules, the AMF can transfer information to the judicial authority in the context of criminal or tax proceedings<sup>10</sup>. Furthermore, the AMF has to provide the tax administration with any document or information collected in the performance of its supervisory competence, at the request of the tax administration. Finally, whenever the AMF becomes aware of a crime or a significant offense (*délit*), it shall communicate that information to the public prosecutor.
113. In its market surveillance activity, the AMF monitors daily short selling volumes, Euroclear delivery settlement fails and securities lending volumes with a follow-up on a range of key indicators such as daily cost of borrowing score and other indicators of stress conditions in the securities lending market.
114. Additionally, in presence of issuer-specific news, transactions around the dividend distribution date may be subject to particular scrutiny by the AMF, e.g. carrying out in-depth analysis on the market data mentioned above, as well as EMIR reporting data on derivatives market.
115. Usually, around ex-dividend date the trading volume in securities lending market increases significantly. Whilst this may be an indicator of Cum/Ex and Cum/Cum type schemes being carried out, such peaks in securities lending are often connected to voting rights operations at the General Assembly (since dividends are often paid soon after the General Assembly) making it difficult to identify the share of tax related transactions.
116. The AMF recalled that the reporting under the EU Regulation on Securities Financing Transactions (SFTR), applicable from April 2020, may become a valuable source of information for NCAs as it can provide granular transaction-level data on securities lending.
117. In 2009, the AMF shared with the French tax administration (Direction Générale des Finances Publiques) those results of market surveillance that highlighted the presence of tax related transactions, e.g. tax optimisation schemes through complex financial structures and arrangements.
118. The AMF has not undertaken any review of historic transaction reporting data with a focus to identify WHT related schemes but has offered technical support and shared relevant information with the tax authorities, with regular exchanges that took place since May 2017.
119. In particular, in February 2019, the AMF provided the tax authorities with its technical expertise, Euroclear data and information regarding trading desks that potentially carried out Cum/Cum schemes.

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<sup>10</sup> Article L. 631-1, III of the Monetary and Financial Code

### **FMA (AT)**

120. The FMA does not carry out market surveillance for WHT reclaim schemes or undertake any review of historical market and transaction reporting data to that purpose.
121. However, the FMA did come across multiple WHT reclaim schemes whilst undertaking investigations for alleged infringements of the market abuse regime as well as of the duties to notify major shareholdings. The investigated transactions were carried out in countries such as India, Germany, Spain, Netherlands, United Kingdom, Luxembourg, Ireland and Belgium, whilst the WHT reclaims were filed with the Austrian tax authority.
122. In particular, in 2012 the FMA carried out an investigation for irregularities in the compulsory notification of major shareholdings and potential market abuse, where the FMA corresponded with the investigated entities, requesting proof and details of the undertaken transactions. That information was cross checked with the issuers, whose response questioned that trades actually took place.
123. In the attempt to verify the settlement, the FMA corresponded with several Austrian entities and activated international cooperation with several EU NCAs. As a result, the FMA informed the tax authority and shared the relevant information with the public prosecutor.
124. Due to the time limits for the FMA to conclude their investigations on market abuse, the FMA could not verify the facts and had to close the investigation.
125. In another instance, the Austrian tax authority requested from the FMA information on facts related to transactions potentially related to multiple WHT reclaim schemes. However, due to the limitations for the FMA to cooperate with tax authorities under the Austrian law, the request for assistance was denied.

### **FSMA (BE)**

126. In 2015, further to Belgian media reports about a potential WHT fraud with regard to dividends paid by Belgian listed companies, the FSMA opened a preliminary investigation for potential infringement of the transaction reporting rules under MiFID, the transparency rules on major shareholdings and the market abuse prohibitions.
127. Upon analysis of MiFID transaction reporting data, the FSMA found abnormally high trading volumes carried out over the counter by UK investment firms in the days before the dividend distribution dates. A request for assistance to the UK FCA was sent in order to obtain the identity of the persons involved in those suspicious OTC transactions.
128. As there was no ground for the FSMA to sanction for market abuse nor the other infringements above illustrated, the investigation was closed and the FSMA transmitted the information gathered to the public prosecutor for potential tax frauds.

### **CONSOB (IT)**

129. In the current legal framework CONSOB's remit does not include any specific form of market surveillance to detect multiple WHT reclaim schemes. Nonetheless, in some instances CONSOB provided assistance to other national authorities on the basis of specific requests and strictly observing confidentiality restrictions.

130. CONSOB has never carried out investigations with the specific purpose of identifying multiple WHT reclaim schemes. However, Cum/Cum trades and dividend arbitrage schemes were in the past identified while investigating a suspected market abuse case.
131. In particular, CONSOB identified several schemes involving Italian shares and related derivatives (traded on regulated markets or OTC), with the involvement of investment firms, banks, asset managers and investment funds from different EU countries (UK, Netherlands and France). An easily identifiable characteristic of the schemes was the large volume of shares or derivatives traded and the proximity to the dividend distribution dates.
132. Eventually, the investigation did not result in the opening of administrative or criminal proceedings within the market abuse framework.

## 5.2 Evidence gathered regarding the trading strategies

133. ESMA's inquiry has shown that multiple WHT reclaim schemes have been reported and are being investigated in the following Member States: Netherlands, Germany, Luxembourg, Austria, Hungary, Belgium and the United Kingdom. In Denmark, WHT schemes were reported where no persons actually received any dividend, and both the trading and WHT reclaims were wholly based on fictitious shares.
134. Other NCAs have declared that it cannot be excluded that their Member State has been the target of those schemes (see Table 1).
135. As it is clear that a WHT reclaim scheme can by nature be perpetrated only to the detriment of those countries where the tax law provides for WHT on the dividends distributed, it can be concluded that any such country can potentially be a target.
136. According to the analysis carried out by ESMA on the basis of the experience of those NCAs that have encountered multiple WHT reclaim schemes during their supervisory activity, even though every scheme is different from the other, some similarities have been identified.
137. In particular, the NCAs' past experience has shown that:
- A. the scheme can be perpetrated through a wide range of trading typologies deployed by different entities;
  - B. the typology of entities involved is broad, both from the EU and third Countries, and include issuers, limited liability partnerships, investment firms, banks, asset managers and investment funds, custodians, brokers, tax reclaim agents and US 401(k) pension plans;
  - C. the scheme is characterised by a high level of sophistication and complexity to give the impression that a series of genuine claims have taken place;
  - D. it involves both supervised entities and non-supervised entities across jurisdictions and involves orchestrated and pre-ordained trading strategies, centrally coordinated by a limited number of sophisticated persons who have the full picture of the scheme.

- E. the trading behaviour is fragmented, often split across multiple clients, firms and jurisdictions;
- F. it shows circular trading patterns undertaken for the purpose of eventually netting positions (potentially unfolding and unwinding even months later) and hedging risks in the meantime. In that sense, at a glance the scheme resembles wash trades carried out to increase the volumes and attract investors leveraging on the fictitious increased liquidity (while no actual transfer of ownership takes place), but a deeper analysis shows a substantial difference in their nature and that none of the elements found in wash trades are actually present in the multiple WHT reclaim schemes;
- G. it involves high volumes of trading in percentage of the outstanding shares in relation to large capitalisation EU index stocks. The only way to render the scheme profitable is to engage in unlawful multiple claims of tax refunds, making it more profitable if carried out in large scale;
- H. the scheme involves transactions carried out on venue but also OTC. OTC volumes may not be clearly obvious to other market participants. It should be highlighted that even though the OTC volumes connected to the scheme are usually large, in some cases they may appear lower than they actually are, due to the fact that some of the entities involved may not have to report all/any trades to financial regulators;
- I. given that the scheme is highly profitable per se, it is designed not to interfere with the price formation and not to commit market abuse. Therefore, often it is not detected by the NCAs' market surveillance systems, expressly conceived to detect insider dealing and market manipulation. However, in some instances, the large volumes of transactions generated by the scheme may indirectly and inadvertently have a price impact;
- J. given its high level of complexity and that it does not seem to involve violations of the market abuse regime, it is unlikely to be reported to the NCAs as part of the Suspicious Transactions and Orders Report obligations under the Market Abuse Regulation;
- K. for the scheme to be successfully completed, short selling transactions are in many cases conducted. In theory, the scheme does not necessarily involve violations of the short selling obligations. However, given the high volumes of trades, short sales are often not covered as requested by the SSR, while in some instances violations of the obligations to report net short positions to NCAs have been identified, allegedly in order not to raise the authorities' attention to the scheme;
- L. when investigated, it emerged that there is no or limited evidence of existence of share ownership (firms and individuals purporting to own shares do not appear on central securities depositories registers or custodians on the record date), nor is there a link with the actual receipt of the net dividend distributed;

M. there seems to be a mix of legitimate and potentially illegitimate conduct at firm level;

N. in the execution of the scheme, entities often make use of legal advice or opinions to provide an appearance of legitimacy.

138. In general, the schemes appear to be aimed exclusively to obtain multiple repayments of a single WHT paid upon distribution of dividends (i.e. likely involving a tax fraud) often using a short selling transaction.

### 5.3 Scope of NCA's remit over regulated entities

139. In almost all Member States, NCAs consider that tax authorities have competence over detection and investigation on WHT reclaim schemes. NCAs consider that those schemes do not fall within their remit, unless they involve violations of rules pertaining to financial markets laws, e.g. the short selling or market abuse regimes.

140. In this respect, NCAs mentioned that a legislative change would be necessary to bring those schemes under their supervisory remit, which currently only covers financial regulation matters (transaction reporting under MiFID II, transparency on major shareholdings, market abuse, short selling, etc).

141. An analysis of the specific MiFID II/MiFIR implications of WHT reclaim schemes is contained in Section 6.

142. In very few Member States, WHT reclaim schemes may fall within the scope of action of NCAs, but only under specific conditions and to a certain extent.

143. For example, if entities supervised by the Central Bank of Ireland were involved in an unlawful activity (such as WHT scheme), there would be a competence of the Central Bank of Ireland for the assessment of (i) the fitness and suitability of the person involved to work in the Irish financial services industry; and (ii) the adequacy of the governance, systems and controls of any regulated entity. Similarly, breaches by entities under BaFin's supervision would be considered by BaFin in the supervisory assessment of their risk management and internal control systems as well as senior managers' and supervisory board members' reliability.

144. In Slovenia, in case the ATVP would find out suspicious practices during its supervisory activity, it could adopt a decision in accordance with its legal remit, and where violations are ascertained, it could start an enforcement action and impose administrative sanctions or measures. Furthermore, it would notify the tax authority about any suspicious transaction that could potentially represent a breach of the tax law.

145. Only in the United Kingdom the UK FCA seems to enjoy a broader remit in relation to WHT schemes, covering the systems and controls that firms have in place, the firms' integrity, the conduct of their employees and their internal controls to prevent the risk of financial crimes in a broader sense. As a consequence, firms are required to have proper oversight and controls to minimise the extent to which it is possible for their business to be used for a purpose connected with financial crime. That includes having a good understanding of risks that are relevant to their business and the controls required to

mitigate those risks including sufficiently considering the purpose and nature of transactions.

## 6 Multiple WHT reclaim schemes and MiFID II framework

146. The focus of this section is the possible involvement of some financial institutions in disputable practices. The technical way to put in place these practices and the degree of involvement of supervised entities may differ (both supervised and non-supervised entities are involved with varying roles). Depending on national tax law some of these practices, or the technical way in which they are executed, may or may not constitute an illegal practice.
147. Even if national tax law allows these practices, or many other tax optimisation schemes, they may be considered ethically or morally disputable.
148. It should therefore be considered whether MiFID II requirements that are applicable to investment firms and credit institutions allow and require NCAs to pursue intermediaries involved in Cum/Ex, Cum/Cum and other WHT reclaim practices, and under which conditions and within which boundaries.
149. This analysis does not cover the AML regulatory framework nor other pieces of legislation which could be relevant (such as the CRD/CRR framework) and for which ESMA has no or limited competence. Furthermore, this analysis is obviously without prejudice to any other national legislation and the competence of other administrative authorities (such as tax authorities) and Courts to pursue behaviours which are illegal under their respective national legislation.
150. The main MiFID II requirements which can be relevant are the following:
- A. the obligation for NCAs to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the “*integrity of the market*” (Article 24 of MiFIR<sup>11</sup> - “*Obligation to uphold integrity of markets*”, included in Annex 2 to this report).
  - B. the obligation for NCAs to ensure that investment firms and their management bodies comply, inter alia, with requirements on the suitability of management bodies, which require members of these bodies to “*act with integrity*” (Article 9 of MiFID II - included in Annex 2 to this report - which, inter alia, cross refer to Article 91(8) of CRD IV, applicable to credit institutions and investment firms).
151. The perimeter of these requirements identifies the scope of supervisory powers and duties by NCAs under MiFID II as well as the possibility and the right to take enforcement actions under MiFID II vis-a-vis the investment firm and/or its directors for the violation of these obligations.
152. In relation to Article 24 of MiFIR (see paragraph 150A above), the terms “*integrity of the market*” is commonly understood as a reference to the sound and orderly functioning

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<sup>11</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

of the financial market (threatened by breaches of financial legislation such as market manipulation and insider dealing). This is in line with NCAs' comments mentioned in section 5.3. In this respect, *in abstracto*, the practices described above *per se* do not necessarily threaten the integrity of the market.

153. Information collected among NCAs confirm that compliance with the obligation to promote the integrity of the market in accordance with Article 24 of MiFIR is generally assessed against financial regulation. This does not exclude that, as also observed by some NCAs, the effects of breaches of non-financial regulation may become relevant in assessing the prudential situation of a financial institution (such as solvency and liquidity) and its governance and internal control environment.
154. Furthermore, and depending on the concrete circumstances of each case, one may find that large-scale, long running tax schemes which are fraudulent, and which are perpetrated through the financial markets, can create disorderly markets or can result in abusive market practices, and can therefore have harmful consequences to the integrity of the market. At this stage, based on information available to ESMA, no direct connection between these tax practices and disorderly markets or abusive market practices has however emerged.
155. In relation to the second set of requirements (see paragraph 150B above), Article 9(3) of MiFID II emphasises the role of management bodies which are directly responsible for a firm's governance arrangements to ensure the effective and prudent management of the firm, in a manner that promotes the integrity of the market and the interest of clients. In addition, MiFID II (by cross-reference to the CRD framework) provides that each member of a firm's management body shall act with "*honesty, integrity and independence of mind*" to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor decision-making. Therefore, members of a firm's management body may also be in breach of MiFID II/CRD IV on the basis that they do not act with integrity when (consciously or negligently) allowing the firm to facilitate an illegal practice, even beyond the violation of MiFID II or other financial legislation.
156. The assessment of whether these requirements<sup>12</sup> have been violated depends on a number of factual circumstances including the degree of involvement of individual supervised entities and some or all of their directors, or how widespread a practice in a given financial institution was. Under MiFID II, the possible sanctions would be administrative ones, such as fines, and disciplinary sanctions (up to the dismissal of members of management bodies). Any criminal sanctions incurred for a violation of MiFID II is dependent on national legislation. Based on information available to ESMA, BaFin and the UK FCA had opened investigations relating to the suitability of members of a firm's management body on the basis that they did not act with integrity regarding the practice of WHT reclaim schemes. However, the relevant investigations were still ongoing at the time of reporting, also considering that in some jurisdictions the illegal qualification of WHT reclaim schemes is still subject to judicial assessment.

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<sup>12</sup> The EBA's view in relation to management body requirements for credit institutions should also be taken into account.

## 7 Dividend-related trades: evidence from market data

157. To try to identify multiple WHT reclaim schemes from basic forms of dividend arbitrage<sup>13</sup>, ESMA looked into the following market data:

- cash trading volumes
- securities lending volumes

158. In theory, both multiple WHT reclaim schemes and basic forms of dividend arbitrage may be structured using either regular cash transactions or securities lending transactions, reflecting national specificities, making it difficult to associate precisely EU-wide increases in traded volumes during the dividend season to one or another scheme. Moreover, increased trading activity around ex-dividend dates may simply reflect normal market reactions as investors digest company news, and can also be linked to voting rights operations at the General Assembly, since dividends are often paid soon after the General Assembly.

159. The analysis is based on commercial data providers. This reflects the current unavailability of EU-wide data. Cash transaction details are available to national authorities, but not at EU-wide level. Granular transaction-level data on securities lending became available only recently, with the reporting obligation of the EU Regulation on Securities Financing Transactions (SFTR) that became applicable for certain counterparties from July 2020<sup>14</sup>.

160. Data on net short positions in EU shares reported under the SSR were also investigated, using the aggregate value of net short positions on individual issuers and the number of position notifications received by NCAs. There were no noteworthy developments to highlight. However, it is unclear whether this is an accurate reflection of market positioning around dividend payments, or whether this is related to SSR-specific features, namely the reporting thresholds (net short positions are to be reported only above certain thresholds, so net short positions below the thresholds were not considered) and the market-making exemption (market making activities are exempt from the reporting requirements)<sup>15</sup>.

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<sup>13</sup> Dividend arbitrage has existed for many years in EU financial markets. For example, dividend arbitrage was first highlighted in ESMA's Report on Trends, Risks and Vulnerabilities (TRV), No.2, 2014, "The systemic relevance of securities financing markets in the EU", p.59, and then constantly monitored and underlined again in several subsequent ESMA TRV reports.

<sup>14</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012. SFTR envisages a phased-in approach as regards the counterparties subject to the reporting obligation until January 2021.

<sup>15</sup> Another possibility relies on the fact that the mandatory transparency of net short positions under the SSR imposes to market participants the reporting of their net short positions to the relevant competent authorities. If participants are using Cum/Cum or Cum/Ex with the intention of committing a fraud, it is likely that no reporting of short position will be made to the relevant competent authorities.

## 7.1 Cash trading

161. Recent empirical evidence on Cum/Ex trading in German stocks shows increasing transaction numbers shortly before ex-dividend dates (Buettner et al., 2020)<sup>16</sup>. Our analysis relies on a similar methodology, focusing on stock-trading volumes around ex-dividend dates<sup>17</sup>. The first sample includes all ordinary shares that compose the Euro Stoxx 50 index, the second sample covers seven EU Member States that are reportedly looking into multiple WHT reclaim schemes trading: Austria, Belgium, Denmark, France, the Netherlands, Germany and the United Kingdom<sup>18</sup>. Both analyses are done for the years 2018 and 2019.
162. For the data analysis, two alternative measures of cash trading volumes are considered: turnover and trade count<sup>19</sup>. Turnover is the amount of shares expressed in the currency in which the instrument is traded. Trade count refers to the number of shares sold in a day.
163. Daily volumes up to eight trading days before and after ex-dividend dates are considered (i.e. 17 observations per share). For the majority of securities, the ex-dividend date falls in April or May, although there are national specificities and some companies pay dividends more than once a year (e.g. on a quarterly basis). In line with Buettner et al. (2020), cash trading from Cum/Ex trades should be reflected in large increases on the last two days before the ex-dividend date.
164. The Euro Stoxx 50 index includes ordinary shares from eight Euro Area countries<sup>20</sup>. In 2018, for the 70 ex-dividend dates across the 50 shares comprised in the index, turnover peaks on the day before the respective ex-dividend dates (chart 1). In 2019 for the 75 ex-dividend dates, the same effect on the average turnover is observed three days before the ex-dividend date (chart 2). However, this is mainly driven by a few stocks, as median turnover and trade count (not displayed) show smaller peaks both in 2018 and 2019.

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<sup>16</sup> T. Buettner, C Holzmann, F Kreidl and H Scholz, 2020, "[Withholding-Tax Non-Compliance: The Case of Cum-Ex Stock-Market Transactions](#)", International Tax and Public Finance.

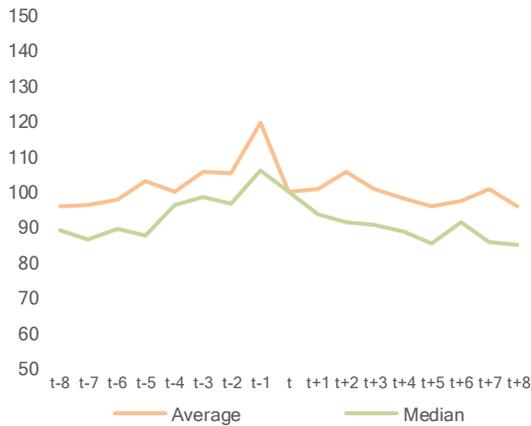
<sup>17</sup> The so-called "Ex-dividend" date is the day that determines to whom dividends are paid out. The implication is that trading volumes should be highest around Ex-dividend dates, rather than the actual dividend payment date.

<sup>18</sup> Calculations were also made for the biggest market index in Luxembourg (LUXX), however due to the small number of the underlying shares, the analysis was not possible.

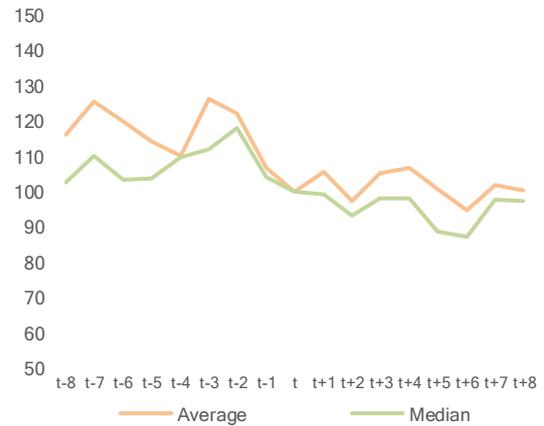
<sup>19</sup> Only volumes from the primary trading venues are included, since off-exchange transactions are not correctly covered by market data.

<sup>20</sup> In 2018 and 2019 these countries, ranked by number of instruments, are France, Germany, Netherlands, Spain, Italy, Belgium, Ireland, and Finland.

**Charts 1 and 2:** Euro Stoxx 50 turnover per share in 2018 and 2019 (t = ex-dividend dates)



Note: Change in average and median turnover indices for Euro Stoxx 50 Shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

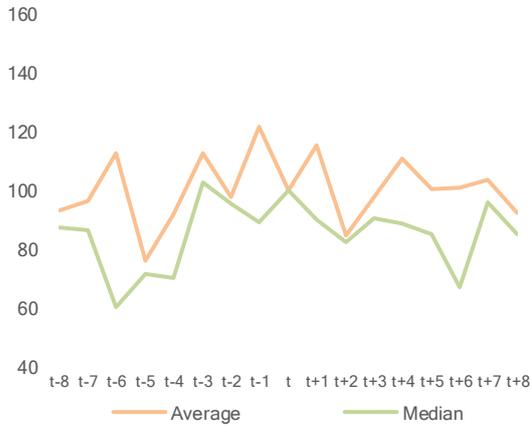


Note: Change in average and median turnover indices for Euro Stoxx 50 Shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

165. The heterogeneity of the Euro Stoxx 50 index composition may to some extent influence those patterns. Indeed, national specificities in Cum/Ex or other multiple WHT reclaim schemes (or the absence thereof) may possibly lead to volume changes for some shares offsetting volumes for other shares. To take account of this, trading volumes are subsequently analysed for the main blue-chip indices in Austria (ATX 20), Belgium (BEL 20), Denmark (OMX 20), France (CAC 40), the Netherlands (AEX 25), Germany (DAX 30) and the United Kingdom (FTSE 100) in 2018 and 2019.

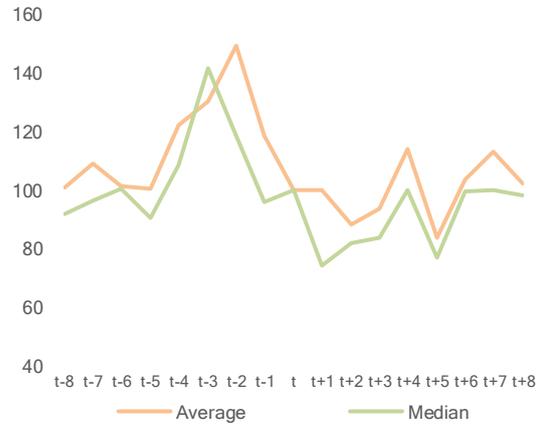
**Charts 3 to 16:** Index turnover changes per ex-dividend date for 2018 and 2019 (t = ex-dividend dates)

**Austria – ATX 20: 2018**



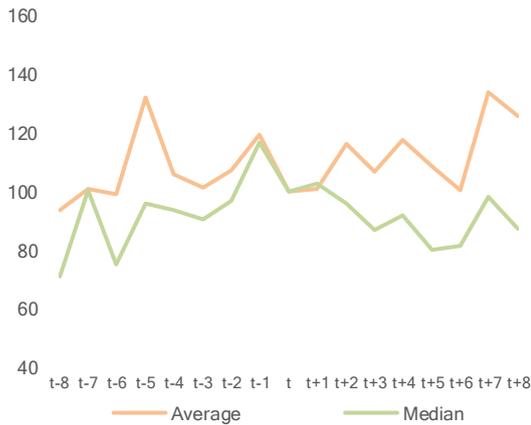
Note: Change in average and median turnover indices for ATX 20 shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

**Austria – ATX 20: 2019**



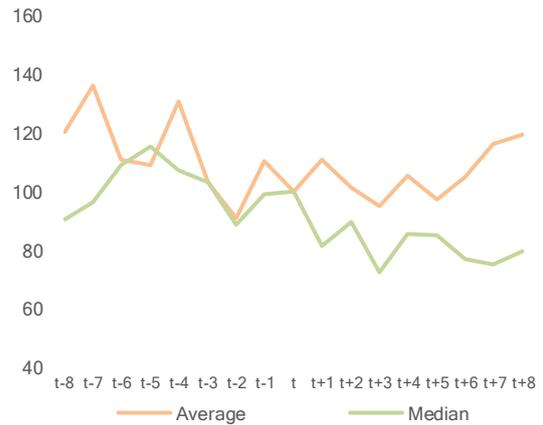
Note: Change in average and median turnover indices for ATX 20 shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

**Belgium – BEL 20: 2018**



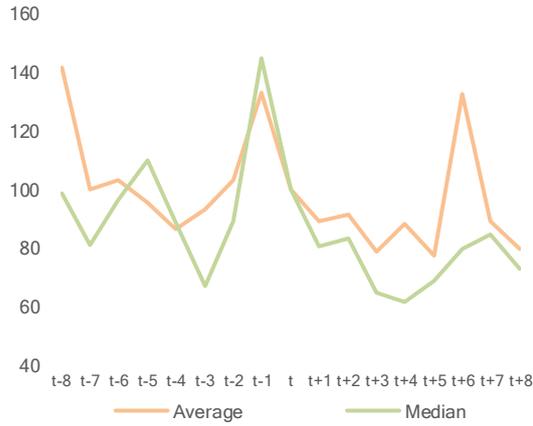
Note: Change in average and median turnover indices for BEL 20 shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

**Belgium – BEL 20: 2019**



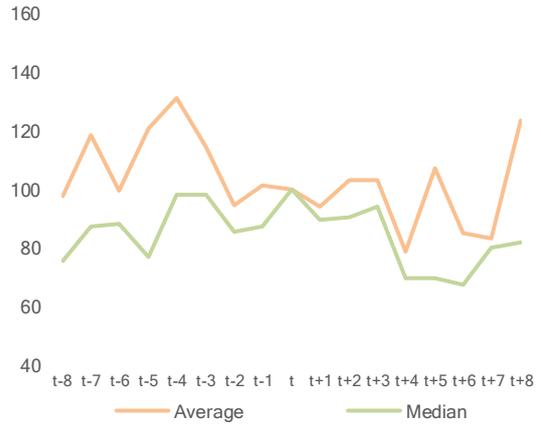
Note: Change in average and median turnover indices for BEL 20 shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### Denmark - OMX 20: 2018



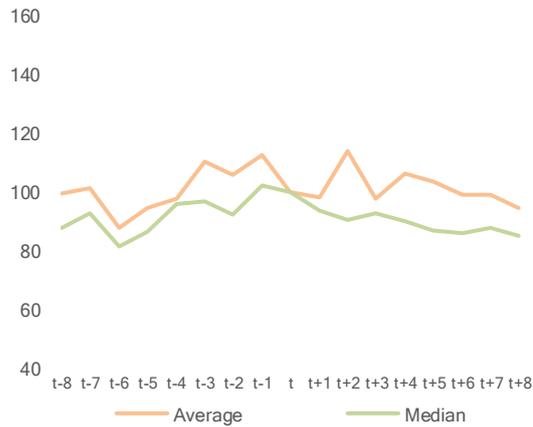
Note: Change in average and median turnover indices for OMX 20 shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### Denmark - OMX 20: 2019



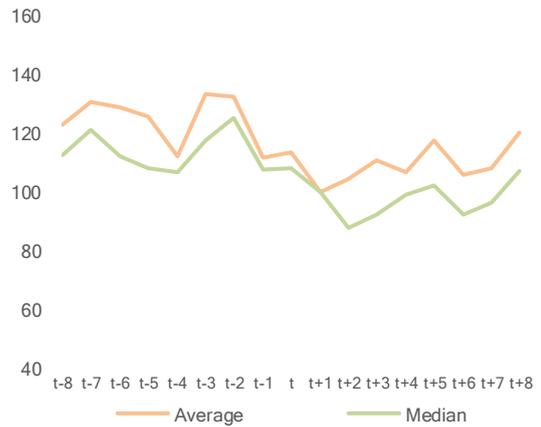
Note: Change in average and median turnover indices for OMX 20 shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### France - CAC 40: 2018



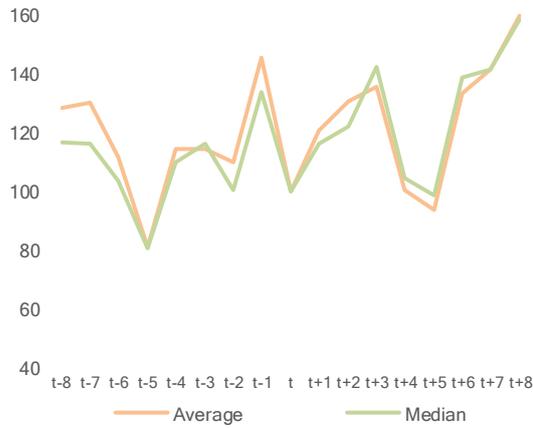
Note: Change in average and median turnover indices for CAC40 shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### France - CAC 40: 2019



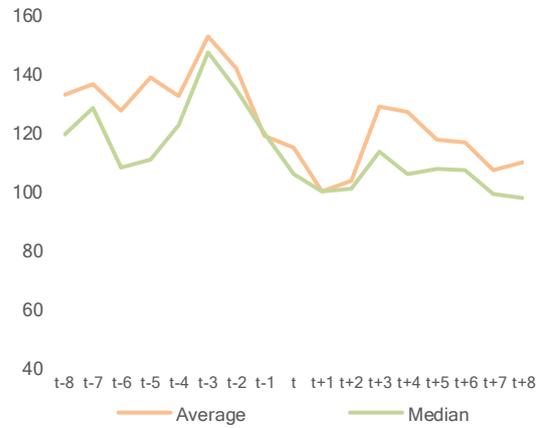
Note: Change in average and median turnover indices for CAC40 shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### Germany - DAX 30 2018



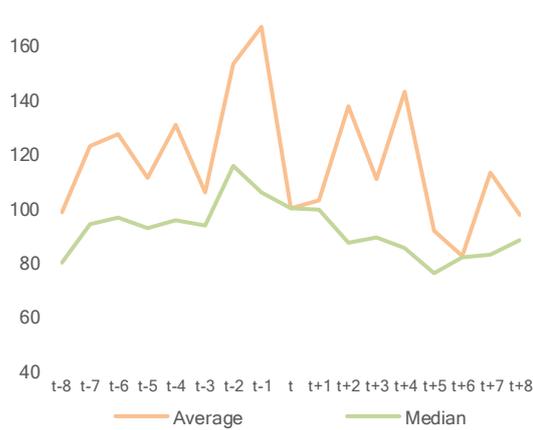
Note: Change in average and median turnover indices for DAX 30 shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### Germany - DAX 30 2019



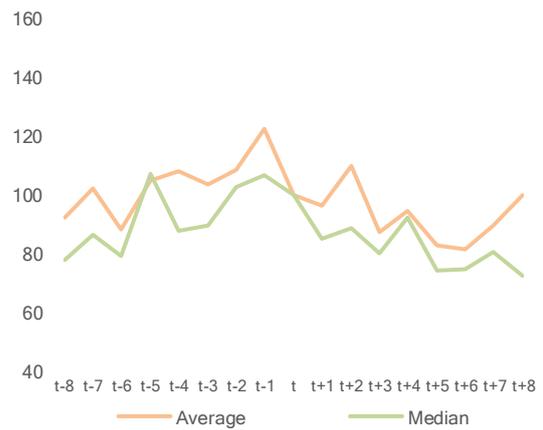
Note: Change in average and median turnover indices for DAX 30 shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### Netherlands – AEX 25 2018



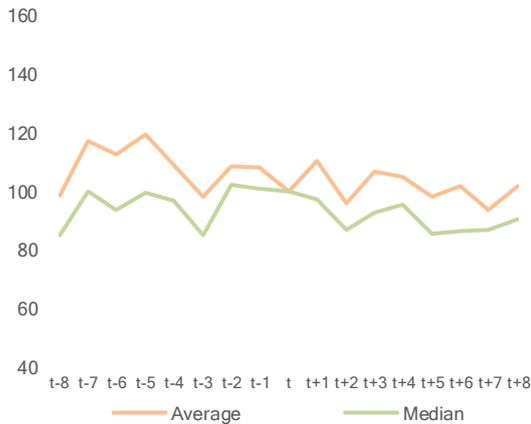
Note: Change in average and median turnover indices for AEX 25 shares in 2018, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

### Netherlands – AEX 25 2019



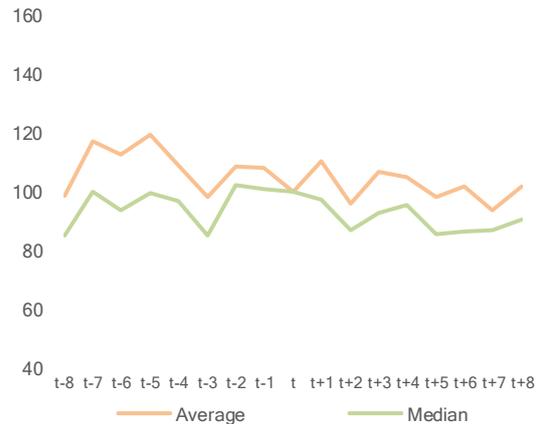
Note: Change in average and median turnover indices for AEX 25 shares in 2019, with t=ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

United Kingdom – FTSE 100 2018



Note: Change in average and median turnover indices for FTSE 100 shares in 2018, with  $t$ =ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

United Kingdom – FTSE 100 2019



Note: Change in average and median turnover indices for FTSE 100 shares in 2019, with  $t$ =ex-dividend dates = 100.  
Sources: Refinitiv Eikon, ESMA calculations.

166. The evidence from national indices is mixed. Some indices in certain years seem to show an increase in the cash trading turnover around ex-dividend dates, e.g. the AEX in 2018, the ATX in 2019 or the OMX 20 in 2018, when others do not show any clear trading activity pattern. In addition, for some indices, the small number of underlying shares can have a detrimental impact on the analysis. However, countries that do not provide for a WHT system, such as the UK, appear less affected by cash trading spikes around dividend dates.

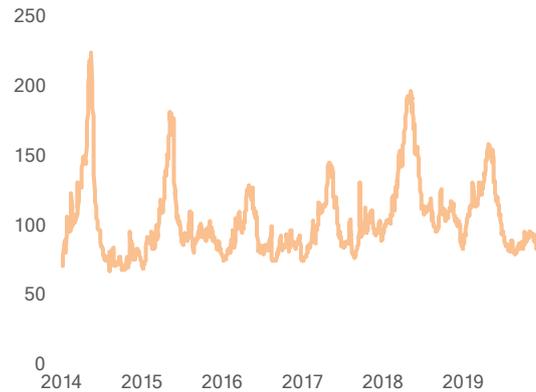
167. Moreover, higher-than-usual trading volumes around ex-dividend dates may simply reflect normal market reaction as investors digest company news. Drawing a conclusive link between the increased turnover and multiple WHT reclaim schemes is thus not possible on the basis of the analysed data.

## 7.2 Securities lending

168. The master agreement that governs the vast majority of securities lending transactions in Europe is known as the Global Master Securities Lending Agreement (GMSLA). Under the 2010 GMSLA, the borrower must pay back to the lender a sum of money equivalent to any income that the lender would be entitled to receive had it not loaned the relevant securities to the borrower.

169. Chart 17 shows the daily aggregate value of EU shares that are on loan, which has averaged at EUR 102bn since 2014 (the fact that the data analysis begins in 2014 is only linked to the availability of granular commercial data). The seasonal patterns reflect dividend arbitrage taking place each year in April and May. The difference between the lending peak during the main dividend season and the average for the rest of the year has fluctuated between EUR 66bn and 223bn since 2014.

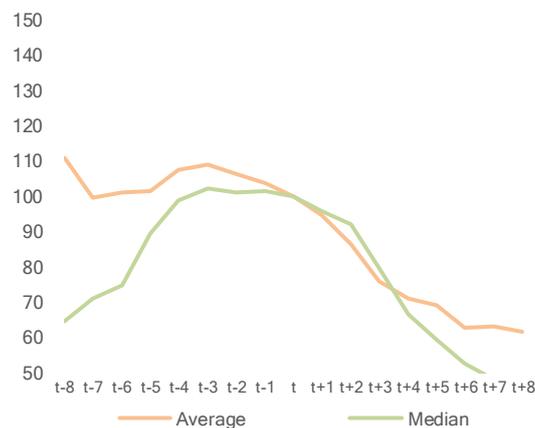
**Chart 17: EU shares on loan (EUR billion)**



Note: Total value of EEA shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

170. Most equity loans are done on an open basis (i.e. no fixed maturity), which gives lenders the right to recall the security at any point in time. However, cyclical peaks suggest that investors tend to favour term lending for dividend arbitrage, possibly to reduce uncertainty<sup>21</sup>. Following the same methodology as for cash trading, the value of EU securities on loan around the ex-dividend dates is calculated for Euro Stoxx 50 shares in 2019. Both the mean and the median display a pattern that suggests the potential relevance of multiple WHT reclaim schemes and dividend arbitrage trades around dividend payment dates (Chart 18).

**Chart 18: Average of Euro Stoxx 50 shares on loan around ex-dividend dates**



Note: Change in average and median value on loans indices for Euro Stoxx 50 Shares in 2019, with t=ex-dividend dates = 100.  
Sources: Quandl, ESMA calculations.

<sup>21</sup> In compensation for giving up this right, term transactions usually conjure higher borrowing fees. However, this does not apply in the case of Cum-Cum trades as it is the share of dividend manufactured back to the lender rather than the borrowing fee that is the object of the negotiation between the two counterparties.

171. Breakdown of securities lending data by country<sup>22</sup> shows different evolutions (charts 19 to 34). The size and frequency of the cyclical peaks appear to vary across countries, although the scale of dividend trading appears to have generally decreased since 2015. In several countries (Austria, Denmark, Germany), the peaks seem to have disappeared in recent years. For others, the amplitude of the pattern has greatly diminished in the last years (Finland, Sweden, Poland, Portugal). However, peaks in securities lending around dividend dates remain significant in other countries (Belgium, France, Italy, and UK)<sup>23</sup>.
172. The frequency of lending peaks also varies. For most jurisdictions, the largest increase in volume of loans occurs on an annual basis, typically around April or May. On the contrary, volumes appear to spike on a quarterly basis in a few countries (e.g. UK, Netherlands and Norway), presumably reflecting quarterly rather than annual dividend payments<sup>24</sup>.
173. For those Member States where a legislative change has been passed between 2014 and 2019, the date of the entry into force of the change is represented as a vertical bar<sup>25</sup>. Total value on loans does not change significantly in Austria, Belgium, but a decrease can be observed in France. However, these legislative changes are recent and need to be assessed in the long run, with an in-depth analysis to identify their impact. In Germany, where the legislative change has been adopted in January 2012, two important lending peaks can still be observed in 2014 and 2015, but the lending value has greatly diminished since.
174. On the basis of the data currently available at EU-level, and the difficulty to disentangle normal market reactions to company news from unusual or suspicious trading patterns, a definitive conclusion on the impact of the ex-dividend dates on the turnover of stocks is difficult to reach. Further investigation possibilities into market participants securities lending patterns will become possible once more data will be collected and more experience will be gained on the recently introduced EU Regulation on Securities Financing Transactions.

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<sup>22</sup> In this analysis, the country presented refers to the primary listing country of each share, and when this information is not available, its domicile country.

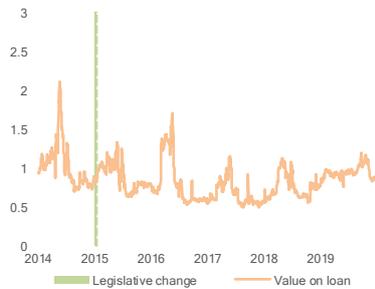
<sup>23</sup> However, higher-than-usual trading volumes around ex-dividend dates may simply reflect normal market reaction as investors digest company news, as aforementioned.

<sup>24</sup> Peaks in securities lending are also linked to operations aiming to increase voting rights at the General Assembly, since dividends are often paid soon after the General Assembly.

<sup>25</sup> The aforementioned countries are Austria (entry into force of the legislative change on 1/1/2015), Belgium (1/22/2019), France (7/1/2019). Germany has adopted a legislative change that entered into force in January 2012, while Finland's legislative change will entry into force in January 2021, therefore outside of the period considered in ESMA's analysis. See Table 2 for a detailed summary of the legislative changes passed in Member States to halt multiple withholding tax reclaim schemes.

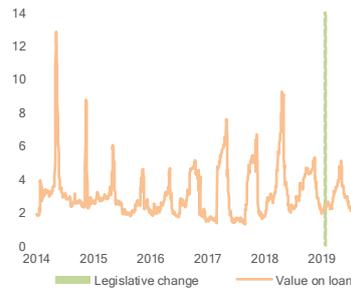
## Charts 19-34: Evolution of the total value of shares on loan in EEA Member States

Chart 19: Austria



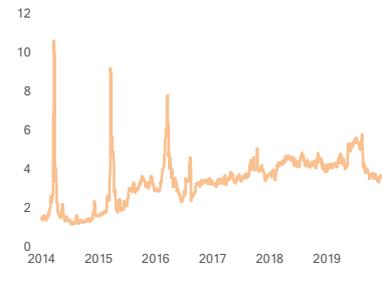
Note: Total value of AT shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 20: Belgium



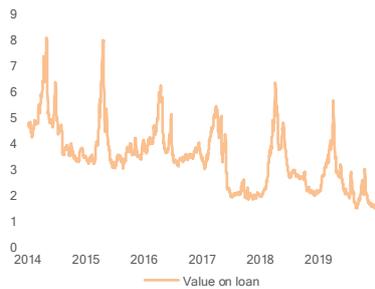
Note: Total value of BE shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 21: Denmark



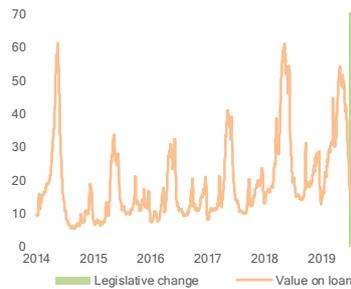
Note: Total value of DK shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 22: Finland



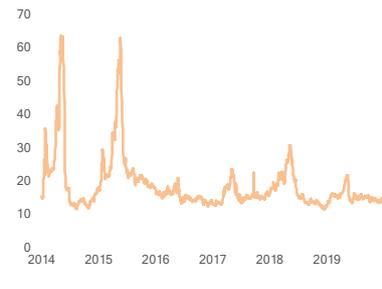
Note: Total value of FI shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 23: France



Note: Total value of FR shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 24: Germany



Note: Total value of DE shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 25: Greece



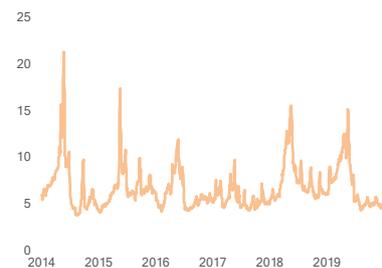
Note: Total value of GR shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 26: Ireland



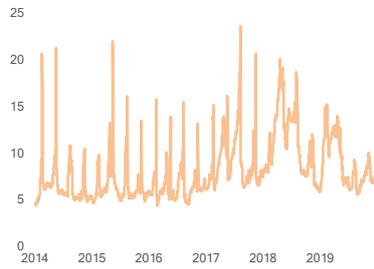
Note: Total value of IR shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 27: Italy



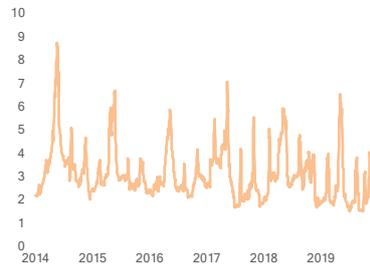
Note: Total value of IT shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 28: Netherlands



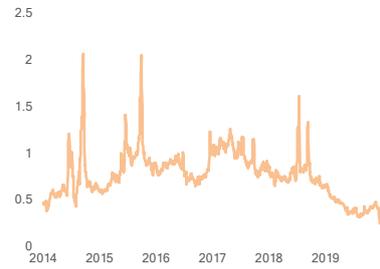
Note: Total value of NL shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 29: Norway



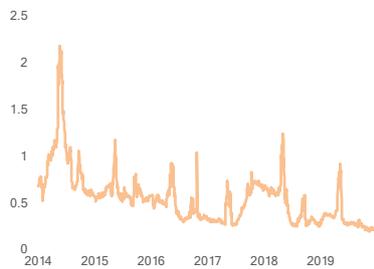
Note: Total value of NO shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 30: Poland



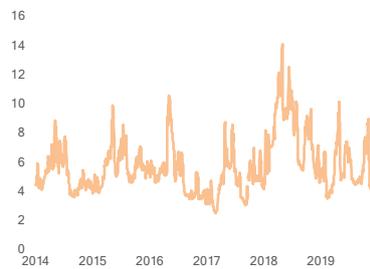
Note: Total value of PL shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 31: Portugal



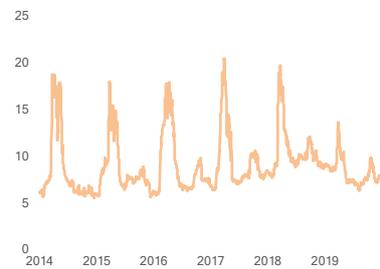
Note: Total value of PT shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 32: Spain



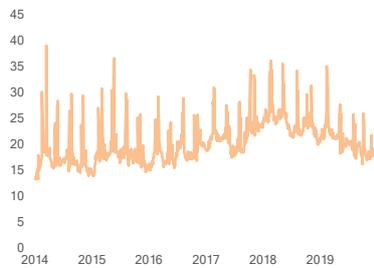
Note: Total value of ES shares on loan, daily data, in USD billion.  
Sources: Quandl, ESMA calculations.

Chart 33: Sweden



Note: Total value of SE shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

Chart 34: United Kingdom



Note: Total value of UK shares on loan, daily data, in EUR billion.  
Sources: Quandl, ESMA calculations.

**Note:** Countries for which there are less than 10 shares on loan during the period are not represented: Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Liechtenstein, Luxembourg, Malta, Romania, Slovenia, Slovakia.

## **8 Legal analysis on the possibility for NCAs to transmit to tax authorities information obtained within their surveillance and investigation activities**

175. Within its inquiry, ESMA has analysed the possibility and the limits for NCAs to exchange supervisory information with the tax authorities. In particular, ESMA's legal assessment focused on the possibility to exchange both the information obtained from another NCA and the one directly obtained at national level within their supervisory activity.
176. In particular, ESMA's legal analysis focused on the Suspicious Transaction and Order Report regime (STOR) under MAR and the Transaction Reporting under MiFIR, two key tools used by NCAs to detect and investigate potential cases of market abuse and to monitor the fair and orderly functioning of markets, which may also evidence behaviours and transactions potentially hiding WHT schemes.
177. The STOR regime is regulated by Article 16 MAR and involves an obligation for persons professionally arranging transactions in financial instruments, market operators and investment firms operating trading venues to notify the relevant NCA of transactions or orders that might constitute insider dealing or market manipulation.
178. In turn, the NCA receiving the STOR should immediately transmit it to the NCA of the trading venue concerned.
179. Article 26(1) of MiFIR set forth the basis for the transaction reporting regime by requiring investment firms which execute transactions in financial instruments to report complete and accurate details of such transactions to the competent authority as soon as possible, and no later than the close of the following working day. Further details on the transaction reporting regime are defined in the RTS on reporting obligations under Article 26 of MiFIR.
180. The Transaction Reporting Exchange Mechanism (TREM) is an IT system aimed at facilitating the exchange of transaction reports amongst NCAs. First implemented in November 2007 on the basis of Regulation (EC) No 1278/2006 implementing MiFID, TREM was later enhanced upon the introduction of MiFIR, which extended the transaction reporting requirements in terms of the scope of instruments covered and information to be provided per each transaction.

### **8.1 Transmission of data received by the NCA of another Member State**

181. ESMA has analysed the question of whether STORs received from the NCA of another Member State and data received via TREM could be used for purposes different to those for which the information has been transmitted.
182. More specifically, in the case at hand the different purpose consists of screening the information for tax purposes and/or providing the – non-anonymized – information to the tax authorities for possible detection and investigation of tax infringements.

183. On the basis of the legal observations set out, EU financial law (namely MAR, MiFID II and MiFIR) does not provide any legal basis to an NCA receiving relevant information under those pieces of legislation to transmit it to the tax authorities.
184. More specifically, regarding STORs received from another NCA in the context of MAR, Articles 16, 25 and 27 of that Regulation (included in Annex 2 to this report) were considered with respect to the potential use of such information for tax purposes. However, based on further legal analysis it needs to be concluded that none of these legal provisions could be used as a legal basis by the NCA receiving the information for screening it for tax purposes and/or forwarding it to a national tax authority.
185. Articles 16, 25 and 27 of the Market Abuse Regulation have to be interpreted in the context of that Regulation, thereby taking into consideration the purpose of prevention and detection of market abuse. In addition, one needs to take into account the specific legal provision(s) on which the foreign NCA relies in order to transmit the relevant information to a NCA of another Member State. Consequently, the NCA receiving the relevant information is restricted with respect to the potential use of it and therefore might only use it in the context of activities of the Market Abuse Regulation, i.e. unless otherwise foreseen the NCA receiving the relevant information needs to take into consideration the purposes for which the foreign NCA provided this information to it.
186. The same is relevant in the context of the framework of MiFID II and MiFIR regarding data exchanged between NCAs via TREM. ESMA analysed several legal provisions, namely Article 26 MiFIR as well as Articles 81(2) and (3) MiFID II and 76(3) and (4) MiFID II (included in Annex 2 to this report).
187. As regards the data provided to an NCA from the one of another Member State, the NCA receiving relevant data needs to take into account the purpose for the transmission of the data to it as set out in the relevant articles of the MiFID II framework. Therefore, data collected in the context of the MiFID II framework can in general only be used in accordance with the situations described in the relevant legal provisions.
188. In particular, as regards the use of data transmitted to a NCA, Article 81 MiFID II contains specific provisions regarding the use of information exchanged between competent authorities. As regards the case at hand, the restrictions set out therein would not allow the NCA to – by default – make use of the data for tax purposes without the consent of the NCA that provided the relevant data to it.
189. Taking into account the aforementioned as well as the specific context in which the NCA receiving the data would like to make use of it, one has to assume that also Article 76 of MiFID II does not provide a legal basis for making use of the data for tax purposes.

## **8.2 Transmission of data domestically obtained in the context of national supervision**

190. ESMA has furthermore assessed whether or not NCAs could transmit data obtained in the context of national supervisory activities to the tax authority located in the same Member State for possible detection of tax infringement, i.e. whether data received by NCAs could be used for purposes different to those for which the information has been transmitted to them by supervised entities.

191. Neither MAR nor MiFID II foresee specific legal requirements for NCAs regarding the provision of specific data to tax authorities. Both the Market Abuse Regulation and MiFID II frameworks leave the choice to Member States as to whether NCAs are to be permitted to provide data to another authority located in the same Member State.
192. According to Article 27(3) of MAR “*information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by Union or national law*”. Therefore, MAR does not impede Member States from establishing national Law specifying whether and if so under which conditions data received in the context of national supervisory activities may be transmitted to other authorities located in the same Member State.
193. The same is relevant with respect to MiFID II, where at least Article 76(5) MiFID II sets out that the provision on professional secrecy should “*not prevent competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State*”.
194. Consequently, under the frameworks of MiFID II and MAR, Member States are not prevented from enacting provisions governing the transmission of data to another authority located in the same Member State.

## **9 Potential solutions to prevent and detect multiple WHT reclaim schemes**

195. ESMA’s inquiry has confirmed that WHT reclaim schemes seem to be aimed at perpetrating a potential tax fraud, with no direct connections with violations of the market abuse regime. Even though WHT schemes often involve short sales and SSR infringements have been identified, the schemes do not necessarily involve violations of the short selling regime.
196. Therefore, as confirmed by the NCAs’ responses to ESMA’s inquiry, WHT schemes are to be primarily considered as a tax related issue.
197. In that sense, ESMA is of the view that a first legislative and supervisory response should be sought within the boundaries of the tax legislative and supervisory framework, which is currently broadly reliant on national law and the specificities of each Member State.
198. Having in mind that any consideration in relation to the tax legislative framework goes beyond ESMA’s and NCAs’ remit, ESMA’s inquiry has shown that any WHT reclaim scheme has its roots in the fact that some national tax law allows for the WHT reclaim to take place without any reference to the underlying distribution of dividends (either in the form of issuance of tax certificates or otherwise). Therefore, ESMA is of the view that it could be considered to what extent a possible legislative change could make it possible to directly and automatically link any given tax reclaim to the underlying distribution of dividends.
199. Once tax certificates or any other form of WHT reclaim can be directly linked to the underlying distribution of dividends, multiple repayments for a single distribution of

dividends should no longer be possible, as the tax authorities would be in the position to carry out reconciliation activity and ensure that any additional claim is blocked and investigated.

200. For those Member States whose regime is built around the issuance of a tax certificate, the national experiences reported by some NCAs has shown that the same result may be achieved by entrusting a single entity with responsibilities over collecting the WHT and issuing the relevant certificate. A number of Member States have already taken steps in that direction, among which Germany, where since 2012 custodian banks are responsible both for collecting the WHT and issuing the tax certificate.
201. In this context, in January 2013 the OECD Committee on Fiscal Affairs approved the Treaty Relief and Compliance Enhancement (TRACE) Implementation Package, which consists in a set of agreements to be potentially adopted by any country whose tax regimes provides for a WHT, and focusses on the introduction of the so-called Authorised Intermediary System.
202. In order to establish effective WHT relief procedures for cross-border portfolio income, the TRACE Implementation Package has promoted the introduction of the Authorised Intermediary, i.e. a standardized system for which “authorised intermediaries” can claim exemptions or reduced rates of WHT on behalf of their customers that are portfolio investors.
203. One of the main advantages linked to the implementation of the Authorised Intermediary System is that information about the beneficial owner of the income is maintained by the intermediary at the bottom of the chain. Furthermore, with respect to the type of information that should be reported, the TRACE Implementation Package has developed an electronic format to be used by financial institutions when reporting to tax administrations and for the purpose of the exchange of information between different tax administrations.
204. Since the main purpose of the TRACE implementation package was to streamline the process by which portfolio investors may claim treaty benefits, including WHT reclaims, ESMA considers that, should it be applied correctly, it could minimize costs for all stakeholders and ensure compliance with tax obligations.
205. Overall, in ESMA’s view, implementing the measures indicated above to prevent fraudulent WHT reclaim schemes from happening in the first place would appear to be more efficient than any efforts to subsequently detect and prosecute fraudulent schemes already perpetrated.
206. Nonetheless, despite being of the view that WHT schemes are to be considered as a tax related issue, ESMA acknowledges that WHT schemes inevitably take place in the financial markets, and as financial market regulators, the NCAs agree with the European Parliament’s urge to identify potential solutions that might contribute to the prevention or the detection of such potentially fraudulent activities.
207. Therefore, within its inquiry, ESMA has assessed in broader terms any potential solution that could be pursued within the boundaries of its remit.
208. Within that assessment, ESMA has considered whether and under what conditions CSDs data could be used by NCAs in the detection of WHT reclaim schemes.

209. Additionally, in its technical advice to the EU Commission on a potential revision of MAR, ESMA has considered whether a legislative change should be pursued at EU level to enhance NCAs' remit to cover WHT schemes.
210. Moreover, ESMA has explored under what conditions and limits any best practice currently followed by those NCAs that enjoy an extended remit to investigate fraudulent activities under national law could be identified and adopted also by other NCAs.
211. Finally, ESMA has assessed whether a legislative change should be pursued to foster inter agency cooperation, and included a dedicated section in that respect in its technical advice to the EU Commission on a potential revision of MAR.

## **9.1 Use of CSDs' data in the detection of WHT reclaim schemes**

212. Within its inquiry, ESMA discussed the issue of the potential use of CSD data with the NCAs' experts sitting in the ESMA Post Trading Standing Committee (PTSC). In particular, it was asked to provide input on the information that CSD NCAs may obtain from CSDs for detecting multiple WHT reclaim schemes, also considering the specificities of the CSDs and the ancillary services provided by them (in particular services related to shareholders' registers, supporting the processing of corporate actions, including tax, general meetings and information services).
213. NCAs' experts highlighted that CSD NCAs would not be competent to investigate these schemes nor to use CSD's information for tax related purposes. Several NCA experts also mentioned their reluctance in assigning any responsibility or role to CSDs in this investigative process. The task of a CSD is first and foremost to provide notary and securities settlement services and maintaining securities accounts. Due to their key position in the settlement process, the securities settlement systems operated by CSDs are of a systemic importance for the functioning of securities markets, and CSDs should not be compromised nor distracted from their key roles by any liability that might arise from having to cooperate with tax investigations, outside of the CSD's remit. It was emphasised that tax authorities have their own mandate with a set of tasks and responsibilities. These ensure that tax authorities have the possibility (and far reaching means to facilitate this) to request information from market participants and their clients if they see fit.
214. NCA's experts mentioned that, in the majority of cases, CSDs do not have any relation with beneficial owners and thus do not have tax information unless they perform tax services, in which case, however, the data would be partial, as it would only refer to: a) clients of non-resident intermediaries who use the service, in case of fiscal services for financial instruments subject to national tax laws; b) clients of resident intermediaries who use the service, in case of fiscal services for financial instruments subject to a limited number of foreign tax laws.
215. The Shareholders Rights Directive II and its Implementing Regulation (EU) 2018/1212 (entering into force on 3 September 2020) may enable CSDs to obtain more information regarding beneficial owners entitled to participate and vote in general shareholders' meetings, and to receive the distributions of profits or participate in other corporate events initiated by the issuer or a third party. However, this would only cover shares admitted to

trading on a regulated market, and it is possible that CSDs may not always receive the information which may be communicated by intermediaries directly to the issuer.

216. NCAs' experts were also asked to provide their views as to whether CSDs may be able to set up any alert or identify circumstances upon verification of which a flag could be raised whenever a transaction may be hiding a multiple WHT reclaim scheme.
217. At the level of CSDs, in most cases the transactions are already netted. Furthermore, CSDs only have access to information at the level of their direct participants. Consequently, CSDs do not have the necessary information which would allow them, or the NCAs, to directly link the transactions to a beneficial owner. Therefore, NCAs' experts could not identify any useful alerts which CSDs may set up in this context.
218. Regarding trends to look out for and to potentially request information through CSD's NCAs, requesting aggregated information could help identifying an increase in transactions during dividend season. However, it would not be sufficient to identify the fraudulent schemes *per se*, since there are a number of schemes that are not necessarily fraudulent, and an increase in transactions around these dates might also be for perfectly legitimate reasons (e.g. voting or expected announcements).
219. At the same time, there could be legal issues in using aggregated data sets obtained under CSDR for other purposes than those established in CSDR.
220. In terms of possible solutions for preventing WHT reclaim schemes, it has been suggested that, given that the deducted tax is nothing else than a claim against the government with maturity on the date tax forms must be submitted to tax authorities, it could be formalized as any other government debt and registered in a CSD (with its own ISIN, the issue would be topped up every time a dividend/coupon is paid and taxes deducted). That would avoid all the paperwork related to tax certificates issuances, and the artificial creation of several tax certificates for the same holdings. At the same time, it should be highlighted that issuing a security is not less burdensome than issuing a certificate.
221. The so created title would be registered with the CSDs and CSD participants exactly the same way as any other financial instruments. WHT would be paid to its owner at maturity as any other debt and could be even traded. CSDs have a mandatory duty of avoiding, detecting and solving artificial creation of securities beyond the amount issued, so the WHT paid back by tax authorities would never be greater than the previously deducted amount on dividends or coupons. This is a measure that should be analysed by tax authorities as a potential mechanism to improve the efficiency of WHT reclaim schemes, with the caveat that the cost benefit of issuing a security versus a certificate is not self-evident.

## **9.2 Potential legislative change to enhance NCAs' remit to pursue threats to the market integrity as a whole**

222. At EU level, the broad powers given to NCAs by MAR and SSR are to be strictly linked to detection and investigation of market abuse and short selling violations.

223. When a suspected WHT scheme is discovered within the NCAs' traditional market surveillance activity, if no violations of the market abuse or the short selling regime have taken place, the NCAs will not have the legal basis to pursue those schemes. Even where violations of the short selling or the market abuse regime are identified, NCAs will not have the legal basis to resort to the MAR and SSR powers to continue investigating the schemes further than in relation to the said market abuse and short selling violations.
224. Therefore, in the absence of any extended remit under national legislation, for NCAs to be able to take action against WHT reclaim schemes and adopt the below reported best practices, their remit would need to be expanded through an EU legislative change.
225. In its technical advice to the EU Commission in relation to a potential revision of MAR<sup>26</sup>, ESMA has considered whether this should be pursued through a revision of that Regulation.
226. In particular, in its consultation paper on the subject, ESMA considered amending MAR in order to “*overcome the identified EU regulatory gap and give the NCAs the power to investigate and sanction unfair behaviours carried out by regulated entities that represent a threat to the integrity of the financial markets as a whole, beyond insider dealing and market manipulation*”<sup>27</sup>.
227. The proposal was publicly consulted upon, but the great majority of the responses were against any such proposal, for the following reasons:
- i. granting NCAs with an extended remit to investigate and sanction unfair behaviours may involve a series of unintended consequences that would require deeper consideration;
  - ii. WHT schemes remain a tax issue, that should be addressed through an amendment to the relevant legislative framework rather than the financial sector's regulations;
  - iii. concepts such as “*unfair behaviours*” or “*threat to the market integrity*” are difficult to define and characterised by intrinsic vagueness. This may involve a high level of uncertainty and give NCAs a disproportionate discretionary power in classifying a given behaviour as illicit.
228. Eventually, in the Final Report on its technical advice on the potential review of MAR, ESMA did not propose to the EU Commission to enhance NCAs' remit in that sense, as ESMA agreed with the respondents to the consultation about the difficulties to define concepts such as “*unfair behaviours*” or “*threat to the market integrity*”. The lack of clarity over what may be or may be not considered “unfair behaviours” or “threat to the market integrity” may end up negatively affecting market functioning and disincentivise trading given the lack of legal certainty for market operators.
229. Additionally, ESMA is of the view that WHT schemes remain mainly a tax related issue, for which most NCAs do not currently have sufficient expertise. Therefore, even in

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<sup>26</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf)

<sup>27</sup> MAR review technical advice Consultation Paper, available at [https://www.esma.europa.eu/sites/default/files/library/mar\\_review\\_-\\_cp.pdf](https://www.esma.europa.eu/sites/default/files/library/mar_review_-_cp.pdf).

presence of an adequate legislative change to give them an extended remit, it would take time for the NCAs' to acquire such expertise, limiting any ambition to address the issue in the short term.

230. Moreover, unlike any potential legislative change in the relevant WHT legislative framework, any such extended remit for NCAs would not directly prevent WHT reclaim schemes from being perpetrated, but rather only contribute to their detection and prosecution *post facto*, once identified by the NCA's surveillance systems.
231. It should also be highlighted that any legislative enhancement of the NCAs' remit would require an adequate increase in the NCAs' resources, with limited synergies with their set of core supervisory activities.
232. Finally, it is unclear whether entrusting the NCAs with additional tasks outside their core supervisory activity represents the most efficient way to address the problem. In that sense, other legislative interventions may achieve a more efficient result, e.g. introducing measures to prevent fraudulent WHT reclaim schemes from occurring in the first place or increasing information sharing and cooperation between NCAs and other law enforcement bodies, within which each supervisory entity could contribute to the common objective by leveraging on their specific and consolidated areas of expertise.

### **9.3 Potential best practices to detect/investigate WHT reclaim schemes**

233. ESMA's inquiry has shown that some NCAs do carry out investigations of potential misconducts in a broader sense, leveraging on a remit that, due to national legislation, goes beyond the one assigned to them under the European legislative supervisory framework on financial markets.
234. In this section ESMA has reported best practices extracted from the experience of those NCAs that, thanks to an extended remit under national legislation, carry out supervisory activity for WHT reclaim schemes and explained how, from a technical perspective, they could potentially be applied by the other NCAs.
235. However, from a legal perspective, those best practices cannot be simply applied by other NCAs as supervisory activity and powers are always to be linked to a clear legal basis, either at European or national level, in the absence of which such powers cannot be activated.
236. Therefore, in the absence of any remit under the EU legislation, the adoption of the below reported best practices remains a viable option only for those NCAs whose remit so allows under national legislation.
237. Nonetheless, from a technical perspective, NCAs' existing monitoring tools (i.e. systems to prevent and detect market abuse and short selling violations) could potentially be used to screen the information available and raise a flag regarding those situations that may hide WHT reclaim schemes.
238. As already highlighted in the ESMA report on preliminary findings on the subject, multiple WHT reclaim schemes are not easily detected. This is mainly due to the fact that

they do not typically involve violations of the market abuse regime, and potential violations of the short selling obligations and restrictions are only an ancillary part of the whole scheme. Therefore, they are often difficult to detect by traditional monitoring systems that NCAs have conceived and calibrated for those specific purposes.

239. However, even where properly calibrated and adapted to detection of WHT schemes, the traditional market surveillance activity, carried out on transaction reporting data received by NCAs under the MiFID II regime, together with the suspicious transactions and orders reports received under MAR, would always have to be cross referenced to other sources of information in order to detect WHT reclaim schemes.
240. Market surveillance around dividend dates by NCAs could only represent a useful starting point to identify transactions requiring further and closer examination of unusual or suspicious trading patterns.
241. Once suspicious trading patterns are identified, to effectively detect potential WHT reclaim schemes, NCAs would need to gather more information on the elements of the schemes. For example, some elements include securities lending transactions and information about these transactions is currently not available to NCAs. The additional information provided by the reporting under the SFTR regime, partly entered into force in July 2020, may therefore become valuable for NCAs to analyse in light of this aspect of market surveillance.
242. More in detail, under the above legal caveat and limitation, ESMA has identified some **best practices** that could represent a way forward for the NCAs to detect and investigate WHT reclaim schemes:
- A. given the complexity of the schemes, it is difficult to have visibility over the full trading strategy. To be profitable, multiple WHT reclaim schemes have to be perpetrated in large volumes. Therefore, in order to detect such schemes, specific and calibrated alerts could be set up in the surveillance systems based on the transaction reporting data, e.g. triggered when the percentage of traded shares reaches a significant level.  
  
As an alternative, where an NCA does carry out an ongoing exercise through calibrated alerts, it could perform a selective analysis around the key distribution of dividend dates for those shares that are deemed more likely to be the target of a multiple WHT reclaim scheme;
  - B. further to an alert or an anomaly being found, a preliminary enquiry could be opened, proactively following up on who and what trading strategies are driving the volumes traded;
  - C. NCAs could also take into account the information from central securities registers to check whether actual settlement and changes in the register ownership have taken place and whether transaction reporting data matches observed trading;
  - D. NCAs could also check the short selling register to determine what was declared under the obligation to report net short positions, as multiple WHT reclaim transactions that led to significant net short positions are less likely to be reported;

- E. even where the off-exchange market seems to be small, the nature of the scheme is that the entities involved may not report all or any trades (in that case a breach of reporting obligations would also materialise).

NCA's should liaise with central securities registers and also with tax authorities to understand the totality of available data. However, in some Member States (e.g. in Germany) the majority of shares are issued as bearer shares and not as registered shares. Consequently, there is no securities register kept by the company so far;

- F. on identification of any instances of significant trading, the NCA's could then follow up directly with some firms via correspondence and visits, to understand the nature of the trading and who the underlying clients might have been. NCA's' experience has shown that, where examined, the majority are institutional clients, with legitimate custodians who could provide verification of share ownership and consequential entitlement to the net dividend;
- G. overall, the process of investigating complex schemes such as the ones subject to this inquiry is resource intensive, and NCA's would need to have in place dedicated organisational structures composed of experienced staff and appropriate IT software;
- H. given the complexity of the scheme, even those firms that were indeed involved in it often did not have visibility over the full trading strategy;
- I. multiple WHT reclaim schemes cross the supervisory remit of the single authorities (NCA's and tax authorities), with none of them having the full picture;
- J. the identified best practices of surveillance and market monitoring should be carried out primarily by the NCA's of those Member States that can be the target of the schemes, as they are in the best position by virtue of receiving all transaction reports about the relevant security. It should be noted though that there are still restrictions associated with the transaction reporting regime, e.g. in case of transaction chains involving links outside the scope of the transaction reporting regime.

## **9.4 Enhanced cooperation and information sharing between NCA's and tax authorities**

243. ESMA's inquiry has shown that enhanced cooperation and mutual assistance between NCA's, tax authorities and other law enforcement bodies could help to detect and prosecute WHT reclaim schemes.

244. Whilst ESMA's legal analysis (see Section 8) has concluded that Member States are not prevented from enacting provisions governing the transmission of information obtained at national level to another authority located in the same Member State, it has also shown the legal limitations for NCA's to use the transaction reporting data obtained via TREM and the STORs received from other NCA's within their usual cooperation systems for other purposes than the ones for which the information was obtained.

245. As any exchange of information between authorities must be done under a clear legal basis, in the absence of which such exchange of information cannot take place, any

attempt to foster cross sectoral supervisory cooperation is likely to require a legislative change.

246. ESMA's inquiry has shown that WHT schemes are never confined within the borders of a given Member State, hence the importance of international cooperation and information exchange.
247. In its technical advice to the EU Commission in relation to a potential revision of MAR<sup>28</sup>, ESMA has considered whether this should be pursued through a revision of that Regulation.
248. In particular, in its consultation paper on the subject, ESMA proposed to amend MAR in order to "*grant the NCAs the possibility to cooperate and share information with tax authorities upon request, including an exchange of information across the EU*".
249. Even though the proposal did not receive broad support from the respondents to the consultation, in the Final Report on the technical advice on the potential review of MAR, ESMA has proposed to the EU Commission to pursue a legislative change to:
- i. remove the legal limitations for NCAs to exchange with tax authorities the information obtained through cooperation and information exchange mechanisms from other NCAs within the EU;
  - ii. provide a common legal basis for the exchange with the tax authorities of the information directly acquired by the NCA within its national supervisory activity.
250. ESMA's proposal was based on the view that cross agency cooperation is key in pursuing WHT schemes, as cross competence in different areas of expertise is of essence to understand the schemes, detect them and prosecute them.
251. Despite being of the view that enhanced cross agency cooperation is overall a valuable step forward in this field, ESMA is aware that such proposal will not be in itself the perfect solution to the issue of WHT reclaim schemes, as their nature makes them a global phenomenon often taking place beyond the boundaries of the European Union.
252. Internationally accepted standards in the field of cooperation and information exchange amongst NCAs and third countries authorities currently do not allow for onward sharing of information to tax authorities and would not be affected by the proposed change. Therefore, one drawback of ESMA's proposal would be that it would only affect the subset of WHT reclaim schemes taking place within the EU through EU regulated firms.
253. It should also be highlighted that removing the legal limitations to the information exchange between NCAs and tax authorities in relation to EU obtained information without any change in the internationally accepted standards in the field of cooperation may also introduce some sort of incentives for market participants to involve third countries firms and trading venues. Market participants may see the EU regulated firms and trading venues as more transparent vis-à-vis tax authorities, and prefer involving third country entities, which may ultimately put EU firms and trading venue at a competitive disadvantage. Still, ESMA believes that competition on this ground should not be incentivised.

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<sup>28</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf)

254. The magnitude of such competitive disadvantage is not easily quantifiable, but it is likely to apply not only to perpetrators of WHT schemes, but also in relation to all those firms proposing borderline practices where the fiscal element is a key component in the decision on how to structure a transaction.
255. Finally, it should be noted that, unlike any potential legislative change in the relevant WHT legislative framework, any legislative change to enhance cooperation and information sharing between NCAs and tax authorities would not directly prevent WHT schemes from being perpetrated, but rather only contribute to their detection and prosecution from an *ex post* perspective.

## 10 Conclusions

256. ESMA's inquiry has highlighted that WHT schemes are to be primarily considered as a tax related issue and therefore ESMA is of the view that a first legislative and supervisory response should be sought within the boundaries of the tax legislative and supervisory framework.
257. ESMA's inquiry has identified a number of measures that could be considered in that respect, such as to make it possible to directly and automatically link any given tax reclaim to the underlying distribution of dividends or entrusting a single entity with responsibilities over collecting the WHT and issuing the relevant certificate.
258. The TRACE Implementation Package approved by the OECD Committee on Fiscal Affairs in January 2013 may represent a valid reference in that context.
259. However, it is not in ESMA's remit to assess the effectiveness of those measures or the presence of constraints to their implementation.
260. Within its inquiry, ESMA has considered potential solutions that, within the boundaries of its remit, could be pursued to contribute to the detection of WHT schemes, and concluded that:

- The use of CSDs data does not seem to be able to provide a source of information that on its own could lead to detection of WHT schemes.

Even though the Shareholders Rights Directive II framework (entering into force on 3 September 2020) may enable CSDs to obtain more information regarding beneficial owners of transactions, this would only cover shares admitted to trading on a regulated market and it is possible that CSDs may not always receive the information which may be communicated by intermediaries directly to the issuer.

- At EU level, the broad powers given to NCAs by MAR and SSR are to be strictly linked to detection and investigation of market abuse and short selling violations.

Where no violations of the market abuse nor the short selling regime have taken place, the NCAs will not have the legal basis to pursue WHT schemes.

After careful consideration and public consultation, in its Final Report on its technical advice on the potential review of MAR, ESMA did not propose to the EU Commission to enhance NCAs' remit in that sense, as ESMA agreed with the

respondents to the consultation on the difficulties to define concepts such as “*unfair behaviours*” or “*threat to the market integrity*”.

Additionally, even in presence of an adequate legislative change to give NCAs an extended remit, it would take time for them to acquire relevant expertise, limiting any ambition to address the issue in the short term.

Moreover, unlike any potential legislative change in the relevant WHT legislative framework, any such extended remit for NCAs would not directly prevent WHT schemes from being perpetrated, but rather only contribute to their detection and prosecution *post facto*, once potentially identified by the NCA’s surveillance systems.

- NCAs’ existing monitoring tools and powers (i.e. systems to prevent and detect market abuse and short selling violations) could potentially be used to detect transactions that may hide WHT reclaim schemes.

ESMA has identified a number of best practices extracted from the experience of those NCAs that, thanks to an extended remit under national legislation, carry out supervisory activity for WHT schemes. ESMA’s inquiry explained how, from a technical perspective, they could potentially be applied by the other NCAs to detect and investigate WHT reclaim schemes.

However, from a legal perspective, the above tools and powers are always to be linked to a clear legal basis, either at European or national level, in the absence of which such powers cannot be activated.

Therefore, in the absence of any remit under the EU legislation, the adoption of the identified best practices remains a viable option only for those NCAs whose remit has been enhanced in that sense under national legislation.

- Enhanced cooperation and mutual assistance between NCAs, tax authorities and other law enforcement bodies could help to detect and prosecute WHT reclaim schemes.

As any exchange of information between authorities must be done under a clear legal basis, in the absence of which such exchange of information cannot take place, as highlighted in its Final Report on the technical advice on the potential review of MAR, ESMA proposes to pursue a legislative change to:

- a. remove the legal limitations for NCAs to exchange with tax authorities the information obtained through cooperation and information exchange mechanisms from other NCAs within the EU;
- b. provide a common legal basis for the exchange with its relevant national tax authorities of the information directly acquired by the NCA within its national supervisory activity.

ESMA is aware that such proposals will not be per se resolute and present some drawbacks, but it remains of the view that pursuing them will still be beneficial.

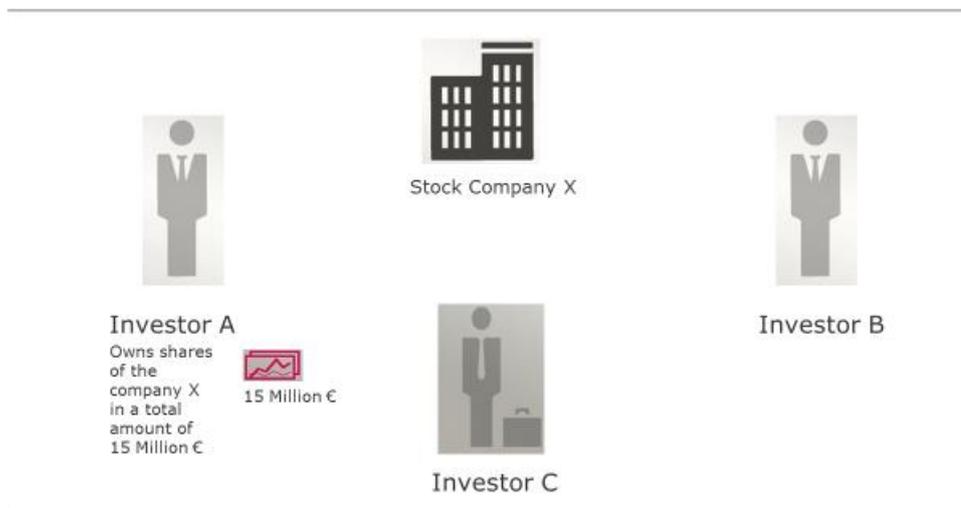
## Annexes

### Annex 1 - Functioning of a multiple WHT reclaim scheme based on a basic Cum/Ex trading in Germany

1. The information gathered allowed to reconstruct the functioning of the scheme in Germany, which is explained with the aid of the slides below, involving for the sake of simplicity three investors (A, B and C) trading on share X.
2. While this scheme has been identified in Germany, it seems to be potentially applicable to all those Member States where the tax law provides for the issuance of tax certificates that can then be claimed back in the form of a reimbursement from the tax authorities.

#### Cum-Ex Trades

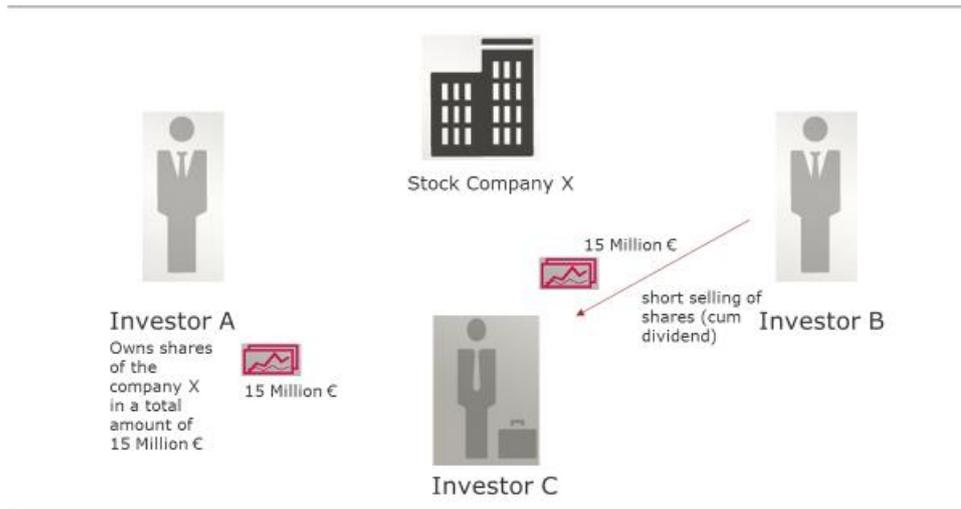
##### Initial Situation



3. The starting point is the situation where Investor A owns shares X (in the example for an amount of 15 million Euro), where Company X is a highly liquid share listed on a German regulated market.

## Cum-Ex Trades

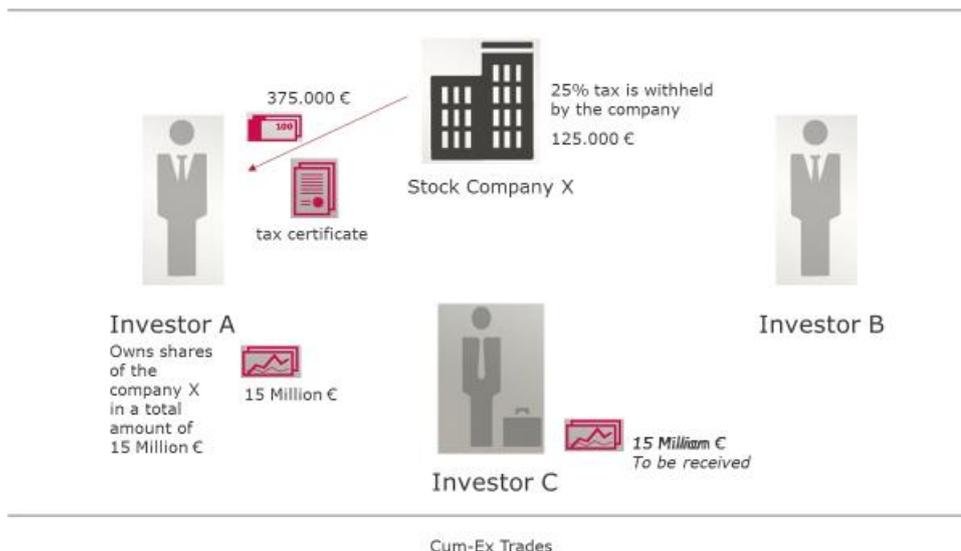
Before Dividend Record Day



4. Shortly before the dividend is paid, Investor B short sells to Investor C shares X for the same amount held by Investor A. Investor B should enter into an arrangement to ensure that the shares X will be made available to Investor C in time for settlement (in T+2, given that the transaction has been executed on exchange). Investor C buys the shares CUM dividend.

## Cum-Ex Trades

Dividend Record Day

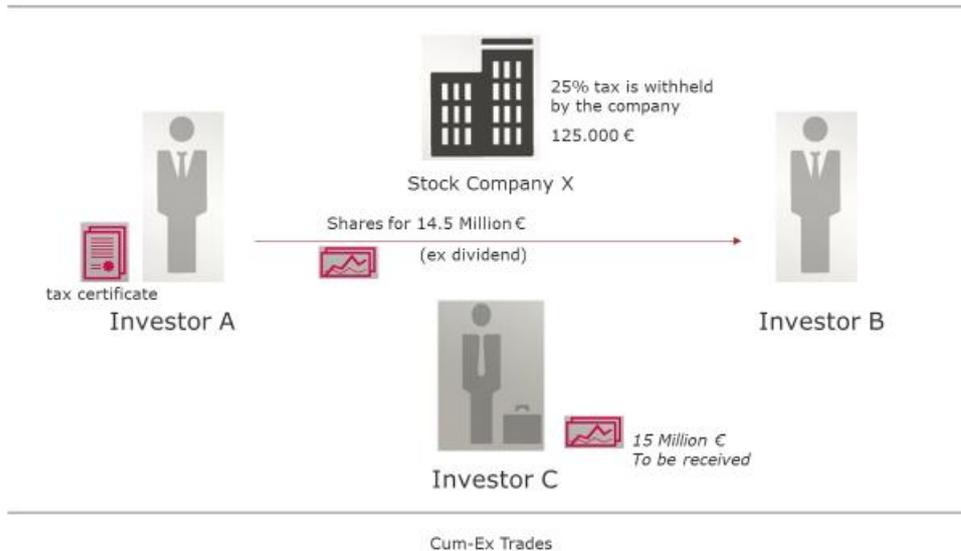


5. On the day Company X distributes dividends, Company X withholds a 25% tax that is directly paid to the German government. Investor A receives a tax certificate from its

custodian bank that will allow to claim for a tax refund for the amount withheld. BaFin explained that, in Germany, the tax certificate does not contain the details of the transaction.

## Cum-Ex Trades

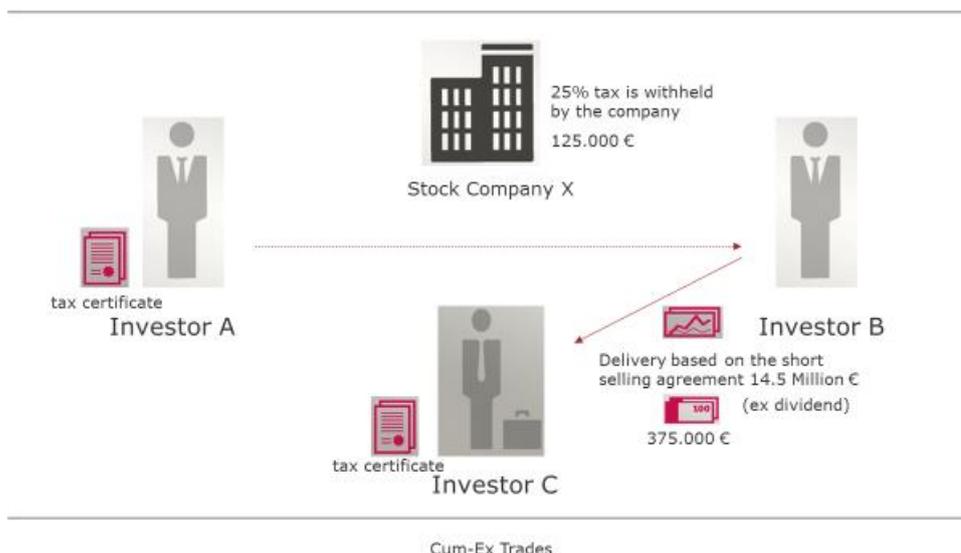
After Dividend Record Day



- After the distribution of dividends, Investor B buys over the counter (OTC) shares X from Investor A, in order to benefit from a reduced time for settlement (shorter than the T+2 settlement time in regulated markets) and be able to deliver the shares for settlement to Investor C (to whom they were previously sold short). The shares obtained by Investor B are now EX dividend.

## Cum-Ex Trades

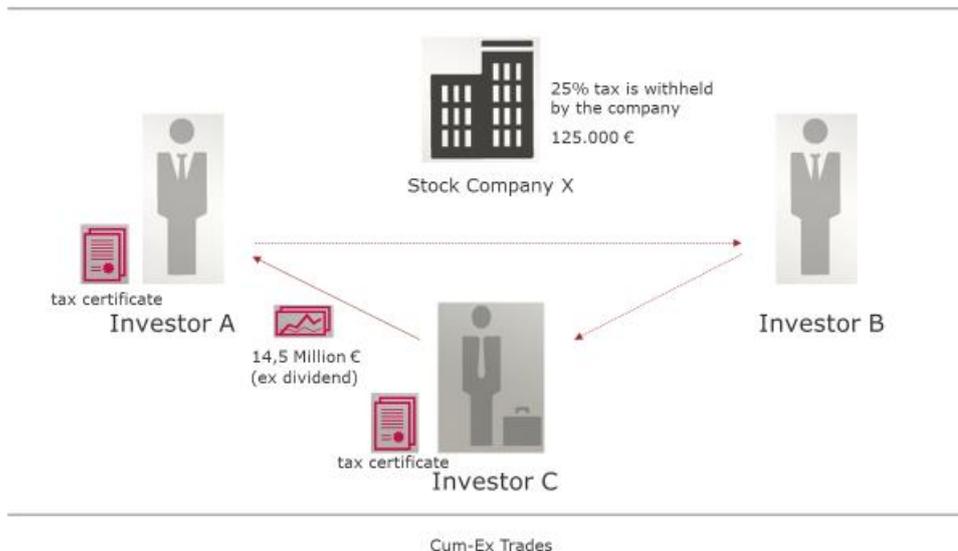
After Dividend Record Day



7. Investor B delivers shares to Investor C in time for settlement. Given that Investor B should deliver to Investor C shares CUM dividend, but can only deliver shares EX dividend, Investor B pays an amount (375,000 Euro in the example in the slide below) as compensation to Investor C, which Investor B can pay since they received 15 Million Euro from Investor C.
8. Investor C receives shares for 14.5 Million Euro worth (EX dividend), compensated by a cash compensation of 375,000 Euro and a tax certificate from its custodian bank for 125,000 Euro, that Investor C will claim back from the Government. However, Investor C did not receive the actual dividend but only a compensation for not receiving it. The actual dividend was received by Investor A, which should be the only one entitled to receive the tax certificate.
9. The reasons for the custodian bank to be able to issue a tax certificate lies in the concept of “economic ownership”, used in the German tax system as opposed to the legal ownership. In the scheme above, Investor C is the economic owner of the shares at the moment of the distribution of dividends, as Investor C bought the shares before the distribution of dividends and therefore at that time Investor C would bear any economic consequence attached to the ownership of the shares, even if the legal ownership will only be transferred with the settlement.
10. BaFin reported that, until 2012, a controversial reading of the German tax provisions seemed to have created a possibility that the economic owner should be entitled to the dividend, and therefore to the tax certificate related thereto.

## Cum-Ex Trades

After Dividend Record Day



11. At the end of the scheme Investor C sells back the shares to Investor A.
12. The result of the whole scheme is that Investor A comes again into possession of the shares X, but overall the series of transactions resulted in two tax certificates being issued



against a single distribution of dividend, with an overall profit that amounts exactly to the value of the tax certificate.

13. As the double issuance of a tax certificate is the only profit realised with the series of transactions described above (125,000 Euro, in the example above to the benefit of Investor B), the participants will share it at the completion of the scheme.
14. According to the German tax authorities, despite all possible interpretations regarding the concept of “economic ownership”, the fact that at the end of the scheme the shares go back to the initial owner (Investor A) clearly showed that the scheme represented a potential tax fraud, as it served no other purpose than obtaining a second tax certificate for a unique distribution of dividends.

## Annex 2 – Relevant legal provisions

Market Abuse Regulation <sup>29</sup>
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### *Article 16*

#### **Prevention and detection of market abuse**

1. Market operators and investment firms that operate a trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation, in accordance with Articles 31 and 54 of Directive 2014/65/EU.

A person referred to in the first subparagraph shall report orders and transactions, including any cancellation or modification thereof, that could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation to the competent authority of the trading venue without delay.

2. Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. Where such a person has a reasonable suspicion that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation, the person shall notify the competent authority as referred to in paragraph 3 without delay.

3. Without prejudice to Article 22, persons professionally arranging or executing transactions shall be subject to the rules of notification of the Member State in which they are registered or have their head office, or, in the case of a branch, the Member State where the branch is situated. The notification shall be addressed to the competent authority of that Member State.

4. The competent authorities as referred to in paragraph 3 receiving the notification of suspicious orders and transactions shall transmit such information immediately to the competent authorities of the trading venues concerned.

(...)

### *Article 25*

#### **Obligation to cooperate**

1. Competent authorities shall cooperate with each other and with ESMA where necessary for the purposes of this Regulation, unless one of the exceptions in paragraph 2 applies.

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<sup>29</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, (OJ L 173 12.6.2014, p. 1).



Competent authorities shall render assistance to competent authorities of other Member States and ESMA. In particular, they shall exchange information without undue delay and cooperate in investigation, supervision and enforcement activities.

The obligation to cooperate and assist laid down in the first subparagraph shall also apply as regards the Commission in relation to the exchange of information relating to commodities which are agricultural products listed in Annex I to the TFEU.

The competent authorities and ESMA shall cooperate in accordance with Regulation (EU) No 1095/2010, in particular Article 35 thereof.

Where Member States have chosen, in accordance with Article 30(1), second subparagraph, to lay down criminal sanctions for infringements of the provisions of this Regulation referred to in that Article, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible infringements of this Regulation and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation.

(...)

#### *Article 27*

#### **Professional secrecy**

1. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 2 and 3.
2. All the information exchanged between the competent authorities under this Regulation that concerns business or operational conditions and other economic or personal affairs shall be considered to be confidential and shall be subject to the requirements of professional secrecy, except where the competent authority states at the time of communication that such information may be disclosed or such disclosure is necessary for legal proceedings.
3. The obligation of professional secrecy applies to all persons who work or who have worked for the competent authority or for any authority or market undertaking to whom the competent authority has delegated its powers, including auditors and experts contracted by the competent authority. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by Union or national law.

*Article 9*

**Management body**

1. Competent authorities granting the authorisation in accordance with Article 5 shall ensure that investment firms and their management bodies comply with Article 88 and Article 91 of Directive 2013/36/EU.

ESMA and EBA shall adopt, jointly, guidelines on the elements listed in Article 91(12) of Directive 2013/36/EU.

2. When granting the authorisation in accordance with Article 5, competent authorities may authorise members of the management body to hold one additional non-executive directorship than allowed in accordance with Article 91(3) of Directive 2013/36/EU. Competent authorities shall regularly inform ESMA of such authorisations.

EBA and ESMA shall coordinate the collection of information provided for under the first subparagraph of this paragraph and under Article 91(6) of Directive 2013/36/EU in relation to investment firms.

3. Member States shall ensure that the management body of an investment firm defines, oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of the investment firm including the segregation of duties in the investment firm and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market and the interest of clients.

Without prejudice to the requirements established in Article 88(1) of Directive 2013/36/EU, those arrangements shall also ensure that the management body define, approve and oversee:

- (a) the organisation of the firm for the provision of investment services and activities and ancillary services, including the skills, knowledge and expertise required by personnel, the resources, the procedures and the arrangements for the provision of services and activities, taking into account the nature, scale and complexity of its business and all the requirements the firm has to comply with;
- (b) a policy as to services, activities, products and operations offered or provided, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients of the firm to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate;

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<sup>30</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), (OJ L 173 12.6.2014, p. 349).



(c) a remuneration policy of persons involved in the provision of services to clients aiming to encourage responsible business conduct, fair treatment of clients as well as avoiding conflict of interest in the relationships with clients.

The management body shall monitor and periodically assess the adequacy and the implementation of the firm's strategic objectives in the provision of investment services and activities and ancillary services, the effectiveness of the investment firm's governance arrangements and the adequacy of the policies relating to the provision of services to clients and take appropriate steps to address any deficiencies.

Members of the management body shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.

4. The competent authority shall refuse authorisation if it is not satisfied that the members of the management body of the investment firm are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions in the investment firm, or if there are objective and demonstrable grounds for believing that the management body of the firm may pose a threat to its effective, sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market.

5. Member States shall require the investment firm to notify the competent authority of all members of its management body and of any changes to its membership, along with all information needed to assess whether the firm complies with paragraphs 1, 2 and 3.

6. Member States shall require that at least two persons meeting the requirements laid down in paragraph 1 effectively direct the business of the applicant investment firm.

By way of derogation from the first subparagraph, Member States may grant authorisation to investment firms that are natural persons or to investment firms that are legal persons managed by a single natural person in accordance with their constitutive rules and national laws. Member States shall nevertheless require that:

- (a) alternative arrangements be in place which ensure the sound and prudent management of such investment firms and the adequate consideration of the interest of clients and the integrity of the market;
- (b) the natural persons concerned are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties.

#### *Article 76*

### **Professional secrecy**

1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 67(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. They shall not divulge any confidential information which

they may receive in the course of their duties, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to requirements of national criminal or taxation law or the other provisions of this Directive or of Regulation (EU) No 600/2014.

2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

3. Without prejudice to requirements of national criminal or taxation law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive or to Regulation (EU) No 600/2014 may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or of Regulation (EU) No 600/2014 or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically relating to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Directive or to Regulation (EU) No 600/2014 shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive or with Regulation (EU) No 600/2014 and with other Directives or Regulations applicable to investment firms, credit institutions, pension funds, UCITS, AIFs, insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators, CCPs, CSDs, or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.

#### *Article 81*

### **Exchange of information**

1. Competent authorities of Member States having been designated as contact points for the purposes of this Directive and of Regulation (EU) No 600/2014 in accordance with Article 79(1) of this Directive shall immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities, designated in accordance to Article 67(1) of this Directive, set out in the provisions adopted pursuant to this Directive or Regulation (EU) No 600/2014.

Competent authorities exchanging information with other competent authorities under this Directive or Regulation (EU) No 600/2014 may indicate at the time of communication that such



information must not be disclosed without their express agreement, in which case such information may be exchanged solely for the purposes for which those authorities gave their agreement.

2. The competent authority having been designated as the contact point in accordance with Article 79(1) may transmit the information received under paragraph 1 of this Article and under Articles 77 and 88 to the authorities referred to in Article 67(1). They shall not transmit it to other bodies or natural or legal persons without the express agreement of the competent authorities which disclosed it and solely for the purposes for which those authorities gave their agreement, except in duly justified circumstances. In this last case, the contact point shall immediately inform the contact point that sent the information.

3. Authorities as referred to in Article 71 as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles 77 and 88 may use it only in the course of their duties, in particular:

(a) to check that the conditions governing the taking-up of the business of investment firms are met and to facilitate the monitoring, on a non-consolidated or consolidated basis, of the conduct of that business, especially with regard to the capital adequacy requirements imposed by Directive 2013/36/EU, administrative and accounting procedures and internal-control mechanisms;

(b) to monitor the proper functioning of trading venues;

(c) to impose sanctions;

(...)

5. Neither this Article nor Article 76 or 88 shall prevent a competent authority from transmitting to ESMA, the European Systemic Risk Board, central banks, the ESCB and the ECB, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks. Likewise such authorities or bodies shall not be prevented from communicating to the competent authorities such information as they may need for the purpose of performing their functions provided for in this Directive or in Regulation (EU) No 600/2014.

MiFIR <sup>31</sup>
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#### *Article 24*

### **Obligation to uphold integrity of markets**

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<sup>31</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173 12.6.2014, p. 84).



Without prejudice to the allocation of responsibilities for enforcing Regulation (EU) No 596/2014, competent authorities coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

## *Article 26*

### **Obligation to report transactions**

1. Investment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day.

The competent authorities shall, in accordance with Article 85 of Directive 2014/65/EU, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives that information.

The competent authorities shall make available to ESMA, upon request, any information reported in accordance with this Article.

(...)

4. Investment firms which transmit orders shall include in the transmission of that order all the details as specified in paragraphs 1 and 3. Instead of including the mentioned details when transmitting orders, an investment firm may choose to report the transmitted order, if it is executed, as a transaction in accordance with the requirements under paragraph 1. In that case, the transaction report by the investment firm shall state that it pertains to a transmitted order.

5. The operator of a trading venue shall report details of transactions in financial instruments traded on its platform which are executed through its systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3.

(...)

7. The reports shall be made to the competent authority either by the investment firm itself, an ARM acting on its behalf or by the trading venue through whose system the transaction was completed, in accordance with paragraphs 1, 3 and 9.

Investment firms shall have responsibility for the completeness, accuracy and timely submission of the reports which are submitted to the competent authority.

By way of derogation from that responsibility, where an investment firm reports details of those transactions through an ARM which is acting on its behalf or a trading venue, the investment firm shall not be responsible for failures in the completeness, accuracy or timely submission of the reports which are attributable to the ARM or trading venue. In those cases and subject to



Article 66(4) of Directive 2014/65/EU the ARM or trading venue shall be responsible for those failures.

Investment firms must nevertheless take reasonable steps to verify the completeness, accuracy and timeliness of the transaction reports which were submitted on their behalf.

The home Member State shall require the trading venue, when making reports on behalf of the investment firm, to have sound security mechanisms in place designed to guarantee the security and authentication of the means of transfer of information, to minimise the risk of data corruption and unauthorised access and to prevent information leakage maintaining the confidentiality of the data at all times. The home Member State shall require the trading venue to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

Trade-matching or reporting systems, including trade repositories registered or recognised in accordance with Title VI of Regulation (EU) No 648/2012, may be approved by the competent authority as an ARM in order to transmit transaction reports to the competent authority in accordance with paragraphs 1, 3 and 9.

Where transactions have been reported to a trade repository in accordance with Article 9 of Regulation (EU) No 648/2012 which is approved as an ARM and where those reports contain the details required under paragraphs 1, 3 and 9 and are transmitted to the competent authority by the trade repository within the time limit set in paragraph 1, the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with.

Where there are errors or omissions in the transaction reports, the ARM, investment firm or trading venue reporting the transaction shall correct the information and submit a corrected report to the competent authority.

8. When, in accordance with Article 35(8) of Directive 2014/65/EU, reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit that information to the competent authorities of the home Member State of the investment firm, unless the competent authorities of the home Member State decide that they do not want to receive that information.

(...)